

JERSEY / JUDGMENT

Julian Radcliffe v States Employment Board

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IN THE JERSEY EMPLOYMENT AND DISCRIMINATION TRIBUNAL IN THE MATTER: BETWEEN JULIAN RADCLIFFE CLAIMANT AND STATES EMPLOYMENT BOARD RESPONDENT TRIBUNAL JUDGMENT Reference: [2019] TRE 204 Hearing Date: 21 and 22 July 2020 Before: Mrs H Westmacott, Deputy Chairman Appearance: The Claimant, in person For the Respondent, Advocate J Tobias DECISION The Claimant's claim for constructive unfair dismissal is rejected.

REASONS

Introduction

1. The Claimant commenced employment with the Respondent within the Education Department of the Government of Jersey on 4 April 2013. The Claimant gave notice of his resignation to the Respondent on 5 July 2019 and his employment ended on 29 September 2019.
2. On 15 October 2019 the Claimant submitted a claim to the Tribunal against the Respondent for constructive unfair dismissal. On 6 November 2019 the Respondent filed a response with the Tribunal indicating its intention to defend this claim.
3. In summary, the Claimant is claiming that the Respondent engaged in a course of conduct, culminating in a final straw event, which amounted to a fundamental breach of the term of trust and confidence implied into the employment contract between the parties and, accordingly, the Claimant was entitled to treat himself as having been dismissed and terminate his employment relationship with the Respondent.
4. The Claimant asserts that the course of conduct was made up of the following acts by the Respondent:
 - (1) failure to evaluate the role the Claimant was appointed to in August 2017;
 - (2) incremental changes made to the Claimant's role between March 2018 and June 2019;
 - (3) the manner in which those changes were communicated to the Claimant;
 - (4) failure to adequately discuss or consult with the Claimant regarding his role; and

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- (5) the Claimant's removal from the Safeguarding Partnership Board and the way in which it was done.
5. In summary, the Respondent denies that it committed any breach of contract at all, let alone any breach that was sufficiently serious to entitle the Claimant to resign. The Respondent argues that the Claimant resigned of his own volition when he was offered a promotion and a higher salary elsewhere. 6. A case management hearing was held on 8 January 2020 ("CMH"), at which this matter was set down for a final hearing ("Hearing"), which was heard on 21 and 22 July 2020. This judgment records my decision following that Hearing and the reasons for that decision. Evidence
7. I received witness statements and heard oral evidence at the Hearing from the following individuals, all of whom work or have worked for the Government of Jersey in the following roles:
- (1) For the Claimant:
- (a) the Claimant, Principal Educational Psychologist and subsequently Director of Inclusion and Early Intervention;
- (b) KR, Head of Service for Social and Mental Health and Virtual School Head;
- (2) For the Respondent:
- (a) SO, Deputy Chief Education Officer and subsequently Group Director, Education;
- (b) MR, Director General, Children, Young People, Education and Skills; and
- (c) DD, Head of Organisational Development, Chief Operating Office, People Services, seconded in 2018 to the team that oversaw the restructure of Government departments.
8. The Respondent provided an agreed file of documents ("File") for the Hearing. References in square brackets below are, unless the context suggests otherwise, to the relevant page of the File. Those followed by § refer to a paragraph on that page.
9. Legal submissions were made on behalf of the Respondent and both parties made closing statements at the end of the Hearing.
10. When making my judgment I considered all of the evidence both oral and written provided by each of the parties and made the findings of fact set out below. Only the facts that are relevant to the issues to be determined have been summarised in this judgment. Where there have been factual disputes to resolve I have done so on the balance of probabilities on the basis of my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the oral and written evidence. The

Facts

11. The Claimant commenced employment with the Respondent as Principal Educational Psychologist within the Education Department on 4 April 2013. Over time the Claimant took on additional responsibilities and, by the summer of 2017, the Claimant was fulfilling a wider role than the one he was originally appointed to.
12. On 1 August 2017, the Claimant was appointed to the role of Director of Inclusion and Early Intervention, also within the Education Department.
13. The Claimant asserts that this new role was a big step up from the role he had originally been appointed to, with a higher level of decision-making and accountability and a vastly increased number of direct reports and budget. However, he remained at the same grade throughout his employment with the Respondent.
14. SO acknowledged that the Claimant's new role was very different and said he felt that the Claimant's appointment to Director of Inclusion and Early Intervention was recognition of how the Claimant's role had grown over time. He also noted that jobs within the same grade can have very different scope in terms of budget and numbers of direct reports. Failure to Evaluate Role
15. The Claimant asserted that his appointment to the role of Director of Inclusion and Early Intervention came about after he was approached by a senior member of staff about being "slotted in" to this role. The Claimant said he would have preferred to be part of an open recruitment process rather than being slotted in, but he agreed to the slot-in on the basis that this new post would be evaluated. This was reflected in a letter from JD, the then Chief Education Officer, dated 24 July 2017, which confirmed that the "new role and job description will be evaluated through the HAY process." [60]
16. The Claimant was not given a job description for his new role. Consequently, in early 2018, the Claimant prepared his own job description, based upon the work he had been doing. The Claimant received comments from the Respondent's Human Resources team and incorporated these into this job description before sending it on to JD on 17 February 2018 under cover of an email stating "please see attached my [job description], which I understand you intend to have evaluated". [74]
17. On 4 April 2018 a further version of the job description was sent to the Job Evaluation team by the Human Resources team under cover of an email stating "A review and evaluation of this role has been pending for a considerable amount of time hence it is now being sent in to be sent to Hay please for evaluation at the request of the Chief Officer." [81]
18. On 26 April 2018 the Job Evaluation team responded to the Human Resources team stating that they "are not in a position to process this request at present due to the restructuring of the top two tiers of the organization, and the impact this will have on the rest of the organization." [94]

