

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Nos: S/4100600/16 & S/4100601/16**

**Held in Glasgow on 18, 19, 20, 26, 27 & 28 January, 6 & 8 February 2017**

**Employment Judge: P Wallington QC**

**Mr Graham Martin**

**Claimant  
In Person**

**1. Poseidon Systems Limited**

**1<sup>st</sup> Respondent  
Represented by:  
Mr M McLaughlin -  
Solicitor**

**2. Poseidon Systems LLC**

**2<sup>nd</sup> Respondent  
Represented by:  
Mr M McLaughlin -  
Solicitor**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is as follows:-

1. By consent, the Claimant`s claim against the First Respondent for unlawful deductions from wages is well founded and the Tribunal awards the Claimant £1,496.00 (One Thousand, Four Hundred and Ninety Six Pounds), net of statutory deductions.

2. By consent, the Claimant`s claim against the Second Respondent for unlawful deduction from wages is well founded and the Tribunal awards the Claimant £1,517.08 (One Thousand, Five Hundred and Seventeen Pounds, Eight Pence), net of statutory deductions.

**E.T. Z4 (WR)**

3. The Claimant`s claim against the First Respondent of constructive unfair dismissal is not well founded and is dismissed.
4. The Claimant`s contract of employment with the Second Respondent was at all material times governed by the laws of the State of New York, and did not contain any term to the effect that the Second Respondent would not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. No such term was incorporated into the Claimant`s contract by Article 8 of the Rome I Regulation (593/2008) of the EU. The Claimant`s claim against the Second Respondent of unfair constructive dismissal is for these reasons not well founded and is dismissed.
5. Pursuant to Rules 75(1)(b) and 76(4) of the Employment Tribunals Rules of Procedure 2013, the Claimant is awarded the sum of £230 (Two Hundred and Thirty Pounds) against the First Respondent in respect of the fees incurred by the Claimant in connection with the claims herein.
6. Pursuant to Rules 75(1)(b) and 76(4) of the Employment Tribunals Rules of Procedure 2013, the Claimant is awarded the sum of £230 (Two Hundred and Thirty Pounds) against the Second Respondent in respect of fees incurred by the Claimant in connection with the claims herein.

## **REASONS**

### **Introduction**

1. In these two cases the Claimant, Mr Graham Martin, claims unfair constructive dismissal and unlawful deduction from wages against each of

the respondents. His claims as presented also raised the issue of unpaid holiday pay, but that claim was abandoned before the hearing the subject of this Judgment.

5     2.     The Claimant was employed under separate contracts by each of the Respondents until he resigned from both employments by letters of 12 November 2015. He was also until that date a director of the First Respondent. The First Respondent is a UK registered company which is a wholly owned subsidiary of the Second Respondent, a company registered  
10     in the State of New York. The President and principal shareholder of the Second Respondent is Mr Mark Redding, who was also at all material times Managing Director of the First Respondent.

15     3.     Both Respondents are relatively small; at the time of the claimant's resignation the First Respondent had only one employee, Craig Anderson, apart from the Claimant, and the Second Respondent about eight or nine employees in total (but it had been carved out of a much larger company the majority of the assets of which had been sold in 2011). The principal activity of both Respondents is the manufacture of sensors which can detect  
20     and monitor the presence of matter such as metal debris in lubricating oil; the largest potential market for such sensors is for use in the gearboxes of wind turbines, to detect early signs of metal fatigue. One of the Respondents' principal products is a data logging and networking hub called Trident AP2200, which is used to transmit data from sensors to a remote  
25     server so that the machinery in which the sensors are installed can be monitored remotely. The nature of the products manufactured and sold by the Respondents is such that protection of intellectual property rights, especially in the software required to operate the sensors, is of particular importance.

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4.     The central issues in this case concern whether each of the Respondents breached its implied obligation not without reasonable and proper cause to act in a manner calculated or likely to destroy or seriously damage the

relationship of trust and confidence between the parties ('the trust and confidence obligation'); the Claimant's case is that both Respondents did so, by the actions of Mr Redding in presenting to the Claimant a summons issued in a New York State court instituting proceedings against him in which the Second Respondent claimed injunctive relief and damages of up to US\$10 million. In the alternative the Claimant relied on this matter as the last straw following a number of other matters which he claimed to have undermined mutual trust and confidence in each of the Respondents.

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10 5. In relation to the claim against the Second Respondent, a prior question raised by that Respondent was whether the trust and confidence obligation applied to a contract governed by the law of New York State, an issue on which the Second Respondent called expert evidence from Mr Antoine Tinnion. It was also in issue whether the parties' choice of law, namely the law of the State of New York, was subordinated to the application of the trust and confidence obligation by the application of Article 8 of the EU Rome I Regulation (593/2008).

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20 6. There were a number of further issues between the parties, the most important of which concerned grounds on which the Respondents asserted that the Claimant should not receive any compensation by reason of his conduct prior to his resignation. The parties had helpfully agreed a list of issues, some of which in the event fell away in the course of the hearing; I refer as necessary to the live issues throughout this Judgment.

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**Additional issue**

30 7. After the conclusion of the hearing and in the course of considering my decision, I identified an additional potentially relevant issue which had not been directly addressed by the parties in their submissions. This is that Article 22 of EU Regulation 1215/2012 (usually referred to as the recast Brussels Regulation), which has direct effect in Scots law, provides that any proceedings relating to an individual contract of employment brought by an employer against an employee domiciled in an EU member state must be

brought in the country of the employee's domicile. Decisions of the Court of Appeal have confirmed that this provision applies even where the contract is governed by the laws of a state outwith the EU, as was the case with the Claimant's contract with the Second Respondent. As it appeared probable, from the evidence given in the proceedings, that the Claimant was at the material time domiciled in Scotland, I considered it desirable to have submissions from the parties as to whether there had been a contravention of Article 22 of the Brussels Regulation, and if so what if any bearing that had on the Claimant's claims of constructive dismissal.

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8. The Second Respondent provided detailed written submissions, on which I invited, and received, comments from the Claimant. The Second Respondent submitted that as this was not an issue raised by either side, I was not entitled to determine it. As an estoppel position, the Second Respondent submitted that it would be in dispute whether the Claimant was in fact domiciled in the USA, under reference to documents of which it had had sight, and that it would therefore be necessary for the proceedings to be reconvened for evidence to be given on this issue in order for the point to be determined. The Second Respondent submitted that it would be contrary to the Overriding Objective to do so, taking into account the additional delay and expense that this would cause. The Second Respondent made further submissions, to which I do not need to refer, as to the merits and consequences of any reliance by the Claimant on Article 22.

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9. The Claimant in response asserted that he was plainly domiciled in Scotland, where he has a house in which he and his family reside. He also asserted that he had at no time had a residence in the USA, and referred to issues raised by the US Immigration authorities over his Permanent Residence ('Green Card') status on a recent trip to the USA.

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10. I do not accept that this is an issue which I cannot consider. If the issuing and service of proceedings instituted in a US Court, which is the matter principally relied on by the Claimant as conduct calculated or likely to

destroy the relationship of mutual trust and confidence between the parties, was in fact a breach of the Claimant's legal rights under Scots law, I consider that to be a potentially material consideration in the determination of whether the Second Respondent's conduct was a breach of the duty of trust and confidence.

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11. However I do accept the Second Respondent's estoppel point that as the Claimant's domicile is in dispute, it would be necessary to reconvene the hearing for evidence on that point to be led. Given the length of the hearing, and the additional delay and expense that such a step would occasion, I agree that it would only be proportionate to take such a step if the point was of real importance to the outcome of the claims. In fact, for reasons set out in more detail below, I have been able to reach clear conclusions on each of the Claimant's claims of constructive unfair dismissal on the basis of my findings in fact and the parties' submissions, which would not be materially affected by any finding that the Second Respondent's action in instituting proceedings in New York State was in breach of Article 22 of the Brussels Regulation. I therefore did not direct a reconvening of the hearing to receive evidence on this issue, and make no finding on the Claimant's domicile or the application of the Brussels Regulation to the Second Respondent's actions.

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### **Evidence**

12. I heard evidence given on oath or under affirmation, over seven days, from the Claimant, and from the following witnesses called for the Respondents: Mr Mark Redding; Mr Brian Brewer, Vice President of the Second Respondent; Mr Ashraf Mabrouk; Mr Craig Anderson; and Mr Antoine Tinnion (called as an expert on the laws of New York State). I was also provided with an agreed bundle of productions, extending after the addition of a considerable number of documents during the hearing to almost 1,000 pages. In addition both parties provided detailed and helpful written submissions, which were developed orally on the eighth day of the hearing. The Claimant, who represented himself during the hearing, had the

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advantage of submissions prepared for him by the solicitor who had been acting for him prior to the hearing but could not do so at the hearing for reasons of cost.

5 13. It is necessary for me to set out my impression of the reliability and truthfulness of the witnesses. I found the Claimant to be a less than satisfactory witness; his recollection on a number of points was limited, and his evidence often rather vague, and somewhat coloured by a lack of insight into why actions on his part which he appeared to believe to have been  
10 legitimate or innocuous were in fact at least potentially serious breaches of his obligations to the Respondents. Where there is a conflict of evidence, and save where I specifically indicate to the contrary in my findings in fact, I prefer the evidence of Mr Redding and Mr Brewer, and (to the limited extent covered by it) Mr Mabrouk.

15 14. I found Mr Redding, the Respondents' principal witness, to be credible and reliable in his recollection of events; occasionally where his evidence shaded into opinion, I considered that it strayed a little towards the self-serving, but this did not in my assessment affect the truthfulness of his  
20 narrative of events, or his explanations of the significance of the material he and Mr Brewer had found as a result of their investigation into the Claimant's activities.

