Case Numbers:
3323234/2016
3323237/2016

EMPLOYMENT TRIBUNALS

Claimants:		**Respondent:**
(1) Mr M Hallam	**v**	Olive Business Solutions
(2) Mr S Pickering		Limited

Heard at: Reading **On:** 5, 6, 7 and 8 June 2017
In chambers: **On:** 9 June 2017

Before: Employment Judge Chudleigh

Appearances
For the Claimants: Mr N Vickery (Counsel)
For the Respondent: Mr R Mundy (Counsel)

JUDGMENT

1. The respondent constructively dismissed the claimants within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("the ERA") and those dismissals were unfair.

2. The respondent is ordered to pay the first claimant compensation for unfair dismissal in the sum of £18,701.47 comprising a basic award of £5,462.50 and a compensatory award of £13,238.97.

3. The respondent is ordered to pay the second claimant compensation for unfair dismissal in the sum of £21,057.31 comprising a basic award of £5,225.00 and a compensatory award of £15,832.31.

4. The respondent is also ordered to pay the claimants the sum of £1,200.00 each in respect of the issue and hearing fees that they paid to the employment tribunal in respect of their claims.

5. The recoupment provisions do not apply.

REASONS

1. In claims presented on 27 May 2016, the claimants complained that they had been constructively dismissed by the respondent and that those dismissals were unfair.

The issues

2. At the outset of the hearing, the parties agreed a list of issues although, as often happens, that list was slightly honed during the course of the hearing. The claimants' essential case was that which was pleaded in their claim forms, namely that the respondent had destroyed the trust and confidence which should exist between employer and employee and that they were therefore entitled to resign on 1 March 2016. The list which was agreed by Counsel read as follows:-

   2.1 Did the respondent fundamentally breach the claimants' employment contracts by:-

      2.1.1 Removing the claimants from their jobs and getting others to perform those roles;

      2.1.2 Failing when asked to tell the claimants how long they would be on garden leave, or why they were not being given an answer;

      2.1.3 Telling the claimants by Martin Flick's email of 8.12.15 [1/280] (and acting accordingly) that they could not return to their jobs and/or work full time for the respondent after the BGF deal completed, and telling the claimants to direct any further questions about it to the respondent's lawyers;

      2.1.4 Failing to reinstate the claimants in their jobs (or any suitable jobs);

      2.1.5 Excluding the claimants from the workplace and contact with their clients in the manner and circumstances demonstrated by the evidence, ostensibly on garden leave;

      2.1.6 Telling the claimants (at the meeting on 29.1.16) that their salaries would be reduced, they might be offered some vestigial role to preserve a tax advantage for the claimants, and that they might work elsewhere;

      2.1.7 Depriving the claimants of the opportunity of earning a bonus;

      2.1.8 Failing to clarify the claimants' position;

      2.1.9 Making various ill-founded claims that the claimants had breached the restrictive covenants in their service agreement without any proper investigation or process;

2.1.10 Excluding the first claimant as a director from his director's function.

2.2 Did the claimants resign at least in part in response to a repudiatory breach of contract by the respondent?

2.3 Did the claimants affirm the contract by delay, by accepting their salaries or, in the second claimant's case, by undertaking to comply with the terms of his contract?

2.4 If there was a repudiatory breach of contract, was the principal reason for the breach that it was commercially prudent for the claimants to remain away from work. If so, was this some other substantial reason (within the meaning of section 98(1)(b) ERA 1996)? If so, were the dismissals fair?

2.5 Were the claimants' employment contracts terminated by the respondent (within the meaning in section 95(1)(a) ERA 1996)? If so, were the dismissals fair? (This alternative case was abandoned by Mr Vickery during final submissions).

2.6 What loss did the claimants incur?

2.7 Did the claimants fail to mitigate their loss?

Evidence

3. At the hearing, I heard evidence from both claimants. On behalf of the respondent, I heard from Martin Flick, the Chief Executive Officer of the respondent; and Roger Flynn, the Chairman.

Findings of fact

4. I made the following findings of material fact:-

4.1 The respondent and its parent company, Olive Communications Solutions Limited (Olive Communications), help businesses to improve the way they run their communications. The respondent is a wholly owned subsidiary of Olive Communications. The businesses were referred to collectively that the hearing as "Olive". I shall do the same in these reasons.

4.2 Mr Flick is the Chief Executive officer of both the respondent and Olive Communications. He is also a shareholder in Olive Communications. Mr Flynn is the chairman of both companies/

4.3 The claimants were the founders (with a Mr Butts) of Wish Holdings Limited (later a PLC) and Wish Communications Ltd (together referred to as Wish). Wish was a telecommunications business.

4.4 The respondent is one of Vodafone's "Platinum Partners". Wish's business was derived to a significant degree from being a strategic partner of Vodafone and selling Vodafone products and solutions.

4.5 On 18 September 2013, Wish was acquired by Olive Communications. The claimants were shareholders of Wish. They each received a cash payment for their shares in addition to an 8% shareholding in Olive Communications. In addition, the respondent took on the claimants as employees. Both claimants entered signed contracts of employment on 18 September 2013.

4.6 Under their contracts of employment, the claimants were each entitled to basic pay of £90,000.00 per year, and they were entitled to participate in the respondent's bonus scheme.

4.7 In addition, the contracts provided for a company car and other benefits. The notice period was three months. The contracts also contained restrictive covenants and at clause 4.1, garden leave was provided for in the following terms:

> "Without prejudice to any rights of or any obligations or duties owed by the executive to the company (or any group company) once either the company or the executive has given notice of termination to the other in accordance with clause 3.1 or otherwise or where in the opinion of the board it is in the interests of the company to do so, the company may at any time and for any period (a "garden leave period") as it determines:
>
> 4.1.2 cease to provide any work for the executive".

4.8 It was provided at clause 4.2 that during any garden leave period the respondent should continue to pay salary and other contractual benefits.

4.9 The first claimant was made a director and board member of both Olive Communications and the respondent. He was employed by the respondent as Chief Operating Officer. The second claimant was not appointed as a director, but was employed by the respondent as Director of Professional Services.

