



# EMPLOYMENT TRIBUNALS

**Claimant: Mr D Bowden**

**Respondent: Opsec Security Limited**

**Heard at: Newcastle (CVP)**

**On: 23-25 January 2023**

**Before: Employment Judge A.M.S. Green**

## **Representation**

Claimant: Mr J Jupp - Counsel

Respondent: Mr M Brien - Counsel

# RESERVED JUDGMENT

The claim of constructive unfair dismissal is well-founded and is upheld.

# REASONS

## Introduction

1. For ease of reference I refer to the claimant as Mr Bowden and the respondent as Opsec.
2. Mr Bowden presented his claim of constructive unfair dismissal to the Tribunal on 21 July 2021. This followed a period of early conciliation which started on 7 May 2021 and ended on 9 June 2021. He resigned verbally on 22 April 2021 and confirmed his resignation in writing on 23 April 2021. His employment ended on 31 May 2021. His case is that his role was reduced without consultation, his obligations as a director were ignored and he was, in effect, demoted. Opsec denies the claim, contending:
  - a. There was no breach of the implied term of trust and confidence.
  - b. Even if there was, Mr Bowden affirmed the breach.

- c. Mr Bowden did not resign in response to the breach, but rather to take on a new role with his new employer, Ulster Carpets.
3. At the hearing, we worked from a digital amended bundle and a digital supplementary bundle. The following people adopted their witness statements and gave oral evidence:
    - a. Mr Bowden
    - b. Dr Selva Selvaratnam
    - c. Mr Peter Waker

Counsel for each of the parties provided skeleton arguments and made closing oral submissions.

4. The issues that I must determine are as follows:
  - a. Did Opsec do the following things:
    - i. Appoint an interim General Manager without notification or consultation in March 2020 and not considering Mr Bowden for that role.
    - ii. Dr Selvaratnam not responding to Mr Bowden's questions about a new organisational chart and describing him as a 'factory man'
    - iii. Removing responsibilities from Mr Bowden such as:
      - a. In March 2020, responsibility for Global Design & Organisation and responsibility for the Grove Park facility in Leicester.
      - b. In June 2020, responsibility for customer services.
      - c. In August 2020, removing Mr Bowden from the Executive Leadership Team ("ELT").
      - d. In September 2020, removing responsibility for managing transaction card stock levels and costs .
      - e. Responsibility for authorising contracts.
      - f. At end of 2020, responsibility for renewal of accreditations.
      - g. The authority to authorise expenditure.
    - iv. Not advertising or giving Mr Bowden the opportunity to apply for the role of General Manager of the Division, which was taken up by Mr Waker.
    - v. Excluding Mr Bowden from management decision making such as:

- a. Setting of objectives.
  - b. Budget management.
  - c. Recruitment.
  - d. Communications.
  - e. Business review meetings.
  - f. Changes to his role
- vi. Not inviting Mr Bowden to meetings such as:
- a. On 13 July 2020, the Q2 Business Review meeting.
  - b. At end of 2020, individual sales meetings and business response meetings.
- vii. Failing to respond to concerns raised by Mr Bowden as to the removal of substantial aspects of his role:
- a. On 28 July 2020 at a meeting with Dr Selvaratnam.
  - b. At meetings with Mr Waker on 15 July 2020 and in September 2020.
- viii. Failing to consult Mr Bowden regarding changes to the bonus scheme.
- ix. In September 2020, changing Mr Bowden's role from Operations Director to Operations Leader.
- x. Mr Waker belittling Mr Bowden in front of his subordinates at a meeting on 24 September 2020 and Dr Selvaratnam accusing Mr Bowden using COVID 19 as a crutch.
- xi. In December 2020 to January 2021, Mr Waker refusing to allow Mr Bowden to temporarily reorganise resources because of the effects of Brexit.
- xii. Failing to respond to a request made by Mr Bowden on 8 March 2021 for clarification of his role.
- xiii. Mr Waker failing to prepare for Mr Bowden's annual appraisal on 12 April 2021.
- xiv. In April 2021, appointing Mr Bowden to a new role as Operations Leader for the UK and US in April 2021 without any consultation

- b. It is Mr Bowden's case that the consequence of this treatment by Opsec:
    - i. Showed no respect for Mr Bowden's seniority in the business.
    - ii. Ignored his obligations as statutory director.
    - iii. Substantially reduced his management role.
    - iv. Ignored his concerns when they were expressed.
    - v. Undermined him with his subordinates.
  - c. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
    - i. whether Opsec behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between Mr Bowden and Opsec; and
    - ii. whether it had reasonable and proper cause for doing so.
  - d. Did Mr Bowden resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for Mr Bowden's resignation.
  - e. Did Mr Bowden affirm the contract before resigning? The Tribunal will need to decide whether Mr Bowden's words or actions showed that he chose to keep the contract alive even after the breach.
5. In reaching my decision, I have carefully considered the oral and documentary evidence. The fact that I have not referred to every document in the bundles should not be taken to mean that I have not considered it.
6. Mr Bowden must establish his claim on a balance of probabilities.

#### Findings of fact

7. Opsec provides technological solutions to combat counterfeiting of its customers' products and services. It is one of the UK divisions of a global multinational business under the Opsec Security Brand. Opsec has a manufacturing facility at the Crowther Industrial Estate in Washington, County Durham. It also has a facility at Grove Park in Leicester. The facility at Grove Park focuses on design and origination and R&D. It designs and produces tooling for the US and the UK. Opsec manufactures holograms, bank strips and security hardware. It conducts its activities at two large manufacturing sites in the UK and the US. Opsec wholly owns a Maltese incorporated entity that operates a facility in Malta. Opsec has a headquarters office in London which it acquired after the acquisition of the Mark Monitor business (see below).
8. On 27 October 2014, Opsec employed Mr Bowden as the Operations Director – EMEA. EMEA stands for "Europe, Middle East and Africa." The

parties entered into a Service Agreement dated 15 January 2015 [53]. Mr Bowden was also appointed as a statutory director of Opsec in terms of the Companies Act 2006. There was one other director called Mr Currie. Mr Bowden's normal place of work was in Washington.

