EMPLOYMENT TRIBUNALS

Claimant: **Mr M Hoggart**

Respondent: **Explorer UK Limited**

Heard at: **Leeds** **On: 25 and 26 September 2019**

Before: **Employment Judge Maidment**

Representation
Claimant: **Mr S Healy, Counsel**
Respondent: **Mr A Sendall, Counsel**

RESERVED JUDGMENT

The Claimant was not dismissed when he resigned from his employment on 17 September 2018. His complaint of unfair dismissal must therefore fail and is dismissed.

REASONS

Issues

1. The Claimant's sole claim in these proceedings is of unfair dismissal based on him having been constructively dismissed. The Claimant's pleaded case was that he had attended a meeting on 17 September 2018 where his departure from the business was discussed but that he had not resigned from his employment at that meeting. Instead, he had resigned subsequently in response to the Respondent's fundamental breach of his contract of employment arising out of correspondence from Mr Ian Thomason of the Respondent sent shortly after the meeting on 17 September 2018 and a further communication then sent on 28 November. This had prompted the Claimant to resign from his employment on 11 December 2018.

2. In discussion with the parties it was clear the Claimant wished to rely, in the alternative, upon a resignation in fact on 17 September 2018 at the aforementioned meeting. If indeed it was found that the Claimant resigned at that point, the Claimant would argue that amounted to a constructive dismissal, his resignation having been in response to the Claimant's demotion in his role as Account Director. The Tribunal allowed the Claimant to amend his complaint to include an unfair dismissal complaint based, in the alternative, on that earlier date of resignation and reliant on the alleged demotion as the sole act amounting to a repudiatory breach of contract.

Evidence

3. The Tribunal had before it an agreed bundle numbering in excess of 500 pages. Having identified the issues with the parties, the Tribunal took some time to read into the witness statements exchanged between the parties and relevant documentation. This meant that when each witness came to give evidence, they could do so by simply confirming their statements and, subject to brief supplementary questions, then be open to be cross-examined.

4. The Tribunal heard firstly from the Claimant. Then, on behalf of the Respondent, the Tribunal heard from Mr Ian Thomason, Managing Director, Neil Symons, Technical Director and Mr Jon Lingard, Sales and Marketing Director.

5. Having considered all the relevant evidence, the Tribunal makes the following findings of fact.

Facts

6. The Claimant was employed by the Respondent from 2 December 1996 and had known its Managing Director, Mr Ian Thomason, since 1993. The Respondent is a reseller of Oracle software products and services which it seeks to combine with consultancy, development and support services for customers.

7. The Claimant was initially employed as a Technical Sales Consultant and entered into a written contract of employment for the position in 1996 which remained in place throughout his employment. He was promoted to Account and Sales Manager in 1999 and to the position of Account Director in 2000. At that time the Claimant was involved with a product known as OpenText which, he accepted, was less complicated than the Oracle product. The Claimant accepted that he initially gave himself the title of Account Director to elevate the size of the Respondent in the perception of clients, but that Mr Thomason did not object.

8. In 2000 the Claimant was given some share options under an EMI scheme but in 2010 these were converted to full voting shares and the Claimant was appointed as a statutory director from 30 November 2011. As such, he

attended monthly board meetings. The Claimant's shareholding amounted to in excessive of 15% of the Respondent's share capital as at the termination of his employment and became governed by a Shareholder Agreement dated 9 March 2016. Leaving the company as a "Bad Leaver" allowed for the 'buy back' of the Claimant's shares for a nominal sum. Throughout the Claimant's employment his role involved new business development, customer account management, maximising opportunities from existing and new customers and cross selling additional services to customers.

9. Around August 2016 OpenText terminated its contract with the Respondent and the decision was taken by the Respondent to sell exclusively Oracle products. The Claimant at the time appreciated that this would be a challenge which would involve him getting up to speed with a new and more complex product and building new relationships with a different product supplier. The relationship with Oracle needed to be delicately managed in circumstances where Oracle did not necessarily appreciate the involvement of a reseller and often preferred to service clients directly.

10. The Claimant agreed that he was provided with help and guidance in understanding the Oracle product and relationships, in particular from Jon Lingard, Sales and Marketing Director, to whom he now reported. He agreed that he was on something of a learning curve and said that he largely agreed with the proposition that the Respondent had done a lot to integrate him into selling the Oracle product and building him back up as an effective sales person.

