



Reserved judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr N Moulton

Paroh Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham ON 9th 10th and 11th October 2019

EMPLOYMENT JUDGE Richardson

Representation

For the Claimant: in person

For the Respondent: Mr Ahmed, Counsel

JUDGMENT

The judgment of the Tribunal is that

1. The claimant's claim of unfair dismissal is not well founded.
2. The claim is dismissed.

REASONS

Proceedings and Issues

1. The claimant was employed on 16th July 2012 by the respondent company initially as sales account manager, then as sales director and latterly as managing director. The respondent is a company selling retail outdoor leisure items such as camping equipment.

2. The claimant resigned on 13th September 2018. The effective date of termination was 12th October 2018. He filed proceedings on 30th December 2018 following a period of ACAS early conciliation. He claims constructive unfair dismissal.

Application to postpone

3. At the start of the Hearing there was a renewed application for the case to be postponed because of the absence of one of the respondent's key witnesses, Mr S Sohal who was attending his niece's wedding in India. The application was

originally made on 24th September 2019 and refused by the duty judge on the basis that the respondent had been notified on 11th January 2019 of the date of the three day hearing. The flight to India had been booked by Mr Sohal on 19th September 2019 prior to the application to postpone. The claimant objected to a postponement for reasons set out in his email of 7th October 2019 inter alia because it had already been 12 months since he left the respondent's employment and that before and during this last year, the proceedings had had an adverse effect on his mental and physical well being.

4. At the hearing it was submitted on behalf of the respondent that Mr Sohal had been given about three week's notice of the wedding.

5. I considered the application and refused it. The decision of Mr Sohal's relative to organize a wedding on short notice must carry with it the risk that some guests would not be able to attend because they have other pressing commitments. The postponement now would cause the claimant inconvenience and leave the tribunal with an empty list for three days which is a waste of the resources allocated to the hearing and unfair to other parties.

Application for video evidence

6. No timely application had been made for video link evidence to be given. In consideration of the overriding objective I did not find it proportionate to postpone the hearing. In further discussion it transpired that the wedding was over three days 10th, 12th and 14th October which would have left the witness able to attend the hearing on the morning of 9th October and then flown out in the afternoon; the tribunal would have readily made such an adjustment to the running order of proceedings.

7. There followed a discussion on video evidence and an attempt to contact the witness in India and the claimant's witnesses who had not been invited by the claimant to attend in person to give evidence and be cross examined. It was evident on Friday morning 11th October 2019 that the technical difficulties of using a video link for evidence to be given remotely, were insurmountable in the time available.

Evidence

8. I heard oral evidence from the claimant, Mr P Trevena, former financial controller of the respondent company and Mr J Gill, Group Financial Director of the respondent. I also received witness statements for the following who did not attend the hearing:

Mr S Sohal, director and shareholder of the respondent company;
Mr B Woodhouse, former Operations Manager of the respondent company;
Mr Mark Collins, Sales Director of Direct Corporate Clothing Ltd;

Mr N Atkinson, Operations Director of Direct Corporate Clothing.

9. I explained that although I would read the witness statements of the witnesses who did not attend the hearing for their evidence to be tested in cross examination, the weight to be attributed to those statements would be a matter for me to decide.

10. The issues were then identified and agreed at the commencement of the hearing, being the principles arising out of the case of Western Excavating (ECC~ Ltd v Sharp [1978] IIRLR 27 as the relevant issues, as more recently developed in respect of the breach of the implied term of mutual trust and confidence.

11. I was provided with an agreed bundle R1 and subsequently during the course of the hearing with further documents by the respondent on matters arising out of cross examination which are exhibited as R2.

12. I heard submissions from both parties of which I have made a substantial note.

Findings of Fact

13. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time.

14. I have resolved such conflicts of evidence as arose on balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and documents.

15. I had no credibility issues with any of the witnesses each of whom were straight forward and appeared to be doing their individual best to assist the tribunal. The claimant in particular readily made concessions during the course of cross examination and recognised at times that there was an alternative explanation contrary to his perception of a state of affairs. Although it was suggested that he had created minutes of meetings which had been subsequently altered and had not produced his original manuscript notes to verify his disclosed notes, I find that the claimant was not dishonest in failing to disclose manuscript notes and that he accepted immediately where he had made an alteration. Both he and Mr Gill were, over all, reliable witnesses. I had no issues with Mr Trevena's evidence. He was a honest and reliable witness.

16. My findings of fact relevant to the issues which have been determined are as follows.

16.1 The claimant was engaged by Paroh Limited (Paroh) on 16th July 2012. The first five years of his employment were happy. He had a good working relationship with Mr Sam Sohal (Mr Sohal) who is the joint shareholder of Paroh, along with his brother Gini Sohal. Their father Charan Dass Sohal was chairman of the group of three family companies which included with Paroh, Direct Commercial Clothing Limited (DCC) and Orbit International Plc (Orbit).

16.2 Paroh had significant losses, estimated by the shareholders at about £3m including historic losses, in February 2017. From the claimant's perspective matters started to deteriorate on about 9th February 2017, when he attended a group board meeting at which the claimant was asked by the chairman to explain losses made by Paroh for the year ending September 2015. At that time the claimant had been Sales Director. He was not appointed to managing director until 1st October 2015. The claimant was taken by surprise and explained to the Group chairman that he had not been responsible for the company's profit and loss up to the financial year ending September 2015. The claimant felt that Mr Sohal and Mr Gini Sohal, who had been joint managing directors of Paroh before the claimant's appointment, had deflected the chairman's adverse attention away from them.

16.3 The claimant provided evidence of a series of incidents with Mr Sohal, starting with the group board meeting on 9th February 2017 which he claimed culminated in his resignation and a claim for constructive unfair dismissal. The following is the chronology of the incidents he refers to.