9. Mr Bowden had a job profile [46]. The following are relevant for the purposes of Mr Bowden's claim:

a. He was required to report to the Chief Executive Officer.

b. His job purpose was:

*To provide leadership and management of UK Operations including manufacturing, production, engineering and supply chain activities at both the Crowther, Leicester, and supply chain activities in Hong Kong and any other future sites; supporting product development and technical activities; preparing, setting, preparing, owning and working to an operational budget; developing and implementing continuous improvement activities, policies and practices; maintaining quality and efficiency of product delivery. Support and drive the integration of Transaction Card business into the UK Operations.*

*This role reports directly to the Chief Executive Officer and will be part of the UK senior management team working alongside the European Finance Director with responsibility for EMEA operational and supply chain performance.*

c. His duties and responsibilities were listed as follows:

- *Key member of the Group Senior Management Team setting group strategy and business objectives*
- *Support the achievement of strategic/company goals and team objectives through the management & coordination of activities and motivation of key personnel at each of the EMEA sites*
- *Facilitate the delivery of Operations projects on-time, in budget and to specification*
- *Ensure that the appropriate facilities, people and mechanisms are in place to support efficient delivery of the current products and processes and development of new business*
- *Contribute to continuous improvement activities associated with company products and processes and work towards the achievement of world class manufacturing*
- *Prepare, set and present annual P&L and capital expenditure budget to the Board of Directors Manage the Operations to a budgeted P&L and have the ability to report to the Board directly on financial performance against budget and agreed targets*
- *Set and manage KPI targets for the Operations and direct reports, conducting annual appraisals and provide opportunities for mentoring and developing staff*
- *Provide commercial support to Market Facing groups Supply Chain and Customer Service team on key customer and*

*supplier relationships Provide clear and accurate reports of current status of projects and activity to the Global Operating Committee and be able to demonstrate and understanding behind the facts/figures provided*

- *Chair independently or jointly the quarterly team brief and review meetings at each of the UK sites*
- *Generate and coordinate necessary internal documentation requirements for manufacturing process changes as required by new product applications*
- *Support and buy-in to the distribution of company policies and procedures which may be communicated/distributed from time to time*
- *HSE accountability for the UK facilities*
- *Manage the capital expenditure requirements for maintenance and improvement of Plant and Equipment requirements to support the Operations requirements*
- *Support the warehouse & distribution requirements of the current Hong Kong operations*
- *Undertake UK statutory director responsibilities*
- *ISO and Security awareness/exposure/understanding*
- *Be prepared to undertake global travel as required*

10. Clause 4.7 of the Service Agreement reserved the right for Opsec to vary any powers and duties assigned to Mr Bowden and to require him to cease performing or exercising any such powers or duties.

11. Under cross examination, Dr Selvaratnam accepted that as directors, Mr Bowden and Mr Currie were responsible for the operation of Opsec. He oversaw the Washington, Grove Park and Malta facility and had dotted line responsibility for the Hong Kong business. He also accepted that as directors they owed statutory and common law duties including exercising independent judgment, acting in good faith, and having unfettered decision-making powers within the controls set down by the parent company in the group. Dr Selvaratnam also accepted under cross examination that Mr Bowden's job description reflected what he actually did. Initially he suggested that job descriptions rarely survive without change but he accepted under cross examination that Dr Bowden was not provided with any job description other than the one that he was given when he commenced his employment.

12. Dr Selvaratnam was appointed Chief Executive Officer of Orca Bidco, which is the parent company of Opsec. Opsec is a division in the group which focused on authentication and had been listed on AIM. It was purchased by Investcorp, a venture capitalist, in 2016. Dr Selvaratnam had been a consultant at Investcorp before joining the Opsec group. In his oral evidence, Dr Selvaratnam explained that the Opsec division of the group had not been performing very well. It was unclear what he meant by this because under cross examination he accepted that the 2020 accounts filed at Companies House indicated that Opsec enjoyed a gross profit of £2 million and had net assets worth £16 million. The previous Chief Executive Officer, Mr Rich Cremona, and the Chief Finance Officer had been based in the US. In December 2019, there was an agreement to buy the business of a company called Mark Monitor in the US and Dr

Selvaratnam was asked to run both businesses. Mark Monitor specializes in online brand protection. The effective date of the acquisition was 2 January 2020. When he came on board in February 2020, Dr Selvaratnam was tasked with creating a global brand. At the time, Opsec was operated in the UK almost as a separate entity. The effect of the acquisition of Mark Monitor was that the workforce doubled from about 352 to 700+. Mark Monitor was headquartered in the US with approximately 200 staff. It also had an office in London (which became the Opsec UK Headquarters) and in Lithuania. Later in 2020, \$3 million was invested to procure and commission holograms for Visa, one of Opsec's key customers. The money was invested in developing the manufacturing facility in Washington and Mr Bowden was asked to run the project which was known as Precision II. Dr Selvaratnam acknowledged that Mr Bowden was on the ELT on the Authentication side of the business when he joined in January 2020.

13. After he joined the business, Dr Selvaratnam admitted under cross-examination that he could not remember having a 1-2-1 meeting with Mr Bowden to explain what his role was or where he sat in the business. Dr Selvaratnam justified this by saying that at the time when he joined the business, the Covid pandemic was beginning, and the business was not performing well. It was in the middle of a significant acquisition and the previous Chief Executive and Chief Finance Officer had both left. He said that he had to make changes quickly and he went on to say "for me to sit with 750 people individually would not have been productive. I did speak to him three years ago." Given that Mr Bowden was part of the ELT which had about six people, I find it difficult to accept that Dr Selvaratnam did not take the time to have a 1-2-1 meeting with Mr Bowden. He could have spoken to him individually and the conversation might have been productive and could have helped him to understand where he stood in the business.
14. On 27 March 2020, Laura King sent an email on behalf of Dr Selvaratnam announcing an organisational change [77]. The email had organisation charts attached to it. The email stated, amongst other things, that Mr Jim Keller, Vice President of Global Product Technology, would assume the interim role of General Manager of Opsec Authentication until that role was filled. One of the organisation charts was entitled "SEC Authentication Management Team." Mr Keller was at the top of the organisation chart. Mr Bowden was placed at the next level down in the position of "Operations EMEA." He would be reporting to Mr Keller. Dr Selvaratnam was taken to another organisational chart entitled "Senior Leadership Team" [167]. This predated the organisational change. Rich Cremona was at the top of the chart. Below him was a level of management comprising six individuals who reported to Mr Cremona, including Mr Bowden. Mr Keller was on the next level down with a direct line of reporting to Mr Ben Stump the CTO. Dr Selvaratnam did not dispute this when he was cross-examined about it. In other words, the effect of the organisational change was to subordinate Mr Bowden to Mr Keller.
15. On 27 March 2020, Mr Bowden sent an email to Dr Selvaratnam [148]. This followed a review of a new organisational chart. Mr Bowden asked several questions. In particular, he wanted to know if he was going to be

considered for the interim role of Opsec's Authentication General Manager. If he was not going to be considered, he asked for feedback on where Dr Selvaratnam saw Mr Bowden in the business. Dr Selvaratnam replied to that email later on the same day suggesting that they should discuss the matter the following Monday [148]. Dr Selvaratnam attended a meeting with several employees, including Mr Bowden, during which he said that Mr Bowden would no longer be responsible for Grove Park. This responsibility would pass to Mr Keller. Under cross examination Dr Selvaratnam initially said he could not remember this because it had been a long time ago, but he then appeared to concede that this decision had been made by others who were closer to the operation of the business.

