

Case Numbers 1318450/2013
1320563/2013
1320531/2013



DJT

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

Mr JP Tyson
Mr MC Brown
Ms L Smith

AND

Respondent

M.A.G. (UK) Ltd

HELD AT Birmingham

ON 24,25,26,27 & 28 February 2014

EMPLOYMENT JUDGE Kearsley

Representation

For the Claimants: Ms T Ranales-Cotos, Counsel

For the Respondent: Mr N Liversidge, Lay Representative

REASONS

(Following an oral judgment on 28 February 2014)

BACKGROUND

1. All three claimants, former employees of the respondent, issued claims for constructive unfair dismissal, breach of contract and unauthorised deductions from wages. The three claims were combined and were the subject of two case management preliminary hearings. The first of these was before Employment Judge Coaster. She identified the issues and made case management orders for the future conduct of the claims in an order sent to the parties on 8 November 2013. There was a further discussion before Employment Judge Tucker on 28 January 2014 where she expressed concern about the manner in which the parties were conducting the litigation and made further orders to ensure that the claims were heard and completed within a time allocation of 5 days. Her Order was sent to the parties on 6 February 2014.

2. The claims came to be heard before me. The parties had agreed a timetable which anticipated submissions being closed by 14:30 on 27 February 2014. The morning of the first hearing was a reading morning and I read all the

witness statements. The respondent kept consistently within its time allocation. There was some slippage during the cross-examination of Mr Liversidge but he made no complaint about that given that it gave him the opportunity to respond to a number of documents within the agreed files of documents.

EVIDENCE AND DOCUMENTS

3. I heard evidence from Mr Brown, Ms Smith and Mr Tyson in that order in support of their individual claims. I heard supporting evidence from Mr A Phillips, Mr N Daniell and Mr J Broad. A statement had been signed by Mr Pyatt but he did not attend I did not take his statement into account. I heard evidence on behalf of the respondent from Mr Liversidge, Mrs Lavender, Mr Mutch, Mr Walker, Mr Turner and a Mrs Smith who attended and whose evidence on one short issue I allowed. In addition Ms Gale Puttock who as an employee of Qdos Consulting heard the first stages of the claimant's grievances attended under a Witness Order from the respondent. There had been an application to treat Ms Puttock as a hostile witness. I advised Mr Liversidge of the relevant authority in Kuttapan -v- London Borough of Croydon EAT 39/00 and of the fact that he would need to establish a previous inconsistent statement before he could cross-examine. In the event Mr Liversidge chose to question Ms Puttock by reference to documents in the agreed files by way of clarification of the witness statement she had prepared and she was not cross-examined by him in the pure sense of that term.

DOCUMENTS

4. The parties had agreed the contents of three lever arch files totalling 821 pages. In addition the respondent had prepared a supplementary bundle containing transcripts of various taped interviews which were said to be more easily digestible than those contained in the original agreed documents.

ISSUES

5. The issues were helpfully identified both by Employment Judge Coaster and Employment Judge Tucker. Judge Tucker identified that in each case the claimant was relying on a breach of the implied term of mutual trust and confidence and upon a course of conduct and a final or last straw. The only remaining other claim at that time was Mr Tyson's claim for unpaid expenses. Judge Tucker gave directions as to how that should be formulated. At the hearing before me the respondent accepted that Mr Tyson's calculations of his expenses was correct but challenged his right to receive those expenses upon the basis that they should be set off against overpaid salary.

6. The parties agreed that I should limit myself to determining the unfair constructive dismissal claims and that any issue of contributory conduct,

reduction for *Polkey*, uplift for failure to follow ACAS procedure and Mr Tyson's expenses claims should be determined at a separate remedy hearing.

General Comments on Credibility

7. This is a document heavy case and when applying the principles of constructive dismissal I am required to view the conduct of the respondents to determine whether, objectively, they have without reasonable and proper cause conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The principal player on behalf of the respondent has been Mr Liversidge. He was the Director against whom the majority of the complaints were made. He has conducted this litigation on behalf of the respondents and represented the respondents before the tribunal. Mr Liversidge is physically imposing. He told me on the first day of hearing, when I remonstrated with him about the volume of his speech, that he was completely deaf in one ear and unaware of the level of his voice. As an observer I could appreciate that those being questioned by Mr Liversidge in this tribunal will have found the level, if not the content, of his questions at times intimidating. In fairness to Mr Liversidge he took direction from me with courtesy and his questioning of Ms Puttock, who had sought to set aside the Witness Order on the grounds that she feared intimidation, was kept well within the limits of common courtesy. I was also conscious that the three claimants were being questioned by an individual against whom their complaints of bullying and harassment had been upheld. My assessment of Mr Liversidge, which is relevant to my conclusions, is that he has no effective insight into the impact that his actions have on others. I reach that conclusion both in respect of his oral and written communications and I will identify examples in these reasons. Mr Walker is also an imposing presence and demonstrated by the truculent manner in which he met cross-examination that he was greatly angered by these claims. In contrast I found Mrs Lavender to be a sympathetic witness who deeply regretted her inability to prevent the confrontation which ultimately led to these claims and lost her the friendship of one of the claimants .