11. The Claimant became an Oracle Account Manager. Indeed, Mr Thomason suggested (and the Claimant agreed to) him dropping the title of Director as some of the Oracle team could be very quick to take against an individual and he thought that it was to the Claimant's ultimate benefit to present himself as operating at a lower level, because he was still in the early stages of learning about the product. For the same reason, the Claimant's profile was not included on the website as part of the leadership team for Oracle.

12. Whilst understanding the reason for these changes, the Claimant still felt marginalised to a degree and that his opinions were no longer valued, despite him regaining his previous Director title around six months after commencing his new role. The Claimant struggled with the transition to the Oracle work and, whilst the Respondent anticipated that it could typically take a year for a new salesperson joining the Respondent to become self-sufficient in managing Oracle customer accounts, it had been hoped that the Claimant would pick things up more quickly. Mr Thomason's perception was that the Claimant was struggling to understand the Oracle products, but was also rubbing Oracle sales people up the wrong way. The Claimant's sales figures included some new accounts which had been gained predominantly through the efforts of Mr Lingard and in which Mr Lingard still had a level of management involvement. The Claimant's sales as a

percentage of his target thereafter were significantly reduced. At no stage was the Claimant, however, advised that the Respondent had any performance concerns with him.

13. The Claimant found a significant amount of his time was involved in managing issues emanating from 2 larger accounts, PrePay and Close Brothers. PrePay, in particular, had very complex systems with which the Oracle software was not always compatible. Whilst both of these customers needed to be looked after, Mr Thomason's perception was that they were increasingly bogging the Claimant down and preventing him from putting more time into new business development. The Claimant accepted before the Tribunal that technical issues were monopolising his time and he carried out business development whenever he had the time to do so.

14. By March 2018, the Claimant was unhappy in his role and raised concerns to Mr Thomason relating to him having to spend significant time project managing and supporting PrePay, impacting on his business development opportunities and in turn on his ability to earn commission. At his request, he met with Mr Thomason on 23 March 2018. The Claimant covertly recorded this meeting as he did all other subsequent significant meetings. The Claimant said that he had no trust in his co-directors, particularly Mr Thomason, as he had seen how he dealt with other people in a bullish and underhand manner.

15. The Claimant started the meeting by saying that he wanted to sell his shares and *"I want a divorce. I do not want to go into detail. I just want to have a quick talk and I do not want questions about it and I want to talk professionally about it."* Mr Thomason described himself as having been hit *"with a bombshell"* and said that the Claimant needed to document what he was seeking and his reasons. Mr Thomason said that the Claimant had to make sure "*… that it is a clear decision. You got to make sure that it is you that is doing it and that no one else is involved. No one else has made the decision for you, right?"* The Claimant again refused to go into detail but said that his decision had been a long time coming stating: *"I am of no value here. I do not feel part of it and have not done for a long time, nothing is going to change, my mind is not going to change. I just want to go. I am not happy at all, I just want to go. That is it, they're the reasons."* The Claimant referred to his shares having a value and that he couldn't be classed as a Bad Leaver.

16. However, the Claimant subsequently sent Mr Thomason a text at 3:51pm on 23 March saying: *"Ian, after such an investment of time and effort a regrettable mistake may be made if I push ahead with exiting. I'm not in a good place and haven't been for some time. I'm certainly not happy with many aspects of work, none of which I foresee changing or improving any time soon… I'll continue to be fully committed as I have throughout and push ahead until the end of the financial year with a personal checkpoint on whether I feel I can/want to remain part of the business. Let's speak on*

Monday if you are amenable to doing so?" Mr Thomason responded that he would see the Claimant first thing but asked him to make a clear decision by then saying that the Claimant had really upset him. The Claimant apologised if he had made Mr Thomason feel that way.

17. It was put to the Claimant in cross examination that he did not think he was being pushed out of the Respondent to which the Claimant replied that at that point he did not and agreed that he was the one doing the pushing.

18. The Claimant had a further lengthy meeting with Mr Thomason on 27 March. The Claimant told him that, despite his concerns, he had reflected and decided he wanted to stay. When put to the Claimant in cross examination that Mr Thomason said that he wanted to make a success of things, the Claimant responded that that was not necessarily what he meant. The accepted, however, that Mr Thomason was trying to fix the situation *"up to a point"* and *"he was trying to an extent to make me not want to leave."*

19. Mr Thomason sent an email to the Claimant and their co-directors later on 27 March. The Claimant had seen a draft in advance and whilst he would not accept in cross examination that he had approved it being sent he conceded that *"could well have happened*". This email recorded the Claimant putting a *"checkpoint"* in place at the end of August 2018 as to whether he wished to remain with the Respondent. He went on that the key point was that the Claimant could not see how his role would yield sales. A number of suggestions were then listed with the aim of removing non-core activities from the Claimant and enabling him to make best use of his time. On a further list, suggestions were made to enable the Claimant to build a pipeline and in turn then to generate sales. Mr Thomason ended by saying: *"At the end of August, we request that you document that you still do not wish to exit Explorer and we draw this issue to a close."* The Claimant accepted that the reference to August was his timing not Mr Thomason's.