25 15. Mr Brewer and Mr Mabrouk, each of whom gave evidence covering a relatively limited part of the factual matrix of the case, presented to me as entirely honest and reliable witnesses, and I accept their evidence.

30 16. Mr Anderson was in a difficult position as a witness called by the Respondents, as he had been closely involved in the activities which were the subject of the accusations made by Mr Redding against the Claimant, and had initially been suspended from duty at the same time as the Claimant; however he had co-operated in the investigation and been reinstated in consequence, shortly before the Claimant resigned, but had

then left the employment of the First Respondent for a new job not long thereafter. Mr Anderson appeared both to be reticent and to have a poor recollection of most of the matters about which he was asked, but as he had been called by the Respondents he could not be cross-examined by Mr  
5 McLaughlin, who conducted the Respondents' case; and on most matters he was not pressed in cross-examination by the Claimant. As a result I considered that his evidence fell far short of giving a full picture of the matters he had been involved in, and I attach limited weight to it. Insofar as it supports the Claimant, however, it is part of the evidence adduced by the  
10 respondents, and I have taken it into account as such; an example is an issue regarding the number of visits made by the Claimant to a company in Musselburgh called Zot, on which the Claimant's evidence that the trips for which he claimed expenses were genuine is at least partially corroborated by Mr Anderson (but his evidence in turn is contradicted by documentary  
15 evidence, a point to which I return later).

17. Mr Tinnion was called to give expert evidence on the law of the State of New York. He is very well qualified to do so, having qualified at the New York Bar and practised with two of the most reputable law firms in New York  
20 over seven years, as well as having a Master's Degree from Harvard. He is also qualified both as a Barrister and Solicitor in England. I found him to be an impressive witness who properly discharged his duty to the tribunal; indeed his evidence on the issue of whether under New York law the employer has a right of suspension without pay, his evidence directly  
25 contradicted the Second Respondent's case and led to the Claimant's claim for unpaid wages against the Second Respondent being conceded at a late stage in the proceedings. I accept Mr Tinnion's evidence in its entirety.

18. It is convenient, having set out my assessment of the witnesses, to deal first  
30 with the Claimant's claims for unpaid wages, and then his claim of unfair constructive dismissal against the Second Respondent, before turning to his claim of unfair constructive dismissal against the First Respondent, including my findings in fact on matters relevant to that claim.



**Claims for unlawful deductions from wages**

19. The Claimant was suspended from both of his employments on 30 October 2015. He had already been paid for the month of October. He was informed  
5 at the time of his suspension that his suspension by the First Respondent would be with pay, but in the event he was not paid for the period 1 to 12 November 2015, the latter date being the day on which he resigned with immediate effect. He was informed that his suspension by the Second Respondent would be unpaid, and that was the case; he also resigned from  
10 that employment with immediate effect on 12 November 2015, his claim of unlawful deductions being for his salary for the period 1 to 12 November 2015.

20. The claims for unlawful deductions were initially resisted by both  
15 Respondents, but at the start of the hearing, Mr McLaughlin indicated that the claim against the First Respondent was conceded. The parties subsequently agreed that the amount which the Claimant should have been paid for the first 12 days of November 2015, after deduction of income tax and NICs, was £1,496.00, and that I should make an award in that sum, net  
20 of deductions. I do so.

21. The claim against the Second Respondent was initially resisted on the grounds that the Claimant's contract with it was governed by New York law, and that that law permits suspension without pay. However Mr Tinnion was  
25 asked as part of his expert report to give evidence as to what the law of New York is on this point. His evidence was that unless the contract gives the employer an express or implied right to suspend the employee without pay, the employee remains entitled to be paid during any period of suspension, and that there is no right for the employer to withhold wages by  
30 way of set-off for sums due to it. In light of this evidence, the Second Respondent conceded the Claimant's claim. The parties subsequently agreed that the sterling equivalent (applying the rate of exchange as at 12 November 2015, the contract providing for a salary in US Dollars) of the net

salary payable to the Claimant after statutory deductions was £1,517.08, and that I should make an award in that sum, again net of deductions. I do so.

5 **Unfair constructive dismissal: claim against the Second Respondent**

22. The relevant facts can be shortly stated. The Claimant was engaged by each of the Respondents (or in the case of the Second Respondent, its predecessor) under separate contracts signed on 3 June 2010 and coming into effect on 1 July 2010. The contract with the then predecessor of the  
10 Second Respondent, Impact Technologies LLC ('Impact LLC'; pp 89-99) was expressed to be governed by the laws of the State of New York. It provided for the Claimant's employment under it to continue until 31 December 2013, unless it was terminated earlier in accordance with its terms. There was no provision for its extension, and an express provision  
15 that it could only be varied by written agreement. There was also an 'entire agreement' clause, to the effect that the terms set out in the written contract comprised the entire agreement between the parties.

23. In 2011 the benefit of the contract was assigned by Impact LLC to the  
20 Second Respondent (this was an event expressly provided for in the contract). The Claimant entered into a separate Non-Solicitation and Confidentiality Agreement with Impact LLC in June 2010 (pp 101-109), and subsequently, after the assignment, entered into a similarly worded agreement with the Second Respondent (pp 101A-101G).

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24. The reason that the Claimant was engaged under a separate contract in this way was in part that the contract was agreed as part of the consideration for the purchase by Impact LLC of intellectual property owned by the Claimant, including rights to pending patents for a sensor he had developed known as  
30 Demon 6. In addition to a cash payment of £75,000 the Claimant was to receive what in effect was deferred remuneration, the rate of pay being rather greater, at US\$100,000 a year, than the expected work obligation of 20 hours a week would of itself have justified. Further, whilst this

consideration may not have necessitated a US contract, the Claimant had good connections with the USA, and had Permanent Resident status (popularly referred to as a Green Card), which allowed him to work in the USA, and wished to retain this status. Possession of a Green Card incidentally had the effect of giving the courts of New York State jurisdiction as a matter of New York State law in a claim brought by the Second Respondent against the Claimant, a point to which I return later. (The question of the appropriate forum for the proceedings as a matter of Scots law is a separate matter, which for reasons given above is not an issue for determination in these proceedings.)

25. The contract between the Claimant and the Second Respondent expired at the end of 2013. The parties had discussions about a new contract but nothing was agreed. The Second Respondent continued to pay the Claimant at the rate of \$100,000 a year. The Claimant continued to visit the USA on the business of the Second Respondent, albeit not as frequently as he may have wished or considered necessary. His parents live in the USA, and some of his visits included visiting them. The relationship continued, with no formal agreement as to terms, until the Claimant's resignation in November 2015.

26. The Claimant's claim of constructive unfair dismissal against the Second Respondent is based primarily on a breach of the trust and confidence obligation by the Second Respondent. His case is that the breach comprised the intimation to him (I avoid the word 'service' as I understand that there is a currently unresolved dispute in the US Court as to whether Mr Redding's personal delivery of the summons constituted valid service of it) on 30 October 2015 at the First Respondent's offices in Bellshill, Scotland, of a summons issued in the Monroe County Court in New York State, in which he was the sole Defendant, and in which the Second Respondent sought injunctive relief and damages, quantified at \$10 million (although the Claimant was not given the summons, and thus did not know the amount claimed, until 1 November 2015). In the alternative the claimant claims that

this was the last straw, and relies on a number of points in relation to matters occurring prior to November 2015.

5 27. It is not necessary for me to make detailed findings in respect of the primary basis for the claim unless the Claimant's contract with the Second Respondent, in whatever form it took after the expiry of the written contract, was subject to an implied trust and confidence obligation.

10 28. The issues arising are therefore, first, what if any contract there was between the parties in October/November 2015; second, if there was a contract, was it subject to the parties' choice of law being the law of the State of New York; third, if not, which country's law (Scotland or New York) governed the relationship; fourth, if the relationship was governed by the laws of New York, what is the law of that jurisdiction relating to the trust and  
15 confidence obligation; and fifth, if the relationship was governed by New York law, and if that law does not imply a trust and confidence obligation, is that overridden by the application of Article 8 of EU Regulation 593/2008 ('Rome I', or 'the Rome I Regulation').

20 29. As to the first two issues, the Claimant's case necessarily depends on there being a contract between him and the Second Respondent. The Second Respondent did not dispute that such a contract was to be implied, the terms being those of the original contract (save for the date of expiry of the agreement). As there is no evidence of any different terms having been  
25 agreed, this is indeed the only basis on which there is any room for a claim of constructive unfair dismissal at all. Since the original contract contained an express choice of law provision, I conclude that if the Claimant's case has any basis, it must be founded on an implied contract which the parties had elected should be subject to New York law.

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30. That conclusion is supported by the evidence of Mr Redding, which I accept, that he had suggested to the Claimant that after the expiry of his contracts (the contract with the First Respondent also had an initial end date

of 31 December 2013) he should be employed solely under a contract with the First Respondent (which would presumably continue to be subject to Scots law), but that the Claimant had expressed a wish to continue to have a contract with the Second Respondent and be paid in US Dollars, and to visit the USA for work on a regular basis, so that he could retain his Green Card. That, coupled with the fact that the Second Respondent continued to pay the Claimant at the same rate, and did so in US Dollars, confirms the presumed intention of the parties to continue the original contractual terms as the basis of their relationship.

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31. In view of this, the third issue I have identified does not arise.

