EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A Buxton	and	Xchanging Procurement Services Limited

Held at Reading on 24, 25 and 26 April 2018

Representation **Claimant:** Mr G Anderson, counsel
Respondent: Miss K Hosking, counsel

Employment Judge Mr S G Vowles (sitting alone)

RESERVED JUDGMENT

Name of Respondent

1 The correct name of the Respondent is Xchanging Procurement Services Limited and the title to the proceedings is amended accordingly.

Evidence

2 The Tribunal heard evidence on oath and read documents in a bundle provided by the parties.

Unfair Constructive Dismissal – Section 95(1)(c) and 98 Employment Rights Act 1996

3 The Claimant resigned from his employment as Chief Technology Officer on 13 March 2017. The effective date of termination was 31 May 2017. He was not constructively dismissed. The complaint of unfair dismissal fails and is dismissed.

Reasons

4 This judgment was reserved and written reasons are attached.

REASONS

CLAIM AND RESPONSE

Claimant

1 On 5 June 2017 the Claimant presented a complaint of unfair constructive dismissal to the Tribunal.

Respondent

2 The Respondent presented a response dated 6 July 2017 in which the claim was resisted.

EVIDENCE

3 For the Claimant the Tribunal heard evidence on oath from Mr Alan Buxton (Chief Technology Officer).

4 For the Respondent the Tribunal heard evidence on oath from Ms Claire Rouse (Senior Manager Human Resources). It also read a statement from Mr Martin Healiss (Regional Human Resources Director) who was unable to attend the hearing due to ill-health.

5 The Tribunal also read documents in a bundle provided by the parties.

6 From the evidence heard and read the Tribunal made the following findings of fact.

FINDINGS OF FACT

Background

7 In 2011, together with two colleagues, the Claimant set up the business of SBB Services Inc t/a MM4. It was a company which provided software-based procurement services to customers. The company was bought by the Respondent in September 2013. The Claimant was paid US$1,533,242 for his shares. He was then employed by the Respondent as the Chief Technical Officer within the Procurement Division. As part of a settlement agreement under the Stock Purchase Agreement (SPA) the Claimant was due to be paid US$195,000 on or before 31 March 2016 in settlement of deferred payments due to him under the SPA. However, he would not be entitled to this payment in the event of being dismissed for gross misconduct on or before 31 March 2016.

8 The Claimant's contract of employment included the following clauses:

13.4 The Company may suspend you on full pay for up to one month (or longer if the circumstances require it) if the Company wishes to investigate any circumstances which, if found to be true would entitle the Company to terminate your contract without notice."

23 Exclusivity of Service

23.1 You are required to devote your full time attention and abilities to your job during working hours and during additional hours as may be necessary, and to act in the best interests of the Company at all times.

23.2 You must not, without the written consent of the Head of HR, be in any way directly or indirectly engaged or concerned with any other business or undertaking whether or not it is in competition with the Company's business. However, this does not preclude your holding no more than 1% of equity in any company which is quoted on a recognised Stock Exchange.

9 In June 2015, as a costs-saving measure, the Claimant was required to reduce his working hours from 37.5 hours per week to 20 hours with a commensurate reduction in salary. The Claimant agreed to this change in his contractual terms and conditions. The letter confirming this change also included: *"All other terms and conditions of employment remain unchanged"*.

10 The Claimant claimed that his line manager, Patricia Dreghorn, expressed to him her concern about him suffering such a substantial reduction in income and encouraged him to seek other part-time employment to supplement the loss of income. He said that she was supportive of him seeking other work elsewhere and agreed that as long as he gave the Respondent first priority in his 20 hours per week, he would be free to find other work to fill the gap.

11 Ms Dreghorn no longer works for the Respondent but in April 2016 the Claimant obtained an email from her regarding this matter which read as follows:

"6. We agreed on 20 hours per week. I also suggested a need to be flexible given Xchanging would always be the priority and hoped we would always be the priority and hoped we would balance out the hours over the month.

7. I enquired what you would do to make up the shortfall in earnings and you advised that you were looking into two start-ups. We discussed the line of business and agreed there was no conflict of interest as they were clearly outside the parameters of Procurement.

8. I emailed HR and asked them to draft a letter to you. I remember Chris Fussel chasing me for the signed letter and me in turn chasing you. I wasn't privy to the letter but I do recall you advising everything was signed and delivered around one week later."

Allegation – March 2016

12 In March 2016 the Respondent became aware that the Claimant was a statutory director in a number of related businesses, all named "Simfoni", which appeared to provide services similar to those offered by the Respondent and therefore may be competing with the Respondent. One of the other directors in these companies was Chirag Shah, co-owner of the business which the Claimant had sold to the Respondent under the SPA. Accordingly, Mr Michael Gibbons (Group Head of Internal Audit and Risk) wrote to the Claimant on 23 March 2016 to inform him that he was suspended from work until further notice pending investigation into an allegation that he was competing with the Respondent's business.

13 On 24 March 2016 the Claimant's solicitor wrote to the Respondent to deny a breach of obligations under the SPA or the contract of employment but confirmed that he would resign as director of the Simfoni companies by 28 March 2016.

