EMPLOYMENT TRIBUNALS

Claimant: Miss C Keeley

Respondent: Grosvenor Packaging Limited

HELD AT: Manchester **ON:** 17, 18 and 19 January 2018
25 January 2018
(in Chambers)

BEFORE: Employment Judge Sharkett
(sitting alone)

REPRESENTATION:

Claimant: Mr D Flood of Counsel
Respondent: Ms K Barry of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of constructive unfair dismissal is well-founded and succeeds.

2. The claimant's claim for breach of contract (for profit share in the year ending June 2016) is well-founded and succeeds.

REASONS

1. The claimant brings claims of constructive unfair dismissal and breach of contract in respect of three breaches:

(1) Breach occurring in relation to a 15% net profit share of the respondent in financial year ending June 2016 (the 2010 agreement)

(2) A breach of the failure to pay the claimant the pro rata amount of her 15% profit share of the respondent for the year ending June 2016 (such breach has been conceded by the respondent); and

(3) The failure to pay the claimant a Christmas bonus of £2,000 in 2016 (the respondent concedes this amount is owed and payable).

2. The claimant was represented by Mr Flood of counsel and the respondent by Ms Barry of counsel. At the outset of the hearing the issues to be determined by the Tribunal were discussed and agreed as those recorded by Employment Judge T Ryan in the Case Management Order of 27 July 2017 as follows:

(1) Unfair dismissal claim –

(a) Was the claimant dismissed? In order to decide this issue the Tribunal must decide –

(i) Did the respondent commit a repudiatory breach of the claimant's contract of employment?

(ii) Did the claimant resign in response to that breach?

(iii) Did the claimant delay in resigning, such that it can be held that the breach was waived and the contract affirmed?

(iv) What was the reason for the dismissal? The respondent confirmed at today's hearing that it does not assert a potentially fair reason for dismissal.

(2) Breach of contract – The claimant asserts that the respondent was in breach of contract in failing to pay the sums set out in paragraph 42 of the particulars of claim i.e.

(a) 15% profit share of the respondent for the financial year ending June 2016;

(b) the 15% profit share for the portion of the year worked for year ending June 2016; and

(c) the £2,000 Christmas bonus which the claimant had been paid throughout her employment.

3. The Tribunal was provided with two bundles of documents, one consisting of in excess of 311 pages, the other relating purely to the tax avoidance scheme which combined ran to 447 pages concurrently from the first bundle. All references to page numbers in this judgment are references to pages in the bundles unless otherwise stated.

4. The claimant gave evidence in support of her claim and Ms Barry on behalf of the respondent called the following to give evidence;

a. Mr G Hodson (shareholder and non-executive Director of the respondent);

b. Mr M Hodson (Managing Director and shareholder of the respondent); and

c. Mr Charles Malcolm Fletcher (external company accountant). It is noted that in respect of Mr Fletcher's witness statement, the Tribunal had been

provided with an incomplete version, with every other page missing. It was only when the claimant had completed her evidence and the Tribunal had already heard from Mr Hodson snr. that the Tribunal received a complete copy. At that point the Tribunal became aware that there were parts of Mr Fletcher's evidence that had not been put to the claimant and in the interests of fairness and with the agreement of both representatives, she was recalled to answer questions in relation to the same.

Findings of Fact

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following finds of fact on the balance of probabilities. The task of the Tribunal is not to make a finding of fact on every matter which arose during the course of the hearing but only on those facts which are relevant to matters to be determined by this Tribunal.

6. The claimant commenced work as a sales representative with the respondent in January 2007. It is the claimant's case that during the course of her interview with Mr Gerry Hodson (Mr Hodson senior (snr.)), the then Managing Director (MD), of the respondent, he indicated that if she was successful in achieving the targets that she herself had proposed, there would be an opportunity for her to acquire shares in the respondent. The offer letter does not make reference to this possibility (p47), but the claimant explained that prior to accepting the offer of employment she had carried out a benefit analysis by weighing up the benefits of working for the respondent against the benefits of setting up her own company, an option which she had seriously been considering at the time (p76).

7. The claimant accepted the job offer and exceeded her targets. She had a good working relationship with Mr Hodson Snr and his son who also worked for the respondent.

8. In August 2009, the claimant was promoted to Sales Manager. At some stage, either before her promotion, or after, she raised with Mr Hodson snr. the possibility of acquiring shares in the respondent. There is some dispute between the parties about when this meeting took place and what was actually discussed, however the upshot was that Mr Hodson snr. refused to consider the possibility of the claimant acquiring shares and the claimant never acquired any. It is the evidence of Mr Hodson snr. that there was never any intention for the claimant to acquire shares in the respondent as it is a family owned company and his intention is and always has been, that it will remain in the family unless otherwise sold to someone else.

9. In support of her assertion that she was promised the opportunity to acquire shares in the respondent, the claimant has produced an email from the recruitment consultant involved in her appointment (p268). The consultant confirms that his recollection is that the option of acquiring shares was something that was discussed during the interview process. Mr Hodson snr. asks that the Tribunal attach little weight to the evidence of the recruitment consultant because the consultant holds a grudge against the respondent due to a dispute arising between him and the respondent following the claimant's appointment. The claimant readily accepts that she waived the respondent's breach in relation to the grant of shares and provides the detail to demonstrate the past conduct of Mr Holdson snr. For the sake of completeness the Tribunal has considered whether or not the claimant was offered the possibility of acquiring shares in the respondent. In doing so the Tribunal has had

regard to all the evidence produced and accepts that the email evidence of the recruitment consultant may not be wholly reliable for the reasons given above.

10. However, the Tribunal has regard to the events and communications around the time of the claimant's appointment. In the email from Mr Hodson snr. which was sent at the same time as the offer letter (p78) the following paragraph is included:

> *"It is hard to put it all in the formal letter, but I can assure you that should you choose to join us you will be joining a small company desperate to grow and with your input I feel we can take Grosvenor a large step forward, not only to the benefit of the company but also for Clare Keeley."*

In oral evidence Mr Hodson snr. was unable to offer any explanation for what he meant by these words, other than that he was selling the claimant the job as much as she was applying for one. It is clear Mr Hodson snr. was keen to recruit the claimant and he clearly expresses his satisfaction at her acceptance of his job offer (p78). The Tribunal notes that claimant did not immediately accept the job offer instead she waited some three days before doing so. During those three days the claimant carried out the benefit analysis referred to above (p76). In carrying out this analysis the claimant has used figures she obtained from Company House, relating to the performance of the company. The respondent has not challenged these figures to say they were not figures relevant to the respondent in 2007, consequently the Tribunal finds that it is reasonable to assume that they are figures acquired by the claimant in 2007. On the basis of the claimant's oral evidence, and the documents produced the Tribunal finds that the claimant did carry out the benefit analysis as she has described. Given that the claimant could not have anticipated the outcome of her employment with the respondent some 7 years later, it is not credible that when carrying out that analysis prior to accepting the job, she would have included the potential acquisition of shares as a relevant factor had Mr Hodson snr. not mentioned this as a possibility in an attempt to encourage her to accept his offer of employment.

11. In finding as a fact, that Mr Hodson snr. did discuss the possibility of the claimant acquiring shares during her interview, the Tribunal notes also that when the claimant was subsequently offered a share of the profits in the respondent as discussed below, she purposively made sure that she had terms confirmed in writing. The claimant explained in oral evidence that given her past experience with Mr Hodson snr. in relation to the acquisition of shares, she wanted to make sure that there could be no dispute about her entitlement to the profit share promised. That said, when Mr Hodson snr. later made it clear to the claimant that she would not be offered any shares, she did not raise any formal complaint and continued to work as usual, enjoying a good working relationship with both the Hodsons.

12. In April 2010, the claimant was promoted to Sales Director and invited to become a statutory director of the respondent. At around the same time Mr Hodson snr. also offered the claimant a 15% share in the net annual profits of the respondent. It is the claimant's oral evidence, which is accepted by the respondent through Mr Hodson snr. that the share of the profits was in consideration of her undertaking the role of a statutory director. The verbal offer was later committed to writing at the instigation of the claimant. The document (p89), confirms a variation to the claimant's contract and includes a clause which states:

> *"In addition to the salary and benefits outlined in clause 9 of the contract of employment, with effect from 1 July 2010 the company agrees to pay annually a bonus of 15% of the net profit per the statutory accounts (year ending 30 June) after adding back into this figure any bonus, dividends (other than the annual dividend paid to Gerry Hodson of no more than £30,000), extraordinary payments or non recurring payments made to the directors or shareholders beyond their normal salary (collectively "extra ordinary deductions"). The bonus will be paid in the month following the approval of the accounts but no later than 30 September following the year end."*

13. The claimant explained that although the profit share was in consideration of her carrying out the role of a statutory director, which position she had taken up in April of that year, the share of profits did not start until 1 July 2010, as that was when the new financial year started. The Tribunal find that there was no discretion on the part of the respondent to decide whether or not to pay the profit share, the terms were clear and if met the claimant received a payment which formed part of her remuneration. In addition to her right to a share of the net profits as outlined above, in November 2010 the respondent shareholders, Mr Hodsons' snr. and jnr. (the Hodsons), agreed by letter of intent that if the respondent was sold to someone outside the Hodson family, the claimant would be entitled to 15% of the net proceeds of the sale.