20. Mr Thomason had hoped that the distraction produced, in particular, by PrePay would have been removed by now and considered that further support been put in place to free the Claimant up to generate new business. The Tribunal has seen emails from Mr Thomason to Mr Lingard seeking to maintain momentum in freeing the Claimant up. In one email between them on 11 May 2018, Mr Thomason stated: *"Now that PrePay is sorted I made sure I asked Mark this morning if he had any other "turds" stopping him from biz dev. He said that he now has a clear desk and a big weight lifted so is now going full burn on new biz dev. Let's see…"* However, Mr Thomason's view over time was that there was no significant improvement in the Claimant's sales performance against target. He did not, however, raise this with the Claimant.

21. On 31 August 2018 the Claimant emailed his co-directors stating: *"As you already know, I'm pleased to confirm that I do not plan to discuss and agree*

an exit plan in the near future." The Claimant accepted in cross examination that "*in the near future*" was a bad choice of words. Mr Thomason responded to his email saying: "… *You've only said "near future" so we cannot draw this issue to a close.… We need to understand if you are still "not happy…""* He also asked the Claimant to document how he had addressed the core issue of building a sales pipeline referring to the Claimant not having met his targets. He suggested that they had a sit down when the Claimant got back from holiday to address this and map out a firm plan.

22. The Claimant then met with Mr Thomason and Mr Neil Symons, Technical Director, on 3 September. This involved a lengthy discussion regarding the Claimant's role and the work he was doing. The Claimant asked Mr Thomason if he wanted him in the business or not. If he did not, he said he was prepared to have a discussion about what they did as an alternative. Mr Thomason said that his key point was that the Claimant had said that he would not seek to exit only in the near future. The Claimant said that his choice of words was "*bad*". He said he was not planning on going anywhere and "*foreseeable future*" he queried might have been a better term. Mr Thomason said that he was looking for the Claimant to just have stated that he had no plans to exit full stop. He said the Claimant had thrown the spotlight on the fact that he was not happy with aspects of his work, none of which the Claimant himself could see changing and improving. He said that the Claimant couldn't be happy with the income he had brought in, the Respondent wasn't happy and something needed to be done about it. Mr Thomason said they wanted the Claimant to stay and get to a point where he was contributing to the business' income. The Claimant appeared to recognise that they couldn't carry on doing the same thing, but saw Mr Thomason's suggestion that there were going to put together a plan that they could both agree on as Mr Thomason seeking to manoeuvre him down a certain path. Mr Thomason's suggestion was the Claimant letting go of his management of the key accounts which were consuming so much time, saying that he would still earn from them through his dividends. The Claimant's view was that he had spent time building relationships with those accounts and wanted to see it through to a conclusion. When put to the Claimant that Mr Thomason was wanting suggestions as to how things could work after the Claimant's return from holiday, the Claimant said that Mr Thomason wanted things to go in a particular way. The Claimant told the Tribunal that Mr Thomason wanted to push him into working on non-key accounts and become an Account Manager reporting into the Sales Manager, Nina Brooks, which he did not want to do as it would have been a demotion.

23. The Claimant went on holiday from 5-17 September which he said allowed him to reflect on his situation and the recent discussions. On 12 September Mr Thomason emailed the other directors highlighting what he saw as the Claimant's issues including that his acquiring new key accounts was not achievable, that key accounts effectively ate up his time, that he was not burning commission against his current targets and that he felt he was self-

reliant and should not have to report to anyone. He then set out his plan for the Claimant to address the issues which include removing key accounts so that they no longer caused the *"time vampires",* that the Claimant went into Nina Brooks' team reporting to her as one of her Account Managers referring to her being a coach (Mr Thomason told the Tribunal she had been brought into the business because of her coaching skills) which he thought would aid the Claimant's business development.

24. Mr Thomason told the Tribunal that he had not discussed the matter with Nina Brooks and did not want to move forward unless he had the Claimant's agreement. He agreed in cross examination that in his mind the Claimant could not continue with his key accounts because they drained the Claimant's time for business development. However, he thought they were still in a discussion and that other suggestions might emerge. For instance, he said that if the Claimant had said that he would accept the suggestion, but did not wish to report to Ms Brooks, an alternative reporting line, possibly to another director, could have been devised. Whilst he had said that he couldn't see any alternative himself, he said that others might have.