14 On 29 March 2016 Mr Simmons conducted an investigatory meeting with the Claimant over the telephone.

Disciplinary Action – March 2016

15 On 30 March 2016 Mr John Priggen (Group Commercial Director) wrote to the Claimant to invite him to a disciplinary hearing the following day, 31 March 2016. The allegations were set out in the letter as follows:

"The meeting is to discuss the following allegation(s):

- *That you have formed, operate, control, and have an interest in, and/or are otherwise connected with Simfoni Limited, Simfoni Group Ltd, Simfoni Procurement Ltd and SImfoni Analytics Limited ("Simfoni");*

- *That until last weekend, you were statutory director for each of these companies;*

- *That Simfoni provides procurement services, including software-based and tail bend procurement services, which are of the kind supplied by MM4, part of the Xchanging group of companies;*

- *We also understand that Simfoni has entered into a partnership agreement to utilise the services of Rosslyn Analytics, a direct competitor of Spikes Cavell, part of Xchanging group of companies;*

- *That you have admitted that you did not inform your line manager that you held the Directorships of these companies. This was in breach of clause 23 of your employment contract and section 12 of the Settlement Agreement and Release (to which you were a party) prohibits you from competing with the business for a period of 3 years.*

If these allegations are found to be true, it would constitute gross misconduct and entitle the Company to summarily terminate your employment without notice or payment in lieu of notice."

16 Having taken legal advice, the Claimant replied on 30 March 2016 to complain about the short notice and asking for time to prepare his position and be able to represent himself against the allegations.

17 On 31 March 2016 Mr Priggen wrote to the Claimant agreeing to reschedule the disciplinary hearing to 12 April 2016. In the meantime, on 30 March 2016, the Respondent paid the Claimant the US$195,000 due under the SPA. The letter referred to the outstanding allegations of breaching the SPA and breaching the terms of the employment contract but nevertheless agreed to pay the outstanding sum.

18 Unfortunately the Claimant suffered a broken right arm on 10 April 2016 and therefore the disciplinary hearing was again rescheduled to take place on 27 April 2016, chaired by Mr Priggen. The Claimant chose not to be accompanied but was given the opportunity to explain and respond to the allegations. Mr Priggen sent a lengthy (20 pages plus appendices) outcome letter to the Claimant on 6 May 2016 which included the following:

"To summarise my findings to date:

- *I have reasonable belief that there are significant similarities between the provision of products and services by SImfoni and Xchanging. This after considering the website information, your views and the views of the business re Simfoni and Xchanging.*

- *I do feel that you held a position[s] with Simfoni and were instrumental in setting up Simfoni, albeit in an administrative capacity and I feel you should have taken more care in being aware of Simfoni's activities/plans prior to agreeing to become a Director of Simfoni to avoid a conflict of interest.*

- *I feel that you negated clause 23 of your terms and conditions of employment in that you were required to seek consent before you became engaged in other businesses. There was no change in this clause even after your reduction in hours. Patricia Dehorn did not say you did not have to seek consent; instead she said (on April 22nd on reflection on events that occurred last year) that she was not aware of anyone drawing your attention to the fact that you would need permission. This requirement already existed and was known to yourself; something you admitted.*

- *I feel that you also negated another paragraph under clause 23 which required to act in the best interests of the Company at all times. I feel that your actions in getting involved in Simfoni contributed to a conflict of interest,*

I have taken on board the mitigations provided by yourself, particularly the fact that Xchanging and Simfoni currently operate procurement and analytics products and services, in different geographical regions, and that fact that your role was fundamentally an administrative one.

From the above I do feel that by your actions the trust and confidence between Xchanging and yourself has been affected and compromised but I do not feel that it has irrevocably broken down, something that would be necessary to lead to a finding of gross misconduct.

5. Before delivering my decision I feel it is also necessary to address some of the points that you raised at the end of the hearing:

- *You had said that you were disgusted that you had been invited to a disciplinary process. I do feel that a disciplinary process was necessary given the facts that have been considered by myself.*

- *I agree that you have participated at all steps of the process.*

- *I do understand that concerns were raised by yourself about the e-mail trail that was attached in Appendix 8 of the hearing pack; a trail that you felt demonstrated that the matter against you was 'dreamt up' to prevent paying you monies owed under the Stock Purchase Agreement. It is my belief that the Company became aware of your actions and had concerns in respect of those actions. The nature of those concerns meant that the non-payment of monies was a possibility. However, the decision was taken to pay the monies owed. I share your concerns over the lack of time originally afforded to you in scheduling the first hearing. However, you requested more time to prepare your case and this was agreed to. Subsequent invites afforded you far more preparation time that is provided for in the Company's Disciplinary policy. I certainly have put a lot of preparation into this matter and my decision is only based on the evidence on this case that is available. I am happy that a full and proper process has been presided over by myself.*

- *I do agree that the investigation hearing was not of a standard that would be expected. These concerns have been raised appropriately by myself. This is another reason why I have been very keen to ensure a thorough preparation for the hearing, to ensure all issues were appropriately discussed at the hearing and to ensure that all evidence was considered thoroughly following the hearing.*

<u>Decision</u>

My decision is to issue you with a Final Written Warning on the grounds that your behaviour/actions, on a number of occasions, constituted breaches of acceptable conduct for the reasons indicated above.

This warning will remain in force for a period of 12 months and will expire on 5th May 2017."