16.4 In late April 2017 the claimant was in China on business. Mr Sam Sohal emailed members of the purchasing team to remind them that all sourcing and pricing requirements had to be directed through the buyer in the UK, having mistakenly understood from earlier emails that the Chinese contact had been approached for prices. The claimant was copied in on the email and at the end of the email Mr Sohal asked the claimant why he had told the sales team to contact the China office for prices when the sales team are to deliver sales, not to be buyers. The claimant felt humiliated at the remonstrations by Mr Sohal which his direct reports would read. The claimant replied that he had merely introduced the Chinese contact to the Paroh Heads via email. A member of the team had misinterpreted the email. The claimant commented in his reply to Mr Sohal, that he was not sure why Mr Sohal had gone "public" without discussion with the claimant first. The issue was not raised again.

16.5 Also whilst on this trip to China, the claimant became aware of security cameras being replaced with CCTV sound recording cameras at Paroh premises on the instruction of Mr Sohal. The Operations Manager, Mr Woodhouse, had emailed the claimant with his concerns about the installation for which there had been no consultation. The claimant also had concerns about the legality of the installation and contacted the Group HR Officer to check on the legality or otherwise of it. Her reply stated that it was illegal to monitor staff using audio

devices until staff had been informed beforehand of the reasons, benefits and duration of the surveillance. The claimant forwarded her reply to Mr Sohal. Mr Sohal and the claimant discussed the matter over the phone. Mr Sohal did not understand the fuss being made as the same cameras were already installed in DCC premises. The claimant did nothing further to ascertain what was going to happen and whether audio cameras were installed. However, no audio CCTV was installed in Paroh.

16.6 After his return to the UK the claimant requested a meeting with Mr Sohal to take place on 12th May 2017. At the meeting the claimant offered to resign on a month's notice as he perceived his relationship with Mr Sohal had deteriorated. Mr Sohal said that if the claimant left it would leave Mr Sohal and Mr Gini Sohal "*in the shit*" and he asked the claimant to stay until the end of the financial year September 2017. The claimant agreed.

16.7 On 25th May 2017 Mr Sohal informed the claimant by telephone that the family had decided to close down Paroh. It was subsequently decided by the family to keep the Paroh going but to reduce staff by a half. After several discussions the claimant committed to staying on and he and the HR department completed the redundancy programme.

16.8 On 24th July 2017 the claimant was informed in a meeting with Mr Sohal and Mr Ken Elvia, the Managing Director of Orbit, that following the restructure of Paroh, Mr Elavia would take responsibility for operations at Paroh and the claimant would focus on sales. In fact the claimant's responsibilities did not change and on 26th September 2017 Mr Elavia informed the claimant that he had been told by Mr Sohal to "keep his nose out of Paroh".

16.9 In September 2017 Mr Jas Gill (Mr Gill) joined DCC as Group Finance Director. He was also to provide support to Paroh. As Group Finance Director he oversaw Finance, IT and HR functions in the group.

16.10 It is disputed whether the claimant was introduced to Mr Gill in September 2017 when Mr Gill was appointed, or for the first time on 11th October 2017 at a meeting. Mr Gill said that they met in September. The exact date is not relevant. The claimant stated that on the first occasion he met Mr Gill on 11th October 2017 he overheard Mr Sohal, on entering the room, say to Mr Gill "*we might as well hear what the f..... idiot has to say*". The claimant took it as a reference to him. Mr Gill was not cross examined on what was said or what he heard on entering the meeting room on 11th October 2017; I find that the claimant has not established on the balance of probabilities that the comment was said or, if it was said, that it related to him.

16.11 On 27th October 2017 Mr Sohal emailed the claimant on the subject matter of the claimant's position. Mr Sohal expressed his disappointment at the latest 2018 budget for Paroh. The first months' sales were below the forecast target

and, Mr Sohal complained, the claimant had not provided any proactive solutions on how he proposed to sell the current stock for Autumn/Winter.

16.12 Mr Sohal stated that it was apparent the claimant did not have the drive to deliver sales for the business at a profitable margin, and that the decisions made under his leadership had negatively impacted on the business causing a £3m deficit. Mr Sohal requested that the claimant tender his resignation and arranged to meet the claimant on 30th October 2017 to discuss the matter further.

16.13 The claimant wrote notes to himself as an aide memoire (R1 page 62/63), refuting and contradicting Mr Sohal's email point by point.

16.14 At the meeting on 30th October 2017 with Mr Sohal, the claimant made a contemporaneous note and records that he said to Mr Sohal that he could go through the email of 27th October 2017 point by point and they could argue about it. But if Mr Sohal had made his mind up that he wanted the claimant out, then provided he was treated fairly and given a settlement agreement, the claimant would leave. The claimant also reminded Mr Sohal that he was still owed £3,000 in pension contributions for the period October 2015 until January 2016.

16.15 The claimant asked for something in writing. Mr Sohal agreed that he would get HR to put something in writing to the claimant.

16.16 On 8th November 2017 the claimant was contacted by HR and informed that Mr Sohal had agreed to pay a settlement of £12,300 plus £3,000 outstanding pension contribution. No settlement agreement was referred to.

16.17 The claimant heard nothing further and wrote to Mr Sohal on 14th November 2017. The letter is headed "Unfair Dismissal." The claimant stated that the email of 27th October had contained significant inaccuracies and assumptions that were an unfair basis for termination of employment. The claimant believed the correspondence to amount to a dismissal and said he would be seeking legal advice. He offered to engage in discussions to resolve the situation amicably and said that he would continue to perform his duties and responsibilities as managing director of Paroh.

16.18 Mr Sohal telephoned the claimant on 15th November 2017 on receipt of his email letter. The claimant made a contemporaneous note of the telephone conversation. The claimant repeated his view that being asked to resign was in fact a dismissal. He complained that he had been subjected to bullying over the past 9 months and used as a scapegoat. He was prepared to go if he was paid a fair settlement figure which he estimated could be £35,000 and that a tribunal could award him up to £80,000. He referred to the previous sales director who had been paid three months salary and went of on paid sick leave the day after she had received her redundancy letter. In contrast, the claimant said that he was working and doing his best. Mr Sohal said their offer had been their opening

gambit and that he would speak to his brother and get back to the claimant.