25. Mr Thomason also sent an email to all directors dated 14 September asking the Claimant to email his plan on how he would modify his job role and overcome the "*time vampires*" issues as his first task on his return from leave.

26. The Claimant duly sent the directors an email on 17 September in which he stated that the plan was to devote time to new business development activities, *"focused activity of a minimum one day per week (no distractions) or wherever time permits."* He also listed a summary of other relevant points covered at the previous meeting. Mr Thomason responded later that morning with his comments on the Claimant's proposals in red including the comment that they had tried to block out time for the Claimant's business development before and it had failed because of logistical issues occurring. The Claimant in his email had asked that he be provided with a list of agreed target accounts for new business development. Mr Thomason responded that all of these were within Nina Brooks' team which had a desperate need to fill slots with people with the Claimant's level of experience on Oracle. Mr Thomason also responded that new business development had to be accomplished without fail, that large accounts developed issues which dominated the Claimant's time to the detriment of anything else and, whilst those issues remained unresolved, he would not be able to develop a decent margin for himself or the business. He went on that in the absence of any other suggestions, he could only see one possible solution which was the handing over of the key accounts to John Lingard since they caused the "*time vampires*", joining Nina Brooks' team and being put on a set of staggered targets to ensure that he could earn whilst building up a sustainable group of accounts. He said that the Claimant now needed to decide if he wanted to do this role or not as, again, Mr Thomason said he

could not see any other alternative. He went on that this was an opportunity for the Claimant to reset.

27. Following this email, the Claimant attended at his request a meeting with Mr Thomason, Mr Symons and Mr Lingard on 17 September.

28. The Tribunal has had the benefit of listening to the Claimant's recording of that meeting. It was conducted almost in hushed tones, it appears out of a concern that the attendees might be overheard through the walls of the meeting room. Certainly, the meeting was conducted in a calm and non-confrontational manner. To the extent that any voices were raised, this was attributable to the Claimant's expression of some indignation when his obligations during a period of notice were pointed out to him. It is notable how calm and measured Mr Thomason appears and the particularly conciliatory tone adopted by Mr Symons who interjected on a few occasions. The meeting largely, however, consisted of a dialogue between the Claimant and Mr Thomason. The Claimant appeared to enter the meeting with something of a prepared statement he wished to make. Mr Thomason's reaction was clearly predominantly one of surprise and of seeking to understand the Claimant's intentions and what needed to be done in response. He certainly had not anticipated a meeting which might involve the Claimant departing the Respondent's employment and had no time to anticipate the issues which could arise. In no sense at any stage was the Claimant unduly pressurised or subjected to what at times he has suggested was an element of duress.

29. Mr Thomason in cross examination, when it was put to him that the Claimant had no alternative but to move to Nina Brooks' team, said that the Claimant never afforded him an opportunity to continue discussions on 17 March. The Claimant did not start the meeting with any form of discussion.

30. Whilst the Claimant stated in his witness statement that he believed this meeting was going to be an opportunity to finally clarify his role moving forwards following the recent email exchange, the Claimant led with a statement that he did not wish to hand over the key accounts given the amount of time he had invested and that: *"Subject to contract and without any prejudice to my rights – I'm open to discussion with you and Simon, who is not here, about exiting the business and getting a fair valuation for it."* The Claimant, without prompting, said that he wouldn't put anything in writing because he didn't need to. Mr Thomason asked if the Claimant was prepared to do the role suggested and the Claimant responded that he was not and that's why he was saying he was open to discussion. He was asked by Mr Thomason if he would put that in writing, but told the Respondent that he wouldn't. Mr Thomason again queried whether the Claimant was saying that he was not prepared to do the role, to which the Claimant responded: "*Yes, pretty much*".

31. Mr Thomason queried whether the Claimant knew what was being proposed for that role and referred to staggered targets to give the Claimant more time, a coach and the Claimant having everything he needed to get to the point of a decent margin. The Claimant that he did not need a coach, but time. In response Mr Thomason said it was the large accounts which generated "*time vampires*" which is why he started with removing them. Once they were removed he said that the Claimant would have the breathing space he needed to get new business development done. He said that the Claimant had booked meeting rooms to stop distractions before but it never worked. The discussion continued regarding the key accounts and how they took away the Claimant from business development. The Claimant referred to them being at an impasse and went on: "*Time for a new beginning for me – not here, time for a new beginning… I think we've just reached a point where it's time for me to move on."* Mr Thomason at that point said that he did not know what he could do based on that verbal statement saying *"you are officially now on notice period*" and that he had never been in this situation before. The Claimant referred to himself having employee rights and dividend rights with everything subject to contract continuing: *"… Nothing is agreed until everything is agreed…*".