4.10 The claimants and Olive Communications entered into option agreements: a "put" option where in certain circumstances, the claimants could require Olive Communications to buy their shares and a "call" option where under certain restricted circumstances, Olive Communications could buy the claimants' shares. That option was not to be exercised after the third anniversary of the agreement (18 September 2013) unless there had been a trigger event. Trigger events included resignation or termination of employment, otherwise in circumstances where the claimants successfully bring claims for wrongful dismissal or unfair dismissal.

4.11 By November 2014, Mr Flick had decided that the claimants did not fit within the business of Olive. He was concerned about what he called the high "churn" in relation to customers of Wish. In addition, he had a concern about how the first claimant had managed a subordinate employee, Ms Moroney, and a contract that the first claimant proposed to commit the respondent to in relation to photocopiers. In addition, Mr Flick was not impressed with the second claimant's performance. The second claimant had intended working with a marketing specialist called "Cruxy" but Mr Flick preferred the use of a firm with whom the respondent was already engaged called "Silver". In addition, there was some concern about the way that Mr Pickering intended to deliver services to a new customer called Admin Re.

4.12 Mr Flick's concerns about the fit of the claimants within the respondent business were shared with the other directors (with the exception of the first claimant).

4.13 On 18 November 2014, it was agreed between Mr Flick and Mr Flynn, the chairman that it would be in the interests of the respondent to negotiate an exit on the part of the claimants from Olive, in other words, the plan was to (1) terminate their employment on terms to be negotiated; and (2) seek to buy their shares.

4.14 In early December 2014, Mr Flick spoke to the other directors about the possibility of removing the claimants from the business and obtained their consent to proceed with executing the plan. On 11 December 2014, Mr Flick attended a meeting with Barclays Bank in order to discuss whether they would be prepared to fund the buy back of the claimants' shares. Barclays were generally supportive of the proposal.

4.15 On 17 December 2014, Mr Flick told the first claimant that the view of Olive was that the business' relationship with the claimants was not working. He said that Olive would like them to take some time to consider selling their shares and leaving the business, by which he meant their employment. The second claimant was then asked into the meeting. Mr Flick said that Mark Geraty, a director and founder of the respondent and Jodie Kennedy (a director and the owner of a business the respondent had bought) and he felt that things were not working out and that they wanted to propose purchasing the claimants' shares and exiting them from the business.

4.16 The first claimant asked how the purchase of the shares would be funded. Mr Flick said that funding should not be worried about as they had a terms sheet from Barclays, access to venture capital monies as well as access to many high net worth individuals to whom, they could turn if required. Mr Flick told the claimants to take

extended holiday while they considered matters. There was also some discussion about the price the respondent was prepared to pay for the shares. The sum of £2.15 million each was discussed with £1 million up front and the balance to be paid periodically over an 18 month period.

4.17 On 18 December 2014, Mr Flick emailed the first claimant indicating that agreement regarding the sale of shares should be concluded during January 2015. On the same day, Mr Flick told the second claimant that although he valued his shareholding at £1,206,000.00, he would be prepared to settle at £2 million.

4.18 The figure that was eventually arrived at was £2,150,000.00. On 24 December 2014, Mr Flick sent the first claimant an email agreeing that price but indicating that it was subject to contract.

4.19 The claimants have brought proceedings in the High Court in relation to the sale of the shares and it was the agreement of both parties that I should make no finding about whether or not there was at this stage, or indeed at a later stage, a concluded agreement in relation to the sale of the shares. I agreed that it was not necessary for me to decide that issue in order to determine whether the respondent had dismissed the claimants and accordingly, I did not make a finding on the question of whether there was a completed contract for the purchase of the shares.

4.20 The agreement between the parties was that the claimants would take extended holiday on full basic pay while the sale and employment exit agreements were finalised.

4.21 Draft settlement agreements relating to the termination of the employment contracts and in the first claimant's case, his directorships, were circulated on 7 January 2015. Thereafter, an announcement was agreed for staff which stated that the claimants were on annual leave pending the sale of their shareholdings and thereafter, their resignations.

4.22 The claimants believed that the deals would be done by the end of January 2015.

4.23 As things transpired, Olive had difficulty obtaining funding to finance the purchase of the shares.

4.24 On 3 February 2015, Paul Butler, the respondent’s Chief Commercial Officer indicated that completion date was looking like month end, i.e. the end of February 2015.

4.25 On 17 February 2015, the first claimant was told that his job title would become Group Sales Director and from that time a new Chief

Operating Officer was engaged. On 26 March 2015, Mr Flick told the claimants that the completion target was looking at that stage towards the end of May 2015.

4.26 On 8 April 2015, Mr Flick indicated that target date was the end of June 2015 at the latest. At this point, the Barclays funding had fallen through and other options were being looked at.

4.27 By April 2015, the claimants' names had been removed from the respondent's websites. This was brought to the respondent's attention on 18 April 2015 but the website remained unchanged.

4.28 On 18 June 2015, Mr Flick told the claimants that the respondent was in discussion with a company called Business Growth Fund Plc (BGF) and that "conclusion" was anticipated before the end of July 2015. Mr Flick was referring to the deals that the respondent intended to do with the claimants.

4.29 On 23 June 2015, the first claimant emailed Mr Flick to advise him that he was commencing a piece of consultancy work within the industry. Mr Flick asked for more details so that he could reassure everyone that there was no conflict. In response, on 24 June 2015, the first claimant emailed to say: "I am working with Pete Kelly at Virgin Media Business (Virgin) on a short term project to look at how they set up an indirect sales channel". He also asked that the matter be kept confidential. In response, later that day Mr Flick emailed and said: "No problem at all, will keep this info between just me and Mark". He did not ask for further information.

4.30 By this exchange of emails, the first claimant gave the information sought and Mr Flick gave the respondent's consent to undertake work for Virgin.

4.31 On 18 July 2015, Mr Flick advised the first claimant that BGF had set a target date for completion of 19 August 2015. However, by 30 July 2015, Mr Flick and the respondent were in discussion with a firm of venture capitalists called Sovereign in respect of financing and on that date Mr Flick indicated that the timing of the completion would be during August.

4.32 On 11 August 2015, Mr Flick indicated to the first claimant that Olive was still hopeful of an August completion.

4.33 On 17 August 2015, there was a meeting between the claimants, Mr Flick and Mr Geraty which time there was discussion about reducing the price of the shares. The indication was that if the claimants lowered their price then completion may take place more swiftly. The claimants agreed that they would be prepared to drop to £2

million each. Again, I make no finding on whether or not there was a concluded agreement.