Appeal – May 2016

19 On 10 May 2016 the Claimant submitted an appeal against the final written warning. He stated that he was not questioning the Respondent's right to undertake the disciplinary process based upon a reading of the Simfoni website, but he considered the disciplinary process to have been conducted unfairly and with the aim of removing him from the business on 31 March 2016 in order to avoid making payments due to him under the SPA. He set out various grounds on which he considered the disciplinary process to have been unfair.

20 An appeal meeting was held on 31 May 2016 chaired by Mr Adrian Guttridge (General Manager) and the appeal outcome letter was sent on 13 June 2016. It responded to each matter that was raised by the Claimant in his appeal. In particular *"Notifying the company in respect to additional employment*"; *Competition/conflict of interest*"; and "*Concerns about the disciplinary process"*. It concluded with a determination as follows:

"Determination

As John stated in his letter to you we have here

'….an instance of a senior status employee within the Xchanging group taking up Directorial positions (albeit administrative) in an organisation operating in a same/similar field without consent'.

Although you did not detect a conflict of interest in respect of Simfoni, the company takes a different view. The objective of the employment clause is to ensure that any differing views are managed and understood prior to secondary employment commencing. The involvement of HR at the time of this opportunity presenting itself could have alleviated the present situation; with consent being given or not at the time.

In reviewing all the facts, I believe that the original determination by John Priggen, to lift the suspension but impose a final written warning, is indeed appropriate. I therefore uphold the decision taken and confirm that this stands as per your original outcome letter. There is no further appeal in this process.

I do recognise that you are concerned about having this sanction hang over you. However, as long as you undertake your responsibilities with the same integrity as you had done before taking on Simfoni, then you should not be unduly concerned."

Review – July to December 2016

21 On 7 July 2016 the Claimant presented a further complaint about the disciplinary process to the Respondent's Ethics and Compliance Office. It included the following:

- *A formal disciplinary process was invoked on 23rd of March and I was suspended pending an investigation for gross misconduct.*
- *The driver behind this process wasn't to find out the information that David wanted. It was to remove me from the business as a bad leaver in an attempt to disqualify me from the payment.*
- *The suspension was done without regard for business impact. My manager wasn't even told until after I had been suspended.*
- *David did not get his answer and so was forced into the unenviable position of making the payment with a potential claw-back depending on the outcome of the process.*
- *On May 6th Xchanging confirmed that I hadn't been in breach of the SPA. My suspension was lifted but I was left with a final written warning. By this time I had been suspended for over 6 weeks.*
- *For two weeks after the official end to my suspension I continued to be excluded by the business. It eventually took a formal complaint from me before I got re-integrated into my team on the evening of May 20th. I had been out of the business for 2 months by this point.*
- *I appealed the final written warning. During the appeal process we established that normally David Bauernfeind should have heard the appeal. Due to his prior involvement in this process it was decided that this was not possible. I requested a truly impartial chair from CSC, i.e. someone without any incentive to protect his colleagues. This was rejected and the appeal hearing was predictably a whitewash."*

22 The Respondent agreed to look into this further complaint and Ms Rouse was appointed to conduct an independent review of the disciplinary process. She did so and provided a written outcome to the Claimant in an email dated 7 December 2016 which included the following:

"In dealing with the seven specific points you raised with me:

1. *"Some people (including John Priggen) wanted to remove me from the business by 31st March 2016 in order to avoid paying money owed."*

As set out above, I do not believe this was the case. I believe that Chris Fussell (on discovering your outside business interests) was concerned about making a significant payment to you if *you were dismissed for gross misconduct a couple of days after the payment being made. Therefore, he was concerned to see if the disciplinary procedure could be completed before the payment was due to be made. Therefore, he was concerned to see if the disciplinary procedure could be completed before the payment was due to be made. I can understand this concern and why he would have raised the question. The conclusion was that it could not be concluded fairly before 31st March 2016 and, therefore, the payment was made to you and the procedure continued as normal. John Priggen could have taken a decision to dismiss you as part of the Disciplinary Procedure but issued you with a final written warning instead. He also agreed to reschedule the disciplinary hearing so that you had more time to prepare which meant the hearing went beyond 31st March 2016. This does not support your suggestion that he wanted to remove you from the business by 31st March 2016.*

2. *"They implemented a sham disciplinary process to effect this."*

   I have not seen anything to suggest that the disciplinary procedure was a sham. In fact, the documentation demonstrates a thorough and carefully considered procedure was followed.

   Responding to specific matters you raised:

   - *In some circumstances it isn't appropriate for your manager to be involved, please see point 3 below;*

   - *In cases such as these there wouldn't usually be an informal discussion, as informal discussions are really only intended to deal with minor disciplinary issues such as poor timekeeping;*

   - *Investigations only need to be reasonable and it would appear the facts in your case weren't really disputed and therefore only a limited investigation was necessary, having said that in addition to this I believe the feedback around your concerns following the investigation were listened to an addressed as part of the overall disciplinary process;*

   - *Upon review I do agree that the start of the process was not managed at the standard I would expect and I wonder whether the desire to try and complete it (not necessarily dismiss you) before the 31 March was the reason for that, however, as soon as you raised concerns a full and thorough process was followed and the initial failures were rectified.*

3. *"They did so without my manager being aware."*

Whilst ordinarily an employee's manager would be aware of an ongoing disciplinary procedure because they would usually be involved, this is not always appropriate. In fact, we usually insist that the circumstances of a disciplinary procedure are kept confidential and, therefore, unless there was a specific need for your manager to know the details and circumstances, we (in HR) would advise that the details should not be shared to respect the employee's confidentiality. In any event, I do not see how this supports the procedure being a sham.