32. The Claimant said he was happy to leave the office and could come back later in the week and put it in writing if that was what Mr Thomason wanted, but that he was open to discussion. Mr Thomason said that the Claimant "*can't keep taking this back. You think about this overnight and then tomorrow morning you change your mind."* The Claimant responded that that would not be the case saying: "*It will be in writing for you this week"* and that he was happy to leave or carry on doing his work. He repeated it was time for him to move on.

33. Mr Thomason sought to understand what the Claimant wished to discuss. The Claimant referred to an exit plan. Mr Thomason referred to the Claimant being on three months' notice. The Claimant then said that there were two things to resolve, the dividends and the shareholding. Mr Thomason responded that the shares issue was completely separate to him as an employee and: *"If you are saying to me now, I am not doing that and I want to leave, you are effectively resigning".* The Claimant said in reply: *"fine".* Mr Thomason queried if that was his intention and if he was clear about that to which the Claimant responded in the affirmative. Mr Thomason again asked whether he was resigning in response to which the Claimant said: "*I do not wish to do that role. Do you want me to actually spell it to state it Ian… It will be put in writing this week to state that I am resigning. There you go."* Mr Thomason said: *"If you're officially resigning now – you're on notice."* The Claimant responded: *"okay".*

34. Mr Symons asked whether it was worth taking some time to step back and reflect *"rather than pressing the button now"*. The Claimant said he didn't think so and there was nowhere else to go. He went on subsequently: *"It is time for a new beginning for me, I will go and do key accounts somewhere*

else, non-Oracle related by the way. Not interested in Oracle…" Mr Symons again sought to explore whether there was something which could be done to persuade the Claimant otherwise, but the Claimant responded that he had thought about it for 8 days. Mr Lingard reiterated Mr Simon's view that it would be a shame for the Claimant's employment to end this way and asked whether this was a knee-jerk reaction.

35. Mr Thomason said that if the Claimant pressed the button on this there will be no taking it back this time to which the Claimant said that they were in agreement and *"we press the button, I am not doing that role, there is nowhere else to go, you have made that crystal-clear."* There was a conversation again about the period of notice where it is clear that the Claimant understood he was now on notice and what was required of him. Mr Thomason asked the Claimant to go home and think long and hard about this because he was "*about to leap over this line. It's massively severe."* The Claimant responded that he absolutely understood and it was purely a business discussion, but he felt things hadn't worked out and whilst he was accountable he didn't take the full blame. It was agreed that other people be told the Claimant was on extended leave to which the Claimant agreed. Mr Thomason asked the Claimant if he wished to do a quick handover that afternoon to which the Claimant was in agreement. There was then a discussion between the Claimant and in particular Mr Lingard regarding current account issues.

36. Later on in the discussion, Mr Thomason again asked the Claimant if he was absolutely clear to which the Claimant responded: "*Crystal. You don't have a choice, I don't have a choice that's the way I see it."* Mr Thomason again sought to describe how the Claimant's new role might look to which the Claimant responded: *"It feels so junior, a director of the business, a shareholder, reporting to a sales manager. It just feels that way, and that is not my reason for me deciding, but that's how it feels."* Mr Symons and Mr Thomason continued to seek to persuade the Claimant to stay within the business. The Claimant reiterated: *"It just feels like stepdown, it almost feels like a demotion."* After further discussion regarding new business development, Mr Thomason again asked the Claimant if he was sure he wanted to do this. The Claimant said: "*I'm as sure as I think I can be*." Mr Thomason referred to the Claimant having indicated previously a desire to leave to which the Claimant responded *"the button's pushed*".

37. Before the Tribunal the Claimant said that within this meeting he was not resigning at all. He wanted to exit, but was not prepared to walk away without package. There was going to have to be a legal process to agree his exit. He would not exit without an agreement on his shares. He stated on a number of occasions that he was under duress as had been evident from Mr Thomason's body language and demeanour.

38. Later on 17 in September Mr Thomason emailed the Claimant noting that the Claimant would not accept the proposed job role and wished to resign.