14. There is no dispute between the parties that, at this time the claimant and the Hodsons' enjoyed a good working relationship. The claimant confirmed in oral evidence that her previous disappointment about the shares had improved and she was happy with the way things were working out. From 2010, the claimant received the bonus referred to above each year together with the bi-annual bonuses which were given, in varying amounts, to most employees of the respondent.

15. At the end of 2013, the claimant learned that Mr Hodson jnr. would be taking over as Managing Director ("MD") of the respondent on the retirement of Mr Hodson snr. There was to be a handover period during the initial months of 2014 and thereafter Mr Hodson jnr. would take over entirely. Whilst the claimant accepts that she did not harbour an ambition to be MD herself, she maintains that she was not consulted about this decision and it had already been decided when she was told. The Tribunal finds that Mr Hodson snr. had made it known to the claimant that the respondent was a family owned business and that the claimant would have known that Mr Hodson jnr. would be his natural successor. Whilst the claimant has not expressed surprise that he was made MD, nor taken issue with the fact that she was not consulted, the Tribunal notes, for the avoidance of doubt, that the claimant did not raise any objection to Mr Hodson jnr. becoming MD either prior to or after his appointment. On the contrary, when following a period of handover Mr Hodson jnr. took over the role of MD completely, the claimant emailed him to assure him of her assistance and support (p139). The claimant also confirmed in her oral evidence that she was looking forward to the two of them working together.

16. Not long after Mr Hodson snr. retired, the claimant complains that her relationship with Mr Hodson jnr. started to deteriorate. She relies on a number of incidents which she explains, would probably not have prompted her to resign in response to any one on their own, but did form part of her decision to resign when the respondent failed to pay her the correct amount of profit related bonus that she was entitled to in 2016. She claims the failure to make this payment in the correct

sum was in breach of the terms of the agreement she had with the respondent and was the final straw in a series on incidents since Mr Hodson jnr. took over as MD. The incidents predominately relied on are summarised below. The Tribunal has not rehearsed all the incidents relied on but confirms that each and every complaint raised by the claimant during the course of these proceedings has been considered, together with the respondent's evidence in response to the same.

17. The first incident occurred not long after the retirement of Mr Hodson snr. The claimant was keen to involve staff in deciding how the sample approval process of the respondent could be improved. She had received approval for this initiative at a meeting of the board and invited the office staff by email to a meeting to discuss the same on 21 October 2014. Mr Hodson jnr. was also invited and attended. The claimant complains that Mr Hodson jnr. mocked her in the meeting and made clear his lack of interest and support. In oral evidence Mr Hodson jnr. accepted that he did express his view that the meeting was not going to achieve anything when after thirty five minutes no progress had been made. He explained in oral evidence that he thought that it was a case of 'too many cooks spoiling the broth' and that a decision was not going to be reached in the meeting. He disputes that he brought the meeting to an end either abruptly, prematurely or at all, as claimed by the claimant, and finds hard to believe her claim that all the staff present at the meeting subsequently came to her later to express negative views about him. The claimant accepts that she did not raise the matter with him and explained that this was because she was of the view that, he knew what he had done and did not need telling. In addition, she explained that it was not her way to confront people and she did not think that she would achieve anything by addressing it with him. She was conscious of the fact that it was in the early days of his position as MD and she was hopeful the situation would improve.

18. The claimant also complains that on a number of occasions in 2014, she asked to see copies of the respondent bank statements but they were not given to her. Mr Hodson jnr. accepts that the claimant asked to see the bank statements once and that he gave it to her. She explained in oral evidence that she had told him that she was anxious about cash flow following the gold investment referred to below, and she wanted to see who had paid invoices. Mr Hodson jnr. had explained to her that he was able to get this information much quicker than relying on bank statements as he had the activity online and could therefore monitor the payments daily. In oral evidence, he explained that paper copies of the bank statements were stored in a cupboard which the claimant had access to and she could have viewed the statements any time she chose. The claimant accepts that she received monthly management accounts which showed the financial position of the respondent. She was unable to explain why, if she had asked for bank statements on a number of occasions, and in particular at board meetings, there is no record of any such requests being made in the minutes of the board meeting which were approved by her and the rest of the board.

19. The Tribunal find that the claimant was not denied access to financial information about the respondent, because this was provided through monthly management accounts, which she accepts showed the financial picture of the respondent. It is accepted that she asked to see the bank statements on one occasion but on the balance of probabilities it is unlikely that she asked again, as alleged, because she would have had all the information needed in the monthly

management accounts and there is no record of her having asked. She agrees in oral evidence that on its own this was a minor issue.

20. A further complaint relied on is that Mr Hodson jnr. was not open and transparent with the claimant and had on occasion lied to her. The example relied on is when a customer with whom she had a good relationship had contacted her because he was unable to contact Mr Hodson jnr. When she first questioned him about this he at first denied having received a call from the customer, but when pressed by the claimant he admitted that he knew the customer had called but had chosen not to take it. In oral evidence the claimant accepted that Mr Hodson jnr. was at liberty to decide who he wanted to talk to and that her issue at the time was the way in which he was treating this particular customer because of the relationship she enjoyed with him.

21. If as alleged the claimant believed that Mr Hodson jnr. was keeping her in the dark and lying to her, it is not credible that she would not have formally raised this in her position as a statutory director, given her own personal liability in that role. The Tribunal finds this incident to be relatively trivial and that the real issue with the claimant was the fact that she did not like the way Mr Hodson jnr. was treating someone with whom she got on well. That said she did not raise this with him at the time although in oral evidence she maintains that she raised all three matters in February 2015 and that thereafter their relationship improved for a while.

22. The Tribunal note that the claimant does not refer to a meeting in February 2015 in her witness statement and Mr Hodson jnr. denies that any such meeting or conversation happened. The Tribunal accepts that there will be occasions when a claimant forgets to include information in a witness statement, but this does not necessarily mean that the event did not happen. However, the Tribunal finds that this is a significant oversight, particularly in a claim of constructive unfair dismissal and where a claimant is legally represented. The Tribunal note that, despite many emails of a personal nature passing between the claimant and Mr Hodson jnr., there is not one that followed the meeting that is said to have taken place in February 2015. The Tribunal also note that the claimant was unable to explain why such a significant meeting was not in her witness statement. She did not say she forgot to mention it; her response when questioned was that she could not explain. On the balance of probability, the Tribunal prefers the evidence of Mr Hodson jnr. in this respect and finds that the claimant did not bring the above three complaints to the attention of Mr Hodson jnr. in February 2015.

23. The basis of a further complaints arises from the decision of the board to approve the purchase of a new piece of equipment for the respondent in May 2015. The approval and confirmation of order are recorded in the minutes of the board meeting of 12 May 2015. At the meeting, the claimant was told that she could tell the sales representatives to look for work for the new equipment. The claimant complains that when she then went to speak to the staff she discovered that Mr Hodson Jnr. had told them about the equipment the day before. The claimant complains that in allowing her to go to speak to the staff without first letting her know that he had already told them, undermined her position with the staff. The Tribunal find that the respondent is a small company and that the claimant spends much of her time off site in her role as sales director. It would not be unusual in a business of this type for staff to know what was going on or, for matters to be mentioned informally by the MD working alongside the staff on a daily basis especially if they

related to plans to improve the business. The Tribunal note that the claimant does not say she asked if she could tell the staff the machine was coming, she asked if she could tell staff that they should look for work for the machine, which is different. The claimant did not complain to Mr Hodson jnr. about this but did ultimately raise it eleven months later in April 2016 when tensions about her profit related bonus discussed below, started to surface.

24. The Tribunal finds that in April 2015 there is no sign of problems between the claimant and Mr Hodson jnr. On the contrary there is email correspondence between them in March and April 2015 which demonstrates the relationship between her and Mr Hodson jnr. as being friendly and supportive (p154&156). In particular, the Tribunal notes that in an email to Mr Hodson of 10 April 2015, the claimant writes:

> "*By the way I've just been reminded by John Hayden on Linkedin that it's 5 years ago today that I became a director. Not been a bad 5 years has it? The next 5 it will just get better and better though"*

The comment ends with a smiling emoji. There are further emails later in the month of April 2015 (p160-163), which have been generated as a result of the claimant being unwell and unable to attend work. It is clear from the content of those emails that there is a good working relationship between the claimant and Mr Hodson jnr. which would appear to be based on a mutual trust and concern for each other. It is the claimant's case in oral evidence that these emails do not reflect the true nature of the relationship, and that Mr Hodson jnr. managed to contain his true colours in written correspondence. The Tribunal finds on the balance of probabilities, that if Mr Hodson jnr. was 'hiding his true colours' in email correspondence and that the relationship between he and the claimant was poor, the claimant would not have responded as she did in a friendly and transparent manner and using smiley emoji's to sign off. The Tribunal finds these emails reflect the true nature of the relationship between the claimant and Mr Hodson jnr. at that time, and that the working relationship between the two was, on the whole, a good one.

25. In oral evidence, the claimant explained that the reason that she never complained about the way in which Mr Hodson jnr. treated her was because it would not have achieved anything and that she had no one to turn to. The Tribunal does not accept this explanation because there is clear evidence in July 2015 that the claimant was able to complain and did so, about the fact that Mr Hodson jnr. had changed the format of a non-compliance report form without first consulting her. The email from her (p184) is direct, to the point and clearly expresses the claimant's dissatisfaction with Mr Hodson jnr. The Tribunal finds that this is clear evidence that if the claimant was unhappy about a matter she could, and did, challenge him. In respect of the complaint that Mr Hodson jnr. changed the format of the form, the claimant accepts that Mr Hodson jnr. was at liberty to change the form as and when he chose and that it was he who would most commonly deal with the forms. The Tribunal finds that whilst the claimant was unhappy with what happened, this was a trivial matter which amounted to nothing more than a minor workplace disagreement.