8. In contrast to Mr Liversidge and Mr Walker the three claimants gave calm and measured responses to the questions from Mr Liversidge and, to the extent that there is dispute between their recollection of events and those of the respondent's witnesses I prefer their recollection. I am to a great extent assisted by the documents within the files in resolving any factual disputes but the disputes are more disputes of perception than reality.

9. Although the claims have been linked and although all three claimants were present at the seminal event on 18 March 2013, their circumstances are not identical and each resigned in respect of separate "final straws." In setting out my

conclusions I will trace their separate initial chronologies whilst noting that those chronologies will to a great extent merge from March 2013

FACTS

10. The respondent is an organisation which represents motor cyclists across the UK and campaigns to protect and promote the interests and rights of all its riders. At the relevant time it had five employees all of whom worked at its Central Office. All others involved as Directors or as Members of the National Committee did so on a voluntary basis. Mr Walker and Mr Liversidge were two of seven Directors. The National Committee (NC) oversees the work of the respondent and the Board of Directors report to the NC. Mr Mutch is the honorary president of the organisation.

11. Mr Liversidge and Mr Walker were both elected to the Board on 14 April 2012.

12. I will deal with the claimants in the order in which they gave their evidence.

Mr Brown

13. Mr Brown was employed by the respondent as the General Secretary from 6 May 2008 until his resignation on 28 May 2013. A summary of his employment terms is at page 69. Historically there has been ill-feeling between Mr Brown and Mr Liversidge and I record here that much of the lengthy witness statements concern themselves with historic events including allegations that Mr Brown sought to prevent the election of Mr Liversidge as a Director and Mr Liversidge's view that both Mr Brown and Mr Tyson were abusing the lack of control exercised over them by earlier Board Directors in pursuing individual business interests at the expense of the respondent, despite the fact that they had earlier approval from the chairman of the directors to carry out this separate enterprise, "Overland" magazine.

Miss Smith

14. Ms Smith was employed from 4 January 2010 as Deputy General Secretary. Ms Smith was diagnosed with cancer in May 2011. By December 2012 Mr Liversidge had questioned the need for Miss Smith to be on the NC mailing list. He claimed that she was spending her time looking for things to complain about. (238). Although the two were not to meet until 18 March 2013 Miss Smith became concerned at his approach to her role.

Mr Tyson

15 Mr Tyson began his employment on 10 October 2009 as Campaigns Co-ordinator/Manager. By 11 September 2012 Mr Liversidge was emailing the board and Mr Brown criticising the decision to allow Mr Brown and Mr Tyson to run Overland and proposing this cease. On 8 September Mr walker had emailed Mr Liversidge with information which he claimed demonstrated a conflict of interest. The email ends "its a start".

General narrative

16. On 28 August 2012 Mr Liversidge is emailing the Board (139), the email includes the following: "It infuriates me that staff wasting time have Facebook spats with T & E at a time when the Board is being told that the centre is short on resources and the database is still not sorted". He refers later in the email to "Pseudo Stalinists". Whilst that was not his description of the claimant it is an example of his style. The email ends "get thicker skins".

17. On 30 August Mr Liversidge emails Mr Brown about members list (146-149). Mr Brown raises concerns about data protection. In his reply Mr Liversidge states: "We're in the business of running a successful organisation here not a clone of the bloody Civil Service with all its tax pay funded flab..... always remember its easier to get forgiveness than permission". When Mr Brown continued to raise concerns Mr Liversidge replied: "I vote we cut off all of bureaucratic crap and just do it".

18. By 11 September 2012 Mr Liversidge is emailing the Board with a list of ten concerns which includes the allegation that he has been given blatantly false information by Mr Brown about staff numbers. He proposes that neither Mr Brown nor Mr Tyson be allowed to run their business "Overland" and concludes: "I won't be a nodding dog for anyone".

19. On 13 September Mr Walker raised concerns with Ms Powell, the then Chairman, about a proposed tour by Mr Brown and Mr Tyson in February 2014.(166). This prompted a response from the Vice Chair of the Board, Mr Peak, on 16 September which includes: "Personally I find subjecting our employees to this level of scrutiny is abhorrent. Some people are currently trying to punish Nick and Paddy for something they might do. It's unacceptable we demand they close their personal business when their contract allows for it and they were given explicit permission by the then Chair of M.A.G.". (169).

20. On 31 October Mr Liversidge emailed Mr Brown offering to spend some time at Central Office. The proposal was not accepted for reasons articulated on 1 November (198). Mr Liversidge objected to the patronising tone and referred to

the reply as a diversionary tactic. This led to Mr Brown contacting Ms Powell and Mr Peak directly (203).

21. On 11 December Mrs Lavender agreed to accept formal responsibility for HR on a voluntary basis and prepared a communication (212) in which she emphasised that matters told to her would need to remain confidential between herself and individual members of staff.

22 Mrs Lavender duly attended Central Office on 11 January 2013 and carried out individual consultations with each of the claimants. She made notes of her interviews with Ms Smith and Mr Brown but, at the request of Mr Tyson made no note of her discussions with him as he feared disclosure of them. Her notes of her interview with Mr Brown are at 223-227. Her notes include the following: "At this stage email correspondence came up. Nick says it is incredibly demoralising to spend time on creating a coherent email to have the response come back within 5 minutes with one line completely dismissing the email. At the very least a protocol should not allow people to say anything that could be considered slander. It is impossible to read sentiment in an email and whilst it was agreed you can't be sensitive to everyone's feelings it was felt that some emails are loaded with venom".