16. In paragraph 5 of his witness statement, Mr Bowden says that on 30 March 2020, Dr Selvaratnam called him and explained without prior discussion or consultation that he saw him as a "factory man". In his opinion, Mr Bowden believed that this comment effectively positioned him as a factory manager and bore no resemblance to the reality of his role. Furthermore, it also indicated that Dr Selvaratnam did not know about Mr Bowden's background, his capabilities, or his aspirations. When this was put to Dr Selvaratnam in cross-examination, he denied that he viewed Mr Bowden as a "factory man". He went on to say that that was not the way that he would speak. The matter was pressed, and it was put to him that he had used the expression "factory man" and it reflected his thinking about the reorganisation of the business. Dr Selvaratnam disagreed and said that he would use an expression such as "head of manufacturing" and that it was odd that Mr Bowden had construed what he said in the way that he did. Under cross examination on this, it was put to Mr Bowden that his role was primarily concerned with manufacturing holograms. Mr Bowden disagreed and said that he had a broad spectrum of responsibilities which included manufacturing, but he also dealt with customer service, compliance, security, design and origination. He said that Dr Selvaratnam was ignoring his duties as a director and the role that he played at the group level. I prefer Mr Bowden's version of what was said given what subsequently happened, when Mr Bowden ultimately became purely responsible for the factory element of the business. The proposed reorganisation, the promotion of Mr Keller, the subordination of Mr Bowden to Mr Keller and the restriction of Mr Bowden's duties are encapsulated in the expression "factory man". Even if Dr Selvaratnam did not have used the expression it was a "rose by any other name".
17. Between April and July 2020, Mr Waker provided consultancy services to the EMEA division of Opsec. He was subsequently employed as General Manager of the global Authentication business in August 2020. In paragraph 2 of his witness statement, he says that this was part of the globalization project. He says that his role as General Manager includes Profit and Loss responsibility for the Authentication Division and responsibility for Sales, Operations and Technology. He says that the role requires sales management experience. He is a member of the ELT. In his witness statement at paragraph 7, Mr Bowden states that he was not told about Mr Waker's objectives or his remit and on 20 May 2020 he emailed Dr Selvaratnam to ask if Mr Waker's role was to become permanent [86] in particular, he wanted to know if he was dealing with a consultant or someone who was joining the company as his line manager. Dr Selvaratnam responded to say that Mr Waker had applied for the role.



When Mr Waker was appointed to the permanent position, he accepted, under cross examination, that Mr Bowden would report to him rather than to the CEO (i.e. Dr Selvaratnam). Mr Bowden was not given the opportunity to apply for the role of General Manager.

18. Mr Bowden claims that in June 2020, his responsibilities for customer services were removed from him without consultation. He claims that Mr Keller telephoned him to inform him that was going to happen and Ms Angela Thompson, his direct report, would take over at group level and would report to Mr Waker. He goes on to say that he believed that Ms Thompson had also not been consulted about the restructuring. He claims that this change took a significant part of his remit away from him. As a result of the change, Ms Thompson no longer reported to Mr Bowden and was now managed by Mr Waker. Furthermore, the Key Account Management no longer reported to him, which, in his opinion, demonstrated that he was no longer operationally in charge of customer services despite being a director with statutory obligations. Under cross examination Mr Waker accepted that he was party to the decision to remove the customer services role from Mr Bowden. Dr Selvaratnam was aware of the changes that were being discussed across the business, including customer services. There does not appear to be any evidence that Mr Bowden was consulted on this change either by Mr Waker or by Mr Keller. Indeed, when specifically asked about this, Dr Selvaratnam did not know if Mr Bowden had been consulted. He said that Mr Keller was driving things at the time towards globalization and bringing businesses together. Dr Selvaratnam's remit was to operate at the business as one because customers needed to see a seamless undertaking. It was put to him that the effect of removing customer services from Mr Bowden's remit was to take away 40 to 50% of his role. He was no longer responsible for Grove Park and was no longer on the ELT. He was no longer reporting directly to the CEO. Dr Selvaratnam did not disagree with that proposition.
19. In paragraph 11 of his witness statement, Mr Bowden describes that on 13 July 2020, there was a Q2 business production meeting. This is a formal review of the business outlook for the second quarter of the financial year and, is consequently important for making business and management decisions. He states that members of the senior management team including the Sales and Supply Chain Manager, Claire Barber, attended that meeting. He would normally have attended this meeting and he would have previously led as Operations Director of EMEA. On this occasion, he was not invited to the meeting. Dr Selvaratnam could not comment on this because he was not involved with sending out the invitation. Mr Waker said that he was not familiar with that particular meeting and said that if it related to UK production, he could not see why Mr Bowden was not invited. I find as a matter of fact that Mr Bowden was not invited to the meeting.
20. On 15 July 2020, Mr Bowden spoke about the Q2 business production meeting with Mr Waker. He recorded the conversation without telling Mr Waker. A transcript of that conversation was produced for the Tribunal. When he was asked why he had taken a clandestine recording he said that he could see that his role was being eroded and that he was being squeezed out of the business. He felt it prudent to record the meetings

and keep a diary. He was losing trust in his employer. I note the following from the transcript where Mr Bowden says:

*... I'm a director with the UK business. So you, Ops UK Ltd, I'm the, it was me and Michael Currie were directors of that business. So I'm, since, within the last, I guess two months I'm no, I have no longer anything to do with the Grove Park facility, and I have nothing to do with customer service. So my particular roles is, is shrank quite significantly. And I'm not keen to make, you know, the decisions that a director needs to make. So I'm, you know, I've raised this with Selva previously, that we need to have a discussion at some point. But you know, I just need to know what the expectation is and what the, you know, what my role is, is evolving into or changing to.*

...

*One thing I'm not comfortable with is that I'm, as I said, Companies House, I'm a listed Director in Companies House, which I have obligations to fulfil, which I, as it stands, I can't do that now. So the business has to address that.*

21. During that conversation, it becomes apparent that Mr Waker did not know that Mr Bowden was a statutory director of the company. Indeed, under cross examination when Mr Waker was asked when he first came into his role if he had looked at Mr Bowden's personnel file and looked up his job profile, he replied that he could not recall. The transcript of the conversation suggests that Mr Waker had not looked at Mr Bowden's job profile. Mr Waker is recorded as saying that there should be clarity in the next few weeks about himself (i.e. whether he would continue as a consultant or become an employee). He also understood that Mr Bowden was looking for clarity and a future direction. Under cross examination, Mr Waker accepted that Mr Bowden wanted to know what his role was, that it had changed and that he had not provided him with any comfort about his new role when he explained his difficulties. He accepted that Mr Bowden had raised serious concerns about his position within the business.
22. Mr Bowden attended a review meeting with Dr Selvaratnam on 28 July 2020 during which he expressed his concerns about what he believed were substantial aspects of his role being taken away from him and redistributed to other people. In his witness statement, he refers to raising issues about customer services, design and origination and responsibility for Grove Park being removed. During that meeting, Dr Selvaratnam suggested that Mr Bowden should take on a brief for "Operational Excellence" which was described as a single task as opposed to a role or responsibility. The role would be shared with Mr Peter Browne who was based in the USA. In Mr Bowden's opinion that task was previously conducted by a junior colleague, who was a Quality Manager in the US, effectively two levels below him in the organisational structure. Mr Bowden claims that he suggested the task could be absorbed by Niall Kenyan, the UK Business Improvement Manager, who worked for him as it was a task/project rather than a role and he was employed specifically to manage such improvement projects. In his opinion, Operational Excellence was not a role. He believed that the task had not been defined. Under cross-examination, Dr Selvaratnam suggested that Mr

Bowden had misunderstood what was meant by Operational Excellence. He said it was about revolutionary change and not evolutionary change. He said that Mr Bowden was looking at it as evolutionary change which was normal in a manufacturing environment. This resonates with opinion that he saw him as a “factory man”. In his mind, Dr Selvaratnam was looking at global change which was far more significant. He claimed that what he had in mind for Mr Bowden sat above manufacturing roles. However, he agreed that whilst this purported to be a significant development in his role, there was no new job description or job profile provided.