26. In addition to the matters outlined above the claimant also complains that Mr Hodson jnr. failed to keep her informed about when he would be on leave or away from the office, failed to introduce her to new members of staff, kept information about staff wages from her and would change delivery times for orders without telling her. In response to these complaints, Mr Hodson jnr. accepts he did not tell her when

he was away on holiday or introduce her to new members of staff. He explained that he did not believe it was necessary to do either as he rarely took more than one holiday a year and this along with any other absences from the office was recorded on the calendar next to his desk. He did not think it was necessary to inform the claimant every time he was away from the office because the staff at the office knew where he was and even when he was on annual leave he was always in email and telephone contact with them. In respect of not introducing her to new members, Mr Hodson simply did not feel he had a responsibility to do this. The claimant was often off site and therefore not around when new members of staff started work. Most of them were shop floor workers with whom the claimant would never have any contact. He was of the view that as a Director and senior member of staff she was able to introduce herself to staff she had not come across before and should not need to be formally introduced.

27. He further explained that the claimant mostly worked off site and changes to delivery times were a regular occurrence. If he was required to contact the claimant every times there was a change to delivery times he would be unable to get on with his job. In respect of the allegation that he deliberately withheld information about staff wages. Mr Hodson jnr. denies this. He explained that financial information about the company was available to the claimant. He did not withhold information about 2016 wages when he handed her figures recording the 2015 wages, because at that time the 2016 wages had not been agreed. The whole purpose of sending the 2015 figures to the claimant had been in preparation for the meeting they had to discuss 2016 wages. The Tribunal accepts the explanations given by Mr Hodson jnr. in respect of the allegations set out in paragraph 26 above. The Tribunal finds that whilst the claimant may have wanted Mr Hodson jnr. to act in a different way the tribunal was satisfied with his explanation for his actions and it was not incumbent on him to do otherwise.

28. Prior to the claimant resigning on 25 November 2016, two further incidents occurred. The first was when the claimant was made aware whilst working off site that a member of staff had closed the office early one Friday afternoon. As she was aware that Mr Hodson jnr was away, she believed the staff member had closed the office early without permission and that, if that was the case disciplinary action should be taken against her. When Mr Hodson jnr returned to the office she raised the matter with him and expressed her intention to discipline the member of staff if what she had heard was correct. Mr Hodson did not stop her from pursuing this course of action, despite the fact that he knew that the office always closed early on Fridays if all the work was finished. When the claimant spoke to the member of staff concerned and informed her that she faced disciplinary action she discovered that closing early on a Friday was a common practice that had always happened. The claimant felt embarrassed by the situation and felt she had been 'set up' by Mr Hodson jnr.

29. In oral evidence, Mr Hodson jnr. explained that the claimant had seemed upset about the office being closed early and he thought that he should let her tell staff that they should not close early without authority. He accepted that he perhaps should have told he claimant about the history of closing early but thought that he was affording her respect by letting her deal with it. Whilst Mr Hodson may in some way have thought he was empowering the claimant by allowing her to deal with this matter in a way that she thought appropriate, the Tribunal finds that it was unreasonable of Mr Hodson jnr. to allow the claimant to proceed without telling her

the true position. It was inevitable that she would discover that her intention to discipline the member of staff would be futile, and in failing to give her the relevant information Mr Hodson jnr. placed her in an embarrassing position. The Tribunal finds that this would not be behaviour expected between directors of such a small company and it was unfair of Mr Hodson jnr. to place the claimant in this position. The claimant accepts in oral evidence that she did not raise the matter with Mr Hodson jnr. at the time. She accepts that she should have done but she did not think that she would achieve anything by doing so and she did not want to rock the boat.

30. The second incident occurred in October 2016 when two members of staff approached the claimant with queries about their pensions. They told her that they had concerns about how the respondent's new pension scheme was going to affect them and although they had asked Mr Hodson jnr. to explain they were still unsure. The claimant was not able to approach Mr Hodson jnr. directly at the time as he was away from the office. Instead she contacted the respondent's accountants to get information from them. When Mr Hodson jnr. returned to the office he learnt that the staff had approached the claimant about their pensions and told them that in the future is they had any queries about matters that he was dealing with they should approach him with them. Contrary to the claimant's initial oral evidence that he had instructed them not to speak to her about anything, giving an impression to the Tribunal that they had been instructed not to talk to her, the claimant subsequently agreed that the instruction was in relation to anything he was dealing with. She further accepted that as their line manager and the person dealing with the pension it was reasonable to instruct them to approach him with such matters.

31. In addition to the evidence above that demonstrates the claimant's ability to complain when she is not happy, the Tribunal further does not accept that the claimant had nowhere to turn with regard to pressing her complaints about the way in which she was treated by Mr Hodson jnr. The Tribunal notes that the claimant has clearly expressed how good her relationship was with Mr Hodson snr. and how much more approachable than his son he was. It is clear that until the problems with the profit related bonus arose, the claimant was held in high regard by Mr Hodson snr. who still held a non-executive position on the Board. Had she been concerned to the extent now expressed, about the manner in which she was treated by Mr Hodson jnr. the Tribunal finds, that on the balance of probability she would have been able to approach him but chose not to.

32. The events that led to the claimant's ultimate decision to resign from her position within the respondent relate to the 15% profit related share that the respondent had agreed to pay to the claimant in the terms set out in the agreement dated 15 November 2010 (the 2010 agreement),(p89).

33. The pre-amble to these events is that in 2012, the claimant along with both Mr Hodson's agreed that the respondent would enter into a tax avoidance scheme which had been brought to their attention by the respondent's accountants. In simple terms, the scheme, Qubic, provided for paymeny from income to be invested in the scheme to buy and sell gold. Returns on the investment would then be paid to the Directors without the need to deduct tax and National Insurance (NI)on the part of the employee or the employer. The gross sum of the returns were therefore paid to the three directors as bonuses. In order to benefit from the scheme the monies paid into Qubic had to come from earnings of the beneficiaries and not dividends. Consequently, the claimant used monies earned from her profit related bonus and

the two Mr Hodsons' from monies paid to them by the respondent as bonuses specifically for this purpose. The sums contributed by each beneficiary were not equal, Mr Hodson snr. contributed 69.18% of the sum total invested, with Mr Hodson jnr. 12.33% and the claimant 18.48%. The claimant's contribution amounted to £29,000, which was made up of her 15% profit related bonuses for 2012 and 2013.

34. All three Directors benefited under the scheme, but they were always aware that HM Revenue and Customs (HMRC) might find that the scheme did not qualify for the exemption from tax and NI, and that the respondent might ultimately have to account to HMRC for the same. This possibility became a reality in March 2016 when the respondent was informed that the scheme had failed and a significant sum of money with interest, had to be paid to HMRC. Mr Fletcher the respondent's accountant, explained in his witness statement that the legal obligation to make the relevant deductions for tax and NI lies with the respondent and consequently the liability to make payments to HMRC also lay with the respondent. There was some discussion between the directors at board level about where the monies were ging to come from to pay HMRC. At the board meeting of 12 April 2016 when the matter was discussed, the claimant expressed her concern about what would happen to her profit related bonus for that year if the payment of the bill was to result in the accounts showing no profit. The minutes of the meeting clearly record that as the tax bill was an ongoing issue the directors would seek to make payment using the respondent reserves and make enquiry about whether it would be possible to write the sum off against corporation tax for that financial year. In oral evidence, Mr Hodson snr. accepts that the possibility of exploring these alternative avenues of payment arose from the claimant's concern about her bonus. He further accepts that as a result of agreeing to explore these methods of payment the claimant would have left the meeting under the impression that the respondent would try to protect her bonus by making the payment out of the reserves of the respondent or a corporation tax adjustment. He does not accept however that he made such a promise to her.

35. Subsequent advice from the respondent's accountants informed the directors that their proposed method of payment was not permissible and that HMRC would insist that the payment would have to be recorded as earnings of the respective beneficiaries and reflected in the relevant sums of each of their P11Ds. What this ultimately meant was that the respondent accounts would have to record the sum of money paid to HMRC as earnings of each of the directors in the amount that each one benefited individually. Accounting for the monies in this way would result in a significant reduction in the net profit shown for the respondent that year, which in turn on the face of it, would have a consequent effect on the claimant's profit related bonus (p219).

36. There is dispute about the content of the discussions that took place between the claimant and the Hodsons in relation to how the HMRC payment would be managed in respect of the claimant's bonus. The claimant maintains that, Mr Hodson snr. had assured her that her bonus should not be affected by the payment to HMRC and, that after the initial board meeting where it was raised, her bonus was never discussed again until the meeting in September 2016. She accepts that Mr Hodson jnr. told her that the money had to be accounted for as earnings of the three of them but this was all she was told. Mr Hodson jnr. disputes this and told the Tribunal that he had told the claimant that he had been worried about telling the claimant about

how the HMRC payment was to be accounted for because of the effect it would have on her bonus.