23. Her notes of meeting with Ms Smith are at 221/222. Ms Smith complained of lack of respect from some people who seemed to be bypassing her completely. She complained of the sentiment in emails. She expressed concern that relationship with members outside of the staff team had been damaged.

24. Whilst there are no notes of the interview with Mr Tyson, in her email to Mr Brown concerning Mr Tyson's request to become a contractor she included the comments "he remains passionate and enthusiastic because that is what his job requires but it is becoming increasingly difficult for him to remain motivated and effective under current conditions".

25. Ms Lavender summarised her conclusions in her report to the Board on 29 January (239/240). Her report includes the following: "Yes we have a strong Board and a strong NC, however this is all at risk at this time. Our staff team have been strong whilst the Board has lacked direction. They would like to work with us but feel they are not being given a fair opportunity to do so. They would like to have input but do not know either who to approach or are in fear of reprisal. We need to be compassionate and retrieve the situation as Board Members it is our job to instigate this. We must not be seen as hatchet men out for blood..... we don't need all to be friends or even to like each other but we must learn to listen and respect each other. The staff wants to be listened to and involved. We owe them this...." (239/240). All three claimants gave evidence that they had expressed their concerns about the behaviour of Mr Liversidge and

I find support for that assertion in the nature and tone of the advice offered by Mrs Lavender.

26. In February 2013 after he concluded that there had been a leak aimed at Mr Walker emanating from Central Office Mr Liversidge wrote to Ms Lavender as follows: "I have had a belly full and the latest nasty deceitful, spiteful, fucking up effort aimed at Pete Walker is the final straw. If they worked in my business they would be at the dole office Monday morning. What we need here is the slap of firm management and its more than obvious that Nick is NOT going to provide it. Therefore the Board must. I propose that Andy Meredith be asked to remove Louisa Smith from all email lists with immediate effect and that Nick Brown as her manager informs her of the fact. That is it no more no less. In future she can do her job and lessen Nick's stress. I do not intend negotiating with the staff to obtain the professional service they owe us by virtue of the fact we pay their wages". (246)

27. Further, in February Mr Liversidge drafted a list of concerns he proposed the Board send to Mr Brown (248/249). The Board decided not to send it but it evidences his view and sets out concerns under subheadings including "dissembling", "partisanship", "unprofessional activities by proxy", "undermining the key fundraisers". The email concludes: "The Board consists of unpaid volunteers who have a right not to have their time wasted. These are not matters on which we intend to negotiate. You owe us this duty by virtue of your employment. We look to you now to correct your behaviour and that of your subordinates in order that correct results may in future be achieved and that there be no need to raise these matters again".

28. On 11 March 2013 Mrs Lavender received a distressing phone call from Ms Smith where Ms Smith ended up in tears. Ms Smith had complained that she felt her opinions was not being listened to. Mrs Lavender advised that Ms Smith be removed from the NC email list to avoid further stress upon her. It was at this point that Mrs Lavender concluded that she should not continue the HR function (273). Earlier that day Mr Liversidge had emailed Mrs Lavender (272) offering that he and Mr Walker be deputed to go to Central Office and face the individuals. He proposed that they sort everything out at one go and give the employees the chance to make a new fresh start on good terms with their employer. The email continues: "Whether that employer is M.A.G. (UK) or a new employer will be their choice and that will be explained to them in precisely those words calmly, reasonably but completely firmly. We establish at outset that they are the employees we are their employers and they act accordingly. In advance they are all told they are to be in the office no excuses accepted. We'll meet separately with each member of staff in private. I have done heavy disciplinary stuff before and it doesn't frighten me.... I am no pushover if I have to fire somebody it is not a problem for me. If it has to be it shall be done properly, fairly and legally but at the end of the day they shall be looking for a new job".

29. Later that day Mrs Lavender proposed that Mr Liversidge and Mr Walker be appointed to visit the office and clear the air (274).

30. On 12 March Mr Liversidge emailed Mr Brown (276), the email includes the following:

"Pete and I have been deputised by the Board to act on its behalf in all matters relating to HR, the running of M.A.G. central, ordering Central priorities where doubts exist etc. We do not intend to be involved in the day-to-day running of the office which is your responsibility. We do however intend to lay down clear ground rules.

Pete and I will both attend at Central next Monday 18 March for meetings with all staff starting with yourself followed by Louisa. We will then meet with Carol and Julia together and Paddy last. In our meeting with Paddy we will discuss and attempt to finalise his contract arrangements. All staff must arrange to be in the office next Monday even if it means cancelling pre-arranged meetings no exceptions."

The email required Mr Brown to issue full member details to all regional representatives with utmost expediency that day. He was instructed to copy this email to the other employees.

31. Mr Brown emailed the Board on 12 March (288) following the notice of the meeting. The email includes the following: "Up to now I have tried to resolve the issues surrounding Neil's attitude towards staff and Pete's express lack of trust through the designated Board Members dealing with HR issues, both of whom have spoken candidly to each member of staff in confidence and have tried to find a way to reconcile the concerns of both sides. The majority of staff have expressed their dismay at the Board's latest decision. One member of staff insists on having legal representation at the time of their interview. Another has voiced concern over keeping their job if they say how they feel and what their experience of dealing with Neil has been. A majority of the staff are considering their position as they believe that individuals concerned have regularly displayed prejudice and lack of fairness in their past dealings with staff". Later that evening Mr Liversidge emailed Mr Brown (290), the email included:

"(i) Please remove Louisa from the NC email list immediate effect.

