EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Nebojsa Gusic		Bancroft Wines Ltd

Before: Employment Judge Downs

Hearing held at: London South Employment Tribunal

Hearing on 6TH & 13TH January 2017

Representation	**Claimant:**	Ms C Darwin (Counsel)
	Respondent:	Ms K Eddy (Counsel)

RESERVED JUDGMENT

IT IS THE JUDGMENT OF THE TRIBUNAL that the Claim for unfair dismissal is not well founded

REASONS

Introduction

1. This is a claim for constructive unfair dismissal brought by way of an originating application of 16th September 2016. This matter was listed for a one day hearing on 6th January 2017 despite both parties agreeing that this was a three day case. I was able to add an extra day on 13th January 2017 and this allowed all the evidence to be heard but not submissions. The parties made their submissions in writing. The submissions in response were submitted on 2nd February 2017. I apologise that it has not proved possible to hand down Judgment until now.
2. The Claimant was employed by the Respondent under a contract of employment dated 21st January 2010 (this was titled as a Service Agreement – the Claimant had been engaged as a Business Development Director). He had continuous service from 19th January 2004 (when he was employed as a sales representative). The Claimant sent a letter giving notice of his "resignation" to the Respondent on 29th April 2016. The Claimant's last day of employment was 29th July 2016.
3. The Respondent Company is a specialist premium importer and distributer of wines based in London supplying customers in the UK and Ireland. It is a

small to medium sized concern employing approximately 23 persons. At key moments it had two members of the De Haan family as key executives and had a "family" feel about the way it was organised – up until the time of "special measures" (see below) it was pretty informal and democratic and with a tendency to be somewhat disorganised. They key players knew each other well.

4. The letter of *resignation* by the Claimant was addressed to the managing Director, Neil McAndrew. It simply said, "Please find this letter as notice of my resignation." It was appended to an email. The email was not much more forthcoming. In essence it was six lines of which the operative phrases were, "it was good to see you yesterday and discuss company plans for me in the future. I really appreciate your honesty and openness. Following our discussion, I have decided to resign."

The issues

5. Both parties were represented ably and with a certain degree of dogged commitment. One glance at the Schedule of issues amended and re-amended in blue and red ink was enough to appreciate that this case could be described as *closely contested*. The Tribunal culled the issues from the claim form and response, submissions made at the beginning of the hearing and the written material presented at that time.
6. In his claim form the Claimant asserted that he was dismissed following a breakdown in trust and confidence which culminated in/followed on from his discussions with Mr McAndrew on 28th April and that the Respondent had taken steps whether calculated to or recklessly that had the effect of destroying the employment relationship. It is said that the breach was sufficiently important to justify the Claimant's resignation and that he did so in response to the last in a series of incidents.
7. It was said that the Claimant resigned promptly after the last discussion in which it was confirmed to him that he would not be restored to his previous role/status and he would not receive a pay rise – this was the last in a series of incidents. It was, "the last straw." It is said that the Claimant left directly in response to this breach and did so promptly. He worked out his contractual notice and did not have a job to go to when that came to an end.
8. As concerns contractual law, it is said on his behalf that the Respondent's conduct towards the Claimant constitutes a breach of the implied term of trust and confidence that the Respondent would not, *without reasonable and proper cause* conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee and it was sufficiently serious as to amount to a repudiatory breach[1]. The termination of his employment amounts to a dismissal within the meaning of section 95 (1) (c) of the Employment Rights Act 1996.
9. The specific matters that were relied upon were:
   (i) That the Claimant (along with one other colleague) was given no real alternative but to step down as a member of the Board on 19th March 2015.
   (ii) The Claimant was told that, in the alternative, he could participate in monthly operational board meetings and retain his title. This was a

[1] Applying the agreed test from *Woods v WM Car Services* [1981] ICR 666 and *Malik v BCCI* [1997] ICR 606

demotion/represented a loss of status and there was also a loss of authority.

(iii) The operational board stopped functioning after October 2015

(iv) The Claimant no longer had line management responsibility for sales staff as of 26th March 2015

(v) The Claimant was set unrealistic sales targets in March 2015 for the forthcoming year

(vi) During March 2016 various disciplinary allegations were made against him of which he was "cleared" but that the Respondents never apologised subsequently; and

(vii) At the meeting on 28th April 2016 with Mr McAndrew, the Claimant was told that there would be no salary increases for any employees and that his job would not be reviewed and nor would he be restored to the executive board. The Claimant maintains that the Respondents by this action reneged on a promise made by Mr De Haan to the Claimant on 20th March and December 2015.

10. Was there an express affirmation by the Claimant of his contract by his signature of 26th March 2015?
11. Was there an implied affirmation of his contract by his continuing performance of his duties? The Claimant would say that he made it clear at all times that he expected the Respondents to remedy the situation and perform its obligations under his contract.
12. Has the Respondent shown that the Claimant was dismissed for a potentially fair reason and was any dismissal fair pursuant to section 98 (4) ERA 1996?
13. The parties agreed that all matters concerning compensation should be deferred to a later date – should that be relevant. In other words the Tribunal was only concerned with liability at this stage.

Evidence

14. The Tribunal heard from the Claimant, Mr Neil McAndrew Mrs Lee Karen Ward (Associate Director for Human Resources for an Associate Company) and the Chairman, Mr Peter De Haan and read their witness statements.
15. The Tribunal had the benefit of a bundle of evidence that was pretty much agreed. So far as this statement is qualified it is because there was a fair amount of disagreement about whether there had been full disclosure and the level of redaction applied to documents that were disclosed. A measure of the difficulty that this caused is that was necessary to read the 400+ page bundle alongside a 29 page "Redaction Key." This made reading a laborious process.
16. The Tribunal was initially provided with a bundle of 14 authorities and by the end of submissions the written material and additional authorities exceeded the size of the evidence bundle. It is for that reason that the parties had agreed that this case required a three day time estimate. It is unfortunate that it had not proved possible to provide the parties with three contiguous days.

The Witnesses

17. In considering his evidence, the Tribunal would conclude that the Claimant was a talented salesperson and had all the requisite gifts that went along with this. He was knowledgeable, passionate, gregarious, charming, persuasive

and – at times firm. He was driven in seeking sales and would have to have struck all outsiders with whom he would have dealings with the aforementioned characteristics. Like many successful salespersons he could also present challenges when his attention was company-facing. He was very interested in setting the terms of any remuneration scheme so that he maximised his income and was keen to ensure that he had as much control as possible over the stock. This would be pursed with the same degree of vigour with which he sought sales.