37. It is clear to the Tribunal that, around the time that Mr Hodson jnr. is said to have given the claimant the information about the HMRC payment, there was a heated discussion between the two of them. During this discussion the claimant raised historical complaints about his behaviour and in an email he sent to himself later that day Mr Hodson jnr. recorded that he had found her to be disrespectful towards him (p199A). The claimant does not dispute that a heated conversation took place and has not challenged when the email was created in which Mr Hodson jnr. made a note of the conversations that had taken place between them. The Tribunal note that most of the matters she complained of at this meeting were those that she had told the Tribunal she had taken a decision not to raise with Mr Hodson jnr. when they arose, for the reasons she has given in oral evidence. The Tribunal find that on the balance of probabilities there would have to have been a significant incident to prompt her to raise them on this occasion when she had not done so in the past. The Tribunal, having regard to the evidence heard, and the email created by Mr Hodson around the time of this discussion, find, on the balance of probability, that the claimant was aware from Mr Hodson jnr. that the payment to HMRC was to be accounted for as earnings and that that this would invariably impact on her profit related bonus. The Tribunal accepts that the claimant may not have been aware of the impact that was ultimately proposed, but it does not accept that because of a promise made by Mr Hodson snr, she did not believe her bonus would be affected. The Tribunal finds that Mr Hodson snr. had initially agreed to explore ways in which the payment could be managed, but on the balance of probabilities does not find that the claimant had received a promise that her bonus would be protected. The Tribunal finds on the balance of probabilities, that if Mr Hodson snr. had resolved to protect the claimant's bonus as alleged by the claimant a note to that effect would be recorded in the minutes of the board meeting.

38. The Tribunal heard evidence from the respondent's accountant, Mr Fletcher, about the instructions he had received from the Hodsons in relation to the payment that had to be made to HMRC. In oral evidence he explained that the Hodsons had told him that there were to be no bonuses paid by the respondent that year. The Tribunal notes that in respect of bonuses, of the three directors, only the claimant had a contractual right to a bonus, which formed part of her remuneration. In contrast Mr Hodson snr had taken monies from the company in the form of dividends since his retirement and Mr Hodson junior, who also received dividends, received bonuses only in a sum agreed which was not profit related and was entirely discretionary. The claimant had a contractual right to a 15% share of the net profits of the respondent each year in accordance with the terms of the 2010 agreement (p89).

39. The Tribunal reminds itself that the terms under which the claimant's bonus was calculated were:

> *"In addition to the salary and benefits outlined in clause 9 of the contract of employment, with effect from 1 July 2010 the company agrees to pay annually a bonus of 15% of the net profit per the statutory accounts (year ending 30 June) after adding back into this figure any bonus, dividends (other than the annual dividend paid to Gerry Hodson of no more than £30,000), extraordinary payments or non recurring payments made to the directors or shareholders beyond their normal salary (collectively "extra ordinary deductions"). The bonus will be paid in*

the month following the approval of the accounts but no later than 30 September following the year end."

In his oral evidence Mr Fletcher explained that the £30,000 dividend of Mr Hodson snr. was a deemed dividend, so even if not taken it was still accounted for as such when calculating the net profit. However, this evidence contradicted the accounts produced to the Tribunal. He confirmed that any other bonus dividends extraordinary or non-recurring payments made to directors or shareholders beyond their normal salary (collectively 'Extraordinary Deductions') would be added back into the net profit figure before the claimant's 15% was calculated. It is clear both from the evidence of Mr Fletcher and the terms of the clause above, that any extra-ordinary or one-off payments made to the directors or shareholders would have to be added back in to the 'net profit' figure before calculating the claimant's bonus.

40. In oral evidence Mr Fletcher accepted that the payment to HMRC was an Extra-Ordinary deduction for the purposes of the clause because it was recorded as a payment to the Directors in the respondent statutory accounts and it was not a usual or recurring payment. This evidence was inconsistent with the evidence of Mr Hodson snr. who had told the Tribunal that it was Mr Fletcher who had advised them that the clause was not relevant in relation to the HMRC payment. Mr Hodson snr. explained in oral evidence that he considered the recording of the payment as income of each of the directors was just a bookkeeping exercise and had nothing to do with the agreement to pay the claimant a bonus.

41. When questioned, Mr Fletcher explained that when advising the respondent, and in particular the Hodsons, his starting point had been his instructions from them that bonuses were not going to be paid that year, because of the HMRC issue. In his witness statement and oral evidence, Mr Fletcher explained that having received instructions from the Hodsons that bonuses were not going to be paid, he prepared the draft accounts prior to the usual meeting that would take place at the respondent's offices in August each year. The purpose of the meeting was to discuss the accounts prior to finalising them and the same format was followed in August 2016. Mr Fletcher told the Tribunal that in order to finalise the accounts it was necessary to confirm the bonus situation. It is his oral evidence that, during the meeting in August the claimant agreed that she would not be entitled to her 15% profit share bonus that year, because the board had agreed that the respondent would pay the HMRC bill. The board had also agreed that none of the directors would be required to pay the money back to the respondent. Mr Fletcher's evidence is that he left the meeting on the firm understanding that the claimant was in agreement that she should not receive her 15% net profit related bonus that year. His written evidence that he did not hear anything differently from the directors of the respondent at all until he was then told about the claimant's resignation (W/S para26), is inconsistent with his oral evidence that he later spoke to Mr Hodson jnr. and learnt that the claimant had gone back on the agreement and wanted a bonus as well. Mr Fletcher told the Tribunal that Mr Hodson jnr. had told him that he and Mr Hodson snr intended to pay the claimant 15% of the net profit after the HMRC payment had been taken out, and that he had advised him that the claimant was not entitled to any bonus at all. Mr Fletcher was asked to explain in cross examination how he had concluded that the claimant was not entitled to a bonus given that he had previously agreed that the HMRC payment being accounted for as income in the statutory accounts, amounted to an extraordinary deduction for the purpose of the 2010 agreement. Mr Fletcher explained that he had not taken a rigid legal like

approach to the clause in the 2010 agreement. Instead, he had looked at it from an accounting perspective, taking into account the monies that the claimant had already had from the Qubic scheme, and what had been discussed and in his opinion agreed at the August meeting. Mr Fletcher was of the view that the claimant was not entitled to ‘have her cake and eat it’. He explained that the claimant was already better off financially because she had benefited from the Qubic investment in the past and was not going to have to repay the respondent for her portion of the bill from HMRC. On his calculations the loss of her entitlement to a 15% net profit share of the respondent in accordance with the terms of the 2010 agreement, still left her in a better position overall than she would have been had she not been in the scheme and if she had to repay the respondent. It was on this basis that Mr Fletcher determined that the claimant was not entitled to any bonus at all under the terms of the 2010 agreement for the year 2016.

42. It is clear to the Tribunal that Mr Fletcher has not considered the 2010 agreement as a contractual right of the claimant. He has told the Tribunal that he weighed it in the balance and decided to discount it because she had benefited financially elsewhere. The Tribunal find that the terms of the agreement of November 2010 are clear and unambiguous. The Tribunal finds that payments recorded as income received by the directors in the statutory accounts for that year are, if not extra-ordinary then are most certainly non-recurring and as such fit the definition of extra-ordinary deductions for the purposes of the agreement. In the absence of an agreement to vary the terms of the agreement on this occasion the respondent would be required to add back in the payment recorded in the statutory accounts as paid to the directors, before calculating the claimant’s 15% profit related bonus. It is a standalone entitlement and if the intention was that the claimant would lose her rights under this clause in the event of her obtaining a windfall from the respondent elsewhere, it should be provided for under the terms of the agreement. In the absence of such a provision, any unilateral variation of the 2010 agreement will result in a breach of the contract.

43. That said the question arises as to whether the claimant did agree to vary her rights under the clause as described by Mr Fletcher. The claimant accepts that she, along with the Hodsons, attended a meeting with Mr Fletcher in August 2016 but she denies that any conversation took place about her bonus or that she agreed that she would forgo her right to a bonus that year. She explained that she had not at first remembered the meeting until she read Mr Fletcher’s witness statement. She has only a hazy recollection of Mr Fletcher explaining how the HMRC payment had to be accounted for in the respondent’s accounts and has no recollection of her figures being discussed at this meeting. She does however clearly recall the figures referred to by Mr Fletcher in evidence, being discussed in detail at the meeting of 19 October when Mr Fletcher’s son Adam was in attendance.

44. The Tribunal note that there is no mention of the meeting of August 2016 in the witness statements of either of the Hodsons’. Mr Hodson jnr. was unable to explain why a meeting of such significance is not mentioned in his witness statement or any of the pleadings before the Tribunal. The Tribunal further note that it is not included in the chronology prepared by the respondent for the purposes of these proceedings, and it was not put to the claimant that she had waived her right at this meeting when she was cross examined by Ms Barry, before she was subsequently recalled on the instruction of the Tribunal. Mr Hodson jnr. in response to questions from Mr Flood challenges the fact that the claimant does not make any reference to

the meeting in her witness statement either. However, that is somewhat missing the point, as there would be no reason why the claimant would make reference in her statement to meeting where she considers nothing of significance took place. The respondent on the other hand claims that it was at this meeting in August 2016, that the claimant confirmed her agreement to forgo her contractual right to a bonus that year in return for the respondent not pursuing her for repayment of her share of the HMRC bill. If true, this would amount to an agreement on the part of the claimant to vary her rights under the terms of the 2010 agreement; a highly significant event and one that the Tribunal would have expected to see documented or at least included in the respondent pleadings and statements of its witnesses. The Tribunal would also have expected to see reference to the fact that the claimant had agreed to this, or alternatively reneged on such an agreement, somewhere in the documentary evidence before it. It is not referred to in the minutes of the board meeting or in the response from Mr Hodson jnr. to the claimant's email of 29 September 2016. In contrast, there is documentary evidence of the claimant showing her clear disagreement to the proposals relating to her bonus in her immediate responses to the discussion that took place in the board meetings of 29 September and 19 October 2016, (p232 & p248). For the reasons outlined above and having regard to all the oral and documentary evidence before it, the Tribunal find on the balance of probabilities that, a meeting with Mr Fletcher did take place in August 2016 but the claimant did not agree to forgo her right to a bonus payment under the terms of the 2010 agreement.