4. *"John Priggen was biased during the process, even to the extent of lying during the disciplinary hearing about his impartiality."*

   I have not seen anything to support that the appeal was not fair or that Adrian Guttridge "covered up" for John Priggen.

5. *"The appeal was not fair. Adrian Guttridge effectively "covered up" for John Priggen."*

   I have not seen anything to support that the appeal was not fair or that Adrian Guttridge "covered up" for John Priggen.

6. *"Even after the conclusion of my disciplinary process I was not re-introduced to the business until I had complained formally about the matter with the Head of HR."*

   I appreciate and understand your concerns about this and agree that, once suspension is lifted, an employee should be re-integrated into the business as soon as possible. I do not know the exact circumstances of what happened in your case as Campbell Hair has left Xchanging but I do know that May was a busy and challenging time following the acquisition of CSC and that managers were distracted from their day jobs. I understand that, as soon as you raised this with Campbell, it was resolved.

7. *"The whole process has cost me (and MM4) significantly in terms of lost time and money."*

   I appreciate that this has been a difficult time for you. However, having seen the documentation I do agree that the disciplinary procedure should have been invoked when it did because, in order to protect our business, we need to act quickly when we discover our employees (especially senior employees) may have a potential conflict/competing interest. Having looked at the documentation, I am satisfied that a fair procedure was followed (although I do accept that it got off to a bad start and will pass on to the HR team (anonymously) the lessons learned from the early part of your case) and that the outcome was reasonable in all of the circumstances.

When we spoke we discussed the possibility of your complaints being considered under the Grievance Procedure. Having now had the opportunity to consider your complaints in detail and the relevant documentation, I do not consider that these are matters which should be dealt with under the grievance Procedure as they relate to the Disciplinary Procedure which has been concluded (and which I have independently reviewed).

I appreciate that this may not be the decision you had hoped for but I hope you appreciate that I have taken in reviewing your complaints and can understand why I have reached the conclusions that I have."

23 The Claimant did not agree with Ms Rouse's findings and there followed a series of emails between the Claimant and Ms Rouse in which the Claimant challenged the findings and requested further investigation into his objections to the disciplinary process. Ms Rouse considered that the Claimant had exhausted the company disciplinary procedure and that she had conducted a further review and she considered that the matter was now closed. She wrote to the Claimant on 23 January 2017 as follows:

"Thank you for your email which I have considered.

Other than the first point (where you confirm how you came into possession of the Appendix 8 document – which, in my mind, again confirms the process was fair as that document was voluntarily shared with you are part of the disciplinary process), the points which you have raised were all raised (as part of the appeal and/or as part of your representations to me).

As you have not raised anything new for me to consider, my conclusions remain as previously communicated to you and I am afraid that I do not consider that a further appeal or review should be conducted. You have exhausted the disciplinary procedure and I have reviewed that procedure as Senior Manager for HR Operations for CSC in addition to that appeal process. You have no further right of appeal."

<u>Grievance – January 2017</u>

24 Because Ms Rouse was not prepared to enter into any further discussions with the Claimant about his complaint, on 30 January 2017 he presented a formal grievance to Mr Martin Healiss (Regional HR Director).

25 On 20 February 2017 Mr Healiss replied to the Claimant as follows:

"I refer to your letter of 30th January 2017 which was addressed to me. Apologies for the delay in responding. I note that you wish to raise a grievance in relation to the following matters:

1. *You believe that the company has not recognised that your disciplinary process was incorrectly run, biased and unfair.*

2. *You believe the company has not given you a credible reason for your exclusion from the business after your suspension had been lifted.*

3. *You believe that HR did not provide an adequate professional investigation into the issues, despite leading you to believe that they would.*

I consider that you have had sufficient opportunity to raise matters related to the disciplinary procedure during the disciplinary process, the appeals process and Claire's review. These matters have been raised and considered with three different managers and it was made clear to you by Claire that her review would be the Company's final consideration of those matters. I can see no evidence to support any requirement to make any additional investigations into the complaints you have raised. Whilst you may not agree with the outcome of the disciplinary procedure, appeal or Claire's review, I am satisfied that the Company has properly considered your concerns and, therefore, your concerns will not be further considered by the Company."

26 On 6 March 2017 the Claimant sent an email to Vijay Gopal (Regional General Manager) repeating his complaints about the disciplinary process and the events which followed it.

Resignation - March 2017

27 On 13 March 2017 the Claimant submitted his resignation as follows:

"I am writing to inform you of my resignation and to give you 12 weeks' notice of this.

I am resigning due to the manner in which I have been treated by CSC/Xchanging over the last 12 months.

In light of the company's conduct during this period of time, it is clear to me that the duty of trust and confidence that should exist between an employer and an employee has been totally destroyed by the company, leaving me with no alternative other than to resign."

28 On 31 March 2017 Mr Gopal replied to the Claimant as follows:

"Dear Alan

As I said in my last email, the matters which you are raising relate to the Disciplinary Procedure which was followed in respect of your conduct, the outcome of which has been reviewed twice by different managers. The Company followed due process and is not acting unreasonably or in breach of its obligations of trust and confidence. You have had the opportunity to state your case on three occasions. I am satisfied that the Company has properly considered the matter and there is no need for a further independent investigation.