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32. The fourth issue is a question of the law of New York state. It is a well established principle that what foreign law provides is a question of fact, on which expert evidence is admissible, and in this case such evidence was given by Mr Tinnion. His evidence is set out fully in a written report which he confirmed on oath. It is not necessary for me to set out his conclusions in full; it is sufficient that he states that under the law of New York State there is no generally implied term in contracts of employment equivalent to the trust and confidence obligation which exists under Scots law. He explains that there is an obligation of good faith and fair dealing, but this would only be broken by acts or omissions which destroy or injure the rights of the other party to receive the fruits of the contract. He states at paragraph 17 of his statement that

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'Unreasonable conduct by a party, even grossly unreasonable conduct, will not constitute a breach of the implied duty of good faith and fair dealing if that conduct does not destroy or injure the innocent party's rights to receive the fruits of the contract'.

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33. Mr Tinnion further states at paragraph 18 that he is

'not aware of any New York case authority to the effect that a breach of the duty of good faith and fair dealing in an employment contract ...will be deemed to be, by its nature, a repudiatory breach of contract';

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nor in his opinion does such a breach give rise in New York law to an independent right of action.

10 34. Mr Tinnion explains that the implied duty of good faith will not apply if excluded by the terms of the contract, including an 'Entire Agreement' term stating that the written terms of the contract contain all the terms agreed between the parties. The original written contract between the Claimant and the Second Respondent did contain such a term.

15 35. Mr Tinnion also explains that the law of New York does recognise the concept of constructive dismissal, whereby an employee can resign in response to a repudiatory breach of his or her contract, such as a unilateral pay cut.

20 36. I accordingly find that the contract under which the parties' relationship was regulated after the end of 2013 did not contain any implied obligation such that the Claimant would be entitled to resign and claim constructive dismissal because of conduct of the Second Respondent in breach of a trust and confidence obligation. His claim against the Second Respondent must therefore fail, unless it can be saved by the application of Rome I - the  
25 fifth issue identified above - or by the application of the 'last straw' doctrine, a question I address after I have dealt with the Rome I issue.

30 37. Both parties made helpful submissions on the effects of Rome I; the Claimant argued that it overrode the effects of a choice of New York law to the extent that that would exclude the implication of the trust and confidence obligation; the Second Respondent disputed this.

38. The Rome I Regulation, as a Regulation of the EU, has direct effect as part of the law of Scotland. It applies to any contract made after 17 December 2009 under consideration in a court in an EU member state (other than Denmark, which opted out of the Regulation) to determine which legal system applies to the contract. It was not disputed that it applies to the Claimant's contract with the Second Respondent.

39. Article 3 of the Regulation gives primacy to any election by the parties as to which law will govern the contract. This is subject to limited exceptions within Article 3 which do not arise in this case. It is also subject to Article 8, which is the critical provision in this case. Article 8(1) provides as follows:

'1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.'

40. It is not necessary to set out paragraphs 2, 3 and 4. Their effect is that in the absence of a choice of law by the parties, the applicable law is that of the country in or from which the employee habitually works; it is not disputed that although the Claimant spent some time working in the USA, he worked for the great majority of the time throughout the period from 2010 to 2015 in Scotland. Therefore if Article 8(1) applies, as the Claimant submits it does, to the trust and confidence obligation, the position under New York law becomes irrelevant.

41. The parties agree that the right not to be unfairly dismissed (including the right not to be unfairly constructively dismissed) is an example of a right that cannot be derogated from by agreement (see section 203 of the Employment Rights Act 1996). They disagree on the issue whether that

general point extends to the trust and confidence obligation. The Second Respondent relies, in support of its submission that it does not, on the speech of Lord Steyn, with whom Lord Goff and Lord Mackay expressly agreed, in **Malik v Bank of Credit and Commerce International SA** [1998] AC 20, the leading case on the trust and confidence obligation. In the course of his speech at p 45D, Lord Steyn refers to terms implied by law collectively (thus including the trust and confidence obligation). His Lordship states:

'Such implied terms operate as default rules. *The parties are free to exclude or modify them.*' (My emphasis.)

42. I accept that it would be very surprising to find a contract of employment intended to be subject to Scots law in which the trust and confidence obligation was expressly excluded, not least because it is a two way street. However I also accept that Lord Steyn's statement necessarily takes the trust and confidence obligation outwith the ambit of the protection conferred by Article 8(1) of Rome I. Whatever the position in New York law, Article 8(1) has the effect that the Claimant was entitled not to be unfairly dismissed, whether by direct dismissal or constructive dismissal. Had the Second Respondent unilaterally imposed a pay cut on the claimant, for instance, and he had resigned in response, he would have been entitled, to maintain a claim of unfair constructive dismissal in this Tribunal, relying on Article 8(1) if necessary to override New York law. But I conclude that he cannot do so in this case, since his primary claim is not based on a breach of any express term of the contract, but on a term implied by law under Scots law but which can be derogated from by the parties.

43. The other breaches of contract asserted by the Claimant, in support of his claim that the presentation of the New York proceedings was the last straw entitling him to resign, are set out in paragraph 17 of the particulars of his claim against the Second Respondent (p 29) as being :

- failure to agree new employment terms as at 31 December 2013;



- changing the nature of the Claimant's role over a period of time so that there was a diminution in status;
- restricting his travel so that his relations with close business associates (presumably, although this is not stated, in the USA) were restricted;
- leaving him and Mr Anderson constantly fearful for their employment security because of negative messages around financing; and
- not investigating face to face with him the allegations regarding Bothwell Engineering before presenting the claim for damages.

44. As to the first of these points, the Claimant's contract contained no provision for the agreement of any new contract, or the extension of the contractual term beyond 31 December 2013. It was not suggested that such an obligation would arise under any implied term. The failure to agree a new contract cannot therefore have been a breach of the original contract.

45. As to the second, there is nothing in the contract to the effect that the Claimant was *entitled* to perform any particular work, as against having *duties* to do so. The implication of any such term would not be possible given the fact that the contract contained an 'entire agreement' clause, which on Mr Tinnion's evidence means just what it says under New York law. I add that the Claimant's evidence as to the more routine work he had to perform (to which I refer in my findings in fact for the purposes of his claim against the First Respondent) related to his work for the First Respondent, performed in Scotland; his complaint about work for the Second Respondent was as to quantity not quality.

46. As to the third point, the contract is silent as to *where* the contract is to be performed, and there is no minimum requirement, in terms of length or frequency, for the Claimant to travel to the USA or attend at the Second Respondent's premises there. Whilst I accept that the Claimant would have

wished, in part for personal reasons, to be able to travel more frequently to the USA at the Second Respondent's cost, it had no contractual obligation to agree to any particular number of visits.

5 47. As to the fourth point, the Claimant was paid in full and on time every month, save in February 2014. On that occasion, Mr Redding advised the Claimant that the Second Respondent did not have the funds to pay his salary on time, but instead arranged for a loan of £5,000 (a sum greater than the sterling equivalent of his net monthly pay from the Second  
10 Respondent) to be paid to him from the account of the First Respondent, and this sum was so paid on 28 February 2014 (pp 459-62). There was no evidence of any subsequent failure to pay the Claimant's salary in US dollars by the due date To the extent that he was warned that the Second Respondent had financial difficulties, I accept that that must have been  
15 unsettling; but it could not reasonably be regarded as a breach of contract, still less one justifying resignation without notice, so long as the only contractual obligation in relation to pay, namely the pay the Claimant his salary every month, was observed, as was the case throughout the Claimant's employment, with the sole exception noted above.

20 48. the fifth point is in substance a repetition of the complaint of an act calculated to undermine trust and confidence. It could only be the last straw if there were other straws; for the reasons I have given, none of the other matters particularised in paragraph 17 of the claim could be relied on as  
25 such.

49. In addition to these points, the Claimant asserts in paragraph 1 of the Particulars of his claim (p 27) that the Second Respondent failed 'despite his contractual terms' to arrange for housing and a vehicle for him during his  
30 stays in the USA, or adequate computer equipment for him to perform his duties.

50. The last of these points was not pursued in the Claimant's evidence. As to the vehicle and housing, the provision in the Claimant's contract referred to (see clause 7(e), incorrectly cited at paragraph 1 as 7(g), at p 93) required the Second Respondent to provide accommodation within three months of the commencement of the contract. Any failure to do so must therefore have been known to the Claimant long before the expiry and implied renewal of the contract, making it inevitable that the complaint would fail by reason that the Claimant waived this breach by continuing to work under the implied contract after the end of 2013.
51. The obligation to provide a vehicle is stated in clause 7(e) to be either to provide a company-owned vehicle or to provide for a suitable vehicle, in each case for the duration of the Claimant's stay in Rochester, New York. The Claimant complained that he had to hire a car on his visits to the Second Respondent. He did not suggest that he was not permitted to do so, or that he was not reimbursed for the cost of doing so, at least for use of the car for business purposes (as distinct from visiting his parents in Virginia). I consider that letting the Claimant hire a car, and charge it to expenses, on his visits to Rochester, sufficiently met the obligation to provide *for* a suitable vehicle (my emphasis).
52. There were thus no straws the cumulative effect of which could be relied on by the Claimant in November 2015 to justify his resignation without notice. It follows from this, and from my earlier conclusion in relation to trust and confidence, that the Claimant's claim of constructive dismissal is not one that can be made in the circumstances of this case. The claim against the Second Respondent is therefore not well-founded and is dismissed.
53. If I am wrong in that conclusion, the position would be broadly the same for the claim against the Second Respondent as for the claim against the First Respondent, in relation to which, to anticipate my conclusions below, I have found that the claim is not well founded, in that whilst the intimation of a claim for damages of the magnitude involved was clearly calculated or likely

to destroy or seriously undermine the Claimant's trust and confidence in his employer, the First Respondent did have reasonable cause to institute proceedings against him, and in the circumstances the choice of forum of the courts of New York State was not unreasonable.