45. The Tribunal accepts that the claimant was prepared to consider a variation of her right to a bonus payment under the strict terms of the November 2010 agreement in an effort to move forward with the Hodsons. She accepted in oral evidence that if the Hodson's had agreed to listen to her suggestions and compromise she would probably not have resigned. It is clear that the issue of the payment to HMRC caused tension and that all the parties were worried about how the bill would be paid. As previously noted the demand for payment was not one that was made to the individual directors but was one that was payable by the respondent. All three directors knew that this possibility may one day present itself and had been advised to save the tax and NI contributions they had not paid for a period of six years in case that happened. The respondent was entitled to seek repayment of what amounted to an overpayment to them in the sums relevant to each one. The option of each individual raising their portion of the cash was fleetingly considered but dismissed when both Mr Hodsons indicated that they did not have the money to pay it personally. The Tribunal accepts the claimant's explanation that she was not asked whether she had the money as the Hodsons had already indicated that neither one of them was in a position to repay it from personal funds and therefore dismissed it as an option.

46. At the board meeting held 29 September 2016 (p227) the minutes record that the respondent was required to make a payment to HMRC in the sum of £78223.16. The minutes further record that:

"*The company should ask each beneficiary to pay back personal monies owed but it was agreed that this would be treated as earnings this tax year and be allocated to each person's P11D. Grosvenor will pay the PAYE Class 1A that this generates"…..*

Clare will receive a bonus of £2400 in her October pay as her contract states 15% of Nett Profit [sic]

Gerry's historical payments from retirement to be looked at too as they should have been removed as part of Clare's bonus the financial year ending 2015"

47. That evening the claimant emailed both Mr Hodsons complaining about the proposed method of dealing with the HMRC payment (p232). In the email the claimant sets out why she considers the manner of dealing with the payment is unfair and she seeks further discussion with them. In the email she acknowledges that as a result of the scheme she has benefited in the past, but she does not accept that this balances out with the loss of the majority of her bonus for that year because she is the only director that will lose out on their actual remuneration. She also raises additional matters about past monies that should possibly have been dealt with as 'extraordinary deductions' and suggests a meeting for 19 October 2016 to finalise discussions. Mr Hodson snr. did not acknowledge the email explaining in oral evidence that he does not respond to emails that he considers may have been sent in fury and that he would rather have a face to face meeting. He did not contact the claimant after the email to speak to her either face to face, or otherwise. Mr Hodson jnr. did not respond to the claimant's email until 14 October 2016 (p231). He advised her that he and his father had sought the advice of the respondent accountant in respect of the matter and forwarded that advice to her together with a schedule outlining her bonus entitlements for the previous five years. The Tribunal note that in neither the email from Mr Hodson jnr. or the attached advice is there any reference to a surprise or dissatisfaction to the claimant's rescission from what is said to have been agreed at the meeting in August 2016, and it is not referred to in the minutes of the subsequent board meeting held to discuss the matter on 19 October 2016.

48. In oral evidence, the claimant explained that by the time of the next Board meeting, she had not had time to take up the Hodsons' invitation to discuss any queries she had with Mr Fletcher. Instead she had spent the time preparing for the meeting and had a number of alternative solutions for the Hodsons' to consider. She knew that Mr Fletcher's son Adam, had been invited to the meeting in his father's absence, so had decided to wait until then to raise the queries she had. The meeting did not go well. Although Mr Hodson snr. gave evidence that the meeting was normal during the time Adam was in attendance, his father told the Tribunal that Adam had told him the meeting was quite heated. All the parties agree that once Adam left the meeting became hostile and unpleasant and nobody was listening to anything anyone had to say. In oral evidence Mr Hodson snr. accepts that he felt agitated by the claimant's attitude and said that he was not listening to her because 'she was like a dog with a bone'. He said that no matter what they said to her she would not accept what they were saying. The minutes of the meeting do not reflect any hostility but do reflect that there was some disagreement about the treatment of the payment to HMRC and the calculation of the claimant's bonus:

"Adam present and answered several queries Clare had regarding Qubic and calculations. Clare asked to discard HMRC payments from her calculations for her bonus. This was rejected.

After historic calculations were looked into, Clare did miss out on £3075 from last year due to GTH's ex-gratia payments. This will be added to this years bonus.

Clare will receive a bonus of £2400 in her October pay as her contact [sic] states 15% of Nett Profit"

49 Mr Hodson snr. has given inconsistent evidence about whether the claimant offered alternative suggestions at the meeting and was evasive in his answers. The claimant was very clear about what happened at the meeting and produced notes that she had made at that time (p239-247). In considering the evidence in the round, and having regard to the previous email communications from the claimant to the Hodsons, the Tribunal find that, the claimant went to the meeting to try to reach what she refers to as a middle ground that she thought was fair to all the parties. She attempted to put proposals to the Hodsons but they were intransigent and accused her of making demands to have the whole of the HMRC payment added back in before calculating her bonus. The claimant accepts that, when asked what she wanted she did say that she would ideally want that but she realised that she could not and instead came up with a solution whereby her portion of the payment would not be added back in. In oral evidence Mr Hodson jnr. accepted that he said 'no way' in response to her proposal and the meeting was concluded without agreement.

50 Following the board meeting of the 19 October the claimant wrote again to the Hodsons on 20 October 2016, (p248). The letter was polite but to the point and clearly sets out her concerns. The claimant did not receive a reply to her letter. Mr Hodson snr. told the Tribunal that he does not believe in responding to emails and he saw the letter as 'another of her rants'. Mr Hodson jnr. accepts that the letter clearly shows that the claimant was unhappy but as she had not stated that it should be treated as a grievance he did not consider that he had to treat it as such. He accepts that the letter was met with total silence, but he considered that it was a matter that had been exhausted and he had wanted to give himself time. He accepted in oral evidence that as her boss, ignoring the letter would potentially make matters worse and that on reflection he can see that meeting with her would have been better

51 The claimant continued to work as usual after she had sent the letter and in oral evidence explained that she was hoping that the Hodsons would reconsider their position in light of what she had put in her letter. She was waiting for her November pay to see if they had changed their minds. When they did not, the claimant resigned by letter of 25 November 2016 (p252). The claimant resigned with notice because she did not have any alternative work or source of income. Her letter of resignation made clear that she was not waiving any of her rights and the only reason she was resigning on notice was for the reasons she had given. Mr Hodson jnr. initially responded to the letter by text accepting the claimant's resignation and advising her that she would not be required to work her notice period. Neither of the Hodsons offered the claimant an opportunity to meet with them to discuss the issues raised in her email letter of 20 October 2016 or her letter of resignation. The respondent confirmed formal acceptance of her resignation by letter of 14 December 2016 (p256)

52 Mr Hodson snr. told the Tribunal that he and his son had taken advice from the accountant, and been told that as the claimant had benefited under the Qubic scheme in a sum that was in excess of the payment she would have been personally liable to repay to the respondent if it had demanded it, Mr Fletcher's view was that in light of the fact that the claimant was still in profit she should not be entitled to her profit related bonus payment that year. The accountant also advised that the payment to HMRC was not an extra-ordinary payment as referred to under the terms on which the claimant's bonus was calculated. It was the accountant's advice that the claimant was not entitled to any bonus at all that year because the respondent

had had to pay out a large sum to HMRC. The Hodsons' believed that they were being reasonable with the claimant because, despite being told by the accountant that she was not entitled to anything the Hodson's insisted that the claimant was entitled to be paid 15% profit of the small profit shown in the statutory accounts after the HMRC had been taken out, which they thought was in accordance with the terms of the 2010 agreement.