The Company's Ethics and Compliance Office reviewed the matters you have raised (twice) and concluded that [the] these are not matters which require a formal ethics and compliance investigation at a Corporate level.

The Company takes it very seriously when employees raise concerns with it. This is demonstrated by the fact that the Company HR conducted a further review of the Disciplinary Procedure (including a review of your suspension which was also dealt with and resolved as part of your appeal) even though you had exhausted the appeals procedure. The Company's HR Leader reviewed your complaint since that review, and concluded no further investigation is necessary.

As I said in my last email, I do not accept that you had no option but to resign.

I do not consider that there is anything further to say on this matter as this is the Company's final position."

29 On 5 June 2017 the Claimant presented his complaint to the Employment Tribunal.

RELEVANT LAW

Unfair Constructive Dismissal

30 Section 95 Employment Rights Act 1996 sets out the circumstances in which an employee is dismissed. Constructive dismissal is defined as follows:

> *(1) For the purposes of this part an employee is dismissed by his employer if –*
>
> > *(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

31 Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 - An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. … He must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

32 WA Goold (Pearmak) Ltd v McConnell [1995] IRLR - There is a fundamental implied term in a contract of employment that an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have.

33 Hilton v Shiner Limited [2001] IRLR 727 - The implied term of trust and confidence is qualified by the requirement that the conduct of the employer about which complaint is made must be engaged in without reasonable and proper cause. Thus in order to determine whether there has been a breach of the implied term two matters have to be determined. The first is whether ignoring their cause there have been acts which are likely on their face to seriously damage or destroy the relationship of trust and confidence between employer and employee. The second is whether there is no reasonable and proper cause for those acts. For example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence, yet it could never be argued that the employer was in breach of the term of trust and confidence if he had reasonable and proper cause for taking the disciplinary action.

34 London Borough of Waltham Forest v Omilaju [2005] IRLR 35 - In order to result in a breach of the implied term of trust and confidence, a “final straw”, not itself a breach of contract, must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. Thus, if an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign and affirms the contract, he cannot subsequently rely on those acts to justify a constructive dismissal if the final straw is entirely innocuous and not capable of contributing to that series of earlier acts. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. Thus, the mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfied the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee’s trust and confidence has been undermined is objective.

35 Kaur v Leeds Teaching Hospital NHS Trust [2018] CA – The point being made in Omilaju was that if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the implied term. To hold otherwise would mean that, by failing to object at the first moment that the conduct reached the threshold for breaching the implied term of trust and confidence, the employee lost the right ever to rely on all conduct up to that point. Such a situation would be both unfair and unworkable. Underhill LJ disagreed with the view expressed by HHJ Hand QC in Vairea: provided the last straw forms part of the series (as explained in Omilaju) it does not 'land in an empty scale'. He recommended that tribunals put

Vairea to one side and continue to draw from the pure well of the Omilaju judgment, which contains all that they are likely to need. [The parties were given leave to present further submissions after promulgation of the Kaur decision. The Claimant did so on 4 May 2018 but the Respondent declined to do so on 8 May 2018.]

SUBMISSIONS

Claimant

36 The complaint of Unfair Constructive Dismissal was set out in paragraph 11 of the Claimant's ET1 grounds of complaint as follows:

The unwillingness of the Respondent to deal with both the original disciplinary process and the subsequent grievance in an open, fair, impartial and objective manner, or even within a reasonable timeframe, amounted to a unilateral breach of the duty of trust and confidence, and left the Claimant no alternative but to resign in response to that breach of contract on 13 March 2017.

37 The Claimant's case was put as follows in the Claimant's written closing submissions:

1. The Claimant's claim is for constructive unfair dismissal. The acts relied on, singly and cumulatively, as constituting a breach by the Respondent of the Implied term in the Claimant's contract of employment are contained in the parties' Agreed List of Issues.

2. The Claimant's case can be summarised shortly: The Respondent embarked upon a sham disciplinary process and then failed properly to conduct the review procedures it had led the Claimant to believe would be carried out, or to allow him to raise a grievance. The Claimant has, to this day, still not had serious allegations addressed properly (1) that the Respondent wrongfully sought to deny his right to a fair procedure in order to dismiss him; (2) that he was kept out of the business despite his suspension being lifted; and (3) that the disciplinary decision maker, Mr Priggen, was involved in a plan to remove him, and was biased.

38 In the agreed list of issues, the claim was set out as follows:

1) Did the Respondent breach the implied term of mutual trust and confidence ("the Implied Term") in the Claimant's employment contract?

2) The Claimant alleges that the Respondent was unwilling to deal with both the original disciplinary process and the subsequent grievance in an open, fair, impartial and objective manner or within a reasonable time frame, and that this amounted to a breach of the Implied Term. The Claimant makes the following factual allegations:

(The factual allegations **a)** to **q)** are set out below).