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**Claim of unfair constructive dismissal against the First Respondent: findings in fact**

54. The Claimant was first employed by the First Respondent (then called Impact Systems Ltd) as Director of Engineering, under a contract dated 3 June 2010 (pp 60-80), commencing employment on 1 July 2010. The Claimant was also appointed as a statutory director of the First Respondent with effect from the same date. The contract, which had been professionally prepared, provided for a salary of £60,000 a year, reimbursement of business expenses, and benefits including private medical insurance and life insurance, and access to a stakeholder pension scheme.

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55. Under this contract, the Claimant was required to devote his full time and attention to promoting the interests of the First Respondent, and not to engage in any activity which might become harmful or contrary to its interests (clause 4.1.3); not without written consent from the Board of the First Respondent to be directly or indirectly engaged, concerned or interested in any other business (clause 4.2); to comply with the legal duties of a director (clause 4.1.6); and to report his own wrongdoing, and that of any other employee of the First Respondent, to the Board immediately on becoming aware of it (clause 4.1.8).

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56. The contract also contained detailed provisions imposing obligations on the Claimant in relation to confidential information, and vesting the intellectual property rights arising from any inventions made by the Claimant in the First Respondent. Specifically, clause 19.1 prohibited the Claimant from using the First Respondent's confidential information 'except for a purpose of [the First Respondent]'. Clause 20.1 required the Claimant to disclose promptly to the First Respondent any invention made in the course of his

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employment, and by clause 20.2, the Claimant acknowledged that ownership of any such inventions and intellectual property vested automatically in the First Respondent.

5 57. The duration of the Claimant's employment under the contract was stated to be until 31 December 2013 (subject to provisions permitting earlier termination); clause 2.2 stated that 'It is the Company's intent that the period of employment will be extended beyond 31 December 2013 based on mutually satisfactory terms being agreed between you and the company  
10 prior to 31 December 2013.' The contract was stated to be subject to the laws of Scotland and the exclusive jurisdiction of the Scottish courts.

58. The contract was part of a package of agreements which included a contract of employment with the then predecessor of the Second  
15 Respondent, the assignment to the Second Respondent's predecessor by way of a Technology Transfer Agreement of intellectual property rights ('IP rights') owned by the claimant in respect of Demon 6, a device for which he had pending patent applications, and a Non-solicitation and Confidentiality Agreement between the Claimant and the Second Respondent's  
20 predecessor.

59. Because of the acquisition of intellectual property rights, Mr Redding arranged for a due diligence exercise to be undertaken prior to the conclusion of the contracts, in the course of which it came to light that the  
25 claimant had had a company incorporated earlier in 2010, with the name Bothwell Engineering Ltd ('Bothwell'). The Claimant was the sole director and majority shareholder in Bothwell, with Mr Anderson holding a minority of the shares (30 out of 130) and being Company Secretary. When asked about this company, the Claimant explained that it was inactive, and had  
30 been formed as a vehicle to hold the rights to a product he had developed called CIC Live, the rights to which were not included in the IP rights being sold.

60. The provisions in the Claimant's contract for medical insurance, life insurance and pension benefits were not put into place by the First Respondent. The Claimant raised the issue of medical insurance with Mr Redding, but was told that he should make the necessary arrangements himself; the intention, which must have been obvious to the Claimant, was that the First Respondent would meet the costs but that it was for the Claimant to procure the insurance. He did not do so. The Claimant did raise the question of Director's liability insurance, and Mr Redding agreed to meet the cost of this (although it was not provided for in the contract), but left it to the Claimant to make the necessary arrangements, which he did. The Claimant did not raise the issue of either life insurance or pension. As to the latter, Mr Redding had offered to include the Claimant in pension arrangements in place in the USA for employees of the Second Respondent, but the Claimant declined the offer.

61. At various times both before and after the date on which the Claimant's contract was due to expire, he and Mr Redding discussed the terms on which his employment was to continue. However they were not able to reach agreement on new terms, and no new contract was concluded. After the original expiry date, 31 December 2013, passed, the Claimant continued to work for the First Respondent and remained a statutory director, and continued to be paid at the same rate as under the contract. I conclude from this that it was the implied agreement of both parties that the contract would continue indefinitely on the same terms save as to duration. As with the Claimant's contract with the Second Respondent, any other conclusion would mean that there was no contractual basis for a claim of constructive unfair dismissal; there must be a contract of employment for there to be a breach entitling the employee to resign without notice and raise a claim.

62. The First Respondent was not particularly successful in generating profitable business; it made a loss in every year the Claimant worked for it except 2014. The First Respondent's losses were absorbed by the Second Respondent and its majority shareholder, Mr Redding. On a number of

occasions Mr Redding indicated to the Claimant that there were difficulties in finding the funds to pay the staff of the First Respondent (principally the Claimant and Mr Anderson) but all salaries were in fact paid on time throughout the Claimant's period of employment.

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63. The principal product manufactured and sold by the First Respondent was a sensor called the Macom TechAlert 10, abbreviated to TA10. The First Respondent had an exclusive licence to manufacture the TA10 from Mr Mabrouf, the owner of Macom, and acquired all the rights in the TA10 from Mr Mabrouf following the expiry of the licence at the end of 2013. The Claimant had worked for Macom some years previously; he resigned from this position in 2005. As the number of employees of the First Respondent fell to only two, the Claimant and Mr Anderson, following the resignation of Thomas Roch in early 2014 and the retirement of Terry Dyter in June 2015, a major part of the Claimant's working time in 2014 and 2015 was taken up with the assembly and testing of TA10 units, and in overseeing the manufacture of the units after this was subcontracted to Zot, a firm in Musselburgh.

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64. Various important matters occurred during the period of the Claimant's employment which it is more convenient to set out below, in the context of the discoveries made, and action taken, by Mr Redding in October and November 2015, and documents disclosed for the purposes of these proceedings.

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65. During the latter part of 2015, Mr Redding became increasingly concerned about the performance of the First Respondent, and by extension the Claimant and Mr Anderson. There was only one significant customer for the TA10, a company called FAG based in Aachen, Germany. It had placed no new orders since January 2015. It also appeared to Mr Redding that there was little evidence of the Claimant generating new business.

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- 5 66. These concerns prompted Mr Redding, together with Mr Brewer, to start investigating Bothwell. They were concerned to find from the accounts filed at Companies House by Bothwell for the year to 28 February 2014 that it had assets of £18,649, and creditors owed a similar amount. This appeared inconsistent with the company still being the dormant entity they had been advised in 2010 that it was.
- 10 67. Further investigations and internet searches undertaken by Mr Brewer revealed an online competition sponsored by Bothwell in August 2015 for the design for a logo for a product called Da2b or Databee (pp 254-5). The description given for this product appeared to match that of the Trident AP2200 hub, the Second Respondent's principal product. A link at the end of the page led to a photograph which appeared to be of a hub similar to the Trident hub (p 609). The advertisement also sought a logo for a cloud server to be called datahive.io.
- 15 68. A further internet search led to the website for datahive.io (pp 259-62), which described its offering as including 'sensors and system solutions for plant condition monitoring'. Three of the four areas for which the datahive product was stated to be suitable were areas within the scope of the Respondents' business. Further searches revealed that a domain name, www.bec-ltd.com, also yielding email addresses ending in @bec-ltd.com, had been registered by Mr Anderson, using Bothwell's registered address, in October 2010 (p 828). Information about the domain name www.datahive.io was also found; this had also been registered by Mr Anderson in November 2013, using Bothwell's address. This information was known to Mr Redding and Mr Brewer by about 19 October 2015.
- 20 69. Prior to these discoveries, Mr Redding had understood Bothwell to be dormant. He concluded that this was not the case, and that the company was being actively used to compete covertly with the Respondents. Mr Redding regarded this as sufficiently serious to necessitate taking legal action; his primary interest was in obtaining an injunction to restrain any
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further competing activity and misuse of the Respondents' intellectual property.

5 70. Mr Redding decided to institute proceedings in the local court in Monroe County, New York State, for two reasons. The first was that he considered this an appropriate forum because one of the Claimant's employers was registered there, and the Claimant had permanent resident status in the USA. The other was that he had available to him the services of a local Attorney at a very advantageous rate, and anticipated saving money by  
10 instituting the proceedings locally. The proceedings were lodged with the court on 28 October 2015 (pp 82-8). The Second Respondent, as Plaintiff, claimed injunctive relief against the Claimant, together with damages separately quantified under each of two heads at \$5 million, an account of profits, and costs. Only the Claimant was named as a defendant to the  
15 claim; the reason for not including Mr Anderson was not canvassed in evidence, but I infer that it was because there would be no jurisdictional basis for proceedings against him in a New York court.

20 71. Mr Redding then arranged to travel to Scotland to confront the Claimant and Mr Anderson and investigate for himself what had been going on. He arranged for a conference call for 1 pm UK time on 30 October 2015, to ensure that the Claimant would be available at the First Respondent's offices but without being forewarned of his intentions.

25 72. Mr Redding travelled to the UK, and on the morning of 30 October 2015 came with Ms McGhee, a solicitor from the firm instructed to act for the Respondents, to the First Respondent's offices in Hamilton. He had with him a copy of the court papers in an envelope, and letters of suspension for the Claimant (from both Respondents) and Mr Anderson. Nobody was there  
30 when they arrived, so they waited in the car park. The Claimant arrived just before 1 pm, and Mr Redding and Ms McGhee followed him into the office. He was understandably surprised to find Mr Redding attending in person when he had been expecting to speak to him by telephone. Mr Anderson

arrived soon afterwards. On the way into the office Mr Redding noticed equipment which looked like the Second Respondent's but was finished in silver, a colour not used by the Second Respondent, and which was connected to the office network. This served to heighten his suspicions about what had been going on.