53 In cross-examination, Mr Flood explored with Mr Hodson snr. the circumstances when the bonus payments were made to the Hodsons to enable them to make their payments to the Qubic fund. Mr Hodson snr confirmed that these one off bonuses were added back into the statutory accounts at that time before calculating the claimant's 15% profit related bonus which was in accordance with the terms of the 2010 agreement. Mr Flood asked him what the position would have been had the claimant not been part of the Qubic scheme but the respondent had been required to make a payment to HMRC as a result of the Holden's involvement in the scheme. Mr Flood also asked if that had been the case would the payment to HMRC, accounted for as income of both the Holden's in the statutory accounts, have been added back in as extraordinary deductions, before the claimant's bonus had been calculated. Mr Holden snr refused to answer the question on the basis that it was hypothetical. Despite being pressed by the Tribunal to do so Mr Holden was dismissive of the question, and an answer was not given,

54 The claimant explained that she fully accepted that she had benefited through the scheme and was aware that the respondent was entitled to ask her and the other directors to pay back the monies. However, that is not what the respondent had proposed. It had been agreed between the directors that the respondent would foot the bill entirely for all three of them and none of the directors would be asked to account to the respondent for their share of the liability. However, the claimant maintained that by denying her the rights under the 2010 agreement, she, unlike the other two directors who as employees of the respondent at the time had benefited from the scheme, would take a reduction in her actual salary that year and would in effect be paying her portion or part of it, back. If the HMRC payment had not been made the net profit of the company as shown in the statutory accounts would have been much higher and thus so would her profit related bonus. She agreed that, even though not in the strict terms of the agreement, she would have been prepared to concede that the portion of the figure paid attributable to her tax and NI should not be added back in before her bonus was calculated. However, she felt it unjust that the sums attributable to Mr Holden snr, which was significantly higher than hers, and that of his son should also be excluded. She accepted that Mr Holden junior would not receive a bonus that year but unlike her bonus, he did not have a contractual right to one and did not always receive one. Any bonus he got was discretionary and not profit related. It was also invariably lower than hers because he as a shareholder also took dividends. Mr Holden snr did not receive any further bonuses after the payment into Qubic but was paid dividends each year in the sum of £2500 per month, although these would not necessarily be declared each year. Mr Fletcher had explained in oral evidence that the financial reserves of the company were such that even if the respondent had not made a profit in any given year the respondent would still be able to pay dividends. He explained that there was a difference between a dividend being declared and monies taken as dividends. The claimant maintains that she was firmly of the view that whilst she was prepared to reach a compromise with the Holdens about her bonus, she felt that it was unfair that she was the only one who would be required to take a reduction in her salary for that year as a result of the

HMRC payment. She explained that despite her best efforts to explain her reasoning and reach a middle ground with the Holdens, that would be fair to all of them, they had not been prepared to listen and had treated her in a hostile manner; She explained that when they finally carried out their threat of non-payment of her bonus in the terms of the 2010 agreement, she had no choice but to resign.

Submissions

55 Ms Barry asks the tribunal to consider the historic incidents that the claimant now relies on as part of her decision to resign and claim that she has been constructively dismissed. She reminds the tribunal of the evidence it has heard and the fact that the claimant raised no complaints about any of these matters at the time of their occurrence. In addition, the claimant herself accepts that none of the incidents complained of would have prompted her to resign and had the respondent not acted in the way in which it did in relation to the 15% profit related bonus for 2016, she would probably not have resigned. In any event Ms Barry submits that there is no significant breach in any of the incidents referred to.

56 In respect of the bonus payment, Ms Barry submits that the Tribunal should find that Mr Hodson senior did not promise to protect the claimant's bonus once it became known that the payment to HMRC was going to be made, because it is not documented anywhere, other than in a handwritten note which makes vague references to *'what's changed'* and no reference whatsoever to a promise already made.

57 Ms Barry submits that the minutes of the board meeting of 29 September have to be read in context. She submits that there had been a previous discussion about a bonus not being paid because the directors had agreed that the respondent would pay the HMRC bill without requiring any of them to pay back money to the it. As a result of this prior agreement, after some debate at the meeting of 29 September, it was agreed that the claimant would receive 15% of the net profit shown on the statutory accounts for that year. It is clear that following the meeting the claimant is no longer happy with the outcome and the Holdens try to accommodate her comments by taking advice from their accountants and ensuring that the accountant is present at the subsequent board meeting of 19 October to explain anything she does not understand. The fact that the claimant thought that she had not benefited under the scheme as much as the Hodson, she says may well have led to a heated discussion, but a disagreement will not always amount to a fundamental breach and there is no suggestion that the claimant did not herself express strong views at the meeting. Ms Barry submits that the Hodsons conducted themselves at the meeting with reasonable and proper cause as they were entitled to express their views in the way in which they did. Ms Barry also reminds the Tribunal that it is the claimant's evidence that as of 20 October 2016 she had not contemplated resigning and therefore the conduct of the Hodson's conduct at the board meeting did not cause her to resign in response to the same.

58 Ms Barry also argues that if the claimant had felt as intimidated by the behaviour of the Hodsons as she now claims, she would not have been prepared to work out her notice period. She submits that the claimant has accepted that she was looking for a compromise with the Holdens and that the reason she agreed to work her notice period is because she was holding out for more money.

59 In respect of the terms of the contract that relate to the claimant's right to 15% of the net profits showed in the statutory accounts, Ms Barry asks the Tribunal to look at the reality of the situation. She accepts that Mr Fletcher's evidence was that this was an extraordinary deduction but that the rationale behind the agreement was to prevent the shareholders from taking large amounts of the profit from the company and thus rendering the clause impotent in as far as the calculation of the claimant's bonus was concerned. The sum of £78,000 plus recorded as being paid to the directors in the statutory accounts of 2016 was a notional payment only. They did not in fact receive it because it was paid to HMRC. This she submits is akin to a mistake whereby the directors get the money and then have to give it back.

60 In the alternative, Ms Barry submits that the claimant waived her right to a payment under the 2010 agreement in the meeting that took place with the accountant in August 2016. Ms Barry asks the Tribunal to accept the account of the meeting given by Mr Fletcher and find that although the figures made sense to the claimant in the meeting, when she agreed she was better off by not taking a bonus, she subsequently had a change of heart when she realised that the Holdens were going to fare better than her out of the deal. She submits that even though she changed her mind and went back on the deal, the Holdens still tried to keep her happy and agreed to pay her the 15% of the remaining net profit after deduction of the HMRC payment even though they had been advised by Mr Fletcher that she was not entitled to any bonus at all.

61 For the claimant Mr Flood submits that there is a clear breach of an express term of the claimant's contract of employment as set out at page 89. There is he says no doubt that the respondent elected not to pay her contractual bonus in accordance with the express terms of the 2010 agreement. He asks the Tribunal to find that Mr Fletcher's evidence that there is a deemed dividend payment of £30,000 each year to Mr Holden snr. is incorrect because it is not paid in 2016 and there is no mention of a deemed payment in the clause itself.

62 In respect of the alleged waiver of the claimant's right. Mr Flood agrees that a meeting with the accountant took place in August 2016 but that the Tribunal should accept the claimant's evidence that her bonus was not discussed at this meeting. He submits that a strong factor in making this finding is that there is no mention of this meeting or most significantly the agreed waiver in the witness statements of either of the Holdens nor is it in the pleadings. He also asks the Tribunal to have regard to the fact that in the subsequent discussions that took place about the bonus, at no stage did anyone say to the claimant that she could not discuss this further because she had already agreed to waive her right under the clause. It is clear he says at least at the outset, that there was a suggestion that the HMRC payment may be paid out of monies that would not have affected the profit and loss accounts of the respondent in the way in which it finally happened and therefore it was not unreasonable for the claimant to assume that her bonus would not be affected.

63 Mr Flood asks the Tribunal to consider the fact that when the three directors entered into the Qubic scheme the claimant used the monies from her contractual bonus. The Holden's however were awarded one off bonuses which dwarf the claimant's contribution. He says the reality of what has happened when the HMRC bill comes in is that they in effect award themselves another one-off bonus to pay the bill while the claimant is forced to sacrifice her contractual bonus. Mr Flood also asks the Tribunal to remember that the claimant's oral evidence was that she would have

preferred to have repaid the company even though she would have been financially worse off according to Mr Fletcher's calculations, that she was only concerned that they should all be treated the same.

64 Mr Flood submits that the claimant tried hard to reach a solution with the Holdens and in doing so came up with a number of proposals for them which they were not prepared to consider. Mr Flood accepts that the events up to the bonus issue were not ones that would have made her resign, but they were matters that played on her mind at the time of the resignation. He concludes that the factors which caused the claimant to resign were, the breach of the express term of her contract of employment, a breach of the implied duty of trust and confidence in the manner in which the Holden's treated her in discussions about the bonus and the background of behaviour that played on the claimant's mind at the time.

The Law

65 The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

66 The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

67 The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed 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."**

68 It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

69 The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

70 In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

71 Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

72 In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However,

the last straw cannot be an entirely innocuous act or be something which is utterly trivial.

73 The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in **Nottingham County Council v Meikle** **[2005] ICR 1**. At paragraph 20 of **Wright** Langstaff P summarised it by saying:

> "**Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause.**"

74 The position as to affirmation once a fundamental breach has occurred was considered by the EAT (Langstaff P presiding) in **Chindove v William Morrisons Supermarket PLC** UKEAT/0201/13/BA (26 March 2014). In considering whether the passage of time alone could indicate affirmation, the EAT said this in paragraphs 25-27

> **"25 ….We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.**
>
> **26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.**
>
> **27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force…."**

75 If it is established that the resignation should be construed as a dismissal under section 95(1)(c), the employer has the burden of showing a potentially fair reason for dismissal before the general question of fairness arises under section 98(4). It is noted that the respondent has indicated that it does not seek to rely on a potentially fair reason for dismissal of the claimant.

<u>Breach of Contract</u>

76 The Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment, if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

77 Article 3 provides that a Tribunal has no jurisdiction over a claim for damages or a sum due in respect of personal injuries.