(ii) Please make all staff aware that if anyone is absent due to illness on Monday they will be required to attend for a meeting at my office in Castleford immediately on their return to work. I am taking a day out of my business on Monday which is an expensive matter for me and I shall not allow my time to be wasted."

32. At 3:49am on 13 March Mr Liversidge emailed the Board (294). The email includes the following: "As you will see when you log in I have given Nick the hard word about throwing sickies next Monday. I am not trying to be unduly harsh but if I had not done this I am pretty sure me and Pete would turn up to find Nick and/or Louisa off "sick". Now as it is they can play that game if they want but if they do they are coming up here for 9:00am on their return to work".

33. On 13 March Mr Liversidge again emailed the Board (299) indicating that his ideal solution was to leave Mr Brown in place well paid and happy but helping not hindering.

34. Following further exchanges of emails on 13 March Mr Brown prepared and handed to Ms Powell a letter he had drafted at 307/308. The letter complains that several members of staff had told him they have felt intimidated by the behaviour of Mr Liversidge and Mr Walker. He referred to the fact that Ms Smith was recovering from cancer and felt that Mr Liversidge claim that he was seeking to relieve her by taking her off the mailing list was insincere. He complained that the staff felt victimised by the very people appointed by the Board to oversee them.

35. Ms Smith emailed Messrs Liversidge and Walker at 10:43 on 15 March, the email includes the following: I personally feel very uncomfortable with meeting you both at this stage because I feel personally intimidated, I will not be taking part in any meeting with the two of you. I have elected Mrs Denise Powell to act on my behalf. I have been advised by a member of my medical team not to take part in this meeting as she believes that the intimidation and stress I am currently feeling is detrimental to my personal health".

36. At 10:47 Mr Tyson emailed the NC mailing list: "At this stage I feel intimidated and I am not comfortable meeting Neil and Pete. As such I will not attend the meeting they have chosen to timetable for Monday 18 March". He appointed Ms Powell to act as intermediary. This prompted a reply to Mr Brown from Mr Liversidge at 10.56 which contains the following: "We have not made a request we have issued a lawful instruction. We deal directly with employees as long as pay their salaries not with intermediaries. If medical advice has been given, we require it in writing". (311)

37. At 15:20 on 15 March Mr Liversidge emailed the NC and Directors' list and copied the email to each of the claimants. The email is a lengthy one. At page 322 he says this: "The behaviour of Nick, Pat and Louisa today has been unprofessional, disgraceful and so far as the citing of stress is concerned, downright dishonest. They are obviously not too stressed to cause trouble. Considering all the years I have known Nick Brown and the high esteem in which I once held him I am utterly appalled and saddened that he should behave in this way. Our position is very simple. On behalf of our members we want the office

to be run efficiently and for the staff to behave professionally. We have consulted with ACAS and their advice is that we are 100% within our rights. They professed themselves appalled at the behaviour of our employees. On ACAS's advice the staff are hereby informed that they are required to attend on Monday at their normal place of employment on a working day during working hours for a staff meeting. If any staff refuse they will be required to attend a disciplinary meeting the same day. If they do not turn up for work on Monday normal procedures will be followed and they will be required to attend a meeting here in this office with Pete and I again on a normal working day. Ms Powell is not an officer of the company. If she attends on Monday she will be asked to leave the premises. If she refuses we shall call the police and ask them to remove her".

38. Later on 15 March both Ms Smith and Mr Tyson prepared written grievances. The grievance from Ms Smith is at page 341. It includes: "I am writing to inform you of my intention to raise a formal grievance in relation to the continuing intimidating behaviour from two members of the Board, namely Neil Liversidge and Peter Walker. I am not prepared to discuss any issues of my grievance with either of the individuals that I have named. I would also like to highlight that the Board are responsible for the health and safety of all members of staff which includes their mental wellbeing. Further to the email that I sent earlier today regarding my health, I do not feel this has been taken at all seriously. I will provide information needed to support my grievance shortly".

39 The grievance from Mr Tyson is at page 342. It includes the following: "I appreciate entirely the efforts made as my line manager to address the issues of intimidation and bullying that I have been experiencing by Members of the Board of M.A.G. (UK) but regret that I must now inform you of my intention to raise a formal grievance against two of the members of that Board, Neil Liversidge and Pete Walker. Due to my raising this formal grievance I feel it is not appropriate to meet these individuals on Monday as they have demanded. I cannot discuss any element of my grievance with either of these individuals especially the changes to my working conditions which I had asked the Board to consider partly in light of the behaviour experienced. It is the responsibility of the Board to ensure my wellbeing both mentally and physically something which I feel has been neglected and led me to this course of action".

40. Mr Brown emailed Mr Liversidge at 21:57 that night confirming that the grievances had been handed in and that his notice of formal grievance would follow. The email refers to Ms Smith's state of health. It concludes: "She was feeling physically sick at the prospect of the meeting which the Board has demanded she should attend on Monday".