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73. There was a sharp conflict of evidence as to what happened thereafter. I found the evidence of Mr Redding on this to be more convincing, and my findings are based on his evidence. Mr Redding advised the Claimant and Mr Anderson that they were suspended, and handed them the letters of suspension (pp 497-8; there were two letters for the Claimant but only one was in evidence). The letter stated that there would be an investigation which might lead to disciplinary proceedings. Mr Redding also intimated to the Claimant that the envelope he had with him contained the papers for court proceedings issued against him in the USA. He slid the envelope across the table to him but the Claimant did not open it or take it away, and at this point Mr Redding did not tell him the total amount being claimed.

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74. Mr Redding asked the Claimant and Mr Anderson for their company laptops, mobile phones, keys and passwords. Mr Anderson was co-operative. The Claimant's reaction was first to say that he needed to speak to his lawyer; then when Ms McGhee told him he was not entitled to a lawyer at that stage, he said he needed to go to the bathroom. Mr Redding asked him to leave his phone, but he refused, with the result that Mr Redding tried to follow him. The Claimant went upstairs to his office and started packing a computer into a satchel, and picked up a black case or laptop bag.

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75. The Claimant then tried to leave. Mr Redding was standing in his way, and the Claimant told him to 'get out of my fucking way' and pushed past him. Mr Redding filmed the Claimant on his mobile phone as he left and got into his car and drove away. Mr Redding considered the Claimant's demeanour to indicate anger rather than fear (as the Claimant himself asserted). Mr Redding then returned to talk to Mr Anderson,. He checked the contents of

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the latter's company phone, and having downloaded one photo, of the Blackbee device, let Mr Anderson leave with the phone. Mr Anderson continued to co-operate with Mr Redding over the following days and provided him with additional information about the Claimant's activities, and was in due course reinstated, although he resigned soon afterwards to take up another post.

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76. Mr Redding and Ms McGhee then inspected the premises and found a number of documents including a detailed proposal bearing the Claimant's and Bothwell's names, for the design and development of a Distributed Smoke/CO alarm for a company called Smart Compliance (pp 510-9) and a Powerpoint presentation bearing what was later discovered to be the Bothwell logo, to RTI System Development, for a remote monitoring and diagnostic system; the device illustrated appeared to Mr Redding to be the Databee. Subsequent investigations revealed that RTI was Real Time Innovation, a company registered at what had been the First Respondent's address until 2013, and with Mr Anderson shown as its contact.

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77. On the evening of 30 October 2015, the Claimant phoned Mr Redding to apologise for his behaviour, and asked if the two men could meet the following day 'without attorneys'. Mr Redding agreed. The Claimant spoke to him by telephone again on the following morning; Mr Redding asked the Claimant to bring his company laptop and phone, but the Claimant said 'they are gone'. This led Mr Redding to cancel the proposed meeting.

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78. Later that day the Claimant texted Mr Redding to say that he would return 'the sensors' on the Sunday (1 November 2015) and asked that somebody be there to receive them. Mr Redding accordingly went to the First Respondent's office that day, accompanied on this occasion by Mr McLaughlin of the Respondents' solicitors. The Claimant arrived with some 50 TA10 sensors which he had been keeping at his home.

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79. Mr Redding was suspicious that these had been kept away from the office as ransom, but I prefer the Claimant's explanation, which is that he had terminated the lease on the offices in early 2014, in the hope of finding

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cheaper alternative premises, and they had been occupied on a month by month basis, and that in the event of the rent not being paid the landlord would have secured the premises and their contents. The Claimant had no reason to hold these sensors as ransom, as he did not anticipate that Mr Redding would come in person from the USA to confront him.

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80. Having taken the boxes of sensors into the office, the Claimant handed over his company phone, but without its sim card. he told Mr Redding that there were no company contacts on the sim card. The Claimant did not return the company laptop. He claimed in evidence that it had become unusable, and had been left in the office, but no laptop was found on a search of the premises. The Claimant also claimed in evidence that he had used his personal laptop for work but had transferred all the Respondents' data from it on to a USB stick which he returned to Mr Redding. Mr Redding was not questioned about the accuracy of the latter claim and I make no finding on the point. At the conclusion of their meeting, Mr Redding gave the Claimant the New York court summons, thus enabling the Claimant to read it and discover the amount being claimed as damages.

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81. Mr Redding and Mr McLaughlin then conducted a further search of the premises. They found a number of hard drives, including one which was thought to have been the original hard drive in the Claimant's laptop, which had had to be replaced in early 2015. A search of this hard drive after Mr Redding returned to the USA revealed some 250 documents (an annotated inventory of the documents is at pp 851-3). Other inquiries were pursued by Mr Redding prior to his return to the USA approximately a week later; I refer later as necessary to matters discovered by those inquiries.

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82. On 2 November 2015 the Respondents' solicitors wrote to the Claimant giving him notice of a disciplinary hearing to be held at their offices in Glasgow on 5 November (pp 501-2). The letter was, somewhat unusually, served at the Claimant's home by a Sheriff Officer personally on 2 November 2015 (p 533). By this stage the Claimant had instructed solicitors, who wrote on 5 November 2015 to the Respondent's solicitors to

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advise that the Claimant had consulted his GP, who had signed him off as unfit for work for two weeks by reason of stress, and enclosing a fit note to that effect, and intimating that he had been advised not to attend the disciplinary hearing. The Claimant remained under the care of his GP and certified as unfit to work at least until the following January (p 885).

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83. The disciplinary hearing was rescheduled to be held on 13 November 2015, and the Claimant was so notified by a further letter from the Respondents' solicitors to his solicitors dated 10 November 2015. There had in the meantime been correspondence between the two solicitors which eventually led to undertakings being given by the Claimant which appear to have been acceptable to Mr Redding, as no proceedings were raised in the Scottish courts for interdict or other relief. The matter of the return of the laptop was however not resolved by this correspondence.

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84. The Claimant did not attend the rescheduled disciplinary hearing. His solicitors wrote to the Respondents' solicitors on 13 November 2015 (pp 548-50) enclosing formal letters of resignation from his directorships of each of the respondents, both dated 12 November 2015 (pp 544-5) and intimating his immediate resignation from his employment with both Respondents. The solicitors' letter set out reasons for the Claimant's decision to resign, broadly comprising the matters pleaded in the Papers Apart to the claim forms in these proceedings.

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85. The Claimant remained out of work until March 2016, when he commenced working in a self employed capacity as a consultant. Schedules of Loss setting out details of his income from consultancy work from March 2016 until the commencement of the hearing were produced and included in the joint bundle of productions (pp 746-51) but the figures used did not take account of the Claimant's liability to pay tax on his profits after expenses, and were not therefore agreed by the Respondents. In view of my conclusion on liability, and in the alternative on compensation, it is not necessary to set out the detail of the quantification of the Claimant's claimed losses.

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- 5 86. The investigations carried out by Mr Redding included contacting Mr McSorley, manager of Zot, the manufacturer of the TA10 units, to check the accuracy of the Claimant's expenses claims for travelling to Musselburgh to visit Zot's premises. The Claimant had claimed for mileage (90 miles at £0.50 per mile) for a total of 97 round trips to Musselburgh between February 2014 and September 2015. Mr Redding sent Mr McSorley a list of the dates for which the Claimant had claimed. Mr McSorley annotated the list to indicate the occasions on which the Claimant had signed Zot's visitors' log (pp 626-8); there were only nine.
- 10 87. Mr Redding then had the expenses claims matched against the Claimant's mobile phone bills and records of his holiday dates, which disclosed that several of the dates for which a claim had been made were dates on which the Claimant was out of the UK. He therefore concluded that the Claimant had made a significant number of false claims for expenses.
- 15 88. The Claimant in evidence said that the reason for the small number of entries in the visitors' log was that this was kept at the front door of the premises. He typically went to Musselburgh to deliver and/or collect sensors, usually in small quantities, and would drop these off and pick them up at the back door. He said that it had not occurred to him to have the sensors (which are quite small, about 6" cubes) sent by courier. He also  
20 said that claims for expenses were made in arrears and he may have recorded some of the dates inaccurately.
89. Mr Anderson in evidence stated that he and the Claimant between them made two or three trips a week over a period of a year and a half, and that  
25 he thought that there were a few claims for trips that he did not make; he also said that after 8 June 2015, when the last of the sensors made by Zot was collected, there might have been one or two trips to collect tools, but that otherwise there were no further trips. The spreadsheet shows claims by the Claimant for a total of 17 trips after 8 June 2015.
- 30 90. Taking this evidence (and extensive documentation supporting the point about claims for dates when the Claimant was out of the country, at pp 629-

84) into account, I find on the balance of probabilities that whilst the Claimant did go to Zot on significantly more occasions than the nine recorded in the visitors' log, he also made a substantial number of claims for visits which did not occur, including in particular for 17 visits after 8 June 2015.

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91. The analysis of the hard disk Mr Redding had taken back to the USA revealed a significant number of matters each of which was relied on by the Respondents as examples of the Claimant engaging in undisclosed activities, in most cases through the vehicle of Bothwell, which either were potentially in competition with the Respondents, or involved the misappropriation of the Respondents' intellectual property, or were actual or potential business opportunities which the Respondents would have wished to pursue had they been given the opportunity. Much of the oral evidence and most of the productions in this case related to these matters. Their relevance to the claim against the First Respondent is that, if the evidence does establish these matters, they involve serious breaches by the Claimant of his fiduciary duty as a Director of the First Respondent, and of the express duties set out in clause 4 of his contract with the First Respondent (see paragraph 55 above), as well as of his duty of fidelity as an employee. These points are relied on by both Respondents in support of arguments that if I find that the Claimant was unfairly constructively dismissed (in either case), it would not be just and equitable to make either a basic or a compensatory award in his favour.