19. Accordingly the Claimant's role was not evaluated in the 8 months following his appointment and, after this time, the Respondent indicated that it no longer intended to evaluate the Claimant's role outside of the "whole of Government" restructuring process. Restructuring
20. On 6 March 2018 an announcement was made by the States of Jersey Chief Executive to all of the Respondent's employees to the effect that there would be a comprehensive restructuring of the States of Jersey public service departments (the "March 2018 Announcement") [75]. The proposed new structure set out in the March 2018 Announcement referred to a new Department for Children, Young People, Education and Skills ("CYPES"), within which the Education Department would sit going forward [30§7].
21. The announcement made reference to various consultations that would be undertaken as part of the restructuring, including:
 - (1) a 45-day consultation amongst tier 1 and 2 managers;
 - (2) a 90-day consultation on the overall restructuring proposals commencing on 6 March 2018 and ending on 4 June 2018; and
 - (3) a consultation for tier 3 managers commencing during the 90-day consultation period on a date to be determined. [77]
22. Following the March 2018 Announcement and the email from the Job Evaluation team on 24 April 2018, it appears to be the Respondent's position that there would not, and indeed should not, be any review or evaluation of the Claimant's role until the consultation for tier 3 managers began, as the Claimant was in a tier 3 position.
23. SO gave evidence that, in the event, the tier 3 manager's consultation did not begin until 22 October 2019 [32§13], over 18 months after the March 2018 Announcement and after the Claimant's employment terminated.
24. When asked why the restructure took as long as it did, DD explained that it was decided that a phased approach would be taken, in accordance with which there was to be consultation on tier 1 and 2 roles and, once those roles had been decided upon, they needed to be filled before moving on to tier 3 and 4 roles. This took time as, once the roles had been identified, the job descriptions had to be written and then the individuals recruited.
25. DD explained that the lead-time for appointing tier 1 and 2 staff is significant; it involves independent panels, external recruitment, assessments and interviews and, once selected, most candidates had to give 3 to 6 months' notice to their current employer. The process could take up to 9 months and this had to be done first with tier 1 staff, then tier 2. Only after this would consultation start for tier 3 staff.
26. The Claimant recalled feeling worried about his role following the March 2018 Announcement. He referred to a paragraph in the announcement that stated that there would be "22 fewer senior roles in the first phase of the restructuring" [75]. In addition, at a

meeting regarding the March 2018 Announcement, which was attended by approximately 200 of the more senior employees of the Respondent, the Claimant recalled the Chief Executive saying that the Government of Jersey was “fat” on directors and some would go. 27. DD gave evidence to say that at the time of the announcement reassurances had also been given that, while there would be changes in job roles, there would not be redundancies. The Claimant believed that those “in the know” may have been more certain of this but for those on the fringe, such as himself, the announcement was very worrying. In addition, when the Claimant saw the new structure chart which was provided as part of the March 2018 Announcement he said he realised his role was “a bit of an anomaly” as aspects of it would be split across different directorates and this made things more worrying for him. Changes to Role

28. The Claimant recalls that, around July 2018, at his first one to one meeting with MR (who had been newly appointed as Interim Director General of CYPES), MR advised him that his future post was likely to involve a reduction in salary, title and breadth of responsibility. The Claimant was surprised that he had been told this by a newly appointed Director General before any consultation on his role had taken place and it made him feel as though his role had been predetermined. This added to his uncertainty surrounding his future.
29. MR had a different interpretation of this meeting. He did not intend to give, and did not think he had given, the impression that the Claimant’s salary and responsibilities would reduce. He did not expect the Claimant’s salary or the value of his role to change and so would not have said it was likely to. MR thought he may have said the Claimant’s title could change to “Head of” rather than “Director of” as this was the title that was being given to tier 3 employees. He also believed he would have said that the Claimant’s job would need to be evaluated and that following evaluation it could change in a number of ways.
30. Following this meeting the Claimant asserts that various areas of responsibility within his job description were handed over to other senior employees as set out below.
31. The Respondent’s position in relation to all of these areas of responsibility was that there was no intention for the Claimant to stop working on them; he was simply being asked to work within a new reporting structure. As a result of the restructure, various tier 2 employees had been “slotted in” above the Claimant and asked to provide strategic leadership on certain of the Claimant’s responsibilities, but the intention was for the day-to-day developments in these areas to remain with the Claimant. Not in Education, Employment or Training (“NEET”)
32. In September 2018, a new director, SF, was appointed within CYPES. SF’s job description had responsibilities and oversight for NEET Strategy. This was a significant strategic initiative that sat within the Claimant’s job description. The Claimant asserts that he was asked to meet with SF and hand over his responsibilities in this area to her, which he did. Early Help / Right Help Right Time (“RHRT”)