41. Mr Brown prepared his grievance on 17 March (350). It includes: "M.A.G. (UK) owes a duty of care for the mental and physical wellbeing of its employees

also to safeguard their dignity at work and protect them from bullying. Individuals within the management structure have been allowed to behave in a bullying manner towards me and other members of staff I am responsible for. I believe my health and that of members of staff has suffered. I have attempted to resolve these issues with Members of the Board over a period of time but to no avail. Therefore and with great regret I have no further option but to take out a formal grievance. I will provide full detail in due course. I repeat my objection to taking part in the meetings demanded by Neil Liversidge for Monday 18 March. Neil's behaviour is at the centre of my concerns and I believe the Board has acted incorrectly by forcing these meetings under threat of disciplinary action".

42 I conclude that each claimant wrote his /her own letter of grievance and reject the assertion that they were each prepared by Mr Brown.

Meeting 18 March 2013

43. Mr Walker and Mr Liversidge attended Central Office by 9:00am on 18 March. The meeting was recorded covertly by Ms Powell. Mr Mutch, a founder member of M.A.G. and the editor of the magazine "The Road" attended as an observer. Individuals prepared their own accounts. Mr Liversidge's report is at 356/357 and with reference to the claimants he said this: "These three operate as a unit. I have never known such bad staff anywhere and I have no confidence in them at all. We had more or less accepted it was over but on reflection I think that would be a mistake. What we should do is deal with the grievances and then hold formal disciplinary meetings with Nick, Paddy and Louisa up here and without Den. (Ms Powell) Here I can control who comes on the premises. Louisa and Paddy I would dismiss for gross misconduct by way of insubordination, rudeness and their withholding of the cooperation they owe us. Nick I would offer a job as researcher seeing how he is clearly unwilling to manage staff. I know this is not pretty but that is what I truly feel from the behaviour exhibited today. God forbid I should ever employ anyone likes these people in my business".

44. The report of Mr Mutch to the Board on 23 March contained a number of bullet points:

"Firstly Neil has done nothing wrong from a legal perspective I reckon neither has Pete..... I don't think I'm telling anyone anything in recognising that Neil has the diplomatic credentials of a chieftain tank. This trait is genetically assisted by vocal cords that have an extraordinary capacity for telegraphing the kind of concern that George Lucas spent millions refining in his creation of Darth Vader. The car crash that happened at M.A.G. Central on Monday is not about facts so much as it is about the list of things I think I sent earlier. It is about apprehensions, tensions, convictions and progressive reactive entrenchment that has escalated out of control. Nick, Paddy and Louisa are all scared to death of

losing their jobs. Whatever crying and distress may have affected Julie and Carol has come from them being caught in the hot gasses at the outer edges of the central blast zone”.

45. He recommended that there should be a further meeting with neutral Board Members and specifically advised Mr Liversidge that he should not go. He likened that to an attempt to justify the presence of Bomber Harris at a Dresden Town planning meeting on the basis that he had been there before.

46. I have not listened to the recording of the meeting. I have considered the transcript. The transcript of the general and the individual meetings is from pages 362-384. Before the meeting started Mr Liversidge had been handed the grievances. He proceeded with the meeting and gave a prepared address from a standing position although asked to be seated. The transcript includes the following (364):

“The Board consists of unpaid volunteers who have a right not to have their time wasted. Last week from Monday morning until 4:00pm yesterday I estimate that over 70 hours were directly wasted thanks to arguments generated from this office. That stops now and anybody who is deluded enough to think otherwise will find themselves looking for a job with no reference to rely on. In the meetings today each of you will have the opportunity at the outset to raise any issues you want to raise. Your demeanour in these meetings today will determine whether we need to move to a disciplinary meeting. If we do we will adjourn for an hour and we will then reconvene a disciplinary meeting. Just so you are all clear, Nick, Paddy and Louisa you have through your actions this week forfeited the trust and the confidence of the entire Board. In case you think that the National Committee is coming to your rescue do not kid yourselves”.

47. Mr Liversidge and Mr Walker then had individual meetings with each of the claimants disregarding their protests that these should not take place. I have heard the recording of Ms Smith's meeting. It is clear that Ms Powell is being vocal on her behalf but Ms Smith plays little part. I accept that when she left she had what she described as “a panic attack” and that she was told by Mr Liversidge that unless she rejoined the meeting she would face a disciplinary in one hour's time which he later increased to 48 hours, after taking advice..

48. The transcript of the meeting with Mr Tyson is at 376-378. At the outset he was advised that if he refused to proceed with the meeting it would be considered gross misconduct and he would attend a meeting in Castleford and that the meeting would proceed regardless of the grievance.

49. The transcript of the meeting with Mr Brown is at pages 378-383. He was advised that if he chose not to cooperate with the staff meeting today he would be required to attend a disciplinary meeting in Castleford the following Monday.

50. On 18 March Mr Liversidge emailed the Board requesting authority to hire a lawyer with a view to carrying out a full disciplinary proceeding leading to a lawful unfair dismissal of Louisa and a final written warning for Nick (358). On 19 March Ms Smith emailed Mr Liversidge concerning her understanding that she was required to attend a disciplinary meeting on 20 March (398). Mr Liversidge replied denying that that meeting had ever been proposed.