18. In his dealings with responsible people in the company he would demonstrate the characteristics set out above but could also be – at times – somewhat mercurial and argumentative (Mr McAndrew may have borne the brunt of this as the Claimant did not have a high opinion of his talents). The papers contain evidence – which the Tribunal adopts – of a number of incidents where the Claimant struggled to retain his self-control when pressing arguments within the Company. Nevertheless the Claimant was popular. The Tribunal concludes that the Claimant was talented and charming but his preoccupation with his own remuneration tended towards the solipsistic and while he was anxious to give a truthful account of events his focus on his own interests meant that he was unable to be a dispassionate witness.
19. In the course of the hearing, the Claimant faced questions that were frequently imprecise – particularly about the finances (something which bedevilled this case – this was, in part, a product of the sheer number of financial documents in the bundle – the significance of which was often not apparent from their face e.g. as to whether they were drafts or not). This meant interpreting the answers was not always easy.
20. Of the other three witnesses, Ms Ward was the most straightforward. She struck the Tribunal as dispassionate, sympathetic and wholly plausible. Although the Tribunal adopts her evidence (see below) it does not help resolve the key issues in the case.
21. Mr McAndrew was a more difficult witness to judge. His witness statement was too long (as was Mr De Haan's). He struggled with some of the questions and appeared to be improvising responses but in most cases this was because he was nervous (which is normal and understandable and not something from which some forensic conclusions could be drawn). He came across as being uncertain when asked questions about bonuses and the Claimant's remuneration generally. The Claimant and Mr McAndrew sought to be polite about each other in the witness box but the Tribunal concludes that their shared history in the firm meant that their true relationship was somewhat complex – most likely this was borne of the fact that the Claimant was by far the more successful salesperson but it was Mr McAndrew who was given executive power.
22. Mr De Haan's evidence was shorter as befits a person who made only a few appearances in the factual matrix (albeit they were important). He was a confident witness but it was striking that he sought actively to charm the Tribunal with a direct/business-like demeanour (described by his Counsel as "unvarnished". He came across as somebody who both liked the company of the Claimant but could find his focus on his own terms and conditions/remuneration somewhat exasperating. The Tribunal does not find this to be inconsistent.

Findings of the Tribunal on the relevant facts

23. The Claimant was initially employed by the Respondents in April 2004 as a Sales Representative and his work involved developing new on and off trade – mainly in the London area. The Claimant was promoted several times.
24. The Claimant was promoted to the Executive Board of the Company from 21st January 2010. At that time it was confirmed that he was to manage three other persons in the London sales team. His starting salary was £50,000 gross with his pre-existing bonus scheme continuing He entered into a detailed 17 page service agreement to take on the post. The service agreement is in fairly conventional terms and contains an "entire agreement" clause. It provides for the power of suspension and makes reference to grievance procedures (which were not invoked by the Claimant). It does not actually make specific reference to the Claimant being contractually entitled to attend executive board meetings. He is an Executive who is obliged to report to the Board. The accompanying letter, however, makes reference to his "promotion" to the Board.

2014 and special measures

25. By March 2014 Mr Peter De Haan put the Company into *special measures*. This was a phrase that he used to describe an intervention whereby he rejected the proposed annual budget proposed to him by the managing director and finance director (which was a breakeven budget) and instead opted for the creation of a budget where there was a generation of £1million in new business. It should be added that the evidence that the Tribunal saw was that the Respondent Company generated considerable sales and even increases over the time of the Claimant's employment. Where it struggled was in making a reasonable profit margin on the sales.
26. Like so many matters in these proceedings, discussions were marred by imprecise language.
27. There is plenty of evidence – not least from the Head of HR that the phrase "year of special measures" gained currency in the company. It is of particular importance that this was the phrase used in the letter to the Claimant from Mr McAndrew of 8th May 2014 which the Claimant signed on 15th May 2014. It is perhaps of even greater significance that the phrase, "year of special measures" is referred to in the Respondent's letter to the Claimant of 26th March 2015 that the Claimant signed the same day. In his evidence, this is what the Claimant understood it to be.
28. In fact, the Finance Director clearly envisaged a two-year plan [109] whereas Mr De Haan thought about the changes as being permanent (but there is little evidence in these proceedings that he communicated this conclusion). This is an insight into the fact that the Company might be small but communications were still poor. It is likely that this was compounded by the fact that Me De Haan was absent for much of the time.
29. If we set aside the phrase "special measures" there appears to have been an agreement that Mr De Haan was entitled to insist that the Company made faster strides towards greater profitability – especially in the circumstances where Mr De Haan would be forced otherwise to make a further capital injection into the Company.

30. The plan was very dependent on the Directors who were to be responsible for £200,000 of additional sales each [115]. The Claimant was by that stage the most successful sales person in the Company but was in the forefront of resistance to the new financial plan [127]. The Claimant did not feel that the burden was spread that fairly between the Directors – Mr McAndrew in particular. This was one of many instances where there was a fair degree of tension between the Claimant and Mr McAndrew. The Claimant did not hold Mr McAndrew is particularly high esteem – in this the Tribunal accepts the evidence of Mr De Haan.
31. It was agreed that the Claimant would receive an increase in his base salary to £60,000 and the bonus scheme was altered as well which increased the scope for the Claimant to make additional money. Despite his misgivings, the Claimant signed off on the various proposals for the year to 31st March 2015 [138]. The Tribunal finds that he put his reservations to one side because of the (additional) financial consideration. He entered into a bargain. It is likely that his acceptance of the same was influenced by the fact that he believed that he could generate the necessary new business (because of his knowledge of forthcoming deals).
32. The internal correspondence would appear to show a genuine concern by the Respondent that the Claimant was best deployed as a super salesperson [207] rather than as a manager of a team. The Claimant was relieved of his management responsibilities for the London team as part of the same special measures reorganisation. The Respondents did not consider the Claimant to be much by way of a "team player." They felt that he did not share his leads, did not "bring-on" less experienced sales persons and was very focussed on his own reward. This is not to say that Mr De Haan disliked the Claimant – quite the opposite. Mr De Haan considered the Claimant a "larger than life" figure and enjoyed socialising with him when that proved to be possible.
33. The Claimant argued for the retention of his line management responsibilities at the meeting on 20th March 2014 and subsequently in discussions with Mr McAndrew. However, this was against a background in which the Claimant was vociferous in putting forward his point of view on many matters. However, his objections to this step were not as vehement as his representations about his remuneration.
34. In or about October 2014 the Claimant was already lobbying Mr McAndrew and Mr De Haan senior for more remuneration in the following financial year. On this and other occasions, the Respondent was not overtly negative to the Claimant's suggestions. This did not connote agreement nor did they mislead the Claimant but it is likely that the Claimant's personality was such that the Respondents were not overly keen on entering into open disagreements with the Claimant.
35. Mr McAndrew and Mr De Haan discussed restoring the Claimant some management roles in January 2015 but decided against it and did not raise it with the Claimant. However, Mr Busby had a management role restored to him – this was in part because his responsibilities were to be for the Regional Sales Team based outside London (i.e. it required more managing). The Claimant did not make a business case in writing to resume his management responsibilities at the end of 2014/beginning of 2015 and so the Respondents considered the matter to be largely closed.