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92. These matters are also a major part of the subject matter of the litigation instituted by the Second Respondent against the Claimant in New York State, which I understand to be continuing. I am concerned that findings in fact made in the present case, following a hearing at which the Claimant was not legally represented, would nevertheless potentially be binding on the parties in the US litigation, where the Claimant does have the advantage of legal representation. In these circumstances, I consider it at least desirable that I do not make findings in fact beyond those necessary to the decisions I am required to make.

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93. As is explained below, my finding on liability in the claim against the First Respondent is that the claim is not well-founded: the Claimant was not unfairly constructively dismissed. I have already, separately, found that the claim against the Second Respondent is not well-founded. Thus far, therefore, disputed issues of fact which bear only on whether it would be just and equitable for the Tribunal to award compensation do not need to be determined. However, if there is a successful appeal against either or both of the decisions dismissing the Claimant's claims of unfair constructive dismissal, it would be of assistance to the Employment Appeal Tribunal to know what conclusions I would have reached on the issue whether it would be just and equitable to award compensation.

94. For that reason I consider it appropriate to make brief findings sufficient to support the clear conclusion I have reached that it would not be just and equitable to award either a basic award or a compensatory award, against either Respondent. I therefore set out brief findings in fact on the principal matters which I consider were serious misconduct or serious breaches of the Claimant's statutory or contractual obligations to the Respondents (in addition to the findings made above in relation to expenses, which I find to be a clear example of serious misconduct in relation to the First Respondent).

95 The principal matters disclosed by forensic examination of the hard disk are:

95.1 Bothwell had been occupying its own leased premises in Hamilton since April 2014.

95.2 The Claimant, using Bothwell for this purpose, procured a commission from a firm called Taytech to design a device for use in water treatment, for which Taytech paid Bothwell approximately £84,000. The project was not successful and did not lead to any further orders. I am not able to say whether it made Bothwell, or the Claimant personally, a profit. However it was a project that the First and/or Second Respondent would have been capable of undertaking, and it was therefore the Claimant's duty as a Director



5 of the First Respondent to disclose the business opportunity to the First Respondent (i.e. to Mr Redding); he did not do so. Further, by undertaking the work involved, the Claimant was engaging in a business activity in breach of his contractual obligations to the First Respondent. (Relevant documents are at pp 162, 290-6 and 708-33.)

10 95.3 The Claimant obtained a grant from Scottish Enterprise in 2012 to develop an oil and machine condition monitoring system. The fact of the grant was known to Mr Redding. The grant was used over a period of two years to develop a hub for the benefit of Bothwell, not the First Respondent, although no ultimate commercial advantage appears to have been secured from the project other than payments of the grant, which were made to the First Respondent (the final project report and associated correspondence is at pp 151-6 and 15 471). The loss to the First Respondent was that the Claimant and Mr Anderson were engaged in work for Bothwell during the time that they should have been working for the First Respondent.

20 95.4 The Claimant made a proposal in July 2013 in the name of Bothwell to Rio Tinto, a customer of the Second Respondent, for the development of remote condition monitoring equipment to be used on trucks operating at Rio Tinto's mines in Australia and the USA (pp 157-61). The Claimant asserted in evidence that the person at Rio Tinto who would determine with whom contracts were to be placed, a Mr Durnan, would not entertain contracting with the 25 Second Respondent, but he failed to afford the Second Respondent the opportunity to make the proposal. In the event nothing came of the Bothwell proposal. I make no finding whether the proposal or a similar proposal would have been successful if submitted by the Second Respondent.

30 95.5 The Claimant corresponded extensively with Mr Rich Wurzbach, President of MRG, a US corporation, using his Bothwell email

5 address. In the course of the exchange of emails, in January 2015 he offered to find and supply to Mr Wurzbach the data sheet for the Demon 6 sensor, the patent rights for which he had sold to the Second Respondent's predecessor in 2010. There is no evidence that the data sheet was in fact supplied or that there was any financial benefit to the Claimant or Bothwell.

10 95.6 The Claimant attempted in January 2015, acting in his capacity as Managing Director of Bothwell, to secure a contract with FAG of Aachen for the supply of hubs similar to the TA10 (for which FAG was the First Respondent's principal customer) at a price lower than had been charged by the First Respondent (pp 876-80). In furtherance of this attempt, the Claimant travelled in January 2015 to FAG's premises in Aachen without informing Mr Redding; the Claimant reclaimed the cost of the trip from Bothwell.

15 95.7 The Claimant, acting on behalf of the First Respondent, contracted with a company called BMac for the assembly of hubs. On each occasion that BMac was paid by the First Respondent for work done, a sum exactly equal to half of the payment made was transferred by BMac into Bothwell's account (pp 540, 340A-B).  
20 Some of these payments were supported by invoices from Bothwell for 'hardware and software services' (pp 454, 471). The Claimant asserted in evidence that these payments constituted repayment of a personal loan of £20,000 he had made to Brian MacFee, the proprietor of BMac, but I consider the more probable explanation to  
25 be that the payments were kickbacks for the award of the original contract. I make no finding as to whether the price agreed with BMac was a proper price for the work done.

30 96. These findings do not encompass all the allegations of wrongdoing by the Claimant made by the Respondents but I consider they are sufficient to support the conclusions I reach in the alternative to my conclusion, as set

out below, on the question whether the Claimant was unfairly constructively dismissed by the First Respondent.

**Claim against the First Respondent: relevant law**

5 97. The legal principles applicable in this case are not in dispute. As an employee with more than two years' continuous employment, the Claimant had the right not to be unfairly dismissed by the First Respondent, by virtue of section 94 of the Employment Rights Act 1996 ('ERA 1996'). 'Dismissal' is defined in s 95(1) ERA 1996 to include what is generally referred to as constructive dismissal, which occurs where the employee terminates the contract under which he is employed (with or without notice) in 10 circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).

15 98. The test for whether an employee is entitled to terminate his contract of employment is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract: **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**. For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence 20 between the parties: **Malik v Bank of Credit and Commerce International Ltd [1998] AC 20**. As noted above at paragraph 41, in principle the implied duty to preserve trust and confidence may be excluded by an express term, but it was not suggested by the First Respondent that there was any such term in the Claimant's contract. 25

30 99. Conduct calculated or likely to destroy mutual trust and confidence may be a single act; in this case the Claimant relies on the events of 30 October 2015 as such. Alternatively there may be a series of acts or omissions culminating in a 'last straw': **Lewis v Motorworld Garages Ltd [1986] ICR 157**. That is the Claimant's alternative case, the events of 30 October 2015 being relied on for that purpose as the last straw. As to what can constitute

the last straw, the decision of the Court of Appeal in **Omilaju v Waltham Forest London Borough Council [2005] IRLR 35** gives useful guidance. The act or omission relied on need not be unreasonable or blameworthy, but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold.

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100. In order for there to be a constructive dismissal, not only must there be a breach by the employer of an essential term such as the trust and confidence obligation; it is also necessary that the employee resigns in response to the employer's conduct (although that need not be the sole reason: see e.g. **Nottinghamshire County Council v Meikle [2004] IRLR 703**). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning. The passage of time alone does not constitute affirmation (and to that extent Lord Denning MR's comment in **Western Excavating** to the effect that the employee must act quickly requires qualification in some cases, as when the employee is ill).

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101. If an employee establishes that he has been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s 98 ERA 1996. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s 98. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s 98(4)). In applying s 98(4) the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the

circumstances within the range of reasonable responses open to a reasonable employer.

102. If the Tribunal determines that the employee was unfairly dismissed, and in a case (as this case is) where the employee does not seek re-employment, the Tribunal must determine what, if any, compensation to award. The basic award is a matter of computation based on the employee's age, and length of service at the effective date of termination. In this case the Claimant had five years' service, all over the age of 41, and a salary in excess of the statutory maximum rate of a pay, which at the material time was £475 a week (see s 227 ERA 1996, as amended). His entitlement would therefore be a week and a half's pay for each year of service, at the maximum rate of £475 a week (see s 119 ERA 1996). However by virtue of s 122(2), where the Tribunal considers that any conduct of the employee before his dismissal was such that it would be just and equitable to reduce the award to any extent, it is required to do so; 'to any extent' includes a reduction to zero. Importantly, conduct here is not limited to conduct known to the employer prior to the dismissal, still less conduct which contributed to the dismissal.

103. As to the compensatory award, the amount to be awarded, subject to a maximum of 52 weeks pay, is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer: s 123(1) ERA 1996.

104. The sum which would otherwise be awarded as reflecting this loss may be reduced, including by a reduction to zero, in any of three circumstances each of which is relied on by the First Respondent in this case. The first is statutory: under s 123(6), if the Tribunal finds that the dismissal was to any extent caused or contributed to by action of the employee, it must reduce the compensation by such proportion as it considers just and equitable having regard to that finding. The 'action' of the employee must involve

some culpability; the test is the degree of culpability on the part of the employee, not a comparison between that of the employer and employee.

105. The second ground for reduction derives from the decision of the House of Lords in **Polkey v A E Dayton Services Ltd [1988] ICR 142**. This establishes, in the context of a constructive dismissal that if the employer shows that the employee would or might have been fairly dismissed had he not resigned, compensation should be reduced to reflect that position; the amount of reduction will depend on the degree of probability of a fair dismissal absent the resignation, and also whether the dismissal would have occurred at the same time as the resignation or later.