4.34 On 24 August 2015, the second claimant wrote to Mark Geraty outlining what he contended had been agreed. This included a sum in respect of shares, £45,000.00 each by way of settlement to terminate the claimants' employment contracts and an agreement that the claimants would continue to be paid their salaries until their shares were purchased and a settlement agreement finalised.

4.35 Mark Geraty responded on 25 August 2015 essentially agreeing that the proposal was as Mr Pickering had outlined.

4.36 At this point, the deal was dependent upon the funding being provided by Sovereign. However, the possibility of that funding disappeared at the end of September 2015.

4.37 On 1 October 2015, the second claimant received a very angry telephone call from Mr Geraty who was shouting and swearing and accused the second claimant of breaching the terms of his contract of employment by selling a mobile tracking device. He said that whilst he was being paid, he should do as he was told or he would be sued.

4.38 A member of the respondent's staff had told Mr Flick that one of their suppliers, Exertis had said that the second claimant was somehow involved in talking to Exertis about a mobile tracking device. Potentially, this could have affected the respondent as had Exertis started selling mobile tracking devices, they would have been conducting business that was potentially open to the respondent although at the time the respondent did not deal in mobile tracking devices.

4.39 The second claimant told Mr Geraty that he had not done what he was being accused of although he had put a friend in touch with a company (Exertis) which might be interested in his tracking business.

4.40 Mr Flick agreed in evidence that the respondent did not know if the second claimant was in breach of contract. I consider that Mr Geraty made serious accusations on 1 October 2015 in an aggressive manner without any proper foundation.

4.41 On 12 October 2015, both claimants received letters which purported to be sent pursuant to the pre-action conduct requirements prescribed by the Civil Procedure Rules. The letters stated that the respondent considered that the claimants were guilty of breaching the restraint clauses in their contracts. The claimants were told that the respondent considered that their breaches

represented serious and persistent breaches of their duties and obligations to the respondent and that unless those breaches were rectified by 19 October 2015, they would immediately be dismissed summarily and that court proceedings for an injunction might be launched.

4.42 In the case of the first claimant, he was accused of breaching the terms of his contract by undertaking a consultancy with Virgin in the absence of consent. This was of course incorrect as Mr Flick had given the first claimant the consent that he had sought.

4.43 Prior to sending these letters of 12 October 2015, the matters had not been raised with the claimants other than in Mr Geraty's intemperate telephone conversation. There had been no measured or proper attempt to investigate the alleged facts in accordance with the respondent's disciplinary procedure or otherwise. The letters simply demanded undertakings and threatening court proceedings and dismissal.

4.44 My view was that the sending of these extremely aggressive letters before action to serving employees without any proper attempt under the disciplinary procedure or otherwise, to clarify the facts was highly inappropriate. The respondent had lost sight of the fact that the claimants were still their employees.

4.45 In the event, to keep the peace, the second claimant gave the undertakings sought whilst denying that he had done anything wrong and the first claimant's solicitors explained that Mr Flick had in fact given consent and the matter was not referred to again.

4.46 On 30 October 2015, the claimants' solicitors, Scott Fowler, wrote to the respondent's solicitors in response to an indication that they had given that the respondent was relying on the garden leave clause in the claimants' contracts. That clause had never been relied on before and the arrangement was that the claimants were taking a paid, extended holiday. Scott Fowler asked the respondent's solicitors "Is your client prepared to say how long this enforced "leave" will continue? If not, why not?". That question was never answered.

4.47 There were various text communications between Martin Flick and the first claimant from the end of October 2015 until mid-November regarding completion of the BGF deal, the indication being that Olive was aiming for completion during the week commencing 30 November.

4.48 On 23 November 2015, the second claimant wrote to Mr Flick indicating that he considered that sum of £2 million had been

agreed and that there would be no further negotiation on the share price.

4.49 Once Sovereign had withdrawn their interest in financing Olive, Olive resumed discussions with BGF who were described as a hard-nosed, soulless bunch of venture capitalists. By this stage, Olive was in financial difficulties and required financing to survive, not just to buy out the claimants' shares. However, BGF were not happy at the proposed purchase price of the claimants' shares. Accordingly, on 7 December 2015, Mr Flick required the claimants to attend a conference call during which he said that Olive were looking to conclude a deal with BGF by 18 December 2015 at which time he said that they had three options: take £1.5 million each for their shares; take part of the money and leave the balance in as a loan; or as he put it, they could all "really fall out".

4.50 BGF were not prepared to provide the finance Olive required if part of that money was going to be used to purchase the claimants' shares for what BGF regarded as an over-inflated price.

4.51 On 8 December 2015, Mr Flick wrote to both claimants, copied to Olive's solicitors, Mr Flynn, the Chairman and Mr Butler. Mr Flick indicated that Olive would:

> "not be exercising our call option at this time, and will consider the situation in relation to the call option at a future time, when enterprise value may have improved and/or an affordability basis".

4.52 He said that this was the position because the claimants were not willing to negotiate further on the price of the shares. Mr Flick considered that the price the claimants wanted for the shares exceeded market value. By indicating that Olive would not be exercising their call option, Olive was saying that it was not going to buy the claimants' shares at that time. The indication was that Olive would buy the shares at a time when the value of Olive had increased to match the price the claimants wanted or when the claimants lowered their price.

4.53 Mr Flick also said:

> "In the meantime our Lawyers will be in touch next week in relation to both yours and Mike's employment at Olive, as although it is our desire to help preserve some employment in order to and provide a limited involvement in the business and to not disadvantage your tax position in relation to your shareholding, it is clear that you cannot be full time employed post-transaction with BGF, and that you should be released form your full time employment obligations in order to pursue your other ventures."

He also said:

> "If you have any further questions in relation to this, please direct them to Paul Bennett or David Stephenson at George Green LLP (copied) who will be acting for Olive in relation to this matter and the transaction with BGF."