23. On 7 August 2020, Ms Chris Holmes, Mr Bowden’s US counterpart informed him during their weekly operations review that he had been removed from the “Leadership” section of the company’s website. In his witness statement, Mr Bowden says that this came as a surprise because he had not been informed that he was no longer part of the ELT. He claims that there was no prior discussion or communication which led to members of his team and the wider workforce asking him if he was leaving the business and stating that he was being pushed towards the exit door. Under cross examination, Dr Selvaratnam acknowledged that had been removed from the leadership section on the website.
24. On 8 September 2020, a groupwide email was sent out outlining a new company organisational chart [102]. A copy of the chart was produced for the Tribunal and is entitled “Opsec Authentication Senior Leadership Team” [173]. Mr Waker is at the top of the chart. The next level below shows six different departments, one of which is called “Operations.” Mr Bowden is described as “EMEA Operations Leader.” He is also described in another lower level as “Operations/Commercial Excellence.” In paragraph 18 of his witness statement, Mr Bowden observes that this is further evidence of demotion and being undermined because he is no longer described as a director. He claims that he was neither consulted nor warned of the change in his job title and he was not provided with any details of any further amendments to his role arising therefrom. This was notwithstanding the concerns that he had raised previously. Members of his team jokingly saying the song “Leader of the Gang” which made Mr Bowden feel undermined and he was unable to respond to their comments. I have no reason to doubt that he felt this.
25. In his witness statement, Mr Bowden says that on 14 or 16 September 2020, following a lack of response from his previous discussion with Mr Waker, he repeated his concerns again regarding the removal of duties which he believed was preventing him from complying with his statutory obligations as a director. The conversation was recorded without Mr Waker’s knowledge and a transcript was provided for the Tribunal [SB57-70]. Mr Bowden is noted as saying:

*Right. So from a communication point of view, you know I’ve got people, I had people, batted them back, asking me, “oh, has your job changed? Has your title changed? Are you not a director any more?” And I guess that, from a communication point of view, that could have been avoided if, if we’d been involved earlier, or I knew it was coming.*

26. Mr Bowden goes on to say that during the conversation, Mr Waker said that his role would not be changing, and he had nothing to worry about. He says that this was the first time since he had raised his concerns formally and he alleges that Mr Waker continued to ignore his concerns about the fundamental changes to his role. Mr Bowden had reached the point of believing that his role had been dismantled and notwithstanding the fact that he had raised concerns with Mr Waker and Dr Selvaratnam the matter had not been resolved. He says "I recognised that I was clearly being squeezed out of the organisation. I had lost complete trust in the organisation." When he was cross examined on this Mr Waker suggested that the only changes that had been made were descriptions and Mr Bowden's role had not changed. Notwithstanding the fact that Mr Bowden had been removed from the ELT, Mr Waker suggested that he continued to occupy a leadership role. That is not supported by the evidence.
27. On 24 September 2020, Mr Bowden attended a monthly management review meeting concerning Precision II. In his witness statement, Mr Bowden alleges that Mr Waker told him not to "screw this up." He goes on to say that at a later project meeting he doubled down but stated adding at another point "don't fuck this up." These comments were made in front of Mr Bowden's colleagues and were, in his opinion, completely unnecessary and further evidence of senior management attempting to undermine his position in the business. He states that his performance figures and those of the wider operations department were of a high quality and had improved on the previous year. Consequently, it was disproportionate to publicly criticise and to undermine Mr Bowden as a manager in front of his colleagues. Mr Bowden also alleges that this was further evidence that Mr Waker did not appreciate the job that he had done over the years nor recognise the good job that he was doing. When Mr Waker was cross examined on this, he was specifically asked whether he had used the words attributed to him by Mr Bowden. He replied that he could not recall using that language in the meeting. It was put to him that he did use those words as Mr Bowden could only be targeted as he was the only person directly responsible for implementing Precision II in the United Kingdom. He then suggested that if he had made such statements, they would not have been specifically addressed to Mr Bowden. He suggested that he would have used words such as "we" rather than "you." I am not satisfied on the evidence that Mr Bowden has established that it was more probable than not that Mr Waker used such language specifically directed at Mr Bowden. I do accept that the Precision II project was very important given the level of investment involved and, under such circumstances, people can be under pressure to deliver and, if any, intemperate language was used it is more likely than not that it was directed at the team.
28. Mr Bowden alleges that from mid-September 2020, he experienced further changes to his role and responsibilities without consultation. This included removing his ability to sign off on process matters, expenditure, and contractual business to business matters under a new sign off protocol. He goes on to say that in general, sign off approval was moved to Mr Waker and to Dr Selvaratnam. The consequence of this was to further affect his ability to manage those for whom he had previously had responsibility. In his opinion, it fundamentally and directly affected his ability to support business relationships with suppliers and customers,

which is a statutory obligation of a director. These sign-off functions were taken away from Mr Bowden and given to other colleagues. He was unable to continue to provide independent judgment as a director but was potentially liable for any mismanagement by his colleagues. He cites this as a further example of diminishing his role.

29. The first example that Mr Bowden gives occurred in October 2020 when a contractual issue arose with the customer called Atak. Mr Bowden states in his witness statement that as a director he was asked to sign a contract amendment by the associated sales representative, Keith Thompson. Previously, he would have done this on behalf of Opsec and would have resolved any issues locally. However, he was informed that he could no longer sign such documents. Mr Bowden told the salesperson to deal with Mr Waker directly. Mr Bowden regarded this as an example of extracting him from the process and undermining his seniority externally. He states, "I felt pointless to the organisation and also frustrated, as I would be accountable for performance within the requirements of the contract, but no longer had the authority to influence it". Under cross examination, Mr Waker accepted that the power to sign off the contract had been removed from Mr Bowden and had become Mr Waker's responsibility. I have no reason to doubt that this made Mr Bowden feel that his position had been undermined and gave the impression externally that he was no longer occupying a position of seniority within the business. This is particularly the case if he was habitually used to signing contracts in his capacity as a director on behalf of Opsec.
30. On 18 November 2020, Mr Bowden attended a monthly operations review meeting with the global management team. In his witness statement, he says that during the meeting he took the team through their KPI dashboard and projects update, which, in his opinion, clearly showed very good performance and ongoing improvement. Mr Bowden then states that Mr Waker stated that he believed that inferior quality of manufactured product was the cause. In his witness statement Mr Bowden said that this was stated without evidence or supporting data and contradicted what had just been presented at the meeting. In his opinion, Mr Waker had made the comment to undermine Mr Bowden and to take focus away from him and his team's positive performance. Under cross examination Mr Waker said that the business had lost half of its revenue because of quality issues but he acknowledged that it was not Mr Bowden's responsibility for the fact that the sales were poor.
31. On 19 November 2020, Mr Bowden alleges in his witness statement that during a regular Precision II project review meeting which was attended by Dr Selvaratnam, Mr Waker, Bev Dew (Group CFO) and others, Mr Bowden declared that there would be a four-week delay in the installation of a machine being shipped from Italy mainly because of travel restrictions implemented by the Italian and UK governments during the Covid pandemic. In his opinion, these were circumstances that would be outside his or anyone else's control. He alleges that, at this juncture, Dr Selvaratnam accused Mr Bowden of "using Covid and will continue to do so" as a criticism of him and his work. Mr Bowden claims that up to that point, he had kept the project on track despite huge external influences caused by the pandemic. He had run the factory at full capacity during the pandemic despite huge external influences caused by it (including the