He attached a letter where he confirmed the Claimant's resignation and asked the Claimant to acknowledge this by return so that he could instruct the Respondent's solicitors. He referred to the Claimant being on notice as of 18 September. In cross-examination it was put to the Claimant that that was clear from the meeting and that all the points Mr Thomason made had been agreed then, to which the Claimant agreed but said that he had no alternative but to accept.

39. The Claimant stayed in the office till around 6pm conducting a handover which included cleansing his laptop and did not return to work.

40. By email of 18 September he asked Mr Thompson to send him a copy of his contract of employment. In further correspondence, Mr Thomason reiterated his request for a written acknowledgement of his letter of 17 September.

41. Mr Thomason then received an email from the Claimant's solicitors stating that the Claimant had not resigned *"as you claim. For the avoidance of doubt, my client's notice period (which is not running, as you claim) is 12 weeks, not one month."* He referred to Mr Thomason not responding to the Claimant's offer to return to work, although the Tribunal has no evidence that any such offer was ever made by the Claimant.

42. The Claimant's solicitors wrote to the Respondent's solicitors on 1 November stating that the Respondent's actions and its comments in the letter of 17 September constituted a repudiatory breach of the contract of employment. The Claimant was considering his position in the light of the breach and reserved his position. Mr Thomason wrote to the Claimant on 28 November confirming that the Claimant's 12 week notice period was to end on 17 December and that he would receive his final payment at the end of December. The Claimant's solicitors responded again to the Respondent's solicitors by email of 11 December noting a lack of response to their earlier communication. They went on that Thomason's letters of 17 September and 30 November (it is presumed reference was intended to be made to the aforementioned 28 November letter) constituted a repudiatory breach which the Claimant now accepted as bringing his employment to an end.

43. The Respondent's solicitors subsequently wrote to the Claimant regarding his shareholding with confirmation that he was classified in the circumstances as a Bad Leaver.

44. In cross-examination, the Claimant said that he did not seek to resign until 11 December to ensure that he got the third month of his salary for the notice period. He felt the relationship had now broken down and that there was no ongoing relationship effectively after the letter from Mr Thomason of

17 September, the Claimant reiterating that he did not resign and wanted to exit.

45. The Claimant had taken steps to look for new employment in late September and a text he sent to a prospective employer on 25 September resulted ultimately in an offer of employment which the Claimant commenced from 2 January 2019.

Applicable law

46. An employee can only bring a complaint of unfair dismissal if he has been dismissed. In accordance with Section 95 (1)(c) of the Employment Rights Act 1996, this includes a situation where the employee is entitled to terminate his employment as a result of the employer's conduct. An employee needs to demonstrate that the employer has acted in fundamental breach of his contract of employment so as to entitle him to resign, that he has resigned in response to that breach and that he has not delayed in so doing, so as to be treated as having affirmed his contract of employment.

47. One question for the Tribunal in this case (and indeed the first one) is whether in fact the Claimant resigned at an earlier point to that which he suggests in his primary case and essentially arising out of what was said at the meeting on 17 September. Counsel are in agreement that this involves the application of an objective test as to whether or not the words used at the meeting meant that the Claimant was resigning on notice. The Tribunal has been referred to the case of **Willoughby v CF Capital Ltd [2011] IRLR 985** as authority for the position and **also East Kent Hospitals University NHS Foundation Trust v Levy UKEAT/0232/17**. The test is an objective one based upon what a reasonable listener would have understood about whether or not the Claimant was resigning.

48. Applying the legal principles to the facts, the Tribunal reaches the following conclusions.

Conclusions

49. The Claimant's principal case is that he resigned on 11 December 2018. The Respondent accepts that he purported to resign on that date but that, as he had already given notice of resignation on 17 September, his purported resignation with immediate effect on 11 December (towards but still within his period of notice) was itself a repudiatory breach of contract as he failed to give his full contractual notice. That would be the case unless he could prove that that resignation was itself an acceptance of a repudiatory breach by the Respondent.

50. It is the Respondent's position (and the Claimant's alternative position) that, if it is found that he did not resign on 11 December 2018, he resigned at the earlier date of 17 September 2018 at the meeting he had called.

51. The Tribunal has found it of assistance to have listened to the recording as well as having read the transcript of the words spoken at that meeting. It concludes that the objective interpretation of the position reached at that meeting is that the Claimant had decided to leave the Respondent, made it clear that he was therefore terminating his employment and that there was a recognition and agreement between the parties that the Claimant was now on notice and that his employment would end at the end of his notice period.