106. The third relevant potential ground for a reduction of the compensatory award derives from another decision of the House of Lords, **W Devis & Sons Ltd v Atkins [1977] ICR 662**. This case establishes that in determining what, if any award it would be just and equitable to make, the Tribunal can take into account matters occurring before the termination of the employee's employment, including in particular misconduct by the employee, even if this was only discovered by the employer after the dismissal. Where serious misconduct prior to termination is discovered subsequently, it may be just and equitable to award no compensation at all.

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### **Claim against the First Respondent: conclusions**

107. The first and most important question in this case is whether the actions of the First Respondent on 30 October were such as were calculated or likely to destroy or seriously undermine mutual trust and confidence. It is important first to note that the Claimant's case on this point, both in his claim and in his written submissions, is squarely based on the events of 30 October 2015.

108. The importance of this is that, as I have found, Mr Redding did not on that day give the Claimant the summons in the New York proceedings, and did not tell him the amount of damages being claimed. However he did arrive

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unannounced and unexpectedly at the First Respondent's offices, and in addition to suspending the Claimant and seeking to repossess his company phone and laptop, informed him that proceedings claiming damages and an injunction had been issued in the New York court.

5 109. The question is therefore whether the actions of Mr Redding in travelling  
unannounced to the UK, presenting himself at the First Respondent's offices  
accompanied by a solicitor, serving letters suspending the Claimant pending  
a disciplinary investigation, and informing him that the Second Respondent  
had issued proceedings against him for damages and an injunction in a  
10 New York State court, were calculated or likely to destroy or seriously  
damage mutual trust and confidence. (No point was taken by the First  
Respondent that the proceedings were brought by the Second Respondent  
not the First, and for practical purposes the actions of Mr Redding fall to be  
regarded as actions of both of the companies he controlled.)

15 110. Insofar as 'calculated' requires a degree of intent, I would be reluctant to  
conclude that Mr Redding had the necessary intention. His concerns were  
plainly to protect his interests against what he feared to be illegitimate  
competitive activity and potential misappropriation of valuable intellectual  
property. However I have no hesitation in concluding that Mr Redding's  
20 actions were objectively likely to, and indeed did, fatally undermine the  
Claimant's trust and confidence in him, and by necessary association the  
First Respondent.

111. The First Respondent submitted that the Claimant was angered by what  
happened because he realised that 'the game was up'. I do not accept that.  
25 It became clear in the course of the Claimant's evidence that he had not,  
until confronted with points such as the terms of sections 170-175 of the  
Companies Act 2006, which set out the duties of company directors, fully  
appreciated that what he was doing was unlawful, or indeed that it was  
improper and in flagrant breach of the terms of his contract with the First  
30 Respondent.

112. The egregious nature of the Claimant's behaviour, as more fully disclosed by examination of the hard drive and other investigations undertaken by Mr Redding, points towards circumstances in which someone in the Claimant's position would be expected to feel guilty, but I am satisfied that the Claimant did not; he was therefore genuinely shocked to be confronted with the sudden appearance of his employer and the news that he was suspended and that legal action had been started in a foreign jurisdiction against him. Indeed any employee suddenly confronted with the news that his employer had started court proceedings against him and that he was suspended pending a disciplinary investigation would be very likely to lose trust and confidence in his employer.

113. However that is only part of the issue. The implied term requires the employer not to act in a way calculated or likely to destroy or seriously damage mutual trust and confidence without reasonable and proper cause. Therefore the second question is whether - at the time and not with the benefit of hindsight taking into account what was subsequently discovered - Mr Redding had reasonable and proper cause for what he did. I regard this point as finely balanced, but have concluded that he did have reasonable and proper cause.

114. It is worth repeating first of all that what was done did not include telling the Claimant that the claim was for \$10 million. I have found on the evidence that that was not done until 1 November 2015, by which time Mr Redding had more reason to believe the Claimant had been acting unlawfully in competition with the Respondents. In any event the case as put by the Claimant is that it was the events of 30 October 2015 which destroyed his trust and confidence in his employers, and it is that case which I must address.

115. Mr Redding knew, from what had been discovered prior to his decision to start proceedings and come to the UK, that Bothwell, a company majority owned by the Claimant and which he had been told was dormant, was active: as long ago as February 2014 it had a healthy bank balance and



significant creditors, which pointed towards it having become active. He knew that it had acquired a domain name (giving it the facility for a website and email addresses). He knew that it had conducted a competition for a logo, and that the logo was for a product which had all the appearance of being a copy of one of the Respondents' products. He also knew that the First Respondent's sales had almost totally dried up, and there was no evidence of any prospect of this situation improving; nor was there evidence of the Claimant being actively involved in trying to procure business, as Mr Redding was entitled to expect he would be.

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10 116. In these circumstances a proprietor based in Scotland would in my view undoubtedly want to find out what was going on, and would be sufficiently suspicious that there was significant illicit competitive activity that he would take steps to prevent evidence of such activity being concealed. Typically in these circumstances that would include suspending the employee, taking control of the premises, and instituting proceedings for interim interdict for the preservation of evidence and to prevent continuing unlawful competitive activity.

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20 117. Whilst in principle Mr Redding could have stayed in the USA and engaged agents in Scotland to serve notice of suspension, take control of the premises and raise an action for interim interdict in the Sheriff Court or the Court of Session, it was not unreasonable of him to want to take personal charge, or to start proceedings in his local court, which he was advised was an appropriate forum because of the Claimant's permanent resident status in the USA. Moreover he only intimated the existence of the court proceedings after he had, on entering the First Respondent's offices, seen a hub connected to the office network which resembled, but was not, one of the Respondents' products, giving him further cause to believe that significant competitive activity was being pursued by the Claimant and Mr Anderson. Until that point he had retained the option of not intimating the existence of the proceedings, which could if necessary have been discontinued without the Claimant ever becoming aware of them.

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118. For these reasons there was no breach on 30 October 2015 of the First Respondent's implied contractual duty of trust and confidence, because Mr Redding's actings were not undertaken without reasonable and proper cause.

5 119. That is sufficient to dispose of the Claimant's primary case. For completeness, had Mr Redding handed over the summons and disclosed the amount claimed at their first meeting on 30 October 2015, I would have had much more difficulty in finding that he had reasonable and proper cause to bring a claim for such a large sum. I found Mr Redding's explanation for  
10 the sum claimed to be speculative and unconvincing, based as it was on a very optimistic forward projection of the value of the Respondents and an equally pessimistic view of how much this might be diminished by illicit competitive activity. Even taking into account all the evidence since amassed about the Claimant's wrongdoing, the sum claimed was  
15 disproportionate and on the borderline of being intimidatory. However the case put forward by the Claimant is squarely based on what happened on 30 October 2015, not what happened two days later.

120. Turning to the Claimant's alternative case, that the events of 30 October 2015 were the last straw, it is necessary to consider what other straws there  
20 are that the Claimant can rely on. He refers to the First Respondent failing to provide him with certain benefits provided for in his contract, namely private medical insurance, life insurance and access to a stakeholder pension. I have found in relation to medical insurance that when the Claimant raised this with Mr Redding he was told to arrange the insurance  
25 himself. This was a perfectly reasonable response: Mr Redding was much less well placed, being in the USA, to make the arrangements than the Claimant. The Claimant did not do so, and so is in no position to rely on this matter as a breach of contract. Moreover any breach considerably predated the end of the initial term of the contract, and by continuing in employment  
30 after the end of 2013, if not long before then, the Claimant must be taken to have affirmed the contract.

121. There was no evidence from either party as to the matter of life insurance, and in particular the Claimant did not say that he had pursued this with Mr Redding. As to membership of a stakeholder pension, it was Mr Redding's evidence that the Claimant was offered the alternative of membership of the  
5 Second Respondent's pension scheme but turned this down, and that thereafter the matter was not pursued. At latest by the time the primary contractual term expired, the Claimant must be taken to have acquiesced in the First Respondent's failure to provide these contractual benefits. Insofar as any of these matters could be relied on as contributing to a loss of trust  
10 and confidence, there is no link between them and what happened in October 2015, in the sense referred to by the Court of Appeal in **Omilaju**. The First Respondent submits that the Claimant has dredged these matters up to buttress his main case; I agree.

122. Next, the Claimant complains that the First Respondent breached the term  
15 of the original contract that it would agree terms with him for the continuation of his employment. It is true that no terms were agreed. In fact however that was not just down to Mr Redding, who made two proposals to the Claimant, which he rejected. One was for the Claimant to have a single contract, subject to Scots law, with the First Respondent, which the  
20 Claimant rejected because he wanted to preserve his permanent resident status in the USA, which he believed would be assisted by continuing to have a contract with the Second Respondent. The second was for the Claimant to have a combination of a salary and a share in the equity of the First Respondent, which the Claimant rejected, it would appear because he  
25 was not willing to take any of the risk of the First Respondent not prospering.

123. The adage that it takes two to tango is in my view a sufficient answer to this  
30 complaint. Whilst the law acknowledges the possibility of an agreement to agree having legal force, such a term could not give the Claimant a right to be offered any particular terms that would meet his requirements, regardless of whether they were reasonable or not. Nor is it easy for a court to determine what would be a reasonable basis for a bargain in such

circumstances (and I do not attempt to ascribe reasonableness or unreasonableness to either party).

124. But there is in any case a simpler answer to this point: the Claimant remained in employment, and accepted his salary, on the old terms for  
5 nearly three years after the primary term expired. He must be taken to have affirmed the implied continuing contract. It is that contract which he has to rely on to bring a claim of constructive dismissal at all. That it was not whatever different contract there might have been had the parties agreed new terms is beside the point. The provision for agreement to new terms  
10 was spent.