3) *Did the Conduct alleged at 2(a)-(q) happen?*

4) *Did the Conduct, taken together or singly, amount to a breach of the Implied Term (it being understood that any breach of the Implied Term will amount to a repudiatory breach of the employment contract)? The Claimant relies on the matters of paragraph (2)(q) as the last straw.*

5) *Did the Claimant resign on 13 March 2017 in response to any such breach?*

6) *Did the Claimant delay in resigning so as to have waived any such breach and therefore affirm the contract?*

7) *If the Claimant is found to have been dismissed, was the dismissal for a potentially fair reason?*

   The Respondent relies on the following conduct by the Claimant: The Claimant holding a number of roles in the Simfoni Group between August 2015 and March 2016 without the written consent of the Respondent's Head of HR and without taking sufficient care to avoid a potential conflict of interest.

8) *If dismissal was for a potentially fair reason, was dismissal within the range of reasonable responses?*

Respondent

39 The defence was set out in the following paragraphs of the Respondent's ET3 grounds of resistance as follows:

42 – The Respondent followed a fair, impartial and thorough disciplinary process, in circumstances in which it was appropriate for it to do so. This resulted in the issue of a final written warning to the Claimant for the breach by him of an express term of the Employment Contract. The Claimant does not deny that he was in breach of an express term of the Employment Contract.

47 – It is asserted on behalf of the Respondent that although the Claimant may have felt a genuine sense of injustice with regard to the Respondent's conduct, the Respondent's conduct did not, when viewed objectively, amount to a breach of any term whether express or implied, of the Claimant's contract of employment.

52 – It is asserted on behalf of the Respondent that if, which is denied, the Tribunal finds that the Respondent's conduct did amount to a breach of the Claimant's contract of employment, such breach was not sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement to treat the contract as terminated with immediate effect.

55 – It is asserted on behalf of the Respondent that, since the disciplinary appeal process was concluded on 13 June 2016, which is the date on which the appeal outcome was communicated to the Claimant, and since the Claimant continued to

work for the Respondent until his resignation by letter dated 13 March 2017, then, even if, which is denied, the Respondent's conduct with regard to the disciplinary process amounted to a repudiatory breach of the Claimant's contract of employment, such breach was waived by the Claimant by his continued performance of the contract.

56 – If, which is denied, it is found that the Claimant was entitled to terminate his contract of employment without notice by reason of the Respondent's conduct, the Respondent will argue that the dismissal was fair having regard to section 98(4) of the Employment Rights Act 1996 on the basis that its conduct was reasonable in all the circumstances.

57 – If, which is denied, it is found that the Claimant's dismissal was unfair, the Respondent contends that any compensation awarded to the Claimant should be reduced to reflect the Claimant's contributory conduct.

40 The Respondent relied upon the EAT's review of the decision in Malik v BICC [1997] UK HL23 in which it was said:

Paragraph 12: This is a demanding test. It has been held… that simply acting in an unreasonable manner is not sufficient. The word "qualifying" damage is "seriously". This is a word of significant emphasis.

The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, it was "conduct with which an employee could not be expected to put up". In Tullett Prebon Plc v BGC Brokers LP & Ors [2011] IRLR 420, it was said that the employer must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.

41 The Respondent also relied on the unreported case of Assamoi v Spirit Pub Company (Services) Ltd [2011] UKEAT/0050/11/LA where it was said that:

"There is a distinction between preventing matters escalating into a breach of the implied term of mutual trust and confidence and trying to cure a breach which has already taken place."

DECISION

42 The Tribunal considered the allegations **a)** to **q)** in turn.

a) That the Respondent requested that the Claimant attend a disciplinary hearing with less than 24 hours' notice and without warning of the charges against him

43 The Tribunal found this factually proved. The Respondent's disciplinary policy requires at least 24 hours' notice in advance of any formal disciplinary hearing.

However, when the Claimant objected to this short notice the Respondent immediately agreed to do a postponement. The Respondent had provided the Claimant with details of the allegations made against him in the letters of 23 March 2016 and 30 March 2016. They were repeated in the letter dated 31 March 2016 in which the Claimant's request for a postponement was granted. Eventually, the disciplinary hearing took place on 27 April 2016.

44 The initial short notice was unreasonable and in breach of the Respondent's disciplinary policy but it was short-lived, immediately withdrawn and was not so serious as to amount to a fundamental breach.

b) That the Respondent instituted and continued with the disciplinary allegations with a view to depriving the Claimant of substantial deferred consideration arising out of a company sale

45 It is true that, in the emails in "Appendix 8" (see extract from final written warning above) the Respondent considered expediting the disciplinary process in view of the deadline of 31 March 2016 for payment of the deferred amount under the SPA of US$195,000. The payment would be forfeit if the Claimant was found guilty of gross misconduct and thereby designated a "bad leaver" under the SPA provisions. The Tribunal found that that consideration was neither unreasonable nor a fundamental breach. In the email dated 26 March 2015, Mr Fussell (Respondent's Head of Legal) said:

"The timing is unfortunate – the final earn-out payment ($195k for AB) is due before 31 March. If AB is a "bad leaver" prior to that date then he loses his entitlement. Whilst we cannot prejudge the outcome, it would be somewhat galling if we ended up dismissing him shortly after a $195k payout. I need your urgent guidance as to what we can and cannot do given the constraints of the policies and procedures, who makes the decision to dismiss etc. We need to move fast."