52. The Claimant had given the meeting a significant amount of thought and had commenced it with a statement he had worked out stating his intention to leave and his desire to come to an agreement. At the outset the Claimant used the terms "*without prejudice*" and "*subject to contract*" albeit not in the context of an existing dispute. However, the meeting moved on in circumstances where the Respondent was not looking to terminate the Claimant's employment or jump on any indication that the Claimant wished to leave, but instead wished to understand exactly what the Claimant was meaning, whether he had thought about the serious step he seemed to be taking, whether he might need further time to think about it and discuss the nature of the Respondent's proposal regarding his job role in an effort to seek to persuade the Claimant to stay.

53. As the discussion progressed the Claimant indeed clarified that his mind was made up and that he had decided to leave. The Tribunal agrees with the Respondent that there are numerous passages where he makes it clear that he was resigning. As noted already, be reached the point where he stated: *"It will be put in writing this week to state that I am resigning. There you go".* Again, objectively on a consideration of everything that had been said, this was to be confirmatory of what had already been decided not a further step necessary to effect a resignation.

54. The Claimant did not want to discuss a new role and said in evidence that he lacked trust in Mr Thomason. At various stages he sought to shut the conversation down. Having made clear his intentions the Respondent's directors gave him chances to reconsider his decision with, as already noted, Mr Symons interventions being particularly conciliatory and expressing a sense of disappointment if the Claimant really had chosen to leave the business and if a solution could not be found.

55. It was made clear to the Claimant that if he decided to resign, that there would be no opportunity to change his mind as had occurred in the past. It is also clear that the Claimant was aware that his notice period would start immediately.

56. The Tribunal concludes that Mr Thomason was anxious to receive something in writing from the Claimant, but this was as confirmation of his (already communicated) resignation decision. The Tribunal concludes that

the parties had clearly waived the need in the contract of employment for notice to be provided in writing in their discussions where both parties were ultimately clear that the Claimant had *"pushed the button"* and the notice period had commenced. The Claimant cannot in the circumstances maintain that his failure to confirm his resignation in writing meant such resignation was in some way incomplete and of no effect. Whilst he had said he would put his resignation in writing, it was again, viewed objectively, clear from the meeting as a whole that notice had been given, accepted and started to run. The Claimant might have gone into the meeting with the intention to resolve the issue of his shareholding before leaving as part of an overall exit package and to have said at one point that nothing is agreed until everything was agreed, but it that is not viewed objectively the basis upon which the meeting continued or the limit of the decision he had reached by the meeting's end. The Claimant's desire to secure a value from his shareholding was an important driver for him, but that does not alter the position which he actually reached at the meeting, i.e. an unequivocal resignation without any agreement on the shares.

57. The Claimant was certainly not, in a further alternative put forward, expressly dismissed. The Respondent did not bring employment to an end following a refusal by the Claimant to accept the new role. That construction cannot be placed upon what was said at the meeting.

58. The Claimant went on at the meeting to discuss current issues with his customer accounts as part of a handover to Mr Lingard. The Claimant's conduct immediately after the meeting is illustrative of an appreciation that he was leaving the Respondent's employment and was not going to return to the workplace. He participated willingly in a further handover process and the removal of information from his laptop. He agreed what would be said to colleagues about the Claimant's absence during his period of notice. At the conclusion of his handover with Mr Symons, they shook hands before the Claimant departed.

59. The statements made by the Claimant on 17 September also have to be viewed against the background of the Claimant's clear and expressed unhappiness at work and indeed a mutual feeling that he had struggled from the outset to adapt to the issues involved in working with the Oracle product and that the Claimant felt there to be obstacles which he would not be able to overcome. In March 2018, the Claimant had started a meeting saying that he wished to bring his employment to an end, saying that he wanted "*a divorce*". He quickly changed his mind and subsequently the Tribunal's findings illustrate significant and genuine efforts on the Respondent's part to ensure the continuance of the Claimant's employment to the Respondent's and the Claimant's benefit including in terms of his commission earnings.

60. The Claimant had undertaken to give matters until August before confirming, it was hoped by the Respondent, an intention to remain.

However, whilst the Claimant might say his choice of words were bad stating, in hindsight his preferred words would have been *"for the foreseeable future"*, he was not giving the unequivocal commitment which he knew the Respondent was looking for. The Claimant's opening of the meeting on 17 September came as a shock to the Respondent's directors, but they had been there before.