Re-structuring of the Board and new bonus arrangements

36. By the beginning of March 2015, Mr De Haan decided he wanted to re-structure the company by having an Executive Board ("the real company Board") with a different composition that met quarterly and an Operational Board that would involve the Claimant which would meet more frequently than that. The rationale that the Board had been too large up until that point was undermined when it emerged that the new Board was effectively the same size. However, Mr De Haan did feel there was a need to put greater stress on the strategic decisions necessary for the Respondent Company to develop so that it became more profitable. Further Mr De Haan had moved abroad and wanted to come to the UK less frequently, he was concerned that the Board meeting became bogged down by minutiae – some of which was involved – at least indirectly – with issues of remuneration for the Claimant as well as questions of wine selection. Additionally Mr De Haan was frustrated by the failure of the Claimant and his colleagues to make a more constructive input to that year's budget and felt that the Claimant had stopped thinking strategically and was almost entirely concerned with his remuneration (the Claimant's email of 9th March 2015 [216] is an example of why it was reasonable for him to have arrived at this assessment).
37. It was recognised by Mr De Haan that it would be necessary to win round the Claimant. It was appreciated that one of the risks was that the Claimant would resign immediately but it was hoped by Mr De Haan that an increase in salary and bonus would outweigh that.
38. The Respondents called a Board meeting on 19th March 2015 and the Claimant was told in the course of the same that it was proposed to remove the Claimant and one other senior executive (there was not complete equivalence in the position of the two as the other Director had line management responsibilities returned to him – but the context of that was very different from the Claimant's situation) from the Executive Board. Although the Chairman invited the Claimant to resign, in reality the Claimant had no choice as if he had not done so, Mr De Haan proposed to set up an emergency AGM 28 days later to remove him – in other words he would have been removed in any event. There was a peremptory character about this but the Respondent was anxious to avoid the potentially destabilising effects of a more prolonged process. The Claimant was shocked. He thought he would receive a promotion because of his sales performance.
39. The Claimant met Mr De Haan on 20th March 2015 (i.e. the day after the Board meeting and before the Claimant accepted the Respondent's offer in writing) and the latter had asked the Claimant to give the proposed new arrangements a chance. Mr De Haan agrees also that he told the Claimant that if they were unsuccessful then he would make changes. He told the Tribunal that, if asked, he would have said that he did not want to lose the Claimant (as he was their best salesman). On the question of Board membership Mr De Haan adopted a "nothing is ruled out" approach but at the same time he promised nothing. Mr De Haan suggested to the Claimant that he should meet with Mr McAndrew and the Financial Director to discuss his desire to have his line management responsibilities for the London team restored and gave him advice about how to put his case (which would have been to make a business case in writing). This was in line with Mr De Haan's

general approach which was: (i) not to get sucked into managing senior staff on a day to day basis but to allow Mr McAndrew to undertake that role; and (ii) to mentor the Claimant – in part because he liked him but also so that he could steer the Claimant into thinking in terms of making proposals that were detailed, in writing and made a business case (i.e. one that had the welfare of the whole company in mind – not just the Claimant).

40. If Mr De Haan deliberately gave the impression that he would make changes if the plans being put forward at that stage did not work out he gave no assurances that that the Claimant would be restored to either his line management role of 12 months previous or his Executive Directorial status. Mr De Haan saw the Claimant's removal from the Board as being carefully planned and executed and he did not see any reason to reverse it on the evidence available to him.
41. In essence Mr De Haan had done no more and no less than agreed that the principal issues would be reviewed if the plan did not bring about the expected benefits. This is broadly consistent with the case that the Claimant put forward in his solicitor's letter of 25th May 2016.
42. After the meeting, the Claimant wrote an email to Mr McAndrew, Mr Johnson and Mr De Haan in the late afternoon of 20th March. This sought a meeting with Mr McAndrew and Mr Johnson and says that he would like to "continue" to manage the *London On Trade Team*. He set out the reasons for this and wanted the meeting to take place when he returned from Vinitaly. The Claimant made no reference to having been promised any particular review in the following year.
43. The Claimant was away immediately after that meeting but upon his return he did sign the letter of 26th March [230].
44. The letter contained the details of the consideration for the change in arrangements as the Claimant was given a salary increase of £10,000 as part of a new salary and bonus settlement. There is disagreement as to whether this was the subject of negotiations with the Claimant or whether an original plan to increase the Claimant's salary by £5,000 was amended by the Respondents themselves to an increase of £10,000 after internal discussion about what would "win round" the Claimant. It is not apparent that resolving this difference of evidence is material but on balance it is likely that there were some negotiations with the Claimant after which the offer to him was doubled.
45. The Claimant eventually signed an offer which set out his new status in the company, his increased basic salary of £70,000 pa and a bonus scheme including targets which would have allowed the Claimant to earn up to £95,000 pa. This was greatly in excess of the other Director who was removed from the Board at the same time. However, the Claimant was faced with "targets" for sales/triggers for his bonus which were very ambitious. In some way they might be considered to represent no more of a leap than the previous year's target but it envisaged a second year when the Claimant was expected to generate very considerable increases in profitable sales. This represented a significant "stretch". It was apparent that the Respondents were utilising the bonus scheme so it did not provide a reward for the status quo but was all about rewarding increases in sales.
46. The letter which he signed made specific reference to his resignation as a Director of the Company [230]. The Claimant had argued that he should hold

line management responsibilities but this was not agreed (the Claimant's evidence is accepted on this point). In any event, the Claimant's principal energies were focussed on remuneration. The Respondent made no announcement either internally or externally as to the changes to the Board and the Claimant's job title remained the same. It should be added that the other Director resigned his post as a Director and has continued working without a particular problem.