33. The Claimant asserts that he initially heard from one of the Group Directors within CYPES, SD, at a board meeting which was held shortly after the March 2018 Announcement and attended by approximately 30 people, that she would be responsible for Early Help going forward [45].
34. Approximately 9 months after this, KR, who was a Head of Service reporting to the Claimant, gave evidence that she met with MR on 23 January 2019 and at that meeting MR showed her a structure chart that covered some of the Claimant's service areas. In particular, KR commented that the chart showed that the Early Help model would now be sitting under a different Directorate [49].
35. KR said that when she was shown the chart MR asked her to keep it confidential. However, as she felt this information would have had a significant impact on some of her close colleagues she did not feel comfortable being privy to it while they were not. So, on 25 January 2019, she shared her recollection of the chart at a meeting chaired by the Claimant and attended by several other Heads of Service.
36. Finally, on 6 March 2019, MR sent an email to the CYPES department which stated that SD had been appointed to "take overall responsibility for the 'change for children' Programme which is a catch-all working title for the department's rolling programme of major service reviews, redesign and transformation (for example the Early Help/Right Help Right Time Project ... and much, much more)" [97]. The Claimant submits that at around the same time as this email MR asked the Claimant to hold off on doing any further Early Help / RHRT work. MR did not recall this but said he might have suggested the Claimant's work on this was paused to allow the dust to settle after the announcement of SD's new appointment.
37. The Claimant asserted that, prior to this, Early Help, which later became referred to as RHRT, was an important part of his role. He had undertaken a significant amount of work on it and it was something he was known for. In addition, SO recognised that the Claimant's previous line manager, CC, was not as "hands on" in respect of some of the Early Help responsibilities as SD was so, after SD was appointed, it could have felt to the Claimant that work was being taken away from him. Family and Parenting Services and Early Intervention
38. In his email of 6 March 2019, MR also made reference to another member of staff, NM, taking on "the senior leadership role for Children's Services" [97]. The Claimant subsequently requested a copy of the job description for NM's new role, which makes reference to the Family and Parenting and Early Intervention service areas [102], both of which the Claimant asserts fell within his areas of responsibility. Proposed Physical Relocation of Services

39. In May 2019 an accommodation plan was presented to the Education department which proposed that teams which fell within the Claimant's area of responsibility (the Early Years and EAL Service teams) were relocated to sit with Heads of Service elsewhere. In addition, the accommodation plan did not mention the Parenting and Family Support teams, which also fell within the Claimant's area of responsibility. The Claimant took this to mean that a decision to move those services to another Directorate had already been made.
40. SO said that the accommodation plan, which was never implemented, was simply a proposal that had been prepared in order to start a discussion on where people should sit; it did not indicate any change of role. The service areas that were not mentioned on the plan were left off as they sat in a different building. SO also said that he recalled a discussion where he reassured the Claimant about the plan. Communications Regarding Changes
41. The Claimant asserts that, as well as the increased uncertainty as a result of the changes referred to above, he experienced significant embarrassment as he was not advised in advance that these areas would be passed over to or overseen by someone else and he found out about the changes in a public forum. The Claimant noted that NM in particular was surprised that he had not been advised that she would be taking over elements of his role.
42. In addition, the Claimant asserted that when he raised the changes with his line manager, SO, he seemed unaware or unclear of what was happening and was unable to provide any explanations [47].
43. DD commented that an employee's line manager should be aware of any changes to their direct report's roles and when asked what process should be followed if an employee's role was changing DD said that she would expect the line manager to speak to the Human Resources team to determine the process. If the change was not significant they may not need to do anything other than have a conversation and informal consultation with the employee. If the change was significant (for example if the new role was unrecognisable from the old one or if there was an impact on pay) a formal consultation may be needed.
44. However, DD also noted that, in the context of the restructuring, tier 2 individuals being slotted in to oversee tier 3 responsibilities would not be considered a change to the tier 3 role. Failure to Discuss Role
45. DD said that this was the first whole of Government restructure in Jersey in her 30 years of experience. It was a new process and a determination had to be made on how best to manage it. It was decided that there had to be a clear process that would be followed to make sure that all employees were dealt with in the same way and that process had to be complied with as far as possible.