51. At 5:57am on 19 March Mr Liversidge emailed the Board (396a). The email includes the following: "Can the grievance against Pete and I be dealt with today please by the rest of you. My defence: (i) I have not bullied Nick; (ii) If I had I'm sure you would have stopped me. There is nothing I have done face to face that you have not seen; (iii) If anything the bullying has been the other way round. Amongst other things yesterday he burst into the room and demanded we all leave the premises before the first meeting even started."

52. On 20 March Mr Tyson attended his GP and was signed off sick with stress. He did not return to work prior to his resignation.

53. On 20 March Mr Brown was given a letter of suspension (415/416). The letter includes the following: "You have been suspended from work until further notice pending two investigations. The Board will conduct an investigation into your grievance as informed in your letter dated 17 March. The Board will also conduct an investigation into an allegation of misconduct or gross misconduct concerning your refusal to follow reasonable management instructions and undermining of the management body". Mr Brown did not return to work before his resignation.

54. On 21 March 2013 Ms Smith attended her GP and was signed off work with stress-related problems from work and breast cancer treatment for one month and she did not return to work before her resignation.

55. Qdos Consulting were appointed to investigate and deal with each of the three grievances. Ms Puttock wrote to each claimant on 25 March inviting them to a meeting on 8 April. She requested that they forward any further information they wished her to consider (434-436).

56. Ms Smith provided further information on 26 March (438-439). She complained about Mr Liversidge's conduct on 18 March and his threats of disciplinary action.

57. On 28 March both Mr Brown and Mr Tyson provided further information (442-448).

58. On 4 April the Board wrote to Mr Brown stating that if he failed to attend his grievance interview with Ms Puttock on 8 April without reasonable excuse this would be regarded as gross misconduct and render him liable to disciplinary action up to and including dismissal.

59. The Board wrote to Mr Tyson on 4 April requiring him to return his office key fob. Ms Smith was sent a similar request on the same day (453/454).

60. The claimants duly attended their grievance interviews on 8 April. They arrived together but were sent away and returned individually. The notes of those interviews and of the subsequent telephone interviews with Mr Liversidge and Mr Walker appear between 455 and 542.

61. Having concluded her investigations Ms Puttock wrote to each of the claimants. Her letter to Mr Tyson on 18 April upheld his grievance both as to bullying and harassment on 18 March by Mr Liversidge and Mr Walker and his lack of confidence in M.A.G. (UK) as an employer going forward given the way in which the meeting was conducted. The outcome letter included recommendations that Mr Liversidge and Mr Walker no longer have responsibility for HR practice.

62. Ms Puttock's outcome letter to Ms Smith is at 562-564. She upheld the grievance that Ms Smith had been bullied and harassed by Mr Liversidge and Mr Walker at the meeting on 18 March but did not uphold the grievance concerning lack of status and loss of trust and confidence going forward. Her letter contained the same recommendations.

63. The outcome letter to Mr Brown on 22 April is at 566/567. Ms Puttock concluded that the tone and contents of the emails and meetings were not that of a modern professional management level and style and therefore upheld his grievance.

64. Ms Smith appealed against the outcome of those parts of the grievance which were not upheld on 22 April (568-570).

65. On 24 April Mr Brown was advised that he was required to attend a disciplinary meeting in Wakefield. He emailed Ms Puttock to advise her. On the same day the Board required him to return all user names and passwords for all systems for social networking sites (580). A similar request was made on the same day to Mr Tyson and Ms Smith (581/582). Each letter said that failure to comply could lead to disciplinary action.

66. Mr Tyson resigned on 25 April. His resignation letter (596) includes:

"....you will no doubt be aware that my grievance has been upheld and that there is substantial evidence to support my claim that the actions of Neil and

Pete have amounted to persistent bullying and intimidation over the last twelve months. As a result of their continued behaviour and the errant way in which my formal grievance all earlier attempts to resolve the situation have been handled by the Board I have lost all trust and confidence in M.A.G. (UK) Limited”.

The letter refers to the requirement to return the fob and further threats of disciplinary action and continues

“ today I have received a further threat of disciplinary action should I not supply password details for all systems to which I have already been denied access. All of the above makes it clear That MAG UK do not wish my return and have no desire to protect my welfare or proffer due diligence when examining my grievance and my position has become untenable.

67. Ms Smith emailed the Board on 25 April in response to the request for the return of all usernames and passwords. She stated that she believed she had been cooperative with Mr Turner when providing him with the information. She referred to the threat of further disciplinary action and reminded the Board that she had had her grievance regarding bullying and harassment upheld and was off sick due to work-related stress. She indicated the threat of disciplinary action was unnecessary and was a further example of bullying and harassment. This email prompted a reply from Mr Liversidge (599) which includes: “Its contents have been noted along with a typically rude insolent and disrespectful tone in which they are made”.

68. Mr Brown attended a disciplinary investigation meeting on 29 April (611-623).

69. On 2 May 2013 Louisa Smith attended the Central Office to hand in a medical certificate. Mr Turner who was deputising at that stage described her as being visibly distressed particularly when she unexpectedly met with a Mrs Tracey Smith. Mr Liversidge chose to email Ms Smith on 9 May (697) complaining that Ms Smith had pointedly ignored Mrs Smith and that this mirrored his own experience. The email continues: “This email is by way of placing on the record and making aware that such discourteous conduct is not acceptable. This is also to give you fair and advance warning that we shall discuss this with you upon your return to work”.