16.19 Since his appointment in September 2017 Mr Gill was communicating with Mr Trevena, the Paroh Financial Controller on day to day financial matters relating to the Paroh business. Throughout the period September – December 2017, It is evident that Mr Gill set about organising the group companies including Paroh to increase efficiency and profitability. Mr Gill liaised with Paul Trevena, routinely emailed the claimant and also copied in the claimant on emails to Mr Trevena on finance matters. Mr Gill did not take over management of Paul Trevena but had a “dotted line” to him on financial issues. Mr Gill also copied in the claimant on emails sent to other management members of Paroh such as Bruce Woodhouse.

16.20 Mr Gill tackled Paroh sales and financial staff warehouse staffing costs, proposed customer sales turnover and margin, debtors and aged debtors. For example at 24th November 2017 Amazon had a debt of over £357k of which £289k was over 4 months old. Total overdue debt was over £700k and 66% of debt was over 4 months old. In early December 2017 Mr Gill instituted a new signing off process for Paroh and the group, in respect of salary amendments and recruitment.

16.21 On 18th December 2017 the claimant received by email Mr Sohal's acknowledgment of the claimant's letter of 14th November 2017; Mr Sohal confirmed that he would be in contact in due course to confirm his response. Mr Sohal's letter was dated 24th November 2017.

16.22 In December Mr Gill discussed with Mr Trevena, the redundancy of an employee in the Paroh accounts department with two years service, and replacing him with a member of the DCC staff who had some 18 years' service. The purpose of the 'bumping redundancy was to reduce staffing costs and the cost of redundancy payments. The redundancy took effect on 31st January 2018.

16.23 On 21st December 2017 the claimant attended a general business review meeting with Mr Sohal when it was agreed to reinstate consolidated weekly sales reports being forwarded to Mr Sohal. At the conclusion of the meeting the claimant was asked if there was anything else he wanted to discuss. The claimant reminded Mr Sohal of their discussions about the claimant's position and their phone call of 15th November and meeting on 30th October. Mr Sohal informed the claimant that he would be in Sri Lanka over the holiday and would discuss the matter with his brother face to face and get back to the claimant in the New Year.

16.24 On 5th January 2018 the claimant and Mr Sohal met for discussions about the proposal to reach a settlement . The Group HR manager was also in attendance. The claimant made a contemporaneous note. This note was later amended to include a general observational comment at the foot of it. I do not

find that the original points in the note were amended.

16.25 In summary Mr Sohal believed that the offer already made to the claimant was fair. He informed the claimant that his performance would be monitored; there would be weekly review meetings. The company was not performing and the settlement offer would not be increased. If the claimant's performance was not satisfactory, the performance management route would be implemented, referred to as the "*warnings route*".

16.26 Mr Sohal confirmed that a letter would be sent to confirm the situation. He also confirmed there would be a meeting on 9th January 2018 with the Group Finance Director when all members of the team would participate to find out what each are doing on a daily basis and what was being planned to recover the deficit in the Paroh accounts.

16.27 Following that meeting on 5th January 2018 the claimant, Mr Sohal and Mr Gill had a meeting at which it was agreed that they would all try to work together to try and improve the company's performance, rather than focus on the claimant's individual performance as it did not seem fair to Mr Gill to single out the claimant. It could not be determined whether that was at the meeting on 9th January or between the 5th and 9th January.

16.28 On 9th January 2018 the formal business review meeting took place with the claimant, Mr Sohal and Mr Gill. Mr Sohal recited what had occurred to date – the claimant had been asked to resign which Mr Sohal did not think was unfair. However, they had now decided they were going to set targets and if the claimant failed to achieve those targets, the disciplinary route would result.

16.29 Mr Sohal then set out the targets and tasks for the claimant. After the lunch break other members of the Paroh management team were called on by one to join the claimant, Mr Sohal, Mr Gill and for a review of their individual role and to discuss their actions and targets.

16.30 The claimant recorded in a contemporaneous note the targets and tasks he and the other members of the Paroh management team were asked to achieve by Mr Sohal and Mr Gill.

16.31 In between each team member leaving the meeting and before the next joined the meeting, the claimant claims that Mr Sohal and Mr Gill spoke in Punjabi which the claimant thought was rude and unprofessional. He could not understand what they were saying and neither had offered a translation. He also complains that when Mr Sohal said he had the claimant's letter (referring to confirmation of their meeting on 5th January 2018) he and Mr Gill again spoke in Punjabi whilst they looked at a laptop screen. Mr Sohal said it needed a couple of amendments and that the claimant would have the letter the next day.

16.32 The times at which the claimant heard Punjabi spoken during the day were recorded in his contemporaneous note. I find that on the balance of probabilities, whilst accepting that the claimant's notes were not the original, but a typed up transcript, it is more likely than not that there were short exchanges in Punjabi between Mr Gill and Mr Sohal in front of the claimant and in between the members of the management group in turn entering and leaving the room. If it had not been the case, it would be odd to fabricate the complaint and also provide the times that he heard Punjabi being spoken.

16.33 On 10th January 2018 Mr Gill set out in an email to Mr Sohal and the Group HR Manager, his summary of the meeting on 9th January with Mr Sohal and the claimant. He confirmed that the meeting had opened by Mr Sohal stating that the company was performing poorly; they wanted to know why this was and what had to be done to turn the situation around. The December management accounts were reviewed. They had been issued the previous day. The claimant was reported as being unsure about a number of key areas which would have been reported in the previous month's management accounts for November 2017. Examples were stated as:

- The customer rebate was incorrectly reported
- Sales variance on budget and prior year was not readily explainable:
 - Routine monthly reviews with the sales reps or agents to be agreed (action NM)
 - Report of sales variances by rep to be revised and consolidated to show year on year variance by month by customer and against budget (action NM)
 - Report on stock and sales of discontinued items monthly as part of sales team meeting. (Action NM)
 - Create telesales function for the above report, identifying previous customer purchase (Action NM)
 - Create a stock report by category to show a column for forward orders, a column for sales orders and a column for non-movers over last 12 months (action NM)
- Unsure of costs breakdowns and variances
 - Monthly meetings with Paul to review accounts (action NM)
 - Need to review commission and bonus payments to reps and agents, including review of contract (action NM)

16.34 The list of tasks continued, including a requirement for the claimant to check on who is responsible for opening and closing the premises; whether a member of staff was driving without an FLT licence; reviewing staffing levels in the warehouse; contracts regarding site management to be reviewed and reported to Mr Gill; staff bonus targets to be reviewed; progress review meeting to be held with Amazon to recover outstanding debt; similarly for Aldi; and to create a schedule illustrating all rebate deals by customer for Mr Gill and Mr Sohal to review. Mr Trevena's actions were going to be notified separately.