46. However, she also commented that not everything “fits to standard”. Accordingly, as part of the overall restructuring process, an assessment was made as to whether any tier 3 roles were impacted sufficiently by the initial phase of the restructuring and, if they were, one to one meetings were held with those employees prior to the tier 3 review. No such meetings were held with the Claimant.
47. The Claimant gave evidence to say that he was labeled as a tier 3 employee without consideration being given to the fact that elements of his role fell within tier 2. He asserted that his role should have been looked at on a more individual basis. In addition, he noted that, as his role appeared to sit across a number of different directorates in the new structure, greater consideration should have been given to the impact the restructure would have had on it.
48. The Respondent’s position is that all employees were invited to submit comments in relation to the overall restructuring proposals as part of the 90-day consultation process, and such concerns could have been raised then. The Claimant noted that there was a big difference between being consulted upon one’s own individual role and invited to comment on the overall restructuring process. Discussions with Line Manager
49. The Claimant gave evidence to say that he tried to discuss his role on a number of occasions with SO and, in particular, areas of his role which he felt were being handed over to other people. However, SO did not seem to have knowledge of what was happening with these areas of responsibility and was not able to give him any clarity on his role.
50. SO stated that, while he could not share confidential information regarding the restructuring with the Claimant, he did give him general reassurance, saying that his skills would always be needed, and in response to concerns regarding being demoted he reassured the Claimant that the new structure would still have a tier 3 role aligned with his current role [32§14]. At the Hearing the Claimant recalled that he did have one or two conversations with SO of this nature, although he noted that while he may have been told there was a future role for him it could not be the same as his previous role as his responsibilities had already changed. Discussions with Director General
51. The Claimant gave evidence that he requested discussions with and clarity from MR regarding his role in January and June 2019. While the Claimant also emailed MR regarding his concerns in May 2019 his email concluded by saying that he was only sharing his concerns as he thought MR would want to know how he was feeling and “nothing more” [122].
52. At the Hearing MR stated that he declined to hold discussions with the Claimant regarding his role as he wanted to “play a straight bat” and did not consider it right or proper to discuss employees’ individual roles with them outside of the wider restructuring process. He felt that everyone should be treated in the same transparent way and no bespoke arrangements should be made, unless there were exceptional circumstances.

53. The Claimant noted that his request to meet with MR in January 2019 was made in the same week that MR met with KR and showed her the structure chart. At the Hearing MR explained that he met with KR to discuss general ideas she had sent to him and how they might influence the structure going forward. The meeting was not to discuss her individual role. MR had declined to meet with the Claimant as the Claimant wished to discuss his role rather than make a general proposal regarding structure. The Claimant commented that he had also made a wider proposal regarding the structure of the CYPES department but MR could only recall the Claimant requesting discussions regarding his specific role.
54. The Claimant's request in June 2019 was made by way of email sent to MR on 19 June 2019 [131], in which the Claimant flagged his concerns regarding areas of his role moving across to other directors and stating that he did not feel reassured in relation to his future with the Respondent. At the Hearing the Claimant explained that he sent this email as he had been living with uncertainty in his role for a prolonged period of time, over 18 months, and he found the uncertainty very difficult.
55. MR confirmed that he was aware of the Claimant's growing concern regarding his role and said he tried to give a general sense of the importance of the Claimant's responsibilities and to reassure him that these would not be devalued. However, he was unable to give any specific assurances. He also noted that he was not the Claimant's direct line manager and it would primarily have been for his line manager to allay these concerns.
56. DD confirmed that it was up to relevant line managers to support tier 3 staff while they were awaiting consultation on their roles. However, she also mentioned that there was general support available in relation to the restructuring; workshops were held in the departments and support was available via the Respondent's grievance procedure and health insurance cover. Removal from the Safeguarding Partnership Board
57. While attending a Safeguarding Partnership Board ("SPB") Core Business Group meeting, which appears to have taken place on 11 June 2019 [126], the Independent Chair of the SPB confirmed to all the attendees that the Claimant was no longer a member of the SPB. The Claimant contends that no mention of this had been made to him in advance of that meeting; the announcement was a total surprise and highly embarrassing to him and the other attendees of the meeting.
58. The Claimant explained that the SPB was a high profile strategic board and, in effect, being removed from it meant being removed from all safeguarding responsibilities. The impact of being removed from the board was significant as it was the forum in which the Claimant met with senior colleagues from other departments. Being removed from the SPB in this way would have led his peers to question why he was being removed so suddenly and without warning.
59. Following this meeting the Claimant alleged that he raised his removal from the SPB with MR who said that he had not meant to share his intention to remove the Claimant at this stage. MR gave evidence to say that, while it had been his intention to stand the Claimant

down from the SPB (as there were currently too many CYPES department representatives on the board), it had been a mistake for this to be communicated to the Claimant at that time. The mistake happened because in early 2019 MR agreed with the then current Chair of the SPB that the Claimant should be stood down, but MR subsequently decided to wait until the new Chair of the SPB was appointed to do this. Unfortunately this message was not relayed to the current Chair before she advised the Claimant he would be standing down [39]. MR said that he had apologised to the Claimant for the message being passed on in this way [40§14].

60. MR also noted that senior officers are removed from boards from time to time and it is “part and parcel of the role flexing in response to changing business need”. He also noted that shortly prior to the Claimant being stood down from the SPB, in spring 2019, the Claimant was asked to chair a new group, the RHRT panel. [39§13]
61. The Claimant asserted that his removal from the SPB was the last straw and that after this his position with the Respondent became untenable. This, together with the background of the other changes that had been made to his role and the fact that he did not receive any further assurance on his role, left him feeling he had no choice but to resign, which he did on 5 July 2019. Resignation
62. Advocate Tobias referred to a CYPES consultation document dated June 2019, which indicated that a consultation for tier 3 roles would begin in September 2019 [133]. She concluded that the Claimant was, therefore, on notice that the consultation process for his role was imminent when he resigned.
63. The Claimant acknowledged this document and noted that he had seen numerous updates on the process which indicated that the process would move forward, but which were not followed through. Accordingly he had lost confidence that things would move forward when promised.
64. KR also gave evidence to say that there was a lack of clarity and that she received mixed messages in relation to the restructuring process. She noted that several times when she was expecting an announcement on the next phase she was instead notified that there was a further delay.
65. When asked at the Hearing why he did not mention in his resignation email [151] that he felt he had been constructively dismissed, the Claimant explained that he did not see what he could gain from doing so; he was aware he would require a reference from the Respondent and he did not want to be seen as an agitator. However, he asserted that he alluded to feeling this way to SO prior to his resignation and he specifically mentioned it in his exit interview. At the Hearing SO said he does not recall this.
66. The Claimant noted that he should perhaps have resigned earlier, or in response to one of the other breaches that he has referred to. However, he did not do so because, as a result of working on a small island, resigning would have meant moving his entire family and their