4.54 Paul Bennett and David Stephenson were Olive's solicitors.

4.55 The intended transaction date with BGF was at that stage 18 December 2015.

4.56 By this email, the respondent was indicating to the claimants that following the receipt of funding from BGF, the respondent was going to alter the terms of the employment relationship between itself and the claimants radically. What was planned was to keep them on as employees in some vestigial format which may have given them tax advantages (entrepreneur's relief) were they to sell their shares. The reference to "some employment" and "you cannot be full time employed post-transaction" was a clear indication that fundamental components of the contract of employment were to be altered, including pay and the type of service required of the claimants.

4.57 Mr Flick was not, on a proper construction of the email, inviting dialogue. Indeed, he indicated only that "further questions" could be put to solicitors.

4.58 As a result of what Mr Flick said in this email of 8 December 2015, both claimants lost trust and confidence in the respondent. I will return to this issue in my conclusions in due course.

4.59 On 9 December 2015, the second claimant wrote to Mr Flick indicating that he and the first claimant were going to rely on the agreement that they believed had been reached with Mark Geraty on 24 August 2015 regarding their employment and their shareholdings. In addition, he indicated that they would be looking to be establishing contact with BGF to ensure that they had full disclosure of the acrimonious position they were entering into. In fact, BGF already knew about the dispute between the claimants and the respondent. In addition, the second claimant said: "We await contact from George Green LLP as informed below." The second claimant was referring to the indication given by Mr Flick that the respondent's lawyers would be in touch next week.

4.60 George Green LLP wrote to the claimants on 9 December 2015 issuing various warnings about the claimants' employment obligations but they did not address the claimants' employment position.

4.61 Due to the breakdown of the relationship between Mr Flick and the claimants (which breakdown culminated with the 8 December email), Mr Flick asked Mr Flynn to deal with the claimants. The position of BGF (although unknown to the claimants at the time) was that the ongoing cost to the respondent of the claimants employment had to be reduced. This had been agreed between BGF and Olive.

4.62 The claimants chased George Green LLP for information about their employment but no response was forthcoming until 25 January 2016 at which time what was said was: "Your employment status remains unaffected by the recent transaction". This was confusing to the claimants in light of what Mr Flick had said in his email of 8 December 2015 as he had indicated that the claimants' employment status was to change. The second claimant emailed George Green for clarification on 25 January 2016 but in their response of 26 January 2016, George Green LLP provided no further elucidation and simply repeated what Mr Flick had said about releasing them from full time employment obligations so they could pursue other ventures without losing certain tax advantages.

4.63 On 27 January 2016, the second claimant wrote to George Green LLP in response to their communication of 26 January, indicating that Mr Flick's email did not suggest that there was a discussion to be had, simply that it says he could no longer be employed on a full time basis and that they would be in contact with him to inform him how Olive wanted to effect his employment. George Green LLP never replied.

4.64 On 29 January 2016, the claimants met with Mr Flynn. The claimants' position was that they were not prepared to budge from the price of £2 million each for their shares. There was a discussion at the meeting about the sale of the shares which became heated. Mr Flynn told the claimants that Olive would be prepared to consider a solution whereby they would be free to work within the industry whilst remaining employed by Olive on a peppercorn salary in some capacity in order to preserve their entitlement to entrepreneur's relief. The claimants both dismissed this suggestion. The suggestion was repeated in emails from Mr Flynn to the claimants on 3 February 2016 and to the first claimant alone on 19 February 2016.

4.65 It would have been difficult for the claimants to have continued in employment by the respondent in some reduced capacity as they would not have been free to be employed by competitors. Both men were experts within the industry and although the first claimant had managed to obtain consultancy work with Virgin, it was terminable without notice and was insecure. The second claimant had not worked at all since being excluded from work by the respondent and

was keen to resume his career before he became deskilled and in order to provide security for his future and that of his family. They had, in any event, lost trust and confidence in the respondent.

4.66 The claimants resigned in separate letters dated 1 March 2016. In those letters, they complained in particular about the October 2015 correspondence, pointed out that the continuing employment was highly artificial, grossly disadvantageous and that the trust and confidence which should exist between employer and employee had been destroyed.

4.67 On 16 February 2016, the second claimant put his house on the market. He initially said he thought he had out the property up for sale in March but he misremembered until shown a document printed out from the internet. I do not consider that the second claimant was being untruthful in his evidence on this point or indeed, on any other.

4.68 An opportunity had arisen for the second claimant at a firm called Database for Business which was part-owned by a friend of his mother's. In March 2016, the second claimant's mother formed a company called Dumbleton Limited. That company bought Database for £1.75 million. The purchase was part funded to the tune of £250/300,000.00 from the second claimant following the swift sale of his house. The second claimant's mother also put a significant amount of her own money that she had inherited into the venture.

4.69 With effect from 1 April 2016, the second claimant was employed by Database for Business as Managing Director on an annual salary of £35,000.00 although it appeared from the pay slips which had been disclosed that his actual gross pay was something in the region of £48,000.00 per annum.

4.70 The second claimant's mother assisted with setting him up in business. She did so with her own money and with funding from the second claimant. This was done in an attempt to mitigate the claimant's losses and was entirely reasonable. The second claimant had a choice; it was clear from 8 December 2015 that his employment relationship with the respondent had broken down and he needed to find another source of income. This he did with the assistance of his mother. In my view, the second claimant took reasonable steps to mitigate his losses. There was no evidence presented to me which suggested that he could have obtained more lucrative work elsewhere but even so, it was reasonable for him to seek to establish his own business in the manner that he did.

4.71 The first claimant had worked on a day to day basis for Virgin from July 2015 earning £700.00 per day working as a consultant. He took

a permanent job with Virgin in July 2016 earning more money than that which he was paid by way of basic pay with the respondent.

4.72 The parties agreed that the first claimant's loss following his resignation was £990.69 per week net. The second claimant's net loss was £5,308.48 for the month of March 2016 and thereafter £469.10 per week.

Submissions of the parties

5. Both parties put in comprehensive written submissions that I considered carefully. Those submissions were supplemented orally. Both Counsel rightly focused on: whether there had been a fundamental breach of contract, whether the claimants left in response to any such breach, and whether, the claimants affirmed the breach.

