Industrial Tribunal

Case No. 28 of 2009

Xenia Davis — **Complainant**

-and

Abacus Financial Services Limited — **Respondent**

Mrs Gillian Golt for the Complainant
Mr. Nicholas Cruz for the Respondent

JUDGEMENT

BACKGROUND

On the 22nd October 2009 Mrs Xenia Davis ("the Complainant") resigned her position as an Associate with Abacus Financial Services Limited ("the Respondent"). By Originating Application dated the 14th December 2009 the Complainant alleged "constructive unfair dismissal, race discrimination, personal injury and bullying". The basis upon which said allegations were made by the Complainant were not set out at all as is required in the prescribed form. Having said this in a letter dated the 24th November 2009 from Mr. L. Newell of Bardellis LLP, the Claimants' solicitor at the time, addressed to the Respondent, it was alleged therein that the events of the 15th September 2009 onwards had resulted in an irreparable breakdown in trust and confidence which caused the Complainant to resign.

I have taken it that the afore-mentioned letter of the 24th November 2009, as read with the said originating application, form the basis of the Claimant's grounds of complaint.

The Respondents Notice of Appearance is undated but appears to have been faxed to the Industrial Tribunal Secretary on the 21st December 2009. In said form the Head of Legal Services for the Respondent categorically denies that there was any dismissal or constructive unfair dismissal or bullying or race discrimination or personal injury. It would appear that the

Respondent, for reasons best known to themselves, decided in early 2009 to instruct Messrs Cruz & Co to advise them only as to whether the Complainant was entitled to claim and it was not until late August 2009 that they decided to change representation from their internal counsel to Messrs Cruz & Co. Thus is came to be that an application was made by Cruz & Co by letter dated the 1st October 2010 to amend the Notice of Appearance filed "in order to clarify, for the benefit of all parties their position regarding this claim" and to add an alternative basis on which the claim was being resisted. The application was allowed despite the Complainants' objections and the upshot of all of this is that the Respondent is resisting the complaint on the basis that (1) there was no constructive / unfair constructive dismissal and (2) alternatively, if the Complainant was dismissed, that such a dismissal was fair and reasonable in all the circumstances of the case.

The hearing of this matter finally commenced on the 16th November 2010 and lasted until the 19th November 2010. During the course of the very full hearing the following witnesses gave oral evidence; the Complainant, Wing Commander K. Rawal, Jessica Campbell, Kevin Tewesbury, Christopher Pitaluga, Leyla Kartakuzhakova, Margaret Melville Evans, Tanya Hurtado, Sharon Harford, Melissa Victory - Peñalver and Paul Bowling.

In the case of Mrs. Campbell and Mr. Tewkesbury they both had to be summoned to give evidence. I found Mrs. Campbell to be a completely reluctant witness who came very close to being hostile and was unable to provide any assistance to the tribunal; I therefore disregard, her evidence such as there was. On the other hand I found Mr. Tewkesbury as a person who although reluctant to appear was seeking to answer the questions put to him and assisting the tribunal is so far as his recollection permitted him to do so.

With reference to Wing Commander Rawal, a senior medical officer with the Royal Air Force, there are two comments that need to be made at this early stage. Firstly, the Wing Commander had to be brought out from overseas for the purposes of attending the hearing only for the Respondents counsel not to have any questions whatsoever in cross-examination after his report /statement was tendered. I find it quite frankly scandalous that the Complainant was put to the expense of having to bring the Wing Commander to Gibraltar and that the Wing Commander's time was wasted in having to come to Gibraltar when the Respondent had no questions whatsoever to put to him. The Wing Commander's report could and should have been agreed to by the Respondent and therefore simply tendered. The Respondent behaviour in this respect left a lot to be desired. If I had the powers I would certainly have ordered the Respondent to pay the costs of the Wing Commanders forced visit to Gibraltar. A similar procedure should have been followed in the case of Ms Melville - Evans who thankfully was still in Gibraltar. Secondly, as the tendered

reports/statements of Wing Commander Rawal and Ms Melville Evans have not been questioned and/or challenged in any manner there contents are taken as accepted by the Respondent.

I have read the documents contained in the bundles before me as well as all the witness statements and the exhibits attached to those. I have taken into account the oral evidence given before me spanning over a number of days and have read the skeleton arguments presented as all the authorities drawn to my attention.