<u>Secondary findings of fact and reasons</u>

78 In order to succeed in a claim of constructive unfair dismissal the burden is on the claimant to show that she has been dismissed in accordance with s95 of the Employment Rights Act 1996 (ERA1996). A resignation in itself can of course not amount to a dismissal for the purposes of s95(1)(a) of the ERA 1996, but it can amount to a dismissal if the reason for the resignation falls within the provisions of s95(1)(c), i.e. that the claimant is entitled to treat herself as constructively dismissed, because the respondent is guilty of conduct which is a significant breach, going to the root of the contract of her employment or, which shows that the respondent no longer intends to be bound by one or more of the essential terms of her contract.

79 It is fair to say that the claimant accepts that if she had received her bonus payment in accordance with the terms of the 2010 agreement, she probably would not have resigned. She does however rely on those historic incidents complained of when deciding to resign in response to the respondent's failure to pay her correct contractual bonus and the manner in which it treated her in response to her complaints about its anticipated failure.

80 It is perhaps appropriate then to first consider the claimant's rights under the 2010 agreement and the circumstances that led to the alleged breach on the part of the respondent. It seems to the Tribunal that the matter is a relatively straightforward one. In 2012, the three directors of the respondent were advised of a tax avoidance scheme (Qubic). In essence, the scheme provided for payment of earnings into Qubic, the returns from Qubic could then be paid to the directors without the need to deduct tax or NI in other words they received the gross amount they paid in plus any increase on their investment. As a consequence the respondent also avoided the need to pay the employer's tax and NI contributions as well. A strict requirement of the scheme was that only 'earnings' of the beneficiaries could be invested. The claimant was entitled to a 15% profit related contractual bonus each year which clearly satisfied the definition of 'earnings' and she contributed two years' worth of her bonus into Qubic. Mr Holden snr however received dividends which were not accounted for in the respondent profit and loss account and were therefore not earnings. Mr Holden junior did sometimes receive a bonus but this was not profit related. Similarly, any monies from dividends he received from the respondent were not 'earnings' and could not be used. In order to comply with the requirements of the Qubic scheme the respondent awarded both the Holdens a one off bonus to pay into the scheme. These two payments to the Holdens would clearly have been recorded as staff costs.

81 It is appropriate now to see how those two bonuses were treated in relation to the calculation of the claimant's bonus in the year end accounts. The Tribunal

reminds itself again of the terms of the agreement under which the claimant's right to this profit related bonus was calculated. The agreement provides:

> *"In addition to the salary and benefits outlined in clause 9 of the contract of employment, with effect from 1 July 2010 the company agrees to pay annually a bonus of 15% of the net profit per the statutory accounts (year ending 30 June) after adding back into this figure any bonus, dividends (other than the annual dividend paid to Gerry Hodson of no more than £30,000), extraordinary payments or non recurring payments made to the directors or shareholders beyond their normal salary (collectively "extra ordinary deductions"). The bonus will be paid in the month following the approval of the accounts but no later than 30 September following the year end."*

Mr Holden snr confirmed that the figures that made up the two bonuses paid to him and his son to enable them to invest in Qubic, were added back into the net profit shown in the statutory accounts for the purpose of calculating the claimant's profit related bonus. This was of course the correct procedure because the bonuses had been 'made to' the directors, and satisfied the definition of extra-ordinary deductions payments under the terms of the 2010 agreement.

82 As we know all three directors benefited from the scheme in the proportions each individual invested. Each received their bonuses from the respondent without deduction of tax and NI. It is not disputed that Mr Fletcher advised the directors before they entered into the scheme that HMRC may not approve of the scheme and in such circumstances HMRC would demand payment of the tax and NI that had not been paid on the bonuses by the directors and the respondent. The directors were also advised that HMRC could seek to recover the payment for up to six years after the non-payment of tax and NI had occurred.

83 In March 2016, HMRC advised the respondent that the Qubic scheme was not approved and it was now seeking payment of the outstanding tax and NI in relation to the bonuses paid to the directors, together with interest on the outstanding amount. The sum was in excess of £78,000 and it is understandable that the directors were concerned about where the money to pay the demand was going to come from. It is not disputed that initially there was some thought that the payment could perhaps be paid out of the reserves held by the respondent, or alternatively whether it would be possible to write the sum off against corporation tax. Having taken advice from the accountants the directors discovered that their proposals would not be allowed by HMRC. HMRC directed that as the payment related to tax and NI liability it would have to be accounted for as earnings of the directors as beneficiaries under the scheme.

84 In the board meeting of 29 September 2016 the directors acknowledged that the respondent was entitled to look to each individual director to repay the difference between the gross and the net amounts of the bonuses they had received under the scheme. Whilst the claimant has told the Tribunal that she would have been able to repay the monies, the Holdens have both given evidence that they were not in a position to do so. The Tribunal accepts that in the circumstances where both the Holden's said they didn't have the money they would have immediately decided without further discussion that the only option would be for the respondent to pay. It is quite clear for the reasons set out in the findings of fact above, that the claimant expressed concern about the effect of doing this on her bonus and did not, contrary

to the evidence of Mr Fletcher, waive her rights under the 2010 agreement. As indicated above there is a plethora of evidence that the claimant continued to object to the way in which the respondent intended to apply the terms of the 2010 agreement from the first time it became clear that HMRC were demanding payment.

85 As indicated above the Tribunal does not find that the claimant waived her rights under the 2010 agreement. Nor does it agree with Mr Fletcher's analysis of why she is not entitled to any payment under the agreement. As the Tribunal have already indicated, the agreement does not provide for non-payment under the agreement in the event that the claimant obtains a windfall from the respondent elsewhere. For this to be the case the claimant would have to agree to a variation or in the alternative there would need to be an express provision to that effect. In the absence of either the question for the Tribunal is what the claimant is entitled to under the terms of the 2010 agreement and is it permissible for the respondent to treat the sum paid to HMRC as something other than an 'extra-ordinary deduction. If it is then there will have been no breach of the 2010 agreement because the claimant was paid 15% of the net profit remaining after the HMRC payment had been paid.

86 The conventional approach to considering the meaning of the terms of a contract is to ask "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*"? (**Arnold v Britton** [2015] 1 AC 1619 per Lord Neuberger PCS at paragraph 15 of his judgment). During the course of cross examination Mr Holden snr agreed when Mr Flood suggested that the purpose of the terms relating to 'adding back in' any bonus, dividends extraordinary payments or non- recurring payments made to the directors or shareholders beyond their normal salary (collectively "extra ordinary deductions"), was to protect the claimant from 'raids' by the shareholders leaving very little of no profit from which her share could be calculated. Given the background to the creation of the clause I find that this is what was understood by the claimant and the Holdens when the agreement was reached.

87 Mr Fletcher has accepted in oral evidence that the payment to HMRC was an 'extra-ordinary deduction for the purpose of the clause. However this is inconsistent with the advice he gave to the Holdens and Mr Holden snr is most definitely not of that opinion. Mr Holden snr considers that accounting for the payment made to HMRC as earning of the directors in the statutory accounts was nothing more than a paper exercise. The directors did not receive any payment under the clause as the money was paid by the respondent to HMRC. In reaching the conclusion that the Tribunal does not accept this argument the Tribunal has firstly had regard to the one off bonus payments that were made to the Holdens in relation to the Qubic scheme. These were clearly a cost to the respondent that were accounted for in 'staff costs'. It was necessary for them to be treated in this way because only 'earnings' could be paid into the scheme. The effect of paying out those bonuses was to reduce the net profit of the respondent in the year they were made. In accordance with the terms of the 2010 agreement, and to protect that claimant from the fact that the Holdens had decided to make an additional payment to themselves, the bonus figure was added back in to the net profit when calculating the claimant's bonus.

88 When HMRC demanded payment of the tax and NI the directors were told that because the payment related to tax and NI it would have to be accounted for as 'earnings' and as such was included in the 'staff costs' of the respondent. The directors knew that the respondent was entitled to recover the monies paid out of 'staff costs' from each of the directors in the sum of their individual liabilities. However, because they did not have the money to pay they resolved at a board meeting that the respondent would meet the costs instead. What they did in doing this was akin to awarding themselves a bonus in the sum in which they would have been required to account to the respondent had they not as directors taken a decision not to pursue repayment of the tax and NI contributions.

89 Whilst it is true that the directors did not physically receive the money in their bank accounts, the money was attributed to them personally in the statutory accounts and they received the benefit in the sum accounted by not having to repay the respondent. In those circumstances the Tribunal finds that a payment was 'made' to the directors that satisfied the definition of an extra-ordinary deduction for the purposes of the 2010 agreement and the figure should have been added back in for the purpose of calculating the claimant's profit related bonus.

90 The Tribunal accepts that by interpreting the HMRC payment in this way the claimant can be seen to gain an additional financial advantage. She avoids paying her share of the bill back to the respondent and she also gets an increased profit related bonus. However, she has a contractual right to that bonus and it forms part of her remuneration. The respondent was at liberty to pursue each of the directors for repayment of their shares of the tax and NI bill but determined not to do so. In essence all three of the beneficiaries received a personal windfall from the respondent because they avoided having to pay the money back to the respondent. If the respondent had wanted to avoid such a situation arising, in the event that the Qubic scheme failed, it should have made provision for the same at the time.

91 For the sake of completeness as part of its consideration of this matter, the Tribunal has also had regard to the fact that if following payment of the bill to HMRC, the directors had then been asked to repay the monies paid out by the respondent, the monies recouped by the respondent would have been credited to staff costs which is where it had been paid from. This in turn would have increased the amount of net profit shown in the statutory accounts after payment of the HMRC bill and thus increased the claimant's profit related bonus. This scenario would place the claimant in almost the same situation as she would have been had the Holdens agreed to her proposal to add back in to the net profit figure only their proportions of the HMRC bill for the purposes of calculating her bonus.