6. Mr Mundy started by addressing the allegations relating to the October solicitor's letters. He pointed out that very often, that sort of letter was sent to ex-employees or to employees who were on garden leave serving notice. He conceded that the situation in this case was not quite the same as those, but argued that the circumstances that prevailed were not the same as if the claimants were in the office every day. He argued that it may be that the letters were inappropriate but they were not a breach of contract. There was a short skirmish between solicitors he said which led to a resolution and the parties moved on.

7. He then addressed the question of the right to work. He argued that there was not always a duty to provide work, it was a matter of construction as to whether a right to work should be implied and the test was whether it was necessary to imply a term to give the contract business efficacy. He relied in this regard on the decision of the Supreme Court in Marks and Spencer Plc v BNP Paribas Security Services Trust Co (Jersey) [2016] A6 742. He said that no such term was to be implied on the facts of this case as clause 4.1 of the contracts of employment provided for a wide garden leave term. In the alternative, he argued that if the right to work was implied, then there was only a duty if the claimants were ready and willing to work: William Hill Organisation v Tucker [1998] IRLR 313. In addition, the right to work does not apply he argued if it was impossible or reasonably impracticable to provide work – see SG and R Valuation Services Ltd v Bougros [2008] IRLR 770, paragraphs 22 to 24.

8. He argued that the claimants were in breach of contract by the first claimant working for Virgin or alternatively undertaking a second contract at Virgin without consent, the second claimant working with Database and because both threatened to approach BGF to explain the acrimonious position that had arisen between the claimants and the respondent. Further, he argued that the claimants had consented to being off work as they had not asked to work and were not ready and willing to work. He also relied on the garden leave clause in the contract and whilst he

acknowledged that the contract provided that although there had not been a formal directors meeting or a meeting of a committee appointed to consider the question of garden leave in accordance with clauses 4.1 and 1.1 of the contracts, all directors had consented to the garden leave.

9. Next, Mr Mundy addressed the question of the correspondence between the parties and in particular the letter of 8 December 2014 which he described as a perfectly sensible attempt to reach common ground. He acknowledged that there had been a delay in communication with the solicitors as per the indication in the letter of 8 December but argued that that was because the focus was on the BGF transaction which had not concluded until 22 January 2016.

10. Mr Mundy conceded that if there had been a breach of the contracts by the respondent, the test was whether or not the breach was an effective cause of the resignations. He argued that the real reason the claimants resigned was the realisation that there shares were not to be bought and also their desire to take up new positions.

11. Insofar as affirmation was concerned, Mr Mundy relied on Fereday v South Staffordshire NHS Primary Care Trust (unreported, EAT, 22 July 2011) at paragraphs 43 to 45. That was a case involving an employee who was on sick leave for six weeks and was taken to have affirmed the contract. Mr Mundy pointed out that the employment contracts in this case were as close to commercial contracts as is possible, both claimants although off work were in good health, were intelligent businessmen and had access to lawyers whom they had instructed. He pointed out that there had been a three month delay from 8 December 2014 during which time the claimants had accepted pay, and he contended that they had thereby affirmed the contract.

12. In the event that the finding was that the claimants had been constructively dismissed, Mr Mundy's case was that the respondent assert that there was a potentially fair reason for the dismissal if the finding was that there had been some technical breach, e.g. in relation to the implied right to work. In those circumstances, he indicated that the respondent's case was that it was commercially prudent to keep the claimants away from work and that was some other substantial reason for the dismissal within the meaning of section 98 of the ERA 1996.

13. Mr Mundy also argued that the first claimant may have resigned anyway or that the contracts (pay) may have been negotiated to a lower figure. He argued that the second claimant had failed to mitigate his losses, he was not a credible witness and that the extent of his losses was unclear.

14. On behalf of the claimants, Mr Vickery pointed out that the situation that had arisen was brought about by the respondent wanting the claimants out of the business in December 2014. He said that there had been a breach

of the implied term relating to trust and confidence or the express terms in the claimants' contracts under which they were employed to do a job.

15. Mr Vickery argued that the October correspondence from the solicitors was a breach of the implied term of trust and confidence. Neither allegation against the claimants had any substance and, importantly, before making threats of summary dismissal, there was no investigation under the disciplinary procedure. He pointed out that the letter in relation to the first claimant was particularly egregious since the first claimant had obtained consent to work at Virgin.

16. It was also argued then that it was in breach of contract not to answer the question posed in Scott Fowler's letter of 30 October 2015 as to how long the enforced "leave" would continue and if not, why not.

17. Next, and most importantly, in terms of the claimants' case, it was argued that the email from Mr Flick of 8 December 2015 was a clear breach of contract. The clear intention was to reduce the claimants' hours and to reduce their salary. The clear plan following 8 December 2015 was to bring about a situation in which the claimants were no longer employed by the respondent other than in some notional or vestigial sense that might be sufficient for entrepreneur's relief. This was a unilateral position as far as the respondent was concerned which the claimants wanted nothing to do with, having never asked for any such scheme or arrangement. It was argued that the form of vestigial employment arrangement proposed would have been impractical; it was only going to permit the claimants to take on work short of employment and that in any event it would put off third party employers if the claimants still had an ongoing relationship with the respondent.

18. Mr Vickery indicated that this case was not in fact about the right to work although under the terms of the garden leave clause, the respondent had never put the claimants on garden leave. Clause 4.1 permitted garden leave "when in the opinion of the board it is in the interests of the company to do so" but the board was defined in clause 1.1.1 of the contracts as "the directors from time to time of the company present at a duly convened and quorate meeting of the directors or a committee of the directors duly appointed for the purpose in question". There had been so such meeting. Further he argued it would have been capricious, arbitrary or irrational to have continued garden leave indefinitely – see Braganza v BP Shipping Ltd [2015] ICR 449..

19. Following the 8 December 2015 email it was contended that there were further breaches and in particular, in relation to the failure on the part of the respondent to do what it said it would do and have the lawyers explain the employment situation. The claimants chased but got no response until 25 January 2016. The response when it arrived was a one line and raised more questions than it answered. Thereafter Mr Flynn also gave no clarity in his dealings with the claimants.