local MP putting pressure on him to close the factory). He denies ever using Covid as a crutch or to blame it for any issues. He found the comment negatively affected the trust and confidence that he had in his employer as they did not understand how well he was managing what he had left in the business. Under cross examination, Dr Selvaratnam denied using those words at the meeting. However, it was put to him that the expression was an unusual framing, and it was reasonable to expect it to have been said rather than being made up by Mr Bowden. It was the sort of phrase that one would remember. Dr Selvaratnam said that he did not talk in that way. Mr Bowden's evidence has not been corroborated by any of the other people who were present at the meeting, and I am not satisfied that he has established, on a balance of probabilities that Dr Selvaratnam use those words in relation to the delay of the delivery of the machine from Italy.

32. Opsec retains accreditations for ISO 9001 (quality management system) and ISO 14198 (security printing). In his witness statement, Mr Bowden states that both are a requirement to maintain business with key customers and Opsec's ability to tender for business. In his opinion, both standards require clear leadership, decision-making, and objective setting. These functions were taken away from him and he was unable to state that he was head of the business. He claims that at an operational level, decisions were being made which put the accreditation at risk. For example new people were recruited without the required security and background checks being completed. He felt that he could no longer be held accountable for those accreditations as he was no longer making the decisions required to maintain compliance. Under cross examination, Dr Selvaratnam accepted that these accreditations were very important because they gave confidence to customers who wanted to buy Opsec's products in the specialist security arena and confirmed that Opsec met lofty standards. He also agreed that whilst these accreditations were not a legal requirement, they were a prerequisite for doing business with many customers. When he was asked whether he knew that this responsibility for the accreditations had been removed from Dr Bowden he answered rather equivocally that he would not know the details. It was not something into which he would get involved. In his witness statement Dr Selvaratnam says that he did not remember saying that Mr Bowden could not sign off on the accreditations. He goes on to say that they were a business in a state of flux. Given the importance of these accreditations in maintaining customer confidence, I find it surprising that Dr Selvaratnam would not remember this incident. I accept what Mr Bowden says.
33. In November 2020, Mr Dave Cooper, Production Manager requested a company laptop to allow him to work from home on a project. In his witness statement, Mr Bowden says that the project was to improve people management and support staff particularly during Covid when employees were required to work from home. Mr Cooper required the laptop to work from home and to communicate with HR out of hours. The laptop cost £300. Mr Bowden would previously have approved such expenses claims as they were within his remit as Operations Director. However, the IT manager told him that he was no longer able to approve such purchases, which was something that he had not been made aware of. Mr Bowden then asked Mr Andrew McGuigan, the IT director, for the policy was told that there was no policy. He then asked the IT director, Mr

Kevin Frazer, who told him there had been a directive from the ELT not to buy new equipment, which was the reason he was unable to authorise the laptop purchase. Mr Bowden asked Mr Waker to authorise the transaction, but he refused to do so justifying this on the premise that if this was allowed to go ahead then every manager would want one. Prior to this, Mr Bowden had authority to authorise expenses purchases up to a value of £50,000 as evidenced by Opsec's Purchase Requisition Limits [117]. Mr Waker said under cross examination that a new authorisation policy had been implemented. In his witness statement he states that these new guidelines were introduced in respect of which employees were entitled to equipment such as laptop computers. According to this policy, the person in question who requested the laptop would not normally receive one because of their particular category of employment. He goes on to say that there were also ongoing challenges posed by the pandemic and there was heightened focus across the whole of the business in the US and globally on process and common practices to ensure that Opsec developed into a scalable business. These practices were introduced alongside a more integrated IT department. He denies that Mr Bowden was singled out as part of the process and explain the rationale to him [127-128]. It was put to him under cross examination that these new processes had never been put into place. In response, he essentially agreed because he said delegation of authorities were being built up which would be comprehensive and were supposed to be more limited. This is another way of saying that it was work in progress and the policy had not been formally communicated to Mr Bowden. Mr Waker also agreed under cross examination that Mr Bowden was one of two statutory directors and that he had to act in the best interests of the company and independently and with integrity. It was vital that he knew what his level of authority over expenditure was. It was put to him that he had sought authorisation of the laptop costing £300 and was told that he could not spend the money. Mr Waker's response was "not completely true." I found that a strange and equivocal answer.

34. Mr Waker then went on to say that he had explained to Mr Bowden that it was a standard rule only certain groups of employees could have a laptop and his request had to be justified. It was put to him that it was ridiculous that Mr Bowden could not authorise the purchase of a £300 laptop for someone to work from home given his position as a director. In response, Mr Waker said that when he had worked at DuPont, he did not have such authority. The IT department had a policy which required consistency at that company. Opsec was standardizing their authorities because the company was changing and there was a new policy which everybody had to follow. I can understand why companies require standard policies. Opsec already had purchase requisition limits which Mr Bowden was fully aware of. The fact of the matter is that when he sought to authorise the expenditure to buy the laptop, he had no idea that the policy had been changed. It is a significant reduction in authority to move from £50,000 to having no authority to authorise such a low value purchase. At its highest, this is poor communication. However, it forms part of a pattern of behaviour of incremental removal of responsibilities and executive authorities from Mr Bowden. These are matters that could and should have been discussed properly with him so that he could understand where he stood in the business and make an informed choice about his future.