life away from Jersey. The Claimant submitted that the decision to leave was a huge decision for him. He loves Jersey; he has many friends here and he had, relatively recently, purchased a house on the island. In addition, his family had attachments in Jersey, indeed one of his children was part way through their exams at school on the island.

67. When asked at the Hearing about applications he had made for other jobs, the Claimant explained that these were not made due to ambition or a wish for a higher salary; in fact his take home pay for all of them, including the job he ultimately moved to, was less than he received from the Respondent. He stated that he made the job applications to ensure he had a “plan B” to provide security for his family’s future if the uncertainty with his role with the Respondent could not be resolved. The Law
68. Article 62 EJJ sets out the circumstances in which an employee is dismissed including the following, which is commonly known as constructive dismissal: “62 Circumstances in which an employee is dismissed
- (1) For the purposes of this Part an employee is dismissed by his or her employer if ...
 - (c) the employee terminates the contract under which he or she is employed (with or without notice) in circumstances in which the employee is entitled to terminate it without notice by reason of the employer's conduct.”
69. It is well established under case law that the conditions which must be met to prove constructive dismissal are:
- (1) the employer must be in breach of either an express or an implied contractual term;
 - (2) the breach must be fundamental, amounting to a repudiatory breach;
 - (3) the employee must resign, at least in part, in response to the breach; and
 - (4) the employee must not have waived the breach and affirmed the contract. The Breach
70. In order for the breach to be sufficient for the employee to treat the contract as being discharged the employer’s conduct must amount to a significant breach going to the heart of the contract or show that the employer no longer intends to be bound by one or more of the essential terms of the contract. (Gibb v JAAR
- [2018] TRE 135 and Western Excavating (ECC) v Sharpe [1978] ICR 221).
71. It is also well established that a term of ‘mutual trust and confidence’ is to be implied into all contracts of employment and there is a two-stage test for determining whether there has been a breach of this implied term (MacLagan v States Employment Board JET 79/15 and Malik v BCCI [1997] UKHL 23). The Tribunal must be satisfied that:
- (1) there was conduct which destroyed or seriously damaged the trust between employer and employee; and

- (2) the employer's conduct was done without reasonable and proper cause.
72. If the employer acts in an unreasonable way there may be a breach of mutual trust and confidence if the test in *Western Excavating (ECC) v Sharpe* is satisfied, but mere unreasonable behaviour is not enough. The behaviour must be 'seriously unreasonable' or 'sufficiently serious' so as to amount to a breach that enables the employee to treat the contract as being discharged.
73. Any breach of this implied term is a fundamental breach amounting to a repudiation, which necessarily goes to the root of the contract and allows the employee to resign and claim constructive dismissal (*Maclagan v States Employment Board and Morrow v Safeway Stores Ltd* [2002] IRLR 9, EAT). However, if the employer's conduct is not sufficiently serious then there is no breach of the implied term.
74. In order to establish constructive dismissal, the 'range of reasonable responses test', which is the test usually used to establish unfair dismissal, is not appropriate (*Luce v Newtel Limited* [2018] TRE 147 and *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445). The test to be applied is an objective one; whether or not the employer intended to breach the contract is irrelevant. In the case of *Lewis v Motorworld Garages Ltd* [1986] ICR 157 the English Court of Appeal stated that: "The Respondents' conduct was repudiatory if, viewed objectively, it evinced an intention no longer to be bound by the contract. Their intentions and their reasonable belief could not determine that issue."
75. By way of example, in the case of *Brown v Merchant Ferries Ltd* [1998] IRLR 682, the Northern Ireland Court of Appeal, following the judgment in *Malik*, asked whether the employer's conduct so impacted on the Claimant that, viewed objectively, the Claimant could properly conclude that his employer was repudiating the contract. In the *Brown* case, the Claimant claimed that there was uncertainty about his future role and lack of consultation with him about the changes. He also alleged that the general manager had been abusive to him in front of another senior manager and a director of the company. He said that he had been "completely undermined" by the company. Whilst accepting that the claimant was unsettled and concerned about his future and annoyed at being insulted, the Northern Ireland Court of Appeal held that the impact of the employers' conduct fell far short of justifying a conclusion that the company had repudiated the contract of employment with the Claimant. *Course of Conduct*
76. The breach of the implied obligation of trust and confidence may consist of a series of actions by the employer which, taken cumulatively, amount to a breach of the term, although each particular incident may not do so in isolation. In such a case the last act of the employer which leads to the employee leaving (which is often referred to as the 'last straw') need not itself be a breach of contract or sufficient on its own to justify resignation without notice. However, it must be more than 'utterly trivial' and must contribute something to the

earlier breaches (Maclagan and Lewis v Motorworld Garages Ltd [1986] ICR 157).