In this judgment I quote extensive from the verbal evidence given before me but this does not signify that I have not taken the contents of the witness statements tendered into account when deciding as to the facts.

SEQUENCE OF EVENTS

The following are my findings from the evidence heard of the uncontested sequence of events that occurred in this case.

A Notification of Vacancy dated 27th May 2008 was filed by the Respondent for a "Company Administrator - Russian Speaker."

The Complainant applied on the 13th June 2008 for the position.

At the beginning of September 2008 the Complainant was interviewed by Mr. Paul Bowling and Mrs Tanya Hurtado for approximately 30 minutes. On the same day the Complainant was further interviewed by Mr. Christopher Pitaluga and Mrs Tanya Hurtado for a further period of approximately 15 to 20 minutes. The interview was successful and the Respondent decided to employ the Complainant.

On the 9th September 2008 the Respondent formally offered employment to the Complainant as an "Associate"; which offer was accepted by the Complainant on the 11th September 2008.

On the 15th September 2008 the Complainant commenced her employment with the Respondent. On commencement the Complainant was assigned to what has been called the Russian team; a section of individuals whose work was to deal with the servicing of Russian clients. The Complainant was assigned to work with the only Russian speaker within the team; namely Leyla Kartkuzhakova but her direct line manager was to be Mrs Hurtado.

Between the 15th September 2008 to sometime towards the end of January 2009 the Complainant was mostly under the wing of Mrs Karkuzhakova although she did do work for other members of the Russian team. During this time the Complainant was given some training by members of the Russian team but over and above the induction course the extent and

intensity of the same is shrouded in some unspecificness and would appear to have been mostly directed towards dealing with issues as and when they arose in the course of work.

In late January 2009 (possibly around the 30th January) the Complainant whilst remaining within the Russian team was assigned to work with Mrs Melissa Peñalver-Victory and Mr Wayne Almeida although she continued to do some work for Mrs Kartkuzhakova and others. Her line manager continued to be Mrs Hurtado.

In the middle of March 2009 the Complainants six month probation period expired and the Complainant's employment with the Respondent continued.

On the 30th April 2009 Mrs Peñalver Victory conducted what she has termed a mini - appraisal meeting with the Complainant but omitted to inform the Complainant that was the purpose of the meeting and failed to make and/or provide any documentary record of this meeting.

Sometime in early June 2009 the Complainant was provided with a Personal Appraisal and Development Plan for the year 2009/2010 form and asked to complete it. The form was completed by the Complainant with the help of her husband (she had never seen one before) and handed to Mrs Peñalver Victory so that she could import into the form her comments. In the event Mrs Peñalver Victory did insert some comments but did not complete the form. As the form has the date 15th June 2009 appearing in the first page it is reasonable to assume that the Complainant completed the form on that day.

Also sometime in early June 2009 Mrs Peñalver Victory had her own personal appraisal the outcome of which was that she had to improve her managerial skills.

On the 18th June 2009 an appraisal meeting was held by Mrs Peñalver-Victory with the Complainant. What transpired at that meeting is the subject of different versions by both sides.

On the 9th July 2009 there was an incident in the office involving Mrs Hurtado, Mrs Peñalver-Victory and a third party which resulted in Mrs Peñalver-Victory moving her desk away from Mrs Hurtado to another location.

On the 9th and 10th July 2009 Mrs Hurtado took leave.

On the 14th July 2009 the Complainant had an incident (which I can only term as minor) involving Mr. Almeida and Mrs Peñalver Victory.

Between the 15th and 30th July 2009 the Complainant was on leave.

In July 2009 Mrs Peñalver-Victory took a months leave and returned to work sometime around the 3rd August 2009.

On the 11th August 2009 the Complainant underwent an appraisal meeting which was conducted by Mr. Pitaluga and Mrs Peñalver-Victory. Here again what occurred at this meeting is the subject of different versions but suffice to say that the Complainant was informed that Mrs Peñalver-Victory and not Mrs Hurtado was to be her line manager as from the following day.

On the 15th September 2009 the Complainant attended the medical centre at 8 am in order to have medical attention for a rash. As a result she was late to work and consequently at sometime after 10am telephoned Mrs Hurtado to inform her accordingly. This resulted firstly in Mrs Peñalver-Victory discussing with Mrs Harford the Complainants leave record and secondly in there being over the course of the 15/16 September 2009 a flurry of exchange of e-mails concerning leave/absences/lunch times.