35. The next incident which Mr Bowden alleges evidences removal and diminution of his role occurred in late November 2020 when he was approached by the Logistics Manager, Mr Steve Gregg. Mr Gregg was concerned about the imminent changes to trade within the EU which would require a significant increase in paperwork. In his witness statement Mr Bowden says that Mr Gregg provided clear forecast data demonstrating that they would not have enough resources to cope. He acknowledges that he was no longer allowed to make basic recruitment decisions and he approached Mr Waker with a plan to temporarily move a production operator who was keen to progress, into a temporary role to cover the short-term need. Mr Waker rejected the proposal 14 times between then and February 2021. In Mr Bowden's opinion this was done purely to prove the point as to who was in charge. At the beginning of January 2021, Mr Bowden says that he took the decision for the good of the business to make the change "under the radar" and kept the matter quiet from Mr Waker and he did so because he did not want the business to fail, and he was not prepared to compromise his own integrity. In his witness statement there is no denying by Mr Waker that he rejected the proposal. He justifies this on the basis that he required the decision to be based on the most up-to-date information. The business was also going through uncertain times and there were parameters in place to protect it. Under cross examination Mr Waker suggested that the position had always been the same and nothing changed. He said that Mr Bowden always required authorisation to hire personnel. That is incorrect as this was not a situation where a new employee was being hired. It was a temporary relocation within the business. Mr Waker was taken to the analysis prepared by Mr Bowden [137-138] to justify the transfer. It was put to him that Mr Bowden was an operations director who had many years of experience and he had decided that the added Brexit-related paperwork amounted to an extra 100 hours of work per month. He repeatedly asked Mr Bowden for further justification and requested more detail. At its highest, Mr Waker was being obtuse. However, I believe that there was a power play issue between the two men and Mr Waker was indulging in micro-management. Furthermore, the nature of the interaction suggested that he did not believe that Mr Bowden knew what he was doing. On being pressed on the matter, Mr Waker eventually accepted that Mr Bowden did not need his authorisation for an internal temporary transfer.
36. In his witness statement, Mr Bowden states that he sought clarification about his remit given the changes to his role over the previous months. He emailed Mr Waker on 8 March 2021 [201]. This concerned a proposal to change his role to Operations Leader. About his ability to make basic decisions in order to fulfil the role and whether he would continue to have statutory duties as a director. He highlighted the following areas where he would need to have decision-making powers:
- a. Management of labour costs to respond to market demands to avoid shortfalls.
  - b. Recruiting and dismissing staff.
  - c. Decisions relating to business-to-business contracts.



- d. KPI and bonus incentives.
  - e. Decisions regarding stock.
  - f. Signing off on operational expenditure.
37. Mr Bowden states in his witness statement that he did not get a response to this from Mr Waker. That is not correct. Whilst he may not have received a written response, he discussed it with Mr Waker (see below). It was put to Mr Bowden in cross examination that he was happy with the proposed new role. Mr Bowden disagreed which was why he had sent the email on 8 March 2021. This is plausible given the antecedent history about the changes to his role. Mr Bowden was then taken to an email sent by Opsec HR on 15 March 2021 entitled “Authentication Organisational Announcement” [144 A] which stated, amongst other things:

*David Bowden, EMEA Operations Director, is promoted to Head of Group Operations, reporting to Peter Waker. In this new role, David will take on the additional responsibility for US manufacturing and supply chain operations. David has over 30 years’ experience in operations and supply chain and will be leveraging best practices throughout our international manufacturing locations and supply chain services to deliver operational excellence across OpSec Authentication.*

Mr Bowden had no recollection of seeing this announcement. I have no reason to doubt this.

38. Mr Bowden and Mr Waker discussed the proposed new position sometime in March 2021. Mr Bowden recorded the conversation clandestinely. A transcript of that conversation was produced for the Tribunal [SB 71]. It is erroneously headed “October 2020”.
39. In April 2021, Mr Waker telephoned Mr Bowden to tell him that he would be undertaking a new role as Operations Leader for the UK and the US. In his witness statement Mr Bowden says that this would entail absorbing the position vacated by Ms Holmes, who had previously been the Operations Director in the US. Ms Holmes had taken over group HR. Mr Bowden characterises this as coming completely out of the blue. He alleges that the matter had not been discussed or mooted previously. He regarded this as a knee-jerk reaction to fill internal vacancies created by Ms Holmes departure. His own role would not be backfilled and there would be a financial saving. He says that no announcement was made to the business, and he did not receive a formal job offer. I disagree because Mr Bowden had discussed the new position with Mr Waker in March 2021.
40. On 12 April 2021, Mr Bowden was scheduled to have his annual appraisal with Mr Waker via a video call. He was required to complete a self-assessment section which he had sent to Mr Waker several weeks previously. 20 minutes before the appraisal was due to start, Mr Waker called him to ask him to send a self-assessment. He told him that he had

already done this. In his witness statement, he says that the fact that he was going to spend 15 minutes preparing for his annual appraisal demonstrated to him how insignificant the business regarded him. Under cross-examination, Mr Waker had downplayed the significance of this. Mr Waker was justified in his belief the business did not value him. The purpose of sending in the self-assessment several weeks in advance of the appraisal was to give Mr Waker the opportunity to prepare for the meeting. An annual appraisal is a significant event and the fact that Mr Waker asked for the self-assessment barely 20 minutes before the meeting reflects badly on him. It suggests he did not value Mr Bowden or recognise the importance of the appraisal to him.

41. Mr Bowden was taken to a letter dated 22 April 2021 [156]. The letter confirmed that Mr Bowden would be promoted to head of Group Operations with an effective date of 1 April 2021. His salary would increase to £107,320 per year. Under cross examination Mr Bowden said that he did not get this letter. Mr Waker acknowledged this in a later conversation that he had with Mr Bowden on 22 April 2021. He acknowledged that he had made a mistake. However Mr Bowden acknowledged that he knew that he was going to be promoted and that he would get a salary increase although he seemed to suggest that he did not know by how much. He only discovered the size of the increase when he received his final payslip after he resigned.
42. Mr Bowden decided to resign his position. In his witness statement he says that he made the decision because his role had been dismantled and he had not received clarity concerning the new role. He says, amongst other things:

*... I felt that I had no alternative but to resign. Notwithstanding the slow erosion of my role, there was a complete loss of trust in the Respondent's senior management team. I formally resigned from The Respondent on 23<sup>rd</sup> April 2021 following a verbal resignation to Peter Waker [SB 94-100]. I was asked by Peter Waker and Selva Selvaratnam not to publicise my resignation, to give them time to develop a restructure plan. I agreed, with my only request that I was given the chance to communicate the news to my team once they gave me permission so that I could answer their concerns. However, on 26 April 2021 I was contacted by a colleague in the On-line division asking where I was going. My resignation had been formally communicated to the cap on-line managers by Bill Birnie, the On-line General Manager. I sent an email to Peter Waker and Selva Selvaratnam stated that only Jim Keller and Michael Currie knew of my resignation so it wasn't possible. I pointed out that Bill Birnie had communicated to his entire team, so he must have been told, at which point Selva Selvaratnam backtracked. This again reaffirmed my lack of trust in the leadership of the organisation.*

43. On 22 April 2021, Mr Bowden had a telephone call with Mr Waker during which he tendered his verbal resignation. Mr Bowden made a clandestine recording of the conversation, and a transcript was produced for the Tribunal [SB 95]. I note that during that conversation, Mr Bowden suggested that there were two ways that his resignation could play out where he said:

*If I was an arse I could say, 'Listen, you know, I feel aggrieved. This is constructive dismissal. I'm not coming back in on Monday'. That's not going to happen. I'm not going to do that.*

44. When he was cross examined on this Mr Bowden said that he intended to do a positive handover to ease the transition after he left the business. This is why he would just not walk out. He said that he felt guilty about leaving which was why he referred to constructive dismissal in the way that he did. He did accept that he felt aggrieved that he had not received a bonus for the fiscal year 2021.
45. On 23 April 2021, Mr Bowden tendered his written resignation to Mr Waker in an email [157]. In his email, he set out his reasons for resigning as follows:

*Despite raising and documenting my concerns and grievances with you on many occasions, I feel that I can no longer fulfil my obligations as Operations Director due to the dismantling of my job role over the past 12 months. The significant changes made to my duties have effectively demoted me without agreement or consultation. I therefore have no option but to find alternative employment, taking a significant salary cut in the process.*

*I would like to highlight my disappointment in your decision to withhold my FY 21 bonus payment. Whilst I accept that this is your contractual obligation, I would have thought that Opsec would want to recognise my significant contribution during a very challenging FY 21 and my intention to deliver a smooth, managed handover. Can I request that you reconsider this decision.*

46. Mr Bowden registered with an agency in January 2021. They were headhunters looking to place people with prospective employers. He had started to apply for other jobs at around the same time. He was offered a position which he accepted at Ulster Carpets, which is located near to where he lives. Although his salary is less than what he was paid by Capsec, he was interested in the work because he would be involved in building a new factory.