20. Mr Vickery argued that the claimants resigned at least in part because of the breach. They resigned because they were told explicitly that they could not work for the respondent in any meaningful way after the BGF deal completed and their salaries would be reduced accordingly. The respondent may have been prepared to relax the covenants to permit them to do some other work while remaining employed, but that was simply not an answer. That would have been wholly impractical, and imposed unworkable restrictions on what other employment they might obtain, would have created problems with confidentiality and the like, and would have left them subject to control by Olive in whom they had lost trust and confidence.

21. Mr Vickery argued that if the latest breaches happened in the period after 8 December 2015, the BGF deal did not complete until 22 January 2016 and the claimants were entitled to try to clarify the employment situation and understand their position as best they could. He said that in any event the employment situation was continuing – this was not a one off breach but a continuing state of affairs.

22. Mr Vickery submitted that any dismissal was quite clearly unfair. He said that the first claimant limited his losses to a three month period. The second claimant claimed the statutory cap or a year's pay, whichever was lower.

The law

23. Section 95(1)(c) of the ERA provides that:

> "An employee is dismissed by his employer if 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"

24. It was common ground between the parties that in order to establish a constructive dismissal, the claimants had to establish that: there was a fundamental breach of contract on the part of the respondent; that the breach caused them to resign; and that they did not affirm the contracts.

25. A breach of the implied term of trust and confidence can involve an employee leaving in response to a course of conduct carried on over a period of time and viewed cumulatively. The final act need not be a standalone breach but must contribute something to the breach even if relatively insignificant – see Omilaju v Waltham Forest London Borough Council [2005] IRLR 35.

26. When assessing whether the employer was guilty of the breach, the conduct in question must be viewed objectively and not through the prism

of the range of reasonable responses: Bournemouth University v Buckland [2010] ICR 908.

27. So far as causation is concerned, it was common ground between the parties that the repudiatory breach must be an effective cause of the resignation. It is for the tribunal to determine as a question of fact, whether or not the employee resigned in response to the breach rather than for some different reason. .

28. As Lord Denning MR said in the case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, 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 the right to treat himself as discharged."

29. As Mr Mundy pointed out, affirmation may be implied from prolonged delay as in Fereday v South Staffordshire NHS Primary Care Trust where six weeks delay and receipt of sick pay constituted affirmation.

30. If I find that the claimants were dismissed, I must then go on and consider whether or not the respondent has established a potentially fair reason for the dismissal and if so, whether that dismissal was fair or unfair within the meaning of section 98(4) of the ERA.

Conclusions

31. The claimants had a dual relationship with Olive. They were both employees of the respondent and were shareholders in Olive Communications, the parent company.

32. Undoubtedly the claimants are intelligent businessmen. However, that did not extinguish their rights as employees or indeed change the power relationship between the parties; they were employees and as such, were subordinates. I consider that Mr Flick lost sight of the fact that the claimants were employees. He said in evidence that he regarded the claimants more as business associates than employees. I believe that this was the case, although this did not prevent him seeking to rely on the restraint clauses in the contract of employment when it suited him and the respondent to do so.

33. My overarching finding is that from October 2015 until the claimants resigned, the respondent used its power over the claimants as their employers in order to exert pressure on them to reduce the price that they would accept for their shares. Mr Flick described himself as direct. He certainly had no trouble using expletives such as "fuck off" and "cunts" in correspondence, and he had an abrasive and domineering management style. What Mr Flick regards as directness may be appropriate in his business dealings. However, in his dealings with the claimants in their roles as employees, that directness amounted on occasions, in my view, to bullying.

34. Inevitably it is difficult when individuals such as the claimants who had been majority owners of a business become minority owners and employees of a business which had subsumed theirs. There were concerns on the part of the respondent about some of the management decisions made by the claimants up to December 2014. However, even Mr Flick admitted that there were no grounds to dismiss by reason of performance or capability – he indicated that perhaps both employees might have merited a warning. My view is that the reality was that both claimants simply did things differently to that which Olive was accustomed and by December 2014, the respondent in general and Mr Flick in particular had decided that Olive's association with the claimants was not working out. There was no going back from this position. A divorce was inevitable. This is how Mr Flick operated. Having taken the decision that the claimants influence was not benefiting the respondent, there was no grey area. The claimants were to be removed from the business. The difficulty is that it was not that simple, because the claimants between them owned 16% of the shares in Olive Communications and the respondent wanted to sever both the employment and the shareholding.

35. On 17 December 2014, when the claimants were told by Mr Flick that the relationship was not working out and it was proposed that they should sell their shares and leave the business, both claimants were stunned. The situation meant that they would be unemployed and neither had any other business interests at that time.

36. I find that at the meeting on 17 December 2014, Mr Flick said that there was already in place the facility of a term sheet from Barclays Bank when there was not. He also said that there were other options for raising finance and that finance would not be a difficulty.

37. In the period, over Christmas of 2014, the claimants simply stayed away from work by consent. The respondent did not invoked the garden leave clause. At this point, it was anticipated that the various deals would be done by the end of January 2015. In January 2015, the agreed position was that the claimants would take annual leave on full pay pending finalisation of the various agreements in respect of the shares and the claimants' employment.

38. Over the period to October 2015, the respondent's difficulty raising finance meant that the hoped for termination of the parties' relationship did not come about. It was accepted by the claimants that this was no-one's fault. It was proposed that there would be a two part deal. The sale of the shares and a separate compromise or settlement agreement terminating the claimants' employment relationship on terms which were to include the payment of a sum of money to the claimants.

39. In August 2014, the proposal was revised to decrease the proposed sum in respect of the shares to £2million for each claimant from £2.150 million

and to increase the sum to be paid as part of the compromise agreement relating to the claimants' employment to £45,000.00.

40. The delay in concluding the agreements was unfortunate and forms the backdrop to what later occurred, but in and of itself, was not a breach of any term of the employment contract. It is, however, inevitable that if employees are kept out of the workplace they are likely to become de-skilled and to lose contacts. Further, there is no doubt that the claimants were in limbo during this period, unable to move on properly with their lives and their careers.

41. By early October 2015, the respondent lost the possibility of doing a financing deal with Sovereign in the foreseeable future. The amount that the claimants wanted to receive for their shares (£4 million) was more than 16% of the perceived value of Olive Communications. This was a difficulty because potential investors did not like the idea of putting money into Olive only for that money to have to be spent buying out the claimants' shares at a perceived over-value. By this time not only was Olive seeking to raise finance to buy the claimants' shares but, the company required finance to survive.