Thus:-

15th September:-

9.23 Mrs Hurtado e-mailed Mrs Peñalver-Victory
10.40 Mrs Peñalver-Victory e-mailed the Complainant
11.09 The Complainant e-mailed Mrs Peñalver-Victory
12.38 The Complainant e-mailed Mrs Hurtado
12.49 Mrs Hurtado e-mailed the Complainant
13.05 Mrs Hurtado e-mailed the Complainant

16th September:-

9.11 the Complainant e-mailed Mrs Peñalver Victory
9.18 the Complainant e-mailed Mrs Hurtado
9.35 Mrs Hurtado e-mailed the Complainant
11.03 Mrs Peñalver-Victory e-mailed the Complainant
11.18 the Complainant e-mailed Mrs Peñalver-Victory.

I pause here to make the following comments. Bearing in mind that all the protagonists of these e-mails were sitting literally within yards of each other it is most extraordinary and indicates that there is within the Respondent a culture of sending e-mails rather than communicating with each other. Moreover, it is also surprising that whilst there is no end of e-mails on the issue of leave/lunch/absences there are no e-mails recording the Complainants' performance at work notwithstanding what Mrs Hurtado and especially Mrs Peñalver-Victory allege was her ever increasing very poor performance.

On the 16th September 2009 the Complainant met with Mrs Harford in order to discuss some concerns. There were a number of further meetings between them in the days that followed.

The events of the 15/16 September in one form or another led to discussions about the Complainant between Messrs Pitaluga / Hurtado / Peñalver-Victory which in turn led to the meeting of the 25th September 2009.

On the 18th September 2009 the Complainant had a meeting with Messrs Hurtado and Peñalver-Victory at her request at which some issues about leave / absences were discussed.

On the 25th September 2009 Mr. Pitaluga and Mrs Hurtado met with the Complainant. Here again there is some difference of opinion as to what transpired at this meeting but suffice to say that the Complainant was informed that she was being assigned to Mr. Kevin Tewkesbury, also within the Russian team, as from the 28th September 2009. On the 30th September Mrs Hurtado made a file note of what transpired at this meeting of the 25th September 2009;

On the 28th September 2009 the Complainant attended her desk but in order to clear pending work did work for Mrs Peñalver-Victory during the course of the morning rather than for Mr. Tewkesbury. That same morning at 12.46 am Mr. Pitaluga circulated an e-mail in which he referred to the Complainant. The receipt of the e-mail made the Complainant go to see Mrs Harford, Mr Tewkesbury and then her doctor during her lunch break. Said doctor gave her a medical certificate until the 12th October 2009 for "work related stress and anxiety."

On the 9th October 2009 the Complainant was given a further medical certificate until the 10th November 2009 for "work related stress / anxiety and low mood."

On the 14th October 2009 Mr. Paul Bowling in the presence of Mrs Harford telephoned the Complainant at home. A file note of the conversation was made.

On the 22nd October 2009 the Complainant had a meeting with Mrs Harford and subsequently submitted a written resignation giving one months notice as well as notice that she would be seeking legal advice on the matter.

On the 23rd October 2009 Mr. Pitaluga telephoned the Complainant and briefly spoke to her. What was said during the short conversation has different versions on each side.

On the 15th November 2009 the Complainant was given another medical certificate for a period of four weeks for "Reactive Depression".

That is the bare bones sequence of events as gathered from all the evidence provided to the Tribunal and which has not been significantly challenged by either party.

Race discrimination

As referred to previously there appears to be an allegation of racial discrimination raised by the Complainant even though no reference was made either in the Originating Application or in the letter of Bardellis LLP to section 9 of the Equal Opportunities Act. Notwithstanding this for the sake of thoroughness I will therefore deal with this aspect of the case.

The Complainant appears to allege racial discrimination/harassment on the basis of two particular incidents; namely:-

(a) Mr. Pitaluga likening the Complainants' pronunciation of the words "its nice" to a character in the film "Bruno"; and

(b) the Respondent preventing the Complainant and Mrs Kartkuzhakova from speaking in Russian whilst in the office.

The evidence with reference these allegations is as follows.