#### Applicable law

47. A contract of employment is a legally binding agreement. Once it is made, both parties are bound by its terms and neither can alter those terms without the agreement of the other. Nevertheless, over the course of an employment relationship, an employee's terms and conditions are likely to change considerably. New working methods may be introduced, perhaps to accommodate technological change; or the employer may wish to alter the structure of the workforce and/or the tasks that the employees perform, introduce new pay systems, or even move the business to another area. Employees may also want to make changes — for example, to alter hours of work to fit in with new domestic commitments.

48. Most changes take place by mutual consent. Increases in salary are probably the most common example of a consensual variation to an employment contract. Problems arise, however, when one party, normally the employer, wants to introduce a variation of contract and the other party does not agree to it. Under common law a contract can only be changed by mutual consent and unilaterally imposed changes will not be contractually binding unless the other party agrees to them.
49. What is the legal status of a clause in the contract which purports to give the employer a power to vary some, or all, of the terms unilaterally? On the one hand, such a clause contradicts the usual requirement that a variation needs consent by the employee, but on the other hand, the clause itself constitutes an express term which the employee has accepted. The case law here is not extensive. It tends to suggest that if the variation clause (or, in an alternative formulation, a clause declaring that the matter in question is non-contractual and so remains within managerial prerogative) is fairly precise and restricted (eg to one particular matter) and is not perceived by the court or tribunal to be oppressive, then it may well be valid and enforceable.
50. In **Wandsworth LBC v Da Silva [1998] IRLR 193, CA** Lord Woolf MR stated [31]:

*The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort. In addition, the court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which that party is required to comply. If, therefore, the provisions of the code which the council were seeking to amend in this case were of a contractual nature, then they could well be capable of unilateral variation as counsel contends. In relation to the provisions as to appeals the position would be likely to be different. To apply a power of unilateral variation to the rights which the employee is given under this part of the code could produce an unreasonable result and the courts in construing a contract of employment will seek to avoid such a result.*

51. The relationship of employer and employee is regarded as one based on mutual trust and confidence between the parties. In **Courtaulds Northern Textiles Ltd v Andrew 1979 IRLR 84, EAT**, the EAT held that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties'. By 1981 the EAT found that the term was 'clearly established' and affirmed the formulation set out in the Courtaulds case — **Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT**. Mr Justice Browne-Wilkinson put it this way: 'To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its

effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.’

52. The existence of the implied term of mutual trust and confidence was accorded high judicial recognition when it was approved by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**. There, their Lordships confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
53. It is an important feature of the implied term that any breach of it will be regarded as repudiating the contract of employment. This was made clear by the EAT in **Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT**.
54. A breach of the implied term as formulated in **Malik**, will only occur where there was no ‘reasonable and proper cause’ for the conduct in question. The burden of proving the absence of reasonable and proper cause lies with the party seeking to rely on such absence.
55. In **Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT**, it was held that while a party’s intention may be relevant, that intention is to be judged objectively, and the tribunal is not required to make a factual finding as to what the actual intention of the employer was. What matters is whether the conduct was likely to have the effect of destroying or seriously damaging the relationship of trust and confidence.
56. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of breaching the implied term of trust and confidence.
57. A breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer that cumulatively amount to a repudiation of the contract. Typically, the employee resigns in response to a final incident that he or she regards as ‘the straw that breaks the camel’s back’. The last straw does not, of itself, have to amount to a breach of contract, still less be a fundamental breach in its own right (**Lewis v Motorworld Garages Ltd 1986 ICR 157, CA**). In that case the Court of Appeal stressed that it is immaterial that one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach and that the employee did not treat the breach as such by resigning.
58. In **Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA**, confirmed that, to constitute a breach of trust and confidence based on a series of acts (or omissions), the act constituting the last straw does not have to be of the same character as the earlier acts, and nor does it necessarily have to constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets

the act as hurtful and destructive of his or her trust and confidence in the employer. As always, the test of whether the employee's trust and confidence has been undermined in this context is an objective one.

59. Given that the last straw will come at the end of a series of related, or possibly unrelated, incidents occurring over a period of time, the question arises as to how tribunals should regard an employee's failure to resign in response to earlier incidents, especially if one or more of those incidents itself repudiated trust and confidence or constituted a fundamental breach of contract on some other basis. In **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA**, the Court of Appeal clarified that an employee who claims unfair constructive dismissal based on a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act, the last straw, forms part of the series. The effect of the final act is to revive the employee's right to terminate his or her employment based on the totality of the employer's conduct. This, at any rate, is the case if the final straw incident is not itself so damaging as to comprise a repudiatory breach in and of itself. If, however, it does comprise a repudiatory breach in and of itself and thereby triggers the employee's resignation, there will be no need for the employee to rely on the last straw doctrine as the basis for claiming that he or she has been constructively dismissed.
60. Whether changes to an employee's job content or status amount to a fundamental breach will depend upon whether the changes fall within the contractual job description. If they do not, one serious change or a gradual erosion of an employee's duties may result in a constructive dismissal claim. Changes that have amounted to a repudiatory breach include demoting a managing director when two new directors, who injected cash into the organisation, were taken on (**Hutchinson v Arkon Group Ltd and anor ET Case No.56347/92**).
61. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in question. This means that if there is an underlying (or ulterior) reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.
62. Sometimes there is more than one reason why an employee leaves a job. For instance, he or she may feel some dissatisfaction with the present job and have received an offer of something that promises to be better. In **Jones v F Sirl and Son (Furnishers) Ltd 1997 IRLR 493, EAT**, J had been subjected to a number of fundamental breaches of contract in the space of a few months. Three weeks after the last of these breaches she resigned, having been offered another job. An employment tribunal took the view that, since the employee's departure had been prompted by the offer of alternative employment, the employer's breach had not caused her resignation. The EAT overruled this, holding that the correct approach in such a case was to ask what the effective cause of the resignation was. The tribunal had not found that in the absence of the job offer J would have stayed and the EAT held that, considering J's long service (30 years) and the fact that she took another job only three weeks

after her contract was fundamentally breached, the breaches — not the job offer, were the effective cause of her resignation.