125. Next, the Claimant complains that Mr Redding started to exclude him from meetings with close business connections. There was no evidence to support this allegation, and there was in any case no provision in the contract of which such conduct would be a breach. The point has no  
15 substance as a 'straw' in a constructive dismissal claim at all.

126. The Claimant also complains that Mr Redding started to limit his trips to see clients in the USA, and failed to adhere to company practice in allowing reasonable business expenditure when on trips to the USA. However any trips to, or business undertaken in, the USA would be matters within the  
20 Claimant's contract with the Second Respondent, not the First, and cannot therefore, even if justified, be relevant to his claim of constructive dismissal against the First Respondent. Further the point about frequency of trips to the USA is easily met by the response that the Claimant was required, rather than entitled, to work from time to time in the USA. The fact that he  
25 wished to visit the USA more frequently (in large part because his parents live there) did not create any contractual obligation on the Second Respondent to facilitate or pay for more visits than it did.

127. The Claimant also complains that Mr Redding told him on numerous occasions that the First Respondent had insufficient funds to pay him.  
30 However he does not allege, and there was no evidence, that the First

Respondent ever failed to pay him his salary on time and in full. That was its contractual obligation.

128. The final matter put forward as part of the Claimant's 'last straw' case is that his job changed beyond recognition, in that he had to spend most of his time assembling sensors. I find this to be unconvincing. The assembly of sensors was subcontracted to Zot in early 2014. I consider that the Claimant was exaggerating the amount of time spent on the assembly of sensors. However, in any case this was a small company with only four employees until Mr Roch left early in 2014, and only three thereafter (with one, Mr Dyter, semi retired and retiring fully in mid-2015). As the most senior employee, and a Director, the Claimant could be expected to do whatever work within his professional capabilities was necessary to generate income. Moreover it lies ill in the Claimant's mouth to complain about this when it is clear from the documentation discovered by Mr Redding that he was spending considerable amounts of time that should have been devoted to serving the First Respondent to pursuing the various activities, some of which I have summarised at paragraph 95 above, intended to establish Bothwell as a viable competing business.

129. In summary, none of the matters raised by the Claimant support a 'last straw' case: there were no earlier straws. It follows that the Claimant was not constructively dismissed; his case falls at the first hurdle.

130. In case this conclusion is successfully challenged on appeal, I set out below briefly what my conclusions would be on the points that would then require determination. The first is whether the Claimant was constructively dismissed, which requires him to establish that he resigned in response to the First Respondent's actions, and did so without first affirming the contract. As to this, the First Respondent submits that his delay in acting, coupled with his conduct in seeking to negotiate undertakings through his solicitor, show that he was not driven to resign by the actions of Mr Redding. I consider however that the time lapse was not significant; that seeking to agree undertakings that would avoid a second court action, in Scotland,

does not indicate a wish to preserve the contract; and that the facts that the Claimant was sufficiently stressed by the situation to seek medical advice, and was certified to be unfit to work, within a few days of 30 October, point against an argument that he had lost the right to resign without notice by affirmation of the contract. I have already made a finding that the First Respondent's claim that he resigned to avoid disciplinary proceedings is not made out. That may have influenced the *timing* of his resignation, but was not the principal *reason* for it. I conclude that the Claimant did resign in response to what had happened on 30 October 2015.

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10 131. It is in principle possible for a constructive dismissal to be fair under s 98(4) ERA 1996. That first requires the employer to show a potentially fair reason; in a constructive dismissal case this must refer to its reason for acting in such a way as to precipitate the employee's resignation. The reason put forward here is conduct: the First Respondent's belief that the Claimant had committed misconduct, in neglecting his job and being actively involved in directly competitive activities in breach of his fiduciary duties as a director, his duty of fidelity as an employee, and the express terms of clause 4 of his contract. I accept that that reason is made out.

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20 132. However if I had found that the First Respondent did not have reasonable and proper cause for Mr Redding's actions on 30 October 2015, I consider that it would almost inevitably follow that the First Respondent had not acted fairly in constructively dismissing the claimant. Put simply, a reasonable employer does not act without reasonable and proper cause in a manner likely to destroy mutual trust and confidence. Therefore if I had found that there was not reasonable and proper cause for Mr Redding's actions, I would have found that the Claimant was unfairly constructively dismissed.

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30 133. It would then have been necessary to determine what if any compensation should be awarded. As to the basic award, I would have held that it would not be just and equitable to award the basic award by reason of the Claimant's conduct, specifically including at least the false claims for travel

expenses for at least 17 journeys to Zot not in fact undertaken, and the various matters the subject of my findings in paragraph 95 above.

5 134. As to the compensatory award, it is necessary to consider the application of each of the three principles identified in paragraphs 104 to 106 above. The First Respondent submits in each case that the compensatory award should be reduced to nil. In short, I agree in relation to two of the three points, and would have made a nil compensatory award if I had found for the Claimant on liability.

10 135. I accept the First Respondent's submission that the Claimant would have been dismissed summarily for gross misconduct on 13 November 2015 if he had not resigned the previous day. By then the First Respondent had considerable evidence that the Claimant had been engaged in activities plainly in breach of his basic obligations as a senior employee and Director.

15 136. I also accept that such a dismissal would have been fair in the circumstances. Although the Claimant was certified as unfit to work, he was clearly fit enough to give instructions to his solicitor, who was involved in substantial correspondence on his behalf with the First Respondent's solicitors. He had been given details, including supporting documentation, of the allegations to be considered at the hearing, and he was offered the  
20 option of submitting his case in writing (which his solicitor could no doubt have assisted him in formulating) if he was not fit to attend the hearing. The procedure proposed was within the range of reasonable responses open to a reasonable employer, and a decision to dismiss founded on a belief that the Claimant was guilty of gross misconduct would equally have been within  
25 the range of reasonable responses.

137. It follows, applying the principles established by **Polkey**, that a nil award would have been appropriate on those grounds alone.

30 138. Additionally, the Claimant had caused, or contributed to, the events which precipitated his resignation, by the conduct of which Mr Redding had become aware prior to his arrival at the company's offices, and by causing

or permitting the hub to be connected to the office network. Much of the Claimant's wrongdoing had not at that stage been discovered, and so cannot have contributed to his dismissal. It is therefore more difficult to justify a 100% reduction in the compensatory award. In all the circumstances I consider that it would have been just and equitable to reduce the compensatory award by 50% on this ground. This does not detract from the gravity of the Claimant's conduct, but is an indication that the full gravity had not at that point been discovered; what caused or contributed to the events precipitating his resignation was the matters causing Mr Redding to suspect illicit competition and misuse of the Respondent's intellectual property.

139. The third ground for a reduction to nil of the compensatory award is the one relied on most strongly by the First Respondent in its submissions, namely the **Devis v Atkins** principle. The simple principle is that it is not just and equitable to compensate an employee for the loss of his job if he has been guilty of serious misconduct, albeit not known to the employer when he was dismissed.

140. The Claimant submits that it is not gross misconduct to prepare to go into competition with your employer after you have left. I accept the principle, albeit that it has to be qualified where, as in this case there are restrictive covenants that would prevent such competition for a period after the termination of the contract. However the scale of the activities of which the Claimant has been shown to be guilty is much more serious than that. In particular the false claims for expenses are in themselves a plain example of gross misconduct; and attempts to procure business in the interest of one's own company from customers of one's employer, whilst still in employment, is an equally serious breach of the basic duty of fidelity, and it matters not that the attempt may not have borne fruit.

141. It is not necessary for me to set out fully the extent of the Claimant's serious breaches of his contractual and fiduciary duties to make the point that it would indeed not be just and equitable for him to receive any compensation.



The First Respondent's submissions on this issue are fully made out, and with only the qualification that I would not have reduced the compensatory award by the full 100% for contributory fault alone, I would without hesitation have accepted the overall submission that no compensation should be awarded.

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142. I add for completeness that if I had found that the Claimant's contract with the Second Respondent had been subject to the implied duty of trust and confidence, my conclusions on liability and remedy would have been the same as in relation to the First Respondent; the Claimant would have failed on liability on the reasonable and proper cause point, and in the alternative would have succeeded on liability but been refused both a basic and a compensatory award.

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143. The outcome is that the Claimant's claims of unfair constructive dismissal against each Respondent are not well-founded and are dismissed.

15 **Expenses**

144. The Claimant seeks an order for expenses for the reimbursement of the fees he has incurred in presenting, and bringing to a hearing, each of his two claims. the total sum paid is £2,400. I have a discretion whether to make such an award. The convention is that a successful Claimant will normally recover fees paid to pursue the claim. The Claimant has succeeded in his claims for unpaid wages, and has been awarded some £3,000. However he has failed in his principal claims, and it is the principal claims which necessitated payment of the higher level of fees. The constructive dismissal claims have also occupied the overwhelming part of the proceedings in terms of time, volume of documentation and oral evidence.

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145. In the Claimant's favour, there was no serious defence to his claim against the First Respondent for unpaid wages: there was no provision in his contract for suspension without pay. The claim should have been conceded without needing to be brought to trial. The position against the Second

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Respondent was less obvious, until expert evidence on New York Law was given. However the point could and should have been checked at an earlier stage in the proceedings rather than only after six days of the hearing (when Mr Tinnion was called to give expert evidence).

5 146. In these circumstances I consider that a fair outcome would be for the  
Claimant to recover so much of the hearing fee as he would have had to  
incur had he only made claims attracting the lower rate of fees. This is a fee  
of £230 for each case. I therefore award the Claimant the sum of £230 in  
expenses against the First Respondent and £230 in expenses against the  
10 Second Respondent.

Employment Judge: Mr P Wallington

Date of Judgment: 26 May 2017

Entered in register and copied to parties: 31 May 2017

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