61. The Claimant's success in these proceedings therefore rests with him having resigned on 17 September in response to a fundamental breach of contract and indeed in response to a demotion proposal, albeit the Claimant maintains that the role suggested by Mr Thomason was the only role which would ever be on offer. The Claimant's position in respect of such fundamental beach is inevitably not straightforward, in circumstances where his primary case is that he did not resign and that, according to his witness statement, he attended the meeting on 17 September believing that it was going to be an opportunity to finally clarify his role moving forwards following the recent email exchange with Mr Thomason. He is now effectively having to put forward that there was never any opportunity, nor was there going to be, such that he was entitled to resign. However, his approach at the meeting removed that opportunity to clarify a new role, not the Respondent's.

62. The Claimant in correspondence after 17 September, in particular through his solicitors, was at pains to stress that he had not resigned and indeed there was an indication that he might be willing to return to work. That does not suggest a fundamental breakdown in trust and confidence at the earlier meeting, but indeed that, if there had been any fundamental breach, the Claimant was now affirming the contract of employment. It is noted that he is not seeking to withdraw any earlier resignation. He then, on his primary case, waits until 11 December, accepting his monthly notice pay before deciding to resign once that was secured.

63. The Tribunal does consider that the proposal for the Claimant to move to an Account Manager role in Nina Brooks' team could have amounted to a fundamental breach of contract. The Respondent is at pains to point out that the Claimant remained on the same salary, retained the same job title, would still receive his dividends, might have a greater opportunity to earn commission, that it was free to distribute the management of accounts as it considered appropriate for the needs of the business and contractually the Claimant could be required to do other duties. All of that, however, ignores that moving the Claimant as an employee at director level to a sales team under the management of a sales manager, herself reporting to another director, would have been likely to have involved a significant change in status such as to be capable of being regarded by the Claimant as a fundamental breach of contract.

64. This is not, however, as straightforward a question as it might have been in many employment situations. Whilst the Claimant was a director and

shareholder, he had not over a period of some years acted as one might expect someone to act at that level. Since the ending of the relationship with OpenText, the Claimant had almost had to go back to square one in terms of learning a new product and applying his experience in sales to servicing new accounts, looking for new work and marketing a complicated product with which he was unfamiliar. As such, it had been necessary on an agreed basis that the Claimant lost his director title for a period of around 6 months and be removed from the website so that it did not suggest he was part of the leadership team responsible for the Oracle product. Indeed, in reality he was not. The Claimant thereafter, whilst holding the title of director, was required to report to another director and dependent upon others who provided significant assistance to him. There was nothing in his role which appears to have set him apart from others and whilst he may have liked to have looked after some larger key accounts, he was not the only one who did so and those accounts, the Claimant accepted, caused him a significant amount of difficulty and grief. By the time of the 17 September meeting a number of things had been tried to allow the Claimant to *"reset"* but without success. The Claimant was not enjoying his work, was still being taken away from new business development by the key accounts and his sales against target were of concern to everyone, not least the Claimant himself in terms of commission earnings. Something had to be done.

65. The proposal of Mr Thomason has to be seen against that background and as indeed in great part an active and creative way of trying to keep the Claimant in the business and for him to develop and thrive. The Claimant had by then in reality in his own mind reached the end of the road, hence his resignation decision. He did not feel that he wanted to carry on trying with the anticipation of him carrying on failing. He wanted to look for pastures new.

66. However, again, in terms of any fundamental breach of contract the Claimant did not allow discussions to proceed regarding the new role as he said in evidence he thought the intention of the meeting on 17 September had been. It was the Claimant who did not allow those discussions to progress. The Respondent's directors made numerous efforts during the meeting to engage the Claimant in a conversation about the role pointing out the perceived benefits for the Claimant and looking for some response in terms of either an agreement or a way of tweaking that proposal. None was forthcoming because the Claimant had already made his mind up but he had done so prematurely certainly before a position had been reached where it had been determined that he would take on the new role in its proposed form come what may and the Respondent would seek to impose it upon the Claimant if he did not agree.

67. Furthermore, for the Claimant to say now, in the context of this argument in the alternative, that he resigned because of a demotion is to say the least an oversimplification of his motivations at the time. The best evidence is from the Claimant's own words at the 17 September meeting where he said

that the new role felt *"so junior"* but went on *"that is not my reason for deciding*".

68. In all the above circumstances, when the Claimant resigned at that meeting, the Respondent was not, in any proposal amounting to a demotion, acting so as to or in a manner which was objectively likely to destroy trust and confidence. Even if it had, the Claimant did not resign in response. He was not dismissed so that his claim of unfair dismissal must fail and is dismissed.

Employment Judge Maidment

Date 8 October 2019