46 It would have been surprising if the Respondent had not, for commercial reasons, considered that matter in view of the timing coincidence between the allegations of misconduct and the due date for payment. The institution and continuation of the disciplinary allegations was not with a view to depriving the Claimant of the payment but the coincidence of timing of events meant that the Respondent was bound to consider the effect of one on the other. There was nothing unreasonable about that. It had reasonable and proper cause. Having balanced fairness against a quick dismissal to avoid payment, the Respondent opted for fairness. In the event, the payment was made on 30 March 2016 and the eventual outcome of the disciplinary process did not amount to dismissal.

47 The mere consideration of non-payment, followed quickly by rejection of that consideration, in the context of the already proceeding disciplinary action, did not amount to a breach of trust and confidence. It was action preventing matters from escalating into a breach.

c) That the Respondent unfairly issued the Claimant with a disciplinary sanction on 6 May 2016

48 The issuing of the final written warning on 6 May 2016 was neither unfair nor a fundamental breach. Mr Priggen's outcome letter was by any standards lengthy, detailed and well-reasoned. The Claimant himself accepted in his appeal: *"I have never questioned Xchanging's right to invoke a disciplinary process based on a reading of the Simfoni website.*" The allegation of breach of the SPA was not upheld and the outcome letter addressed in detail the mitigation provided by the Claimant. It also addressed the concerns that he raised during the course of the disciplinary process regarding the Appendix 8 email trail, the short notice in scheduling the first hearing, and the fact that the investigation hearing was substandard. The final written warning, in the circumstances, was not outside the range of reasonable responses. The decision was fair, balanced and reasoned.

d) That the Respondent did not permit the Claimant to return to work until 20 May 2016 despite lifting his suspension

49 The delay in reinstating the Claimant was explained by Mr Adam Selsby (the Claimant's line manager) in an email dated 24 July 2017 which read as follows:

"Regarding your suspension, to my knowledge, there was no notice given to me or anyone at MM4 that you would be suspended. I simply got an email saying you were to be removed from all aspects of the business effective immediately. This was disruptive to the business on a number of levels, from the human element both within MM4 and with our vendor partners who have worked with you for years, and from a productivity standpoint because we all had to shift gears and find all of the many different systems you were in and assign a new owner and learn whatever "it" was. While you're gone it was radio silent, save for an email on April 27th from, Jonathan Moye, stating the hearing was going to take place that day, and on May 6th Jonathan sent an email stating to reinstate IT access. I don't recall the extent IT access was reinstated but to an extent it was. During your suspension, significant cost-cutting measures were set in motion. There was a good chance your role would be eliminated, so while cost cutting measures were being executed, and with a good possibility it would result in your departure yet again, we took time before fully integrated you into more critical work activities and engagement with dev teams. Once your role was firm, we got you back fully engaged."

50 The Claimant said that Mr Selsby had told him that he was not permitted to reintegrate him back into the business, notwithstanding the fact that his suspension had been lifted. That is at odds with the statement of Mr Selsby above. There was no obvious reason, other than that stated by Mr Selsby, why there should be a delay in reintegration. The reasons given are plausible and uncontradicted by any other documentary evidence. Any delay was not unreasonable nor a fundamental breach.

e) That the Respondent unreasonably and without explanation delayed addressing the Claimant's subsequent appeal

51 This allegation was withdrawn during the course of the hearing.

f) That the Respondent failed to consider the proper person to conduct the appeal in light of the seniority of the people against whom the Claimant's allegations were made

52 This allegation was withdrawn during the course of the hearing.

g) That the Respondent on 13 June 2016 unfairly upheld the Claimant's final written warning

53 It is correct that the final written warning was upheld on appeal but the decision was not unfair. The Claimant was granted a right of appeal and did so. An appeal meeting was held on 31 May 2016 attended by the Claimant and chaired by Mr Adrian Guttridge.

54 In the Claimant's closing submission, he complained that the finding was that there was no competition between Simfoni and the Respondent company and that there was only a potential conflict with the Respondent's activities. That was part of Mr Guttridge's determination and it was not unreasonable for him to rely upon that as justification for upholding the sanction of final written warning.

55 The Claimant was also critical of Mr Guttridge's failure to address the Claimant's allegation that Mr Priggen lied about his impartiality and had not been a fair and impartial decision-maker and that new evidence had been introduced. It is correct there is no specific reference to these matters in the appeal outcome but it is clear that Mr Guttridge viewed all of the facts when he examined the original determination by Mr Priggen and found it to have been appropriate.

56 The Respondent accepted that Mr Priggen had been copied in to some of the Appendix 8 correspondence. He never denied receiving copies of the correspondence but asserted that he had not read them. There is no doubt that Mr Priggen addressed the Appendix 8 correspondence in his outcome letter and it was also looked into by Mr Guttridge who said:

"I would also like to consider your view the approach taken was an attempt to exit you from the business before the payment related to the SPA… I have reviewed the process and undertakings within this entire process and the steps taken by a number of individuals to ensure that the full facts of the case have been sought prior to any formal sanction being presented to you and I am of the view that the disciplinary process has been thorough."