63. In **Meikle v Nottinghamshire County Council 2005 ICR 1, CA**, it was held that once an employer's repudiation of the contract has been established, it is for the tribunal to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. The fact that the employee also objected to other actions (or inactions) by the employer that did not amount to a breach of contract did not vitiate the acceptance of the repudiation. It is enough that the employee resigned in response — at least in part — to the employer's fundamental breach of contract. Applying this reasoning to the facts of the instant case, the EAT held that the tribunal ought to have asked itself whether the breach of contract involved in failing to pay the sick pay was 'a' reason for the resignation. In its view, there were sufficiently clear findings of fact to conclude that the sick pay matter was one of the reasons why L left and a finding of unfair constructive dismissal was accordingly substituted.
64. The Employment Rights Act 1996, section 95 (1) (c) ("ERA") states that there is a dismissal when the employee terminate the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as "constructive dismissal".
65. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA**, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: '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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'
66. In order to claim constructive dismissal, the employee must establish that:
- a. There was a fundamental breach of contract on the part of the employer that repudiated the contract of employment.
  - b. The employer's breach caused the employee to resign.
  - c. The employee did not delay too long before resigning, thus affirming the contract, and losing the right to claim constructive dismissal.

### Discussion and conclusions

67. In his submissions, Mr Brien acknowledged that this was not a case where there was a lot of factual dispute. He submitted that it was largely agreed that some of the role and responsibilities that Mr Bowden had

were taken away from him. It was a matter for me to decide whose evidence I preferred.

68. Mr Brien submitted that there was no unilateral attempt to remove Mr Bowden from his role for which he was employed. Indeed, he had been offered a new role. There was discussion about that role including clarification, as revealed in the transcript of March 2021. The evidence pointed to Mr Bowden being content to accept the new role. He was being promoted. He would be given greater responsibilities and a higher salary. This could not be seen as the final straw on which he purported to rely.
69. Mr Brien also submitted that Opsec had reasonable and proper cause to vary the terms of Mr Bowden's contract, given the extent of Covid and its impact on the business. Furthermore, the business was expanding and was globalising. Changes were being made daily and the business was having to respond, "on the hoof". People were working from home. Social distancing applied in the Washington plant. It was reasonable and proper for Opsec to adapt the role of employees, including Mr Bowden.
70. Mr Brien submitted that Mr Bowden's real complaint was not that his role had changed but there was not as much consultation as there could have been. However, the requirement to consult was outweighed by the requirements of the business. Mr Bowden's major issue was that he had not been promoted as soon as he had wanted. He had been stagnant in his role for six years whilst other people were getting positions in the US. Mr Kelly had been promoted and Mr Waker had been brought into the business. Mr Bowden felt that he had been overlooked. When the businesses were merging and the global function was being developed, he was not part of the strategy group. In Mr Brien's submission this was not a fundamental breach of contract. However, if there had been a breach of contract, there was reasonable and proper cause to do so.
71. Turning to the question of the resignation, the question that I have to determine was if there was a breach, did it play any part in Mr Bowden's decision to resign? There had to be a fundamental breach of contract. In Mr Brien's submission, the sole reason why Mr Bowden left the company was because he had a new job at Ulster Carpets. It was a good opportunity for him and this was reflected in the transcript of the final meeting between Mr Bowden and Mr Waker.
72. If Mr Bowden felt that his trust and confidence had eroded in July 2020, why did he continue to work for a further 10 months? At no stage did he lodge a formal grievance. Instead, rather than resigning in July 2020 he continued to work and he was headhunted for his new role. The fact that he continued to work for so many months indicated that there was not a complete breakdown in his trust and confidence with the company. Finally, during the meeting with Mr Waker when he discussed his resignation, he expressly stated that he would not be making a claim for constructive dismissal. It was only when he did not get his bonus that he changed his mind.
73. I agree with Mr Jupp's submission that in assessing this claim, one must contrast the position that Mr Bowden found himself in March 2020 and April 2021. By April 2021, he no longer reported to the CEO. He was



no longer on the ELT. He was no longer responsible for Customer Services or Grove Park and was no longer involved with setting global group objectives or revising the bonus scheme at Washington. He no longer had authority internally to relocate staff. He no longer had authority to contract on behalf of Opsec and he had no individual authority to approve expenditure where he had previously been able to make such authorisation for expenses up to £50,000. I also accept that he was described or at least viewed as a factory man by Dr Selvaratnam. By April 2021, the approach was to regard Mr Bowden as being responsible purely for the factory element of the operational side of the business given the removal of these responsibilities and he was no longer invited to strategy meetings. This was a significant diminution of his role and one which was implemented over time without his consent.

74. During the Covid lockdown, Mr Bowden kept the Washington plant open whilst under tremendous pressure, including from the local MP, to close it. The Precision II project, for which Mr Bowden was responsible, was a success.
75. The evidence of the relationship between Mr Bowden and Mr Waker can best be characterised as the latter micromanaging the former. This has all the hallmarks of a power struggle however one looks at it. Mr Waker had joined the business and wanted to change it. There is a well-known management mantra in such circumstances which is “change the people or change the people”. Mr Bowden was unhappy with the changes that were applied to him, and this ultimately triggered his decision to resign his position. This was the effective reason. The fact that he had another job to go to at Ulster Carpets was secondary and, indeed, prudent. It does not vitiate the fact why he ultimately left, namely, the unilateral and non-consensual diminution of his role.
76. Opsec’s position is that the changes were justified because the business was undergoing globalization and dealing with the challenges of Covid. I have no doubt that this was the strategy and I do not criticise Opsec for that. However, good management demanded that the proposed changes to Mr Bowden should be disclosed and discussed rather than inflicting them piecemeal without consultation. Transparency is preferable to stealth. Mr Jupp described these as “drip, drip, drip” changes; I agree. Mr Bowden could only tolerate so many “drips” before he had enough and felt that he had no option but to resign.
77. I disagree with Dr Selvaratnam’s proposition that the business was not doing very well when one looks at the last set of accounts that were filed with Companies House. It made a substantial net profit, and it had a healthy balance sheet.
78. Mr Bowden was one of two statutory directors of Opsec. He had several statutory duties which, if breached, could render him personally liable (e.g. personal liability under the Health & Safety at Work Act 1974, section 37 or for wrongful trading in an insolvency situation). Whilst I accept that there can be group level policies relating to such matters as authorisation of expenditure, borrowing powers, corporate social responsibility, antibribery and corruption etc.... these cannot be applied in

such a way as to unreasonably restrict the duties of statutory directors of subsidiary companies and how they operate the day-to-day management of the business. This was a very real concern for Mr Bowden and he was justified in holding that opinion. He was effectively only a director in name shawn of his executive powers. One also gains the impression that Dr Selvaratnam and Mr Waker were operating almost to the extent of being shadow directors of Opsec which has separate legal ramifications for them and are not the subject matter of this case.

79. Whilst I accept that there was an express variation clause in Mr Bowden's contract of employment, its operation was subject to the implied duty of trust and confidence, and it had to be applied reasonably. The evidence in this case does not point to its reasonable operation. Furthermore, I do not accept that the clause was, in any event, sufficiently widely drafted to give Opsec carte blanche to impose major variations on Mr Bowden.
80. The claim of constructive unfair dismissal is well founded. There will need to be a separate remedy hearing.

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Employment Judge Green

Date 1 February 2023