47. Mr McAndrew in his evidence downplayed the objections made by the Claimant as to his line-management responsibilities. In reality the Claimant's protests continued but Mr McAndrew discounted them because (i) he thought that the Claimant was not a good line manager, that it distracted him from sales and he did not believe that it was that important to the Claimant as his principal focus was on his personal remuneration
48. In addition to his basic salary the Claimant was paid a bonus for his performance in the previous year 2014 – 2015 for which he was congratulated by Mr Neil McAndrew [257]. This had originally been miscalculated by the Respondents. Mr De Haan's evidence about the Claimant's remuneration was based on a misreading of the figures (the grounds of resistance was wrong also).
49. The Operational Board met regularly at first but when everybody became busy in October it became difficult to fix a meeting day and thereafter no meetings were organised but Neil McAndrew promised they would "get back on track" with such meetings in the New Year" [272]. That didn't happen. The Operational Board was allowed to fall into abeyance.
50. The Claimant spoke to Mr De Haan in December 2015. The fact that Mr De Haan gave the impression that his recollection of the meeting was not entirely clear and, by contrast, the Claimant purported to have a reasonably good recollection of what was said does not actually assist in trying to establish what was said.
51. In the course of the meeting, it became apparent that Mr De Haan was unhappy about the financial performance of the Company and could see that the budget for that year would not be achieved. Mr De Haan told the Claimant to meet with Mr McAndrew and have discussions with him about his executive status and management structure after the end of the financial year (i.e. April 2016). Again this finding is in line with the letter written on behalf of the Claimant on 25th May 2016
52. The Claimant did not complain to Mr De Haan at that meeting that the Operational Board had fallen into abeyance.

<u>Disciplinary allegation</u>

53. The Claimant was suspended on 26th February 2016 [285] because of an allegation that he had told two new salespeople that they had better look for new jobs after their probationary period. Simon Johnson investigated the matter and concluded by 29th February 2016 that the allegations could not be substantiated as it was essentially one person's word against another [292]. This was a reasonably charitable view given the evidence that he had gathered. The initial process was not particularly satisfactory as Simon Johnson had been the Claimant's "witness" when he was suspended initially. The Claimant made no complaint about that procedural defect at the time but did mention the fact that he felt he was owed an apology once the matter was

concluded. He mentioned this again in a private discussion with Ms Ward on 1st March but did not take it further [298] (in fact the Claimant's chief ire was directed at inadequate stocks).

54. The Claimant opted to keep the discussion with Ms Ward informal – despite the fact that he was given the option by her of making their discussion formal and allowing the possibility of him making a grievance (the evidence of Ms Ward being preferred over that of the Claimant because of her clear contemporaneous note). In the event the whole matter was resolved by 1st March (i.e. within about two working days). The Claimant felt that the incident was an affront to his dignity. On previous occasions incidents had been dealt informally by asking the Claimant to resign. However, the contractual arrangements governing the Claimant allowed the Respondents to suspend and investigate him. Even taking into account the fact that suspension is not a neutral step, the Respondent had reasonable grounds to believe that the Claimant was guilty of misconduct, they investigated the allegations very swiftly and resolved the whole matters within a few days with no action being taken against the Claimant.
55. There were plenty of signs of increased tension generally at around this time as the Chairman's son, Carlos left as a Director of the Company in January 2016. This would tend to show that there was pressure on all the senior figures in the Company to improve their performance and it was not focussed on the Claimant. The Claimant was very concerned about repeat stock failures against a backdrop of enhanced targets. He lost his composure in a meeting with two other senior figures in a meeting on 23rd February 2016. Part of the cause of this was the fact that the Claimant had lost some of his autonomy in purchasing wines as a result of further decisions made in or around March 2015.

<u>Last Straw Meeting</u>

56. By the end of March, it became apparent that the Claimant had not met his targets. To his credit, he had the largest single sales in the company. None of the other Directors had managed to meet their targets either. The Claimant came the closest of senior figures in the Company.
57. On 28th April 2016, Mr Neil McAndrew met the Claimant for an informal catch-up at the latter's request. The Claimant had asked for 15 minutes. Mr McAndrew agreed to the meeting as he wanted to start the process of discussing targets for the next year in any event.
58. It is agreed that, at that meeting, the Claimant asked whether he would be awarded a salary increase and a position on the executive board and have his line management responsibilities restored. In addition, it is agreed that the Claimant told Mr McAndrew that he had discussed his position on the board with Mr De Haan the previous December**.**
59. We know from the Claimant's email of resignation that the discussions included "company plans for me in the future" and that Mr McAndrew was thanked for his "honesty and openness". That implies a frank discussion about his future. In the letter before action of 25th May 2016, the Claimant's solicitor says that – going into the meeting – the Claimant had expected that he would regain his position on the Board and his management responsibilities. It is asserted that the Claimant was told that there would be no changes going

forward and no salary increases for anybody in the Company – which is said to be untrue. In fact this is not straightforward as the remuneration of the other two members of staff involved some element of promotion/reorganisation. It is not consistent with the Claimant's email of resignation (with its reference to honesty) that he would have believed at the time (as opposed to when the letter had been written) that he had been deceived that there were to be no salary increases for anybody in the Company. The implication of this is that the Claimant's recollection of the meeting is imperfect (it is probably coloured by his negative feelings about Mr McAndrew).

60. The meeting lasted for no more than 15 minutes and Mr McAndrew had no notice that it was going to be of particular significance. In response to being asked by the Claimant whether he would be awarded a salary increase and a position on the executive board and have his line management responsibilities restored, it is likely that McAndrew sought to avoid committing himself too deeply. Final decisions had not been arrived about his targets. It is likely that Mr McAndrew sought to manage the Claimant's expectations ahead of the impending negotiations by being pessimistic about salary increases – the fact that the Company had made losses would have been on his mind. It is also plausible that Mr McAndrew asked the Claimant where he got the impression from that there might be changes to the executive board. It was in response to this question that the Claimant told Mr McAndrew that he had discussed his position on the board with Mr De Haan the previous December**.**
61. Against that background, Mr McAndrew's recollection that he said that Directorial roles were not in his gift and he said so, is plausible. It is likely that he said he would consult Mr De Haan. Mr McAndrew proposed a further meeting with the Claimant on 8th May after the London Wine fair in an email sent on 29th April at 09,01 [313A] but received no response. [313A]. It is unclear what it was that would be discussed at such a meeting.
62. In the event – as described at the beginning of this Judgment, the Claimant gave notice that he would be leaving the company/resigning by way of a letter giving notice of his "resignation" to the Respondent on 29th April 2016.The email was sent at 20.03 on 29th April. The resignation was accepted on 2nd May 2016 and the Claimant was placed on gardening leave.
63. It is agreed that Mr De Haan met with the Claimant over lunch following his resignation and Mr De Haan expressed surprise that the Claimant had not resigned earlier. This is because he had been led to believe that the Claimant had turned down the offer of a much better paid position from a competitor. Mr De Haan said that the Claimant was paid commensurate with sales and would have been paid more when and if that was achieved. Mr De Haan said that the Claimant told him he resigned because when the Claimant had met Mr McAndrew the latter had proposed no changes in the following year and the Claimant considered his to be an incompetent Managing Director.
64. By way of a letter from Slater and Gordon the Respondents were put on notice of the Claimant's principal contentions on 25th May 2016. Crucially it included the assertion that he grudgingly accepted the loss of his membership of the Company Act Board on the basis of discussions with Mr De Haan that the *demotion* would be reviewed the following year. No mention was made of his increase in base salary. The Claimant said that he had a brief meeting