70. On 21 May Hayfield HR, who had been appointed to consider Ms Smith’s grievance appeal, wrote rejecting it (676-679). Ms Smith replied expressing her disappointment. Her email concludes: “I will consider my position carefully although I don’t see how I can work with Mr Liversidge moving forward when I find him so intimidating it gives me palpitations just thinking about it”.

71. On 23 May Ms Smith gave notice of her resignation (683-685). She complained of her treatment and of the fact that the recommendations made by Ms Puttock had not been followed but indeed had been blatantly ignored. She concluded that she had the choice to remain at work and continued to be bullied or to resign. She complained of the email communication she had received since being off sick. She described the grievance process as the last resort and the appeal process even more so. She concluded:

"I feel incredibly let down by M.A.G. (UK) Limited as an employer. I am absolutely devastated. I have been forced to resign from a job that I loved because of bullying and harassment by the people that were elected to directorial positions to protect the organisation including its paid members of staff. I am absolutely disgusted with the contempt that has been shown for me and my colleagues specifically by Mr Liversidge. He wanted a M.A.G. without Nick, Paddy and I in it and the board of M.A.G. are complicit in allowing this to happen".

72. On 21 May 2013 Mr Liversidge invited Mr Brown to attend a disciplinary hearing on 24 May conducted by himself to consider allegations of unacceptable conduct including obstructing the staff meetings on 18 March.

73. On 24 May Mr Liversidge notified Mr Brown in connection with an invitation to a disciplinary hearing on 29 May. In this email for the first time he advised Mr Brown that the Board had rejected the Qdos findings and recommendations. Neither Ms Smith nor Mr Tyson had been aware of that rejection at the point of their resignations.

74. On 28 May Mr Brown emailed his resignation (700/701). The email includes:

"I have finally lost all trust and confidence in the process employed by the Board regarding the grievances that I and my colleagues raised and in the disciplinary process which followed my objections to your treatment of staff at Central Office. Never before in my professional career have I had to send a member of staff home or see another reduced to a panic attack, much less have two colleagues placed on sick leave following the actions of a Director. I found your subsequent accusations that my colleagues have been downright dishonest to be grossly unjust. ...even though the grievance process has not yet been completed you have held a disciplinary investigation against me. I regard these allegations an attempt by you and other members of the Board to divert attention for shortcomings I have been trying to get you to address for more than a year and which the independent investigator recommendations and earlier advice received by the company would support.

It is my sincere belief that you and the Board have mishandled both the grievance and the disciplinary process, that you are working to an agenda which required the removal of loyal and hardworking staff and that there is no prospect of a fair process. It is now ten weeks since I was suspended on full pay. The company's grievance and disciplinary process is intended to be internal solution to resolve any disputes with the staff. Had the Board acted reasonably I believe we could have avoided almost all of the cost to M.A.G.s fighting fund and reputation."

75. Ms Smith's employment terminated on expiry of her notice on 22 June.
- 76 On 26 July each claimant presented their claim to the tribunal.

THE LAW RELATING TO CONTRUCTIVE DISMISSAL

78. Section 95 Employment Rights Act 1996 provides:

"(i) 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."

79. That situation has been referred to in numerous decisions as "constructive dismissal". The authorities demonstrate that for an employee to be able to claim constructive dismissal, four conditions must be met, namely:

- (i) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;
- (ii) The breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify him leaving;
- (iii) The employee must leave in response to the breach and not for some other unconnected reason;
- (iv) The employee must not delay too long in terminating the contract in response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract.

80. The breach relied upon by the employee may be a breach of either an express or an implied term. The implied term relied upon most frequently by an employee is the implied term of trust and confidence. There is a helpful review of the law relating to the breach of this implied term contained in the decision of the Employment Appeal Tribunal in the case of Safeway Stores Plc –v Morrow 2002 IRLR 9. That decision traces the progress of the implied term from the decision in Western Excavating Ltd –v- Sharp [1978] IRLR 27 to Mahmud –v- BCCI [1997] ICR 606. In the latter decision the House of Lords expressed the term as an obligation that:

“The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

81. The term was revisited by The House of Lords in Johnson –v- Unisys [2001] IRLR 279, where Lord Millett referred to the obligation thus: “This is usually expressed as an obligation binding on both parties not to do anything which would damage or destroy the relationship of trust and confidence which should exist between them”.

82. Further, Safeway Stores Plc –v- Morrow 2002 IRLR 9 is authority for the contention that in general terms a finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean, inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract.

83. The question in every case is whether, objectively speaking, the employer has conducted himself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. Furthermore, an employer can breach the implied term of trust and confidence by one act alone or by a series of acts which cumulatively amount to a repudiatory breach of contract, even if the last event in that series is not actually a breach of contract at all. The question to be asked is whether the cumulative series of acts taken together amount to a breach of the implied term.

84. The consideration of the “final straw” law has been summarised by the Court of Appeal in London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 in the judgment of Dyson LJ as follows:

“Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things...is of general application. 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. It must contribute something to that breach, although what it adds may be relatively

insignificant. I see no need to characterise the final straw as “unreasonable” or “blameworthy” conduct. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence.”