In her witness statement the Complainant states:-

> "In the office - when he came to see us - he used to say "its nice" and laugh together with the others and after few days I stopped laugh together with him - and he said "let me know when this will start getting on you" but even if it started bothering me I would not go against Chris I still want to work there and don't want to make any problems or fuss, but it was not funny at all. I didn't feel comfortable with his joke. I still had not seen this film."

In evidence the Complainant stated that:-

> "My concern arose because I was employed to help Leyla who was speaking with Russian speaking people who did not understand English. I did ask her as I did not understand why I had been moved and she said that it was very secret information. She had been told by Jessica Campbell that we did speak Russian language between us a lot and the other members of the team thought we were talking about them and that is why we have been moved away from each other. She said to me I told you not to speak Russian to me a lot and to

speak in English and you did not listen. I spoke Russian to her related to job. If there was another person beside us we would speak not in Russian but in English."

"We went to summer retreat ..... After lunch we were sitting on the table together with my colleagues and Mr. Pitaluga. At that time he mentioned that my accent reminded him of Bruno especially when I said, "that's nice." It was a kind of a joke and I laughed also. At the time I did not know who Bruno is or what he did. At that time Mr. Pitaluga said he had seen the film and found it hilarious and any time that I said That's Nice "it reminded him of the film. He continued saying this in the office a few times in front of other colleagues and make them laugh."

"He did tell me tell me when you have had enough of this." I didn't see the film until when I was sick October/November 2009. When I saw film I found it offensive to a lot of nations in the world. I did not find it funny at all."

"The Bruno incident was the race discrimination. It was in June."

In evidence Mrs Kartkuzhakova stated that:-

"We spoke Russian together when we started. I was told that we could speak Russian but at the same time we had to speak English so that we could not speak Russian all the time."

"On occasions when I had to explain something to Xenia and I felt that she would understand me better if I explained it to her in Russian that is when I could speak to her in Russian. I was told by Tanya to not speak all the time in Russian to Xenia."

"I was aware that we could not speak Russian all the time and people because we work in a foreign country I believe it unethical to speak a different language all the time because people cannot understand what we are discussing and if I explain something to Xenia then my manager would not be a able to understand whether what is being explained is correct or not."

"They speak llanito if its not related to the job they speak it between themselves."

"It was Borat but I don't remember Mr. Pitaluga making the joke at the summer outing. I recall him saying this at a team dinner at jumpers. I don't think everyone heard but the people around laughed including myself but I also remember Chris apologized and then said to Xenia I hope that you did not find it offensive and if you find it offensive please tell me to which Xenia replied its okay I don't take joke like that seriously. Chris apologized to Xenia."

"I have seen Bruno and some episodes of Borat. The film Bruno was not released at the time so I don't know why it is being mentioned. The film was Borat."

"No I have not heard Chris make the same joke in the office. I only remember him mentioning it once in Jumpers and that is it. He never joked with me about my accent. It depends on how it is said as to how I would feel if he made the joke to me."

In evidence Mr Pitaluga dated that:-

"I remember the 2009 outing. I make it a point to try and socialise with as many people as possible. I have no specific recollection of being with Xenia but if she says we did sit all together then I believe her."

"I have not seen the film Bruno. I don't recall having said you sound like Bruno what I would have said is when you say its nice your accent sounds like Borat. I don't recall saying it at the summer outing but I recall saying it at some stage. I don't recall her being offended. I do recall making a comment in the presence of Leyla also. I think this is relevant because Leyla is from Khargastan and Borat is characterised as a character from Khargastan and I was studiously careful to ensure that Leyla in particular would not be offended by the correlation. Leyla was also absolutely not offended. I made the comment simply because there was a similarity in the accent that struck me but I would put it as being no more or less offensive as when people in the UK comment on the Britishness of my accent. There was absolutely categorically no intention whatsoever to imply that the contents of this film bore any relation to the character disposition or personal nature of the Complainant."

"I perceive there to be a similarity in the accent. It was certainly not mocking. It was a casual conversation."

"I made the remark twice, three times maximum. It would only have been when she actually said those words. It was not a random imposition but only when the words themselves would have been said."

"As reported to me the nature and frequency of the conversation was proving to be of some difficulty for the Management Team who felt that they were obviously unable to ascertain the nature and content of those conversations and I think it is reasonable that if you are trying to manage a group of people and there are conversations which you do not understand then that is going to impact on how you manage those people."