with Mr De Haan at the end of 2015 where the Chairman [p]referred the Claimant to have discussions with Mr McAndrew about his management status at the end of the financial year. The letter put the Claimant's case ably and in a helpfully pithy way. The root of the problem was the fact that the Claimant had been demoted and he was not subsequently restored to his role [339]. The meeting of 28th April is said to be the last straw. It is striking that there is no mention of the investigation into his alleged misconduct.

65. The Claimant was placed on gardening leave on 29th April 2016 and his contract concluded on 29th July 2016.

Submissions

66. Counsel made detailed submissions in writing at the conclusion of the case. It is apparent that many of them concern disputed factual considerations which are dealt with below. In essence, however, the Claimant would contend that the Respondents breached the implied term of trust and confidence in his contract of employment in that he was the subject of a demotion in March of 2015 which was fundamental in character. Although he agreed to this – in reality – he was given no choice. It was a change that was imposed upon him. The Claimant would argue that he worked under protest thereafter and was the subject of the same demotion from then on. This was ameliorated only by the fact that the Respondent had given him assurances that the arrangements would be reviewed. It was not quite said that these were pivotal. They were though, very important.

67. The Claimant would say that subsequently the Respondent showed further evidence that they did not consider themselves bound by their contract of employment by taking other steps – such as allowing the Operational Board (to which the Claimant was appointed when he was demoted from the Company Act Board) to fall into abeyance and subjecting him to a disciplinary investigation (which was without merit). This culminated in the "last straw" which was the revelation that, despite assurances to the contrary, the Respondents had no intention of restoring him to the Board and to his line management responsibilities.

68. The Respondents would say that any "demotion" (they would resist the label) was the subject of a written agreement (or otherwise the contract was affirmed) and can't be relied upon as a breach and that the subsequent problems therefore need to be examined to assess whether they would ground a finding that the implied term was breached – the Respondent would say they do not have that character.

Submissions on behalf of the Claimant

69. Counsel for the Claimant argued her case on the basis that the implied term of trust and confidence had been breached as a result of the Claimant's demotion from his appointment as a Company Act Director and from his responsibility for managing his own sales team. In addition, that the year of special measures – was meant to be exactly what it said – a proposal for 2014/2015 only and therefore it was very significant when they were continued thereafter and the Claimant did not have his line management responsibilities restored to him.

70. It was said that the Respondent's case is incoherent about the circumstances of and justification for the Claimant's removal as a Director and that the targets set for the Claimant for 2015 – 2016 involved a figure that was considerably higher than in the previous year and represented a much higher increase than in previous years. The Claimant was given assurances that his position would be reviewed if the measures put in place for 2015/2016 were not successful. In this regard the evidence of the Claimant was to be preferred on the basis that it was much more precise than that of Mr De Haan. That there is no evidence that the Operational Board was *merged* with purchasing meetings in early 2016 and that any assertions to that effect by the Respondent are not true and that the disciplinary measures taken against the Claimant were a way of seeking to side-line him.
71. It was asserted that Mr McAndrew accepted that the Claimant raised with him the possibility of being reinstated to the Executive Board and his line management responsibilities and asserted that he had previously been given assurances about the former and had had discussions with Mr De Haan. Mr McAndrew also agreed that the Claimant had mentioned a salary increase to him. The Claimant further asserts that he was told by Mr McAndrew that there would be no salary increases for anybody (when this was inaccurate).
72. Mr McAndrew exceeded his authority by saying that the Claimant would not reconsider his position on the Board and that nobody was to receive a salary increase (which the Claimant knew to be untrue) and that his follow up email after their last (April) meeting was to discuss other matters.
73. Mr De Haan agreed that the Claimant had told him that he had resigned because at the meeting with Ms McAndrew he had asked what changes would be made and was told none.

Submissions on behalf of the Respondent

74. The Respondent's case is that the Claimant had no contractual right to serve on the Executive Board and his removal from the same was not a demotion as he kept his title and received a substantial salary increase. In any event he resigned and signalled his acceptance in writing by way of signing the letter of 26th March 2015. They contend that the Claimant's 2015/2016 targets were not unrealistic and were in line with targets set the previous year which the Claimant had exceeded.
75. Further it is said that the Operational Board was not dissolved. Counsel for the Respondent went on to contend that it was entirely appropriate for the Respondent to investigate the allegations made about the Claimant's conduct and the investigation was fair and reasonable and it is significant that this issue was not relied upon in the pre-issue correspondence.
76. On the main question, it was said that the assurances given by Mr De Haan went no further than an agreement to review the Claimant's status in the 2016 financial year and to take this up with Mr McAndrew – which process had been commenced in April 2016 and that Mr McAndrew did not tell the Claimant that no employee of the Respondent would receive a salary increase (and to assert that the Claimant knew he was lying is not consistent with thanking him for his honesty) nor did he tell the Claimant that there would be no change going forward but he did tell the Claimant that he was not aware of proposed changes to the executive board.

77. The Respondent would say that the Claimant cannot rely on the meeting with Mr McAndrew of 28th April 2016 as amounting to the last straw in circumstances in which Mr McAndrew emailed the Claimant on the morning of 29th April 2016 to propose a meeting to continue their discussion.
78. In general it is said that the Claimant did not resign in response to the purported breach but rather because of his dissatisfaction at his remuneration and a lack of confidence in the management of the company by Mr McAndrew. In any event he affirmed his contract of employment/waived any breaches by his conduct.

Relevant Law

The Contractual agreement

79. The claim is brought as an alleged breach of the implied term of trust and confidence. However, insofar as the Tribunal is concerned with other contractual provisions, the ET must glean the true agreement from all of the circumstances of the case, of which the written agreement is only a part (as per Lord Clarke at [35] in *Autoclenz Ltd v Belcher and others* [2011] ICR 1157) and the Tribunal is entitled to make inferences from the surrounding circumstances and how the parties conducted themselves subsequently (see *Carmichael v National Power PLC* WLR [1999] 2042 at 2047G on inferred terms).