42. On 1 October 2015, Mr Geraty made serious allegations to the second claimant about an alleged breach of his contract of employment without proper foundation. His behaviour was inappropriate as he was aggressive and he swore. More significantly, he made allegations and threatened to sue without being sure of the facts. He was motivated in making this call by anger at the claimants which arose from their refusal to accept less that £2 million each for their shares. He believed that the Sovereign finance had been lost at least in part because of the position the claimants were taking in relation to their shareholdings.

43. That irate telephone call was followed up with letters on 12 October 2015 to the claimants from solicitors which were also very aggressive**.** The letters purported to be sent in accordance with the pre-action conduct requirements in the Civil Procedure Rules, demanded action and threatened summary dismissal.

44. The contracts of employment provided, as one would expect, for use of a disciplinary procedure. The respondent instead acted as if the claimants were former employees, threatening injunctions and the like, having lost sight of the fact that the contracts of employment were still subsisting. My finding is that the respondent was not concerned about the alleged activities on the part of the claimants. Indeed, the first claimant had been working for Virgin since July as Mr Flick knew. The respondent used the rumours it had heard about the second claimant's activities and the fact that it knew that the first claimant was doing contract work for Virgin to exert pressure on the claimants through the guise of the employment contracts because of the claimants' refusal to drop the price they would accept for their shares. This was an abuse of their position as employers.

Further, the failure to conduct any investigation whatsoever before threatening legal action was wholly inappropriate. Taken individually or together, the respondent's actions in October, that is, using the employment contracts as a means of exerting commercial pressure on the claimants in relation to their shares; and failing to investigate under the disciplinary procedure or otherwise before threatening legal action, amounted to a breach of the implied term of trust and confidence.

45. The accusations made against the first claimant were even more egregious as consent had in fact been provided for him to undertake work for Virgin. The variation in the contract work being undertaken was insignificant and in any event unknown to the respondent.

46. On 30 October 2015, the claimants' solicitors wrote on behalf of the second claimant asking how long the enforced "leave" would continue. The letter was written on behalf of the second claimant but applied equally to the first claimant. There was no response from the respondent or its solicitors. This had the effect of leaving the claimants uncertain as to the future of their employment situation. In itself, this was not a breach of the implied term of trust and confidence but, as a small factor taken cumulatively with the other acts of the respondent, is of some relevance to the overall conduct of the respondent.

47. After the deal with Sovereign had fallen through, Olive resumed discussions with BGF. BGF were not going to provide the finance sought if the claimants were to be paid £4 million for their shares. Mr Flick made this clear to the claimants on 23 November 2015 when he told them that one of the options moving forward was that the parties would "really fall out".

48. The 8 December 2015 email from Mr Flick was, as Mr Vickery described it, a change in the relationship between the parties. At this point, the claimants' were told that their shares were not going to be bought. In addition, Mr Flick made positive assertions about the future employment relationship between the respondent and the claimants. The claimants were told that they could not be full time employed post-transaction with BGF (which at that time was supposed to be on or around 18 December 2015) and that any questions about this should be directed to the respondent's solicitors.

49. In my view, what Mr Flick said in this email breached the implied term of trust and confidence. It an actual breach rather than an anticipatory breach. Mr Flick made a statement about how things were going to be - "you cannot be full time employed post transaction with BGF". He did not invite negotiation, only questions which most inappropriately were required to be directed to solicitors.

50. Unbeknown to the claimants, it had been agreed with BGF that a strategy would be agreed alongside the respondent's solicitors to reduce the costs of the claimants. They were of course being paid £90,000.00 per year

each which equated to an overall cost to the respondent taking into account benefits and other matters, of £230,000.00 per annum.

51. Again, the respondent was seeking to exert influence over the claimants by using power as employer in relation to the commercial difficulty presented by the claimants' refusal to drop the price they would be prepared to take for their shares.

52. It could be argued that the representations that were made on 8 December 2015 regarding the future relationship of the parties amounted to an anticipatory breach rather than an actual breach. I have decided that the way that the email and options for the future were presented together with the instruction to contact the solicitors if there were questions amounted to an actual breach. However, if I am wrong about that, my finding is that although the respondent did not dock the claimants' pay unilaterally after the BGF deal was done on 22 January 2016, the respondent did not cure the unilateral anticipatory breach as at no point did it resile from the position as indicated in Mr Flick's email. Mr Flynn told the tribunal that had no deal been done whereby the claimants were released from their employment obligations in return for some limited ongoing employment, the claimants would have remained on £90,000.00 per year indefinitely. I rejected that evidence as being not credible, and in any event, it is not something that the claimants were ever told.

53. In the email of 8 December 2015, Mr Flick told the claimants that the respondent's solicitors would "be in touch next week" in relation to the claimants' employment. This did not happen.

54. The claimants chased but got no response until 25 January 2016 when they were told: "Your employment status remains unaffected by the recent transaction". This assertion raised questions as it appeared to contradict that which Mr Flick had said in his email of 8 December. The claimants were no clearer as to where they stood and what was going to happen, for example, whether they were going to continue to be paid the salary they were currently receiving or whether at some point changes would be implemented. Against a background of highly aggressive threats to sue for breach of the restraint clauses, and the delay since they were put on an extended holiday, the claimants were in difficult and untenable situations

55. The failure to contact the claimants in the week following the 8 December email and the failure on the part of the solicitors to provide a response to the chasing correspondence until 25 January 2016 was not in itself capable of amounting to a standalone breach of the implied term of trust and confidence. However, when taken together, the breaches that I have found, this was part of series of acts on the part of the respondent (whether by themselves or their solicitors) which, taken together, amounted to a breach of the implied term of trust and confidence.

56. Mr Flynn, who was deployed to deal with the claimants, their relationship with Mr Flick having broken down, indicated that the respondent might be prepared to relax the restrictive covenants, change the claimants' roles and reduce their pay. Disingenuously, he indicated that the respondent's desire was to help the claimants retain entrepreneur's relief. The claimants had never asked for assistance with regard to entrepreneur's relief and Mr Flynn was not being honest when he told the tribunal that there was nothing in it for the respondent. Had it unfairly or wrongfully dismissed the claimants, the share price may have been affected. Under the circumstances, it was in the respondent's interests to keep the claimants on as employees because that gave them power to control the claimants through the employment contracts.