"There was no problem with Leyla's work. As far as they spoke in Russian did not impact on Leyla's work. The conversations as reported to me were that they were frequent and inhibited their management of the group as a whole."

Taking all of the above into account the question(s) I ask myself is whether the Complainant has proved on a balance of probalities:-

(a) less favourable treatment by the Respondent of the Complainant than another person (real or hypothetical) of a different racial or ethnic origin; and

(b) that the different treatment was on the ground of racial or ethnic origin; and

(c) that the treatment was within the Complainants employment.

The Complainant has not satisfied me on any of those stages. Taking first of all Mr. Pitaluga's remark likening the Complainants pronunciation of "its nice" or "that's nice" (as the case may be) to the Bruno (or Borat) film and the two or three subsequent repeating of the words in the office.

The Complainant has admitted that she laughed at the original remark, that she was unaware of the contents of the Bruno film until she was sick in October/November 2009 and it was at that point that she realised how offensive it was, that after it was repeated a number of times she no longer found it funny and that she never objected to it being said even though she was invited to do so by Mr. Pitaluga.

Bearing the above in mind it seems to me that:-

(a) if she had resigned prior to having seen the Bruno film then I fail to understand on what possible basis the Complainant can allege racial discrimination as the basis for resigning; or

(b) if she saw the Bruno film whilst on sick leave but before resigning but two to three months after Mr. Pitaluga is said to have made the remarks in the first place, here again I cannot understand how it can be said that the sudden knowledge of the contents of the film made the Complainant belatedly suddenly believe she had been racially discriminated and therefore she resigned.

Turning to the question of the Complainant being prevented from speaking Russian in the office. It is clear from the evidence that (a) the Complainant was never informed formally by a line manager and/or a partner / director that she could not speak Russian in the office and (b) Mrs Kartkuzhakova, who was the one to whom Mrs Hurtado spoke to, was able to and did speak to the Complainant in Russian for the purposes of explaining a point to her. Even if such a state of affairs could possibly be said to constitute less favourable treatment of the Complainant by the Respondent, and in my view it cannot in these circumstances, it was treatment based on sound and reasonable managerial considerations and controls within an office environment and not grounded on ethnic or racial origins.

Having taken everything into account it is clear to me, and I so find, that there was no racial discrimination against the Complainant.

Demotion

It has also been alleged in one form or another that the assignment of the Complainant to Mr. Tewkesbury was an act which completely changed the terms and conditions of the Complainants' employment. I turn therefore to consider this aspect of the matter.

The notification of vacancy form dated 27th May 2008 submitted by the Respondent to the Employment and Training Board ("ETB") states that the vacancy is for a "Company Administrator - Russian Speaking" and states that the person concerned was required to have by way of qualifications "must speak fluent Russian - graduate".

The Notice of Terms of Engagement filed by the Respondent with the ETB dated the 16th September 2008 states that the Complainant is engaged for an indefinite period as from the 15th September 2008 as a "company administrator - Russian speaking."

The offer of employment made to the Complainant dated the 9th September 2008 states she was being employed "as an Associate"; a phrase which

designates a grade but which is non-descriptive of the work she is being employed to do.

The "Associate" grade within the Respondent company is accepted by both parties as being the most junior of positions within the firm and, therefore on the face of it, not one that would be equated with the more important position of company administrator. In order to resolve this apparent discrepancy one has to turn to the evidence given as to the basis upon which the Complainant was employed.

In evidence Mrs Hurtado stated:-

"It was made clear that one of the primary things she would be doing would be translations and that these translations would be held on file and therefore it was obvious that they needed to be of good standard."

"The primary reason we employed Xenia was to cover Leyla in her absence."

In evidence Mr Pitaluga stated:-

"At the time we advertised there had been a growth in the number and importance of clients introduced by PWC in Russia and in addition to existing capacity for Russian work and translation that we had in the person of Leyla we had decided as a Management Group that the time was right to try and recruit a Russian speaker."

"I was quite frankly enthusiastic. It seemed auspicious to me to have the opportunity to recruit a second Russian speaker with relative ease ....."