92 Although the Tribunal accepts that the Holden's were acting on the advice of the accountant, it is clear from their evidence before this Tribunal that their minds were made up and they were not prepared to listen to the claimant. Whist they may have met with her to discuss what was going to happen, it is clear that whatever she might have said would not have been given consideration. By failing to correctly apply the terms of the 2010 agreement they placed the respondent in breach of the claimant's rights under the 2010. The Tribunal finds that refusing the pay the claimant in accordance with the terms set out in that agreement is a significant breach because it formed part of her contract of employment and her right to remuneration. It was an essential term which the respondent clearly indicated it no longer intended to be bound by.

93 Whilst the Tribunal has found that the respondent is in breach of the claimant's contractual rights under the 2010 agreement, the claimant also claims that the respondent in conducting itself as it has had breached the duty of mutual trust and confidence and in this respect she relies not only on the breach of her contractual right under the 2010 agreement but also the manner in which the Holdens have treated her during the time that her bonus was in dispute, and in the preceding years she has worked with them. She relies on the failure to pay her a bonus calculated in accordance with the terms of the 2010 ageement was the 'last straw' which triggered her resignation.

94 In order to show that the respondent has breached its duty of mutual trust and confidence, the claimant must show that the respondent, without reasonable and proper cause has conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between her and it. In accordance with **Malik** above:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

The motive of the respondent is not determinative and even though the respondent may have thought it was doing the right thing according to it's accountant. As established in **Buckland** above whether an employer acted within the band of reasonable responses is not the appropriate test to apply in deciding whether there has been a repudiatory breach of a kind envisaged in **Malik**

95 It is clear that simply acting in an unreasonable manner will not be sufficient to satisfy the test of breach of trust and confidence. The conduct must be calculated or likely to seriously damage the relationship taking into account the respondent's interest in managing its business as he sees fit balanced against the claimant's expectation of not being unfairly and improperly exploited. While in this case there was an obvious concern about how the HMRC bill was going to be paid, there is a clear indication that the Hodsons had taken a unilateral decision to ignore the terms of the 2010 agreement and once the claimant attempted to explain the injustice she would suffer as a result of their proposals they refused to entertain the possibility that they may not be right. It may be that they were under the Hodsons were under the impression that the respondent had the right to take the action it did, although it is difficult to know how that could be so when in oral evidence Mr Fletcher readily agreed that the HMRC payments amounted to an Extraordinary Deduction for the purpose of the 2010 agreement. However, irrespective of their motive, the claimant had a contractual right which the Tribunal have found she did not waive, and by failing to comply with its obligations under the relevant clause in that agreement, it was clear that its actions would seriously damage the relationship between them because as the claimant asserts, it was true that she was the only one who in effect was being required to repay part of her share of the monies to HMRC by taking a pay cut in 2016. By not complying with the terms of the 2010 agreement, the claimant was not receiving the remuneration she had the right to receive. This was treatment which it could be said the claimant could not be expected to put up with, whilst the respondent ultimately to pay a much reduced sum, it is clear that it did not intend to perform at all those aspects of the contract relating to the terms on which the bonus was calculated.

96 If I am wrong on this matter and that failure to comply with the terms of the 2010 agreement does not for some reason amount to a fundamental breach going to the route of the contract, I consider whether, on the basis of previous conduct of the respondent the claimant was entitled to treat the failure as a last straw and resign in response. It is well established that the last straw itself does not need to be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. The Tribunal finds that the fact that the respondent failed to comply with the terms of the 2010 agreement cannot in any way be said to be 'entirely innocuous' or 'utterley trivial'. In carrying out this task where there may be more than one reason why the claimant resigned, the correct approach is to examine whether any of the reasons is a response to the breach, not to see which amongst them is the effective cause. I

97 In its findings of fact above, the Tribunal has already indicated that most of the complaints relied on by the claimant prior to 2016 amount in reality to nothing more than the rough and tumble of life in the workplace especially when operating in an environment where one of the two people who have been used to working together at an equal level, moves into the most senior position in the company. It is inevitable that there will from time to time be differences of opinion between those who are responsible for managing the business and these will not usually amount to fundamental breaches of trust and confidence. However, from around the time that the respondent was notified of the demand from HMRC the relationship between the claimant and the Holden's starts to show signs of increasing tension between them.

98 It is not disputed that the board meetings in September and October where the payment to HMRC was discussed were hostile and unpleasant for everyone in attendance and not just the claimant. Save for the fact of a difference in gender, the claimant was of similar seniority and was an equal participant in the meeting, as one might expect from someone in such a senior positon. It is accepted that each party was on an equal footing in respect of a 'permission' to vocalise their opinions and argue their corner. The Tribunal finds that although the meetings were unpleasant the conduct of the Holden's did not amount to a breach of the implied duty of trust of confidence at this stage, although there intentions as stated in the meeting were an anticipatory breach.

99 While the Tribunal accepts that senior members of staff and members of the board may well find themselves in situations where they have to stand their ground and front up to situations, the circumstances of these meetings led to a situation where the personal interests of the claimant became the whole cause of the disagreement and hostility between them. This is a different scenario from one where there is a disagreement about management decisions, this was one where an employee, who happened to be a director, was complaining about the way in which she was being treated. Mr Hodson snr accepted in oral evidence that neither he nor his son were prepared to listen to any proposals she had to offer. It is clear that as far as they were concerned the matter was closed they had made their decision and that was the end of the matter. That this is the case is clear from their failure to respond to her emails expressing her desire to sort things out between them. While Mr Hodson jnr paid lip service to her concerns in his response two weeks later, he completely ignored her second email on 20 October 2016 on the basis that there was nothing more to say as the matter had been exhausted. It had clearly not been exhausted as far as the claimant was concerned as she was pleading for a solution

to be found. The Tribunal finds it is indicative of how dismissive they were of the claimant's concerns that in oral evidence Mr Hodson snr said he did not consider responding to her email he described her as being like a dog with a bone and viewed the content of her emails as being 'rants'.

100 The Tribunal finds that the respondent as the claimant's employer, did not have reasonable and proper cause for failing to respond to the claimant's emails and that its failure to do so was likely to seriously damage the relationship of trust and confidence between them. Mr Hodson jnr agreed on reflection that it would have been better to meet with the claimant to discuss matters with her but he did not and the fact that he just ignored her was clearly not appropriate or acceptable in the circumstances. The Tribunal finds that the respondent's failure to properly address its mind to the claimant's concerns and its failure to reply at all to her second email, was conduct which was calculated or likely to cause serious damage to the relationship of trust and confidence.

101 The Respondent argues that in waiting until 25 November to resign, the claimant waived any breach on the part of the respondent. As explained by Langstaff P, the then president of the EAT in **Chindove**

"25 ….We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

102 The Tribunal have had regard to all the evidence in relation to the events leading up to her resignation. It accepts that the claimant did continue to work and corresponded with Mr Hodson jnr in a normal manner. To this extent she may have been seen to have waived the failure on the part of the respondent to rely to her emails expressing her concerns about her bonus payment. To the extent that she did this she may not have made it clear that she was unhappy with the manner in which the respondent was dealing with her concerns. She explained that she did this because she wanted to remain professional and she was still hopeful that the Holdens would do the right thing and pay her the bonus she was entitled to under the 2010 agreement.

103 The Tribunal does not find that the claimant waived the breach of the 2010 agreement because she made her objection to the respondent's stated intention clear, both in the meetings she had with them and afterwards in email correspondence. There was no communication between the parties after her emails so her position remained unchanged. She has explained that the reason she waited was in the hope that the Holdens would change their minds. The Tribunal notes that given that neither of the Holdens had responded to the claimant's email of 20 October and it was not therefore unreasonable for her hold out a hope that they might still be considering the situation which had been ongoing for some time. Once the claimant discovered that no further payment had been made in her November salary she immediately notified the respondent of her resignation, setting out clearly her reasons why. The Tribunal find that even if the failure of the respondent to calculate her bonus payment in accordance with the terms of the 2010 agreement did not amount to a fundamental breach entitling her to resign in reposne, she was entitled to treat the non payment of a bonus calculated in accordance with those terms as the 'last straw' in a course of conduct by the respondent which cumulatively amounted to a fundamental breach.

104 The Tribunal further finds that the reason given by the claimant about why she resigned on notice is reasonable in the context of her particular circumstances. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121 that deciding to resign is for many if not most employees a serious matter. In the claimant's case she did not have another job to go to, because she had remained hopeful that she would have been able to reach an agreement with the Holdens. Given that she worked a great deal of her time away from the office and she did not have any other source of income it is understandable that she would remain to give herself an opportunity to find alternative work before giving up her income. In these circumstances the Tribunal does not find that the claimant affirmed the contract by agreeing to work her notice. Her letter of resignation made clear her intent and confirmed that her actions were not intended to be seen as an affirmation.

Conclusions

105 For the reasons given above the Tribunal find that the claimant was entitled to resign in response to the respondent's treatment. The claimant's claim of constructive unfair dismissal is well founded and succeeds.

106 The claimant's claim for breach of contract (the 2010 agreement) is well founded and succeeds.

Employment Judge Sharkett

13 March2018