16.35 A comparison between Mr Gill's email and the claimant's brief notes broadly corresponded. No reference was made in evidence to any glaring differences. Neither Mr Gill's notes, nor the claimant's notes referred to Mr Sohal referring to dismissal, or threatening to dismiss the claimant, as the claimant subsequently alleged.

16.36 In late December 2017/early January 2018 Mr Gill discussed with Mr Trevena the proposed redundancy of a member of the Paroh accounts staff who reported to Mr Trevena. Although the claimant complained that he was not informed of the redundancy until the day it happened, email evidence of 23rd January 2018 from Mr Trevena to the Group HR manager confirms that the claimant must have been aware of the proposed redundancy even if he had not been personally involved in the discussions between Mr Gill and Mr Trevena. The claimant did not raise an objection to Mr Gill's plan for the redundancy.

16.37 Following the meeting on 9th January 2018 the claimant had regular management review meetings with Mr Sohal and Mr Gill. Mr Sohal was sometimes present at the meetings but often was not. The claimant heard nothing more about a settlement proposal; nor was a disciplinary performance review put in place. The claimant had little if any interaction with Mr Sohal until early March when he requested a meeting with Mr Sohal, a business review meeting.

16.38 The meeting took place on 9th March 2018. Mr Trevena attended. The review meeting appeared to be uncontroversial. The claimant continued to attend monthly meetings with Mr Gill and together they worked collaboratively to improve the company's profitability and reduce loss with some success.

16.39 At some point in early 2018, although the claimant could not be sure when, he learned through an employee of DCC who had been temporarily seconded to the warehouse that the building in which Paroh operated was going to be sold. The claimant does not recall whether he raised the matter with either Mr Sohal or Mr Gill. Staff had seen people being shown around the building and had asked the claimant what was going on; the claimant could give no information.

16.40 Paroh was still occupying the premises at the date of the claimant's departure on 12th October 2018.

16.41 By the end of September 2018 there was approximately £4.6m of stock at historic cost which had fallen from £6m from the prior year to 4.6m in the current year. The intercompany loan from DCC had also been reduced from £8m to about £6-7m. Nevertheless the business was making a loss. A stock write down of £800k was recommended by Mr Gill and about £300k-£400k written off as bad debt.

16.42 The difficulty faced by the claimant and by Mr Sohal and his brother were that the Paroh business was seasonal, most of it relating to outdoor equipment. Therefore in order to get appropriate winter stock to market in the winter months when sales were lower, orders had to be placed in June/July/August. Sales across all lines of stock were enhanced if a full range of outdoor equipment was on offer in stores. Against this background, during July/August 2018 the claimant put forward proposals to purchase stock of certain key lines for the winter season and attempted to get approval, without success, from Mr Gini Sohal and Mr Sohal for about £200,000 worth of new stock.

16.43 On 7th September 2018 the Group HR manager issued a new phone list by email to all staff in DCC. It was not issued to Paroh staff or Orbit staff. The phone numbers were given for staff in each section of DCC: Directors, Sales, HR, IT, Finance, Customer Services, Procurement, Logistics and the meeting room phone numbers. A small section provided the switchboard numbers for Paro, Orbit, CDS and Aria.

16.44 In another small section, phone numbers were set out for Paroh staff in Finance, Customer Services, Procurement, Sales and Logistics. The list came to light in Paroh because a member of staff from DCC seconded to Paroh, had received the telephone list and made a joke that the claimant had been demoted. The claimant believed he should have been listed under Directors, not realising that the list related to DCC only. The claimant was humiliated by Paroh staff joking with the claimant that he had been 'demoted'.

16.45 The undated Paroh telephone list in R1 at page 125 identified the claimant as Managing Director.

16.46 There was no evidence of any incidents between the claimant and Mr Sohal over the summer months other than the claimant seeking and failing to obtain approval from Mr Gini Sohal and Mr Sohal for the purchase of certain lines of new winter stock. In July 2018 Mr Sohal was in Sri Lanka on business.

16.47 By September 2018 the claimant decided to call a meeting with Mr Sohal to discuss various points regarding the future of the business including winter stock purchases and staff positions. Staff had been wanting to make certain stock purchases as customers wanted to submit orders. The claimant had been unsuccessful in getting those stock purchases authorised by Mr Gini Sohal. He needed to have the authorisation through the summer to get the stock ordered so that it could be on sale in winter months. Additionally, several members of staff were leaving. The claimant wanted to replace a buyer and also wanted to request a salary review for a member of the sales team.

16.48 The claimant decided to write out his letter of resignation and he took it with him in his pocket to the meeting arranged with Mr Sohal for 13th September 2018. The claimant decided that depending on Mr Sohal's responses to the

requests the claimant was going to make, the claimant would then decide whether or not to tender his resignation.

16.49 At the meeting Mr Sohal did not agree to any of the claimant' requests. The claimant handed over his resignation letter.