57. In conclusion, my view is that there was a breach of the implied term of trust and confidence and that the breach was fundamental.

58. I rejected Mr Vickery's submission that there was some ongoing continuing breach. I consider that the breach finally crystallised with the solicitor's one line response about employment status on 25 January 2016. However, in case I am wrong about that, I will address the questions of causation and affirmation on the basis that the breach may have crystallised with the email of 8 December 2015 as well as on the basis that it crystallised on 25 January 2016. .

59. I agreed with Mr Vickery that this case is not about the right to work. The question of the claimants' return to work was never contemplated by any party. For completeness, however, I should indicate that I agree with Mr Vickery that the claimants were not on garden leave within the terms of the employment contracts. They were on extended annual leave. Further and in any event, even if the claimants had been on garden leave, there must be implied into the contract a term to the effect that garden leave cannot last indefinitely.

60. Further, I reject the submission that the claimants were in breach of contracts themselves and that somehow such breaches prevented the claimants relying on the respondents' fundamental breaches to resign and claim constructive dismissal.

61. The first claimant had consent from the respondent to work for Virgin as a contractor and he was not thereby in breach even when the nature of the work changed slightly. The second respondent did not start working for Database until 1 April 2016 and his dealings with Database before that time did not breach his employment contract. Further the threat to approach BGF to explain the acrimonious position that had arisen between the claimants and the respondent was not a breach as: (1) BGF already knew about the situation; and (2) it was something BGF were entitled to know about.

62. In any event, the respondent did not rely on any alleged breaches by the claimants to terminate their contracts of employment so both contracts remained in being until they were terminated by the claimants accepting the respondents' repudiatory breaches.

63. The claimants resigned because the trust and confidence that must necessarily exist between employer and employee had been destroyed by the respondent. Taken as a package, the acts which constitute the breach of the implied term were bullying and controlling acts that were designed to secure commercial advantage for the parent company in relation to the share sale. As the first claimant put in his witness statement, the respondent was “trying to leave the claimants dangling” and the indication was that it would continue to do so for the foreseeable future.

64. I considered carefully the respondent’s suggestion that the claimants resigned not in response to a fundamental breach of contract but to take up other opportunities. It is true that the second claimant put his house on the market in February 2016 in order to free up capital to invest in his future. This did not mean that he did not resign because of the breach. Indeed, I consider that he was taking sensible steps to mitigate his losses. Equally, it was not the first claimant’s desire to take up any new position that forced him to resign but the respondent’s breach. Further, I reject the respondent’s suggestion that the claimants resigned because their shares were not going to be bought. The real reason for the resignations had nothing to do with that fact. In the circumstances, I am more than satisfied that ‘the’ effective cause (not ‘an’ effective cause) of the resignations was the respondent’s breach.

65. The claimants resigned on 1 March 2016. They had of course not been at work following the breach (8 December 2015 or 25 January 2016). I recognise this does not mean they cannot be taken to have affirmed the contract (see Fereday). They were in good health, are intelligent businessmen and had access to lawyers. However, mere delay is not, of itself, affirmation. Over the period from 8 December 2015 to the latter part of January 2016, the claimants were seeking to clarify their employment position. They did not meet with success either through the solicitors or indeed Mr Flynn. I consider in the circumstances that they did not affirm the contract over this period. Over the following five weeks or so, they were not at work but they accepted pay. I take both these matters into account. I also have regard to the fact that when added together with the Wish service, the claimants’ period of continuous service was long (12 years in the case of the first claimant and nine in respect of the second claimant). The decisions to resign were a life-changing decisions and a large salary was at stake. In all the circumstances, I do not consider that the claimants waived the breach, even if one takes the breach as having crystallised on 8 December 2015.

66. Accordingly, I was satisfied that the claimants were dismissed by the respondent within the meaning of section 95(1)(c) of the ERA.

Losses

67. The parties agreed that the basic award for the first claimant should be £5,462.50 and for the second claimant, £5,225.00.

68. My view is that but for the breach, the claimants both would have resigned on 3 months notice on about 1 June 2016 as they would have wanted to break free from the respondent to develop their careers and pursue other business interest. Accordingly, their employment would have lasted six more months. I consider that by 1 June 2016, the sale of the shares would not have materialised but that the claimants would have recognised that there was a need to get on with their careers unencumbered by employment by the respondent and that they would have accordingly severed their employment relationship of their own free will. Accordingly, compensation that is just and equitable to award in respect of loss of earnings should be limited to the six month period following the dismissals.

69. In the case of the first claimant, he agreed that his losses should be capped at three months which amounted to £12,878.97 at the agreed weekly rate of £990.69 (multiplied by 52 and divided by 12 months x 3 months). In addition, he claimed £360.00 for loss of statutory rights which I award. Accordingly, the first claimant's compensatory award amounts to £13,238.97. The total award is £18,701.47.

70. As to the second claimant, there was an argument by the respondent that he had not mitigated his losses. I considered that he had. He had set himself up as Managing Director of Database with a salary of £35,000.00 gross per annum with an opportunity to earn more by way of commission and bonuses. It is true that he is an owner of the business, that he owns shares in it and that he engineered the employment opportunity for himself with the help of his mother. However, in doing all this he was, in my view, taking reasonable steps to mitigate his losses. There was no evidence to suggest that his earning potential would be greater elsewhere or that he would have been able to find a better job by 1 April 2016. In the circumstances, I was entirely satisfied that the second claimant took reasonable steps to mitigate his losses. Accordingly, I award him his loss of earnings for the six month period following his resignation which sum amounts to £15,832.31 at the agreed weekly rate of £469.10 net. His March loss amounted to £5,308.48 (again agreed). Accordingly, he is entitled by way of compensatory award to £15,832.31 which includes £5,308.48 for March 2016 when he received no pay, £10,163.83 in respect of the additional months to 31 August 2016 plus £360.00 by way of loss of statutory rights). His total award amounts to £21,057.31.

71. Finally, I consider that the respondents should repay the claimant's their issue and hearing fees in the sum of £1200 each.

_____
Employment Judge Chudleigh

Date: 16 June 2017…….

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office