57 Although Mr Guttridge did not address the issue of Mr Priggen's knowledge of the correspondence directly, it is clear that he looked at the case as a whole and provided a thorough, detailed and reasoned outcome. The Tribunal can find no unfairness or fundamental breach in the conduct of the appeal and the outcome.

h) That Claire Rouse refused to meet with the Claimant to discuss the nature of his complaints
i) That there was unreasonable and unexplained delay by Ms Rouse in concluding her investigation into the Respondent's actions
j) That Ms Rouse failed to consider, sufficiently or at all, the material facts and concerns put by the Claimant
k) That Ms Rouse refused to discuss her findings with him

58 Ms Rouse did not refuse to meet with the Claimant although they did not in fact meet face to face. A telephone meeting took place between them on 12 October 2016 and there was extensive email correspondence between them. She confirmed in her evidence before the Tribunal that she conducted a review of the process by way of examining documentation and did not meet with any of the participants.

59 So far as delay was concerned, she kept the Claimant informed of reasons for delay including work commitments, annual leave and a bereavement in her family. There was delay in completing her review, which took from 17 October 2016 to 7 December 2016, but there were good reasons why she was unable to complete the matter sooner.

60 Ms Rouse considered all the material provided to her by the Claimant. He had sent a considerable amount of paperwork (over 100 pages) for her to consider, and she dealt with the seven specific points the Claimant had raised with her in considerable detail in her outcome dated 7 December 2016. The outcome is quoted extensively above.

61 After the Claimant had received her review outcome, it is correct that she refused to agree to a meeting or to receive any further material from him. That was a reasonable stance to take in the circumstances. She had provided the outcome which the Claimant was unwilling to accept. Her explanation in her email dated 23 January 2017 (quoted above) sets out her reasons why she refused to take the matter any further.

l) That the Respondent failed to acknowledge the Claimant's grievance when he initially raised it in January 2017
m) That the Respondent on 13 February 2017 closed the Claimant's grievance without any explanation
n) That the Respondent informed the Claimant, on or around 20 February 2017, that no further action would be taken to deal with his concerns
o) That the Respondent told the Claimant on 6 March 2017 that an investigation would be raised but did not respond to the Claimant's requests for clarity on the applicability of the grievance process
p) That the Respondent passed the grievance back to the Ethics department to deal with on 10 March 2017
q) That the Respondent demonstrated, through the actions set out above k) to p) , that it had no intention of offering a reasonable opportunity to the Claimant to redress his grievances.

62 It is correct that the Respondent did not undertake a formal grievance process as requested by the Claimant in January/February 2017. The reason is set out in Mr Healiss's email dated 20 February 2017 which is quoted above.

63 By that time, the Claimant's conduct and concerns had been considered by three different managers under three different processes. The grievance policy includes the following under the heading "Scope":

"This policy… cannot usually be used where the complaint refers to an issue which is being dealt with under another process. For example, the disciplinary, absence or employee performance improvement policies, redundancy or restructure process and consultation. …"

CONCLUSIONS

64 The Tribunal did not find that the Respondent wrongfully sought to deny the Claimant's right to a fair procedure in order to dismiss him. On the contrary, the Respondent decided upon a fair procedure rather than an unfair one and he was not dismissed. His SPA deferred payment was paid notwithstanding the reasonable commercial misgivings of the Respondent.

65 His reintegration into the business after the suspension was lifted was delayed but there was a plausible reason for that. The fact is that the suspension was lifted and he was reintegrated into the business.

66 The Tribunal did not find that the disciplinary decision-maker, Mr Priggen, was involved in any plan to remove him and was biased. On the contrary, it was clear that although he was copied into some of the Appendix 8 correspondence, he was not the author of any of the correspondence and, as found above, his outcome letter was clear, detailed and evidence based. There was no evidence that he was biased against the Claimant.

67 The conduct of the Respondent throughout had reasonable and proper cause. The Claimant breached clause 23 of his contract of employment and he accepted that it was not unreasonable for disciplinary action to have been invoked against him in the circumstances which prevailed in March 2016. He took it upon himself to decide whether there was any conflict, or potential conflict, with the Respondent's business whereas the clause 23 made clear that that was, not unreasonably, a matter for the Respondent to decide.

68 Thereafter, the Respondent undertook a thorough and well documented disciplinary process which was reasonable and procedurally fair, in accordance with its own disciplinary policy and which complied with the basic requirements of the ACAS Code of Practice. He was given a right of appeal and a further opportunity for his complaints to be considered in the form of Ms Rouse's independent review.

69 In this case, the Claimant's position was that there was a conspiracy to dismiss him in order to avoid paying him the deferred SPA payment. It ignores the stark fact that he was paid and was not dismissed.

70 His case also involved an allegation that there was a failure to properly investigate and fairly deal with his concerns regarding the disciplinary process. On the contrary, there was a fair procedure followed at the disciplinary hearing, at the appeal hearing, and by way of an independent review by Mrs Rouse. As stated in Kaur (above), a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee.

71 He also complained that he was not allowed to pursue a grievance when his concerns had already been considered by three senior managers and, in any event, such a grievance was contrary to the Respondent's grievance policy and a proper disciplinary process had already been followed. In the circumstances, although the Claimant disagreed with the outcomes, he was afforded a reasonable opportunity to obtain redress of his grievances.

72 Overall, viewed objectively, there was nothing in the Respondent's conduct which did not have reasonable and proper cause or which amounted to a breach of trust and confidence, either individually or cumulatively.

73 The Claimant was not constructively dismissed and the claim of constructive dismissal fails.

_____
Employment Judge Vowles

Date: 23 May 2018

Sent to the parties on:

…….....

.....
For the Tribunals Office