16.50 The resignation letter explains that the claimant had no choice but to resign in light of his recent experiences regarding Mr Sohal's attempts over recent months to exit the claimant from the business. The claimant then listed his complaints under three main headings. The first was 'Fundamental breach of contract' followed by complaints that I have rearrange in chronological order:

- Referring to Mr Sohal's 'without prejudice' email of 27th October 2017, the claimant had not been asked if he was prepared to enter into without prejudice negotiations and he did not agree to it.
- The claimant had been asked on 27th October 2017 to resign.
- The respondent had provided redundancy figures to the claimant without having given the claimant any warning or entered into any consultation on redundancy.
- The respondent had failed to follow the grievance procedure to address the claimant's letter of 14th November 2017.
- Mr Sohal had failed to respond to the claimant's letter dated 8th November 2017 until 19th December 2017, sending only a 'holding' letter.
- The claimant had had very short notice for the meeting with Mr Sohal on 5th January 2018, being called at 11am for a meeting in Oldbury at 3pm.
- The respondent failed to provide the claimant with the right to be accompanied to the meeting on 5th January.
- The meeting on 9th January 2018 started at 10.20am and ended at 5.30pm with only a ten minute break. It was a breach of the Working Time Regulations and put the claimant under undue stress and pressure.
- During the meeting on 9th January Mr Sohal and Mr Gill had spoken to each other in Punjabi causing the claimant undue stress because he could not understand their discussion.
- During the meeting on 9th January 2018 the claimant was threatened with dismissal by Mr Sohal unless he completed the certain actions.

- The issues set out above were not concluded and have continued to cause the claimant undue stress and anxiety as they could be resurrected at Mr Sohal's convenience.
- Mr Gill changed the claimant's direct reports and made a member of his team redundant without his knowledge, undermining his position in the company.
- A new phone list had been issued on 7th September 2018 across the company which showed the claimant as Paroh Sales and not a Director, appearing to demote the claimant, undermining his position, humiliating him as subordinates had made jokes about the situation.

16.51 The next section in the resignation letter was under the heading 'Breach of trust and confidence'. The claimant complained that:

- Mr Sohal had breached the claimant's trust and confidence by threatening his employment on several occasions;
- Had put the claimant under undue pressure regarding his sales performance yet more recently had not approved stock to be able to sell;
- Had alienated the claimant from the business by not communicating with him and completely ignoring his requests for information, failing to respond to business reports the claimant had sent to him.

16.52 The next section was titled 'Effect on my wellbeing' and stated that since October 2017 the claimant had been subjected to uncertainty about his employment at Paroh and the bullying behaviours had caused him stress and anxiety.

16.53 The final section in the resignation letter was titled 'Last Straw Doctrine'. The complaints were:

- Mr Sohal had not approved stock order requests; therefore the company had no stock to sell of certain key lines.
- On 7th September a sales agent had asked the claimant to explain why they were out of stock. This put the claimant in difficult position as some of the lines were on a request to purchase made on 20th July 2018. Repeated requests were made on four occasions in July and August with no response. As a result no stock was ordered and customer orders were being turned away.
- Requests to Mr Sohal and Mr Gini Sohal to attend a sales meeting had been made on 13th and 20th July and met with no reply and no attendance.

- The request of the sales team to exhibit at the GLEE Garden Industry Trade Show on 10th – 12th September was made to Mr Sohal on 23rd July, and repeated in weekly reports in July and August with no acknowledgment or reply from Mr Sohal.
- Mr Sohal had failed to support him and would use the downturn in Sales against the claimant at some point in the future when it suited Mr Sohal's agenda.

16.54 The claimant concluded by confirming that he would work his month's notice.

16.55 Mr Sohal wrote to the claimant on 18th September 2018 accepting his resignation and setting out the arrangements for holiday, final salary and return of company property to HR.

16.56 Mr Sohal issued a memo to Paroh staff on 21st September 2018 to announce the claimant's departure on 12th October 2018.

16.57 On 24th September 2018 the claimant wrote to Mr Sohal requesting the payment of employer pension contributions that were owed to him in the sum of £3472 including interest.

16.58 On 2nd October 2018 a member of the sales team emailed the Group HR manager to put her on notice of a potential issue with the claimant. The employee, the claimant and a third member of staff had been lodging in the company owned accommodation on the night of 1st October. The employee explained that the claimant was in room 6 and she was in room 4. The TV remote control for room 4 had been in room 6. The remotes in her room 4 didn't work. The claimant had gone out and left the door open; the TV remote controls were on the bed. The employee 'popped' into room 6 and swapped the remotes. Later in the evening the claimant returned, realised that the remotes had been swapped and went down to room 4. The employee gave the remotes back to the claimant.

16.58 Later in the morning of 2nd October 2018 the claimant also emailed HR to raise a grievance about the same incident the night before complaining about the conduct of the member of the sales team in room. He objected to the employee entering his room and taking things out of his room whilst he was out of the building.

16.59 On 4th October 2018 Mr Sohal wrote to the claimant to confirm the employer pension contributions had not been paid into the claimant's pension over the period October 2015 – January 2016 and that the amount of £3472 would be paid to the claimant's pension provider on or before 12th October 2018.

16.60 On 10th October 2018 the claimant wrote to Mr Sohal stating that he would prefer to leave on amicable terms rather than commence tribunal proceedings entailing the disclosure in full the company's behaviour towards him which had resulted in his constructive dismissal. The claimant reminded Mr Sohal he had had no response to his grievance of 2nd October 2018 (concerning the TV remote controls being taken from his room by a sales person). The claimant re-iterated that if a suitable resolution could not be reached, he would file tribunal proceedings.

16.61 The claimant attended an exit interview on 12th October with the Group HR manager. His responses to the questions were mainly negative.

16.62 On 12th October 2018 Mr Sohal wrote to the claimant to confirm that he did not intend to respond to the claimant's allegations in his letter of 10th October and 13th September 2018. Mr Sohal confirmed that the Group HR manager was investigating the grievance.

Law

17. Section 94 of the ERA sets out the right not to be unfairly dismissed and Section 95 (1) (c) of the ERA says that an employee is taken to have been dismissed by his employer if the employee terminates his contract of employment (with or without notice) in the circumstances in which he is entitled to terminate if not notice by reason of the employer's conduct i.e. constructive dismissal.