77. The Tribunal in Maclagan, having determined whether or not each individual alleged act and omission was a breach, then summarised that the test for assessing the whole course of conduct is as follows: “The Tribunal noted that the test in such situations is whether, viewed objectively, (i.e. from the perspective of a reasonable person in the position of the innocent party) there was some act or omission (or series of acts or omissions) which was “likely to destroy or seriously damage the relationship of confidence and trust between employer and employee... so that the relationship is fundamentally damaged and not able to continue as before.”
78. In the case of Luce, the Tribunal applied the test as summarised by the English Court of Appeal in Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1 in relation to course of conduct cases:
 - (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - (2) Has he or she affirmed the contract since that act?
 - (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
 - (4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of contract?
 - (5) Did the employee resign in response (or partly in response) to that breach? Resignation in Response
79. The employee must be able to show that they resigned in response to the relevant breach. When the employee is claiming that there was a course of conduct which amounted to a fundamental breach of the implied term of trust and confidence, the employee must show they resigned in response to the final or ‘last straw’ act in that course of conduct.
80. However, the relevant breach or final straw act breach does not have to be the only cause of the employee’s resignation. Once a repudiatory breach of contract has been established, an employee can claim constructive dismissal so long as the relevant breach or last straw act ‘played a part’ and was ‘one of the factors relied upon’ in the employee’s resignation (Maria Manuela Leite v Jason’s Limited, Abbey Cars (West Horndon) Ltd v Ford UKEAT/0472/07 and Wright v North Ayrshire Council UKEAT/0017/13). No Affirmation

81. A repudiatory breach by an employer does not bring the contract to an end automatically. The contract is not terminated until the employee accepts the breach and treats the contract as at an end (*Gibb v JAAR and Societe Generale, London Branch v Geys* [2012] UKSC 63). The Tribunal must therefore consider whether the employee has affirmed the contract prior to accepting the breach and terminating the contract; it must ask whether the employee's conduct, in all the circumstances, has demonstrated an intention to continue the contract.
82. The Tribunal in *Maria Manuela Leite v Jason's Limited* considered a number of authorities on this point and summarised the test as follows: "an employee's delay in resigning in response to a repudiatory breach by the employer is one factor which the Tribunal must take into account in deciding whether or not the contract has been affirmed. However, delay in and of itself will not lead automatically to the conclusion that the employee has affirmed; there must be an event which indicates affirmation and the Tribunal must look at all the circumstances to establish whether, on the facts of each case, the employee did indeed affirm the contract through their conduct." (*Western Excavating v Sharp*, *Bournemouth University Higher Education Corporation v Buckland* 2010 ICR 908, CA, *El-Hoshi v Pizza Express Restaurants Ltd* EAT 0857/03 and *Mari v Reuters Ltd* UKEAT/0539/13).

Conclusion

83. All of the witnesses conducted themselves very well during the Hearing and their evidence was sensible and clear. In particular, the Claimant seemed to be very genuine and credible. Further, several of the facts in this case are undisputed. However, on a number of occasions the witnesses interpreted what was said and done very differently and their perspectives on how things should have been managed and communicated varied greatly. I also note that, particularly in relation to some of the earlier facts that were described, it appeared that some of the witnesses' recollections may have been coloured, at least to some degree, by the positions of the parties in the dispute.
84. In determining whether or not the Claimant was constructively dismissed, I have applied the test set out in *Kaur* and adopted by the Tribunal in *Luce* and set out my conclusions on the questions raised in that test below. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
85. The Claimant was clear in his evidence that the last straw in the course of conduct that led to his resignation was his removal from the SPB and the way in which it was communicated to him. Has he affirmed the contract since that act?
86. The Respondent alleged that the Claimant affirmed the contract as he did not hand his notice in until July 2019 and he worked during his notice period until September 2019.
87. The last straw occurred during a SPB Core Business Group meeting held on 11 June 2019 and the Claimant resigned on 5 July 2019. The Claimant therefore resigned within a month of the last straw event and worked for approximately a further 3 months after the last straw event.

88. Following the Tribunal's conclusion in *Maria Manuala Lietė*, a delay before resigning is something that I should consider, but delay in and of itself will not automatically equate to affirmation of the contract. In addition, it has been established that an employee is entitled to resign 'with notice' and still claim constructive dismissal (see *Gibb*). Accordingly, working during a notice period will not automatically infer that there has been any affirmation. The question I must ask myself is whether the Claimant's conduct, in all the circumstances, has demonstrated an intention to continue the contract.
89. The Claimant has made it clear, and the Respondent has not disputed, that any decision to resign would inevitably have meant that he and his family would have had to leave the island, which was not something he wished to do and, accordingly, the decision required a great deal of consideration. In addition, it was evident that the Claimant was dedicated to the projects he was responsible for and the teams that he oversaw at work. In these circumstances, and based on the nature of the alleged breaches, a short delay prior to resigning and the Claimant's willingness to work his notice period are understandable and do not, in my view, indicate any intention to continue the contract.
90. In light of this, I find that there was no affirmation of the contract following the last straw event. If not, was that act (or omission) by itself a repudiatory breach of contract?
91. The Claimant has put forward compelling arguments as to the importance of his position on the SPB and I do not underestimate how his removal from it, coupled with the way in which it was communicated to him, impacted upon him. Indeed, MR has made it clear that it was not his intention for the Claimant's removal from the SPB to be communicated to him in this manner.
92. That said, for an act to be considered a repudiatory breach, the conduct must have been more than just unreasonable; it must have been sufficiently serious to destroy the trust between the parties. In my view, this incident, while it was handled badly, was not sufficiently serious to destroy the trust between the parties when considered alone.
93. Consequently, I do not consider the last straw event to be a repudiatory breach of contract. If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of contract?
94. In order to determine whether there was a course of conduct which amounted to a repudiatory breach of contract it is first helpful to consider each of the alleged breaches individually. Failure to Evaluate Role
95. Having agreed in July 2017 that the Claimant's role should be evaluated, the Respondent failed to undertake that evaluation prior to March 2018 when the whole of Government restructuring commenced. This was despite the Claimant's attempts to move the process forward.