The claim for constructive unfair dismissal

80. The claim is made pursuant to Employment Rights Act 1996 section 95 (1) … an employee is dismissed by his employer if:
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
81. Before going on to consider the detailed case law referred to by the parties, it is useful to touch upon the general principles as summarised in Harvey on Industrial Relations and Employment Law at DI 403 which states that in order for the employee to be able to claim constructive dismissal the following conditions must be met:
    (i) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;
    (ii) That breach must be sufficiently important[2] to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving
    (iii) He must leave in response to the breach and not for some other, unconnected reason;
    (iv) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed have waived the breach and agreed to continue the contract.

[2] It is "fundamental" – in *Wright v North Ayrshire Council* [2014] ICR 77 Langstaff J referred to a "breach which indicates that the employer altogether abandons and refuses to perform its side of the contract.

The implied term of "confidence and trust"

82. The operative implied term in this case is derived from *Woods v. W. M. Car Services (Peterborough) Ltd.* [1981] I.C.R. 666 and confirmed by *Malik v BBCI* [1997] ICR 606
And is the obligation that the employer shall not:

"without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee:"

83. The test is objective – as determined by the Court of Appeal in *Tullett Prebon v BGC Brokers* [2011] EWCA 131 at para 22 – 24 where Maurice Kay LJ said,

"[22] The central point in this ground of appeal is that it is said that, having correctly directed himself in paragraph 80 of the judgment that the defendant brokers could rely on any conduct by Tullett "which, objectively considered, constituted a breach of its duty not seriously to damage the degree of trust and confidence which each was entitled to have in Tullett", the Judge departed from that self-direction by applying a subjective approach when he came to make his findings. In particular, exception is taken to the language of paragraph 106, where the Judge said:

> "Tullett's conduct was not intended to attack the relationship between Tullett and the brokers, but was intended to strengthen it."

[23] Mr Hochhauser submits that this constituted a subjective analysis of Tullett's reasons for acting as it did and not an objective consideration of whether its conduct was calculated or likely to seriously damage or destroy the relationship of trust and confidence.

[24] I do not accept this submission. It assumes that Tullett's intention was irrelevant whereas the central question is whether it had "clearly shown an intention to abandon and altogether refuse to perform the contract" (*Eminence Property Development Ltd*, at paragraph 61). As Etherton LJ went on to say (at paragraph 63):

> "… all the circumstances must be taken into account insofar as they have been on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed as such by a reasonable person."

Reasonable and proper cause

84. The Tribunal was referred to *Hilton V. Shiner Ltd – Builders Merchants* - [2001] IRLR 727 where Mr Recorder Langstaff (as then) said,
"34. The implied term, as formulated in *Malik v BCCI*, is qualified by the requirement that the conduct which is complained of must be engaged in without reasonable and proper cause. Other cases have referred to the duty as being one not to act arbitrarily nor capriciously in the exercise of a discretion or power open to an employer. It has been termed an obligation of fair dealing."

"last straw"

85. The Tribunal was referred to *Lewis v Motorworld* [1986] ICR 157 where Ackner LJ at [166] set out the primary principal,

> "The employer's conduct was repudiatory if, viewed objectively, it evinced an intention no longer to be bound by the contract. Its intentions and its reasonable belief could not determine that issue."

86. Neil LJ set out at [167] the conclusions to be derived from *Woods v. W. M. Car Services (Peterborough) Ltd.* [1981] I.C.R. 666 in the Employment Appeal Tribunal,

> "The conduct must therefore be repudiatory and sufficiently serious to enable the employee to leave at once. On the other hand it is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

87. And at [168] Neil LJ stressed that the test was objective:
"The question is: did the employee terminate the contract in circumstances such that he was entitled to terminate it without notice by reason of the employer's conduct? In answering this question it is not sufficient to consider merely the intention of the employer and its reasonable belief as to the effect of its conduct. In these circumstances I am unable to escape the conclusion that the industrial tribunal misdirected themselves to a material extent."

88. At [169] Glidewell LJ set out the applicable law

> " The principles to be found in the relevant authorities can, I believe, be summarised as follows.
>
> (1) In order to prove that he has suffered constructive dismissal, an employee who leaves his employment must prove that he did so as the result of a breach of contract by his employer, which shows that the employer no longer intends to be bound by an essential term of the contract: see *Western Excavating (E.C.C.) Ltd. v. Sharp* [1978] I.C.R. 221.
>
> …
>
> (3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v. W. M. Car Services (Peterborough) Ltd.* [1981] I.C.R. 666.) This is the "last straw" situation.

89. At [170] in applying the facts to the law, Glidewell LJ said this,

> "This case raises another issue of principle which, so far as I can ascertain, has not yet been considered by this court. If the employer is in breach of an

express term of a contract of employment, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, but the employee does not leave and accepts the altered terms of employment; and if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence; is the employee then entitled to treat the original action by the employer which was a breach of the express terms of the contract as a part -- the start -- of the series of actions which, taken together with the employer's other actions, might cumulatively amount to a breach of the implied terms? In my judgment the answer to this question is clearly "yes."

90. The Claimant asserts that a "last straw" led to his resignation. The Tribunal was referred to London Borough of Waltham Forest v Omilaju [2005] IRLR 35 where, in the judgment of the court given by Dyson LJ, paragraph 20 makes clear that

> "20. … The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. …"

91. Paragraph 21 reads:

> "21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

Causation

92. The Tribunal reminds itself of the Judgment of Langstaff P in *Wright v North Ayrshire Council* [2014] ICR 77 where the President referred to the importance of the Court of Appeal's Judgment in *Meikle v Nottingham County Council* [2004] IRLR 703 at [33]

> "The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation"

93. The breach must be an effective cause of the resignation – but not the sole of predominant/principal/major/main cause.

The imposition of change

94. In *MacBride v Falkirk Football & Athletic Club* [2012] IRLR 22, the EAT concluded that,

"With regard to the duty to maintain trust and confidence, an employer cannot pray in aid that he and others in his industry treat all employees badly and therefore treating an employee badly cannot amount to a breach of that duty. Employers have a duty not, without reasonable and proper cause, to conduct themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee and it is plain that the conduct in question falls to be objectively tested.

95. The EAT stressed the significance of the imposition of changes (in certain circumstances) which in that case indicated a wholesale lack of respect for the employee and his views on the change itself and the means of its implementation, and was bound to upset the employee.