18. If the dismissal is established, then the Tribunal must also consider the fairness of the dismissal under Section 98 of the ERA. This requires the employer to show the reason for the dismissal (i.e.: the reason why the employer breached the contract of employment) and that it is a potentially fair reason under sections 98 (1) and (2) and where the employer has established a potentially fair reason then the Tribunal will consider the fairness of the dismissal under section 98 (4), that is:

18.1 did the employer act reasonably or unreasonably in treating it as a sufficient reason for dismissal; and

18.2 was it fair bearing in mind equity and the merits of the case.

19. It was established in the case of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 that the employer's conduct which can give rise to a constructive dismissal must involve a "significant breach of contract going to the root of the contract of employment", sometimes referred to as a repudiatory breach. Therefore, to claim constructive dismissal, the employee must show:-

19.1 that there was a fundamental breach by the employer;

- 19.2 that the employer's breach caused the employee to resign;
- 19.3 that the employee did not delay too long before resigning, thus affirming the contract of employment.

20. If the act of the employer that caused resignation was not by itself a fundamental breach of contract, the employee may on a course of conduct considered as a whole, establish constructive dismissal. The 'last straw' must contribute, however slightly, to the breach of trust and confidence (Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75).

21. It was confirmed in the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833 in an ordinary case of constructive dismissal tribunals should ask themselves the following questions:

21.1 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?

21.2 Has he or she affirmed the contract since that act?

21.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

21.4 If not, was it nevertheless a part...of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

21.5 Did the employee resign in response (or partly in response) to that breach?

Conclusions

2017

22. The claimant was sincerely aggrieved by the conduct of the respondent; and Mr Sohal in particular. Mr Sohal was a joint share holder in Paroh and had personally invested in the company. The company was making a loss and was in debt. Without doubt the relationship between Mr Sohal and the claimant deteriorated after the 9th February 2017 group board meeting when the company had about £3m of debt. This could not be attributed to the claimant personally and there was no cogent evidence that it was attributed to him.

23. The claimant refers generally to there being many minor incidents occurring in 2017 which he found 'undermining'. For example the email to him when he was in China. In any event, none of the incidents described by the claimant were sufficient to make the claimant's position untenable because on 12th May 2017 he volunteered his resignation but when Mr Sohal did not accept

the resignation and instead asked the claimant to remain in post until the year end, 30th September 2017, the claimant agreed.

24. The next complaints made by the claimant is that he was told by Mr Elavia that Mr Elavia had been told by Mr Sohal to “keep his nose out of Paroh” business and that the claimant had not been consulted by Mr Sohal about audio CCTV being installed in Paroh premises. In respect of Mr Elavia’s involvement in Paroh, the claimant’s evidence was that he had continued with his full range of duties as Managing Director and in respect of the complaint about the installation of audio CCTV, the claimant did not bother to follow up and check whether it had been installed which suggests that it was not a serious concern to him.

25. As part of the attempts to turn around the respondent’s fortune, Mr Gill was engaged as Group Financial Director in September 2017. The claimant was aware of his appointment in September and I find that the claimant’s evidence that he did not meet Mr Gill until 11th October 2017 is unreliable.

26. Mr Gill immediately set about improving the group and Paroh’s financial affairs. He worked collaboratively with not only the claimant and the financial team at Paroh, Mr Trevena in particular, but also the rest of the management team.

27. There was little in the way of evidence of the true financial status of Paroh at the year end September 2017, Mr Trevena’s evidence focussing on the budget and plans for the year 2017/2018. The available evidence taken from the statutory accounts was that at the year end September 2017 the company’s profit before tax was -£2.6m.

28. Having refused to accept the claimant’s resignation on 12th May 2017, by end of October 2017 Mr Sohal was disillusioned with the claimant’s sales performance and asked the claimant to resign.

29. The claimant was aggrieved and insulted by Mr Sohal’s reasons for requesting the claimant’s resignation in late October 2017. There followed limited negotiations on 30th October. The claimant was willing to leave the respondent provided that there was fair compensation. The offer made by the respondent on 8th November through the HR manager was £12,300 plus a sum to settle the shortfall in employers pension contributions of about £3000. The claimant did not accept the proposal. He wrote to Mr Sohal on 14th November 2017 stating that the letter of 27th October 2017 amounted to an unfair dismissal. The claimant confirmed he would be willing to discuss how to resolve the situation amicably and at this point, 14th November 2017 confirmed that he would continue to perform his duties and responsibilities as Managing Director of Paroh. On 15th November 2017 the claimant orally confirmed to Mr Sohal that he “would go quietly” for a fair settlement. He suggested he could be awarded as much as £35k - £80k in compensation by an employment tribunal. Mr Sohal

was not committal and said he would think about it and discuss the situation with his brother. He said he would get back to the claimant.

30. Taking the history of the matter to this point I can only find that the claimant's position as Managing Director of the respondent was not untenable. He found Mr Sohal's conduct unreasonable at times but unreasonable is not the same as conduct which amounts to a repudiatory breach of contract. The claimant makes it clear to Mr Sohal that he was willing to carry on in his role; he had no intention of resigning without compensation.

31. Mr Gill continued to work throughout with the claimant and was supportive. The claimant chased up Mr Sohal again December 2017 for a response on settlement. Again Mr Sohal was non committal and said he would discuss the situation with his brother and get back to the claimant in the new year.

2018

32. Clearly Mr Sohal decided not to offer the claimant the settlement he was asking for. Unknown to the claimant, Mr Sohal was persuaded by Mr Gill that it was not fair to single out the claimant and that they should focus on working together. Mr Sohal met the claimant on 5th January 2018 and referred instead to disciplinary performance measures being put in place if the claimant did not meet his targets and achieve the required results.

33. The claimant complained that in the early part of the 2018 he had not been informed by Mr Sohal that the Paroh building was up for sale. He claimed he had been embarrassed by the lack of information that he could give when staff asked him what was going on. There was little evidence on this matter although it would have been the case, if the claimant did know of the situation, that it is unlikely he should or would have imparted confidential information to members of staff. The claimant did not raise a grievance about it and in any event the company premises were not sold during the claimant's time with Paroh.