96. After the whole of Government restructuring commenced the Respondent indicated that it no longer intended to evaluate the Claimant's role outside of that restructuring process. The Claimant did not, at that stage, raise this as a breach of contract and, in my view, this failure to evaluate the Claimant's role does not indicate any intention to end the employment relationship and is not sufficiently serious to constitute a repudiatory breach of contract.
- Changes to Role
97. The Respondent argues that no changes were made to the Claimant's role; senior staff were merely allocated to oversee some of the projects the Claimant worked on. I am not convinced by this argument. I prefer the Claimant's evidence that he was asked to hand over or stop working on at least two out of the three projects he has referred to. The Claimant was certain on this and the Respondent's witnesses did not seem to be close enough to the facts on these particular points to dissuade me from the Claimant's evidence.
98. In addition, if it were the case that senior staff were only being asked to oversee the Claimant's work, this could easily have been made clear to him at the time and there is no assertion that this was done. From the evidence before me this only seems to have been raised as an explanation in these proceedings. I therefore conclude that changes were made to the Claimant's role and certain work was handed over to other people.
99. Although some of the Claimant's responsibilities may have been handed over, the Claimant confirmed that a number of other projects remained as part of his role and there appeared to have been sufficient work for him to do in order to allow the employment relationship to continue, even if his role had changed somewhat. Indeed, the Claimant continued working during the period in which the changes were made and at no stage has he asserted that he had insufficient work to do. 100. In these circumstances, it is my view that the fact that the Claimant was asked not to perform work on particular projects does not constitute a sufficient breach of the trust and confidence between the parties to amount to a repudiatory breach which entitled the Claimant to treat the contract as at an end. Manner in which Changes were Communicated 101. I must also consider whether the way in which the changes were communicated to the Claimant meant that the relationship could not continue as before. 102. It seems to me that the way in which the changes were communicated to the Claimant was clumsy and was not thought through. In addition, it clearly would have been preferable to discuss the changes with the Claimant prior to the announcements being made. Further, the Claimant has made reference to the fact that the way in which the announcements were made caused awkwardness and embarrassment. 103. That said, while the way in which the communications were made was far from ideal and clearly had an impact on the Claimant's trust in the Respondent, I am not persuaded on the basis of the evidence before me that this lack of communication constituted a fundamental breach of contract which caused such significant damage to the trust and confidence between the parties so as to prevent the employment relationship from continuing. Failure to Discuss Role 104. The Claimant was concerned that his role was changing; responsibilities that were important to him were being handed to other people without warning or discussion and, in

addition, he understood that some directorships would be lost due to the overarching restructuring. He discussed these concerns with SO who gave general reassurance that the Claimant's skills were needed and that there would be a role for the Claimant going forward. However, SO did not know enough about the specific changes to provide the Claimant with the clarity he sought. The Claimant therefore tried to discuss his concerns with MR. 105. I have been shown evidence that the Claimant requested clarity from MR on 2 occasions. MR refused to provide this clarity or discuss the Claimant's role with him as the Claimant was considered to be a tier 3 member of staff and MR was not prepared to discuss the Claimant's role with him in advance of the commencement of the consultations for all tier 3 staff. The Respondent noted that some tier 3 staff had meetings regarding their roles before the tier 3 consultations began as it was felt that their roles were impacted more than others by the restructuring. The Claimant asserted that the restructuring had a significant impact on his role, so it would also have been appropriate for a discussion to be held with him in advance of the tier 3 consultations. 106. Based on the evidence before me, I agree with the Claimant on this point. His role was already overdue for evaluation when the restructuring commenced and it appeared that the Claimant did indeed work at a tier 2 level in respect of certain elements of his role, for example those which new tier 2 staff were asked to take on or oversee. In addition, as I have concluded that changes were made to the Claimant's role, it is clear that the restructuring process had already had an actual impact upon his role. While I understand the need to maintain a process that is fair to everyone, some exceptions were made and no explanation was given as to why the Claimant should not have been one of those exceptions. 107. The tier 3 consultation was initially due to commence within 90 days of the March 2018 Announcement. However, DD has explained why it did not commence until much later and, based on the long recruitment process that she described, it should have been evident to the Respondent that tier 3 consultations would be significantly delayed. Once this became evident to the Respondent, it could have given the Claimant a more realistic estimate of when tier 3 consultations would begin and considered whether it would, in fact, have been appropriate to hold a consultation with the Claimant regarding his role at an earlier stage. From the evidence before me it does not appear that this was done. 108. In light of this, it is not surprising that the Claimant was frustrated when, on asking for clarity on his role, he was told he had to wait for the already significantly delayed process to progress before he would receive any such clarity. 109. However, I also note that general assurances were given by SO and the Claimant's main concern did not appear to be that he was at risk of redundancy or a reduction in salary. He still had work to perform and he was being paid to do it. While the Respondent could and, in my view, with some hindsight, should have given the Claimant more clarity on his future role, the fact that it failed to do so, even for a prolonged period of time, while frustrating, does not prohibit the employment relationship from continuing nor does it indicate any intention to end the employment relationship. Accordingly I find that this does not constitute a repudiatory breach of contract which entitled the Claimant to treat the employment relationship as at an end. Removal from the SPB 110. I have already concluded that this event on its own does not constitute a repudiatory breach of contract. However, the question is whether this event, when looked at