Disciplinary investigations

96. In *Working Men's Club and Institute Union Ltd v Thomas Balls* UKEAT/0119/1/LA Underhill P held at [29], "We do not accept that submission. The Tribunal was evidently referring not to the imposition of any disciplinary sanction but to the initiation of disciplinary proceedings. It is well-established that the unreasonable bringing of disciplinary proceedings, irrespective of any eventual findings, is capable of constituting a breach of the (to use the accepted shorthand) "duty of trust and confidence": see, e.g., Gogay v Hertfordshire County Council [2000] IRLR 703. Of course tribunals should be slow to treat the initiation of an investigation as itself a repudiatory breach: very often an employer may act reasonably in investigating allegations of misconduct which turn out in the end to be groundless."

Affirmation

97. The Claimant's Counsel referred to the passages concerning affirmation in Chitty at 24-003 where it was explained that affirmation will only be implied if the Claimant did some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated. It is trite law that mere inactivity after the breach does not of itself amount to affirmation (see Chitty at 24-003, p.1735.) Nor does the fact that C called upon R to change its mind and perform the contract in accordance with its express and implied terms.

98. The Claimant cited the Judgment of Henderson J in the case of *Flanagan v Liontrust Investment Partners LLP and ors* [2015] Bus LR 1172 at [1236-7]. This added little to the general statements found in Chitty above.

99. So far as it might be suggested that the Claimant was somehow affirming his contract by giving notice, this was dealt with in *Cockram v Air Products plc* - [2014] IRLR 672 by Simler J where she said,

> "13. the common law contractual approach [is that]: a party cannot affirm the contract for a limited period of time and then abrogate it on the expiry of that period of time at common law. At common law therefore, an employee wishing to resign and successfully claim constructive dismissal would have to resign without notice. To do otherwise would be to affirm that part of the contract covered by the period of notice, whilst disaffirming the rest in the sense of accepting

the employer's repudiatory conduct as entitling the employee to bring the contract to an immediate end.

14 Section 95(1)(c) provides an express statutory exception to this principle by providing for termination of the contract by the employee *'with or without notice'*. In *Western Excavating v Sharp* at 29 Lord Denning suggested that: 'th[e] words *"with or"* were inserted because it was realised that [s.95(1)(c)] as enacted in 1965 left a gap. A man who was considerate enough to give notice was worse off than one who left without notice."

100. The Claimant did nothing special in the way he gave and served out his notice.

Impact of any Prior Affirmation

101. The Claimant would say that, even if there was any affirmation, given the Respondent's continued and/or repeated repudiation of the express and implied terms of the Claimant's contract, the Claimant acquired a fresh right to accept further repudiatory breach/es.

102. In *Vairea v Reed Business Information UK Ltd* UKEAT/0177/15 HHJ Hand sitting in the EAT on 3rd June 2016 determined that

(1) a later non-repudiatory action (normally capable of being a last straw) does *not* revive previous misconduct that was subject to affirmation;

(2) there cannot be a series of last straws; and

(3) in these circumstances what the employee has to show is new (post-affirmation) *repudiatory* misconduct by the employer.

103. He went on:

"83 I think when a contract has been affirmed a previous breach cannot be "revived". The appearance of a "revival" no doubt arises when the breach is anticipatory or can be regarded as "continuous" or where the factual matrix of the earlier breach is repeated after affirmation but then the real analysis is not one of "revival" but of a new breach entitling the innocent party to make a second election. The same holds good in the context of the implied term as to mutual trust and confidence. There the scale does not remain loaded and ready to be tipped by adding another "straw"; it has been emptied by the affirmation and the new straw lands in an empty scale. In other words, there cannot be more than one "last straw". If a party affirms after the "last straw" then the breach as to mutual trust and confidence cannot be "revived" by a further "last straw".

84 In my view, this is not in any way unfair to an employee, who has elected to go on with the contract. On the contrary, that is the whole point of an affirmation. Affirming the contract obviously involves its continuance and that continuance is on the basis that the remedy for past breaches will be purely monetary. The result is that a further "entirely innocuous" action on the part of the employer cannot entitle the innocent party to revert to the pre-affirmation breach. That is just as much the position where the pre-existing breach comprised a "bundle of straws" amounting to a breach of the implied

term as to mutual trust and confidence as it is with a “unitary” repudiatory breach."

Timeliness

104. In *Chindove v William Morrisons Supermarket plc* UKEAT/0043/14/BA (unreported) Langstaff P examined the statement by Lord Denning MR in *Western Excavating Ltd v Sharp* [1978] QB 761, [1978] 1 All ER 713, [1978] IRLR 27. At p 769 where he said,
“[the employee] must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”
And at para [25] commented as follows:

“[25] This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

[26] He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, [2011] QB 323, [2010] 4 All ER 186, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

105. The citation from Lord Denning had earlier been examined by Browne-Wilkinson in *W. E. Cox Toner (International) LTD. v. Crook* - [1981] ICR 823. After surveying the law he concluded at 828 F – G

If one party ("the guilty party") commits a repudiatory breach of the contract, the other party ("the innocent party") can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: *Allen v. Robles* [1969] 1 W.L.R. 1193"…" if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation: *Farnworth Finance Facilities Ltd v Attryde* (1970) 1 WLR 1053."

106. He noted the particular problems with contracts of employment with the danger that a contract might be thought to be affirmed by an employee every day she or he attended work. He therefore focussed on what happened in the period of delay and concluded that, (at 829 G – H),
"provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purpose is merely to enable him to find another job."

Application of the facts to the law

107. Resolving the contentious factual matrix was not easy in this case because of the dearth of written material. The Claimant is also a very attractive personality and persuasive. He has been a long-standing servant of the Company and served it well. Additionally the Claimant has left this post without another to go to. There was no gamesmanship involved.

108. The Respondent resigned because of *his perception* that the Respondents had repudiated his contract. The reality is that it was most likely greatly influenced by the Claimant's negative view of Mr McAndrew's management of the Company, its financial planning and the organization of the sales function in particular as well as the fall in his remuneration in the last full year and his concern that it might not rise thereafter. Nevertheless the Claimant's *perception* that the Respondent had failed to restore the Claimant to his Company Act Directorship and line management role unreasonably was part of his thinking and an effective cause of his resignation. However, the Tribunal is not solely concerned with the Claimant's perception. The test is objective.