34. The claimant complained that Mr Gill had undermined him. I find the opposite. Mr Gill had supported the claimant and had worked with Mr Trevena the financial controller to improve Paroh's performance. The claimant and Mr Gill had regular communication and monthly meetings to monitor company performance. I do not find that the "dotted line" between the financial controller and the group finance director undermined the claimant's position. It was an efficient and normal method of working which did not trouble the claimant with minutiae or matters that did not concern him.

35. The claimant complained that Mr Gill had made one of the claimant's staff in the accounts department redundant in January 2018. Mr Trevena had been involved by Mr Gill in the proposal because it involved one of Mr Trevena's reports but Mr Trevena had not mentioned it to the claimant. Nevertheless the

claimant failed to establish that he had not known about the redundancy at least in principle. He had been copied in on email correspondence about it although he had not been directly personally consulted by Mr Gill. At the time, January 2018 he made no complaint about lack of consultation with him.

36. The claimant's complaint that he had been humiliated by his perceived demotion to 'Sales' in the phone list for a different group company is not objectively reasonable. There was no demotion.

37. Throughout the last few months of 2017 until September 2018 and the claimant's resignation the claimant complained that he was not supported by "the directors". That may be the claimant's perception but it is not supported by the documentary evidence. Mr Gill was working supportively to improve the financial standing of Paroh with the claimant and his management team. Mr Sohal had other business commitments and attended few meetings. That does not amount to the claimant being unsupported because he had little personal interaction with Mr Sohal. The financial evidence is that the claimant and his management team, with Mr Gill's support, achieved significant improvements as demonstrated by the statutory accounts for 2017/2018 which showed the October 2017 – September 2018 profit before tax had been reduced from -£2.6m to -£614k.

38. The claimant did establish that through the summer of 2018, during July and August he was trying to obtain authority from Mr Sohal to place orders for new stock. For at least some of this time Mr Sohal was abroad. The claimant was concerned that purchase orders for winter stock were made in July/August and at the latest by September 2018 because the sale of winter stock would improve profitability and customers were requesting the stock. We do not know the reasons why Mr Sohal did not authorise the purchase of the stock the claimant requested. He did not explain it to the claimant which was no doubt a source of frustration by the claimant.

Resignation 13th September 2018

39. The claimant was asked at the hearing in cross examination what was the last straw that caused him to resign on 13th September 2018? He replied that he had called the meeting with Mr Sohal on 13th September because he wanted to discuss the future of the business including stock purchases and staffing positions. He had questions he wanted to ask. He decided that if Mr Sohal was negative, he would hand over his resignation letter. That is what happened but the claimant did not explain what the questions were or what Mr Sohal said exactly. The claimant stated: *"I got negative answers on [stock purchase orders] and staffing position – several people were leaving at that time, one was a buyer and a salary review request for a sales person – both requests to replace were denied. I was getting nowhere with the position. My position was untenable and that was the last straw."*

40. Of the resignation letter, the claimant also stated that his *“hope was that the meeting would be positive and it would stay in my pocket but when I got those negative answers....”*

41. I asked the claimant how Mr Sohal had been negative? The claimant replied: *“I asked for stock items that were regularly selling and we had customer orders for, but no supplies. There was no engaging in discussion, it was a shrug of shoulders, and brief comments to the negative. I can’t remember the exact wording because there weren’t any words and there were also requests [for] staff replacement of a buyer who had resigned, that was denied. He said we are not replacing her.”*

42. I consider the various complaints in the resignation letter. The first 8 bullet points as set out above at paragraph 16.50 are de minimis issues or simply do not amount to even a minor breach of contract. I would expect the Managing Director of a company with the claimant’s experience and interpersonal skills to be resilient and robust enough to able to say if he needed a comfort break, or wanted someone to attend a meeting with him.

43. As to the other complaints raised in this section of the resignation letter, being asked to resign on 27th October 2017 was a potential breach of the claimant’s trust and confidence even if it was not acted upon.

44. The discussions in Punjabi between Mr Sohal and Mr Gill were at its highest, discourteous. The claimant did not allege that the discussions in Punjabi were about him.

45. The claimant was not threatened with dismissal on 9th January. The documentary evidence does not support that contention.

46. Mr Gill did not change the claimant’s direct reports and did not make a member of the claimant’s team redundant without his knowledge.

47. The claimant was not demoted by the issue of a new phone list for a different group company.

48. There was little evidence about the claimant being provided with redundancy figures although ultimately he was not made redundant. This is not a breach of contract.

49. The claimant complained that the grievance letter of 14th November 2017 had no response and was not investigation. The letter does not raise a grievance; it informs Mr Sohal that the claimant intended to take legal advice, wanted to resolve the situation amicably and intended to continue in his role a Managing Director

50. . In the next section of the resignation letter 'Breach of Trust and confidence' the claimant complained that Mr Sohal had threatened his employment on several occasions. The single occasion was on 27th October 2017 when the claimant was asked to resign. As already stated this amounted potentially to a breach of trust and confidence.

51. It was not established by the claimant that he was put under "undue" pressure regarding his sales performance. There was little or no evidence to support this contention. There was no medical evidence that the claimant suffered adverse mental and physical stress and lack of well being. In contradiction to the claimant's assertion, in fact he made a significant improvement in the company's sales figures by the year ending September 2018.

52. There was no evidence that Mr Sohal had failed to respond to business reports and in any event the claimant was supported by and worked with the Group Financial Director. It is untrue that the respondent did not support him.

53. In the final section of the resignation letter 'Last Straw Doctrine' the claimant refers to the failure by Mr Sohal to approve stock order requests resulting in them not meeting customer demand for certain lines. It is evident from that very statement that the company did have stock to sell albeit it not in some key lines which some customers were requesting.

54. There was no evidence during the hearing relating to the refusal to allow the sales team to exhibit at the GLEE Garden Industry Trade Show.