together with the other alleged breaches, constitutes a course of conduct that amounts to a fundamental breach of contract. Course of Conduct 111. In his closing submissions the Claimant asserted that he was “on the receiving end of a significant period of change”, which was not communicated well. He alleged that the process was carelessly managed and that the “left hand did not seem to know what the right hand was doing”. In his view, more should be expected of employers when making significant changes. 112. The Claimant may be correct in these submissions. However, it is not the role of the Tribunal to sanction employers for their conduct unless it falls outside of the law. In this case, the question I must ask myself is whether the Respondent’s course of conduct, when looked at as a whole was “likely to destroy or seriously damage the relationship of confidence and trust between employer and employee... so that the relationship is fundamentally damaged and not able to continue as before.” [emphasis added] (See MacLagan). 113. The Claimant also summarised in his closing statement that his trust in the Respondent was eroded over a long period of time; initially he waited 8 months for his role to be evaluated prior to the restructuring starting, then he was told that the consultation process for his role would commence in 3 months, but it still had not started after a further 18 months. He felt that his future was pending and it became very difficult without any certainty. 114. In addition, the Claimant has referred to being worried about his role following the Chief Executive’s announcement in March 2018 that there were too many directors and MR telling the Claimant in their initial meeting in July 2018 that there may be reductions in salary, title and role. However, from the witness evidence at the Hearing it appears that the Claimant accepted that he had been given some reassurance from SO that there would be a job for him. 115. Accordingly, I conclude that the Claimant’s main concern regarding certainty was not that he would be made redundant or that his salary would diminish, but that he did not know what his future role would be. Further, I note that the Claimant has not alleged that he thought that there would be no review of his role, rather that the length of time taken to commence that review was unacceptable. 116. It appears that the Claimant was very passionate about his role and that he made a significant positive contribution to the Education and CYPES department; indeed despite all the changes to his role there was no question in relation to the Claimant’s work ethos or capability and SO commented that he would have liked to continue working with the Claimant. 117. This case, therefore, deals with a very unfortunate situation. It appears that an effective, conscientious and well respected member of staff left due to the way in which he was managed and communicated with by his employer. In addition, I do not underestimate the impact that the Claimant’s resignation had upon him and his family. Accordingly, this was a difficult decision to make and I have considered very carefully whether the Respondent’s conduct constituted a breach of contract that was sufficiently serious so as to allow the Claimant to treat the contract as no longer continuing. The burden of proving this lies with the Claimant and a high bar is set for this to be satisfied. 118. The relationship between the parties clearly suffered some damage as a result of the Respondent’s conduct, but was it so seriously damaged that the employment relationship could not continue? The Respondent’s conduct may have been unreasonable, but was it unreasonable enough? 119. While the case of Brown can be distinguished from the claim

currently before me on some of the facts, I have, nevertheless, found the judgment of the Court of Appeal in that case to be of some assistance when considering these questions. In particular, the conclusion that the impact of the employer's conduct upon the employee fell short of the test for constructive dismissal even though the employee was unsettled and concerned about his future is of relevance. 120. In the current case the Claimant was still being paid the same, he had not been advised that his salary would reduce, he still had work that he was able to conduct and he had been given general reassurance that this would continue to be the case. As these fundamental elements were in place and considering all of the conclusions drawn above, I do not find that the Respondent's conduct when looked at together as a whole was sufficient to have entitled the Claimant to treat the contract as at an end. Accordingly, the claim for constructive unfair dismissal does not succeed. Did the employee resign in response (or partly in response) to that breach? 121. As I have determined that there was no repudiatory breach it is not necessary to address this final question in the Kaur test. However, for the sake of completeness, I have set out my findings in respect of the Respondent's argument that the Claimant wanted a promotion and better pay and he resigned when he was offered another job that provided this. 122. It was clear the Claimant's resignation was a last resort as resigning meant leaving the island and uprooting his family, which he did not want to do. In addition, the job the Claimant went to resulted in less net pay. Accordingly based on the evidence that has been shown to me it appears the Claimant did not resign because he wanted a promotion or better pay elsewhere. Mrs H Westmacott, Deputy Chairman Sent to the parties on: 7 September 2020

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