109. The Claimant's removal from the Board in 2016 was the obverse of his "promotion" to the Board in 2010. The manner in which it happened had a peremptory character about it. By itself (i.e. judged in isolation) it had some of the hallmarks of an action which was in breach of the implied duty of trust and confidence. However, the Claimant spoke to Mr De Haan and formed the impression that the decision was not immutable for all time (albeit no guarantees were given). Additionally, the Claimant was offered a very

considerable increase in his basic pay. If Mr McAndrew was proved right in his projections, it is likely that the Claimant would have been in receipt of a very sizeable bonus. All of this bore upon the Claimant and led to his decision to sign the written agreement with the Respondent of 26th March 2015. This dealt with his status, targets and remuneration. The Claimant continued to argue that he would operate better as the leader of a team rather than as a sole sales person (see email of 27th March 2015) but despite his disappointment this did not stop him scanning and sending his signed version of the agreement to the Respondents.

110. All of this is without even considering whether the Respondents had acted without reasonable and proper cause. The financial situation of the Respondent Company was unhealthy. Its very solvency was at stake. Mr De Haan was entitled to take actions to protect the business. He was managing the Company from overseas. It was not possible for him to participate in very regular meetings. He required a Board that need not meet that often but which could devote their energy to core business planning and not get distracted by detail. He adjudged that the Claimant was not assisting the Board to have those discussions but was rather allowing them to become bogged down in operational matters. It is fair to say that Mr De Haan had authority over the agenda but that still did not allow him to control the vehemence by which the Claimant would argue some matters – particularly if they touched upon his remuneration.

111. The move did have some signs of a "demotion" but the Respondent were anxious to protect the Claimant's status and he retained the title Director.

112. This is not to say that the Respondent did not value the Claimant. They did and remunerated him accordingly. He was their chief salesperson. They adjudged that he operated best as an individual and declined to restore to him line managerial responsibilities.

113. The Respondents had reasonable and proper cause for their reorganization of the management function of the Company in March 2015 – particularly as it touched upon the Claimant. Their actions of March 2015 did not therefore amount to a breach of the implied term of trust and confidence.

114. If the Tribunal is wrong about that and there is no subsequent incident that could be relied upon to form a series of the same then, the resignation in April 2016 was not sufficiently timely. The Claimant had protested his loss of status but he nevertheless continue to work under the new arrangements for 13 months. Taking account of long-service, relative disparity of power and his circumstances generally, this is just too long.

115. Subsequently, it is true that the Respondent allowed the Operational Board to atrophy. The evidence would appear to show that at the relevant time, the key actors were just very busy and it was just difficult to arrange meetings. There is no evidence of any deliberate plan to sideline the Claimant. There is no evidence of the Claimant complaining about the lack of such meetings in the last quarter in any coherent sense. As a member of the Operational Board and an Executive in the Company, if he felt that it should be meeting more often he would have had a responsibility to raise that point. He did not. This does not have the quality of a breach of the implied term of trust and confidence being insufficiently grave.

116. The suspension of the Claimant and disciplinary investigation of February 2016 was almost a model of its kind in that it was resolved very quickly. The problem about using Mr Johnson as a witness was a mistake but it did not vitiate the investigation. In context, it was trivial. The Claimant may have felt embarrassed that his actions were called into question but the Respondent were in possession of *prima facie* evidence of misconduct. They did not conjure up the allegations from nothing. The Respondents certainly had reasonable and proper cause for their actions and they never went further than a very short suspension and investigation.

117. The Tribunal then comes to the "last straw" meeting. This troubled the Tribunal as the outlines of a hypothetical "trust and confidence" case can be seen if an employee is encouraged to stay working for a Company as a result of misleading assurances. However, it is not apparent that this is what took place here. The Claimant does have a history of misreading a situation. The Tribunal recalls his assumption going into the March 2015 Board meeting that he was going to be promoted based on his sales performance. In reality he was ignoring the wider financial situation of the Company and simply adopting an approach that was centred on his performance and remuneration. He appeared not to have addressed himself to the issue of what he could offer to the Company Board by way of information, insight and judgement. It was not reasonable to treat the Director's post as being all about status. There were considerations of performance as well. It is clear that the Claimant would have liked to have had his staus restored. This applied also to his line management responsibilities. Mr De Haan had actually considered this in early 2015 and had also sought to coach the Claimant to make a business case for this. He had offered to look at the matter again but had offered no guarantees.

118. In 2015 – 2016, the general financial situation of the Respondent Company had deteriorated. The Claimant could at least point to his performance as the least bad sales person in the Company. In his very short meeting with Mr McAndrew in April 2016 however he did not set out a case as to why he should be restored as a Company Act Director or a line manager. Instead, Mr De Haan, having agreed to keep matters under review, the Claimant just assumed that his line management responsibilities (from 2014) and Company Board membership (from 2015) would be restored to him (this expectation is taken from the letter written on his behalf of 25th May 2016). This was a misreading of the situation by the Claimant.

119. He may well have been entitled to have had a considered response from Mr De Haan and Mr McAndrew to his requests for the restoration of his previous roles in due course. He was not entitled to have them for the asking in a meeting where he hadn't even given Mr McAndrew advanced notice of what he wanted to raise. So far as there is even a *proto* case by the Claimant he acted prematurely by resigning when he did without waiting for a substantive meeting with Mr McAndrew and giving him an opportunity to speak to Mr De Haan.

120. With reference to *Tullett Prebon* the Tribunal has been anxious to take account of all the circumstances. The Claimant had formed the view that he was entitled to be restored to his Company Act Directorship if the Company did not thrive under the 2015 – 2016 budget it had adopted. This was not soundly based. All he had been offered was a review.

121. From the perspective of the Respondent, they had been anxious to retain their chief salesperson. They had had to take unpopular decisions with a view to keeping the business alive. So far as they touched on the Claimant they made a number of positive adjustments to his basic pay in an effort to make it up to him. They had also been prepared to listen to his proposals without committing to particular changes in advance. This was not the unsugared imposition of change as seen in *MacBride v Falkirk Football & Athletic Club.* In hindsight there may have been problems with the 2015 – 2016 budget but it was adopted in good faith. The consequences of its shortcomings fell on many shoulders – not just the Claimant.

122. The Respondent had reasonable and proper cause for their actions. They agree that they would keep the Claimant's status under review. They were entitled – at first asking – to be pessimistic about granting the Claimant further remuneration given the financial situation of the Company. If the contract had subsisted it is possible that this might not have been their last word. In any event, they did not mislead the Claimant.

123. Standing back from the factual matrix, the Tribunal ask, have the Respondents been responsible for a series of acts or incidents (some of them quite trivial) which cumulatively amount to a repudiatory breach of their contract of employment? The Tribunal would conclude that it has not.

Employment Judge Downs
2 April 2017