55. The final point in the resignation letter is not a breach of contract – it is speculative in that it refers to the claimant's fear that at some point in the future, the downturn in sales could be 'used against' the claimant when it suited Mr Sohal.

The trigger for resignation – fundamental breach or last straw

56. I return to the question of Mr Sohal's conduct on 13th September. I consider whether that meeting of 13th September 2018 was on its own a fundamental breach of the claimant's employment contract, as a single act. There may have been many reasons for Mr Sohal's decision including the obvious need for financial constraints on purchasing given the company's fortunes at that time . There was £4.6m of historic stock value in the company. The claimant did not agree with Mr Sohal's reluctance to authorise the purchase of certain key lines of stock.

57. However, it was not established in the evidence by the claimant what difference this would have made on sales turnover. Mr Trevena thought it would have been prudent to have bought more stock in certain lines in order to sell more stock generally, as the company needed to offer a broad range of lines of

outdoor equipment, not just a few lines. However he recognised that Mr Sohal and his family had businesses around the world; their Sri Lankan factory was supplying clothing to Paroh. Their worldwide businesses were interconnected and that he appreciated it was not a simple decision to make; they would have to consider implications.

58. I find that the claimant has not established that on 13th September 2018 Mr Sohal's refusal to agree to purchase £200,000 worth of key lines of stock, or to agree to further recruitment and a salary review was a fundamental breach of the implied term of trust and confidence. Mr Sohal's decision was on the face of it, an executive decision not to spend more money. Paroh did have stock to sell.

59. There is in essence here a difference of opinion on spending £200,000 on new stock existing stock is being written off in the sum of £800k. It is counter intuitive that Mr Sohal, an experienced business man with multi national business interests, would arbitrarily refuse the claimant's request because of a personal dislike or lack of respect for the claimant. I find that the refusal to authorise the claimant to purchase additional stock, recruit a buyer and undertake a salary review was an executive decision and viewed objectively does not constitute a fundamental breach of the claimant's trust and confidence.

Last straw

60. I then consider whether the refusal to buy stock was the last in a series of incidents, and whether it could amount to the last straw justifying the claimant's resignation bearing in mind which of the allegations in the resignation letter referred to above, amount to a potential breach of contract.

61. The claimant was a man in a senior position with responsibility for running the respondent company as managing director. He had support from the group financial director at all times and achieved significant improvement in financial terms for the business. The claimant was on a high salary. This was, no doubt, a major reason why he had on two occasions affirmed the employment contract despite claiming that he had been treated unjustly by Mr Sohal, as described in the incidents complained above. His position was not untenable in May 2017 and again it was not untenable in late October 2017 when he was asked to resign and effectively refused. He refused because he had not been offered sufficient compensation to go quietly. He continued working in his role as Managing Director for almost another year with little interaction with Mr Sohal personally.

62. I step back and look at the evidence as a whole with particular reference to the resignation letter which the claimant had considered and prepared in advance of his meeting with Mr Sohal. Although the resignation letter contained many complaints about Mr Sohal's conduct, in fact the claimant's resignation being tendered depended only on Mr Sohal's response to the requests for

purchase of stock, recruitment of a buyer and salary review of a sales person. Had Mr Sohal given a positive response to one or more of the claimant's requests, it would seem that the claimant was prepared to keep the resignation letter in his pocket despite the long list of complaints and perceived injustices perpetrated by Mr Sohal or Mr Gill.

63. Only because Mr Sohal did not give a positive response to the claimant's requests was the resignation triggered. There was no evidence that despite the refusal to authorise stock etc. that the claimant could not continue to work in his role successfully reducing historic stock and improving profitability although, according to Mr Trevena, the new stock would have improved profitability.

64. The claimant affirmed his contract following the request for his resignation on 27th October 2017, and was clearly prepared to affirm his contract on 13th September 2018 had his request for authorisation of stock purchase etc. had been met. It could be considered that he affirmed the alleged breaches of trust and confidence from 9th February 2017 by his remaining in the role for nearly two years. However, following Kaur I consider whether the conduct of Mr Sohal in the meeting on 13th September was the last in a series of acts or omissions which viewed cumulatively over the course of conduct from February 2017, amounted to a repudiatory breach of the claimant's trust and confidence.

65. Many of the claimant's allegations have not been made out. Many were de minimis and of a nature that a Managing Director of the claimant's stature should have dealt with without taking it personally. I have notwithstanding, given this careful consideration. I recognise the claimant's genuine belief that he has been wronged by Mr Sohal and has received unfair treatment, certainly financially in comparison to the departure of the previous sales director. As I have already stated twice, unreasonable behaviour is not enough. There must be an intention to repudiate the contract.

66. Mr Sohal's conduct on 13th September 2018 does not constitute unreasonable behaviour in the circumstances. There was a significant period of time in the evidence produced by the claimant between the claimant's last clearly stated interaction with Mr Sohal and 13th September 2018. There could be many reasons why Mr Sohal did not authorise purchase of stock or authorise taking on a further recruit, or granting a salary review. Mr Trevena recognised the difficult decisions to be made by the directors. The requests made by the claimant required executive decisions with financial implications to be made by Mr Sohal.

67. The claimant has not met the objective test that Mr Sohal's conduct in refusing the claimant's requests was unreasonable from a business perspective or that his conduct was intended to obstruct the claimant personally in his role. Mr Sohal's decision or his failure to provide reasons for his decision was a response open to him to give even though the claimant believed that it was the wrong response. There was no evidence that Mr Sohal's decision prevented the

claimant from performing his role and there was no evidence that that he would fail in meeting his targets because of his decision. He was not on a disciplinary performance review.

68. The only significant and relevant incident in the claimant's list of complaints was the request that he resign on 27th October 2017. Was the meeting on 13th September, following the request to resign on 27th October 2017, a last straw?

69. I find that there was no 'last straw' in Mr Sohal's business decision not to accede to the claimant's request for authorisation of stock purchase, recruitment of a buyer and a salary review for one member of staff.

70. Consequently the claimant's claim for constructive unfair dismissal fails and is dismissed.

Employment Judge Richardson
31st January 2020