85. In Bournemouth University Higher Education Corporation V Buckland 2010 IRLR 445 the Court of Appeal confirmed that in constructive unfair dismissal cases the question of whether the employer has committed a fundamental breach of contract is not judged by the range of reasonable responses test. The test is objective. A breach occurs when the proscribed conduct takes place. The Court confirmed that the following stages apply to the analysis of such a claim

- (i) in determining whether the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Mahmood test applies
- (ii) if acceptance of that breach entitled the employee to leave he has been constructively dismissed.
- (iii) It is open to the employer to show that such a dismissal was for a potentially fair reason
- (iv) If it does so it will then be for the tribunal to decide whether the dismissal for that reason both substantively and procedurally fell within the range of reasonable responses and was fair.

86. In Wright V North Ayrshire Council [2014] IRLR 4. Mr Justice Langstaffe reinforced the test in Nottingham CC V Meikle 2005 ICR 1, namely to ask whether the breach played a part in the dismissal. Was the breach a cause of the resignation? It need not be the sole cause.

SUBMISSIONS

87. Mr Liversidge on behalf of the respondent referred to the claimants having poisoned the grievance process and having conspired to produce the unfair dismissal claim. He described the actions of all three claimants as the equivalent to revolt and mutiny. He described them as untruthful and manipulative individuals who were pursuing groundless claims. Counsel for the claimant in her submissions referred me to a significant number of documents the contents of all of which I was already aware of and a number of which I do refer to in this judgment.

CONCLUSIONS

The general conclusions in respect of all three claimants.

88 I have decided that I can limit my conclusions to the events following the appointment of Mr Liversidge and Mr Walker to carry out the HR function on 12 March 2012. I have provided an earlier narrative in order to establish some background for each claimant. After March 2012 Mr Liversidge, in particular,

embarked on a course of conduct both in person and by email which led each claimant justifiably to conclude that they each had no trust and confidence in the respondent. He had concluded that the meeting on 18 March would go ahead regardless. He rejected the conciliatory approach proposed by Mrs Lavender. He regarded the grievances, which each claimant raised as a last resort and which I have concluded represented a genuine expression of their concerns, as a dishonest and collusive attempt to prevent the meeting going ahead.

89 It was inexcusable to continue with the meeting after receipt of those grievances and Mr Liversidge compounded the situation when he accused the claimants publicly of having forfeited the trust and confidence of the Board. He had earlier circulated an email, which deliberately included the claimants as recipients, in which he accused them of disgraceful unprofessional conduct and claimed that their citing of stress was downright dishonest. As a consequence of these actions the meeting turned into the car crash so graphically described by Mr Mutch. Mr Liversidge then exacerbated the situation by insisting that he and Mr Walker had individual meetings with the individuals who had raised grievances of bullying and harassment against them and threatened them with disciplinary action if they failed to attend. To the extent that Mr Liversidge claims to have relied on ACAS advice, ACAS can only react to the information they are given. ACAS cannot have been aware that the claimants had raised grievances because any advice sought will have predated that development.

90. Subsequently the entire Board chose to reject conclusions and recommendations which Ms Puttock was entirely justified in reaching and further exacerbated the position by failing to advise any claimant of that rejection until after Ms Smith and Mr Tyson had both resigned, believing that their grievance had been upheld but that the board had chosen to ignore Ms Puttock's recommendations..

Conclusions in respect of Mr Brown

91. In addition, Mr Brown was entitled to conclude that the respondents had without cause broken his trust and confidence by threatening to bring disciplinary action if he failed to attend a grievance; by suspending him partly on the basis that he had raised a grievance and by inviting them to a disciplinary hearing to be conducted by the individual against whom his complaint of bullying and harassment had been upheld. After Mr Brown had finally been notified that the Board had rejected the findings of the independent consultants he was told that he was not entitled to know their reasons for so doing.

Specific conclusions in respect of Ms Smith

92. I adopt and endorse the reasons given by Ms Smith in her resignation letter. Despite the fact that her grievance of bullying and harassment had been

upheld she continued to receive communications from Mr Liversidge which were unacceptable in both tone and content. Despite Ms Puttock's recommendations, Mr Liversidge was still involved in HR matters. He continued to communicate directly with Ms Smith and she was entirely justified to feel trepidation about any subsequent return to work.

Conclusions in respect of Mr Tyson

93. I adopt and endorse the reasons set out by Mr Tyson in his resignation letter. He was entitled to conclude that having been treated in the way he was on 18 March 2013 and having had his grievance upheld no steps had been taken to address the recommendations in the grievance outcome. In addition he had been threatened with further disciplinary action.

94. The catalogue of events which concluded with each individual resigning was in essence caused by Mr Liversidge's desire for combat and his inability to stand aside. He remains convinced that the claimants were motivated by malice and effectively in revolt. That conviction has influenced the actions and communications which I have identified in my findings of fact and set out in detail above

96 The respondent has failed to show that the resultant dismissal of any claimant could have been for a potentially fair reason. They resigned in response to the breaches of trust and confidence I have identified. Accordingly the dismissals of all three claimants was unfair.

Signed by  on 4th March 2014
Employment Judge Kearsley

Reasons sent to Parties on

6 March 2014
M E Roberts