Talking all of the above into account it is my finding that the Complainant was employed as a junior administrator whose primary tasks were to converse with Russian speaking clients as and when Mrs Kartkuzhakova was unable to do so, to conduct translations of Russian documentation as and when required to do so and to carry out basic tasks related to company administration. In the course of the evidence no witness gave a complete list of the tasks which the Complainant was required to do although reference was made to billing, translations, minutes. The only evidence that there is on the issue is contained in the letter of the 21st December 2009 from PWC's legal counsel to Bardells LLP. As the items on this list have not been challenged either in correspondence or in the course of the hearing I see no reason for not accepting the list as being a correct statement of the position. This being the case was the assignment of the Complainant to Mr. Tewkesbury a demotion of the Complainant to the role of filing clerk thereby creating a diminution in status as has been alleged. On this issue the evidence is as follows.

In evidence the Complaint stated:-

> "He recommended putting me in Kevin's team. I had worked with Kevin before doing some work for him. I was more than happy to start to work with Kevin. It was not new work it was more of the same."
>
> "I was quite distressed about this e-mail because Mr. Pitaluga mentioned twice that I am going to do filing for the whole of Abacus. I understood that I would be doing filing almost all day which was instead of learning something new was going back to do filing and not for what I was taken on for in the first place. I don't mind to do anything in the firm but not to be doing just filing all day. The bank filing is normally in English. Sometimes it can come in Russian."

There are two points to be made with respect to this evidence. Firstly, that until receipt of the e-mail in question the Complainant was perfectly willing to abide with and had accepted the re-assignment to Mr. Tewkesbury. Secondly, what concerned the Complainant was the possibility of just doing filing and not learning anything new rather than any question of being demoted or her status diminuted. Whether she would have simply done filing we will never know since the Complainant went on sick leave on receipt of the e-mail and therefore the issue was never tested.

In evidence Mr. Pitaluga stated:-

> "It was absolutely not a demotion or a change of terms of employment. Xenia was being retained in the same team at the same grade at the same level of pay subordinate to the same grade of supervisor discharging work of the same kind that she had been used to doing possibly in different proportions but the work generally the same."

It is significant to note that not only had the Complainant already been re-assigned before but also certainly by, if not before, the 25th September 2009 the Complainant according to the evidence given was doing very work for Mrs Kartkuzhakova and/or very little translating into or in Russian.

Moreover, it is my opinion that the Complainant unfortunately misinterpreted the salient points of the e-mail in question possibly as a result of a combination of the undoubted highly emotive state (as clearly shown in the doctors report(s) she was in and her understanding of the English language (during the course of the hearing I found that the Complainant at times did not easily grasp what was being said to her and that her spoken English appeared to be much better than her written English):-

The appropriate part of the e-mail states as follows:-

> "Xenia Davis will join Kevin as an assistant on banking matters and to deal with the banking filing for the whole of AFSL. For avoidance of doubt, until we assess the depth of resource required, Kevin will continue to dedicate himself to banking matters for the Russian team only, notwithstanding that Xenia will assist with banking of filing for the whole of AFSL."

The manner in which I read this e-mail it cannot be interpreted as stating that the Complainants' sole function would be filing (she would also assist on banking matters) indeed according to the e-mail there was another person also doing filing. Having said this in a perfect world Mr. Pitaluga's distribution of the e-mail was ill advised and the choice of phrasing could have been better.

Bearing all of the above in mind, I find that the re-assignment of the Complainant to Mr. Tewkesbury on the basis that it was going to take place did not cause a demotion or diminution in the status of the Complainant.

Bullying and Personal Injury

It was alleged by Mrs Golt on the Complainants behalf that the Complainant was subjected to an effective campaign of bullying intending to cause distress and which did cause personal injury. In making such a generalised submission Mrs Golt was referring, I believe, without naming them to various actions by Messrs Pitaluga, Hurtado and Peñalver-Victory. It is pertinent to note that such a submission goes beyond what the Complainant herself has said. In her evidence the Complainant when referred to the allegation of bullying stated only that what she was complaining of, referring to Mr. Pitaluga only, was:-

> "The way in which he talked to me was bullying. He was talking in a higher than normal level of voice. The way he talked to me and what he said to me was bullying. It is not right to raise his voice. He did not shout to me. He was speaking quite loud to me."

Moreover, in her tendered statement the Complainant makes no reference at all to feeling bullied or being bullied in any particular situation or by any particular person or person.

Notwithstanding this what matters/issues could Mrs Golt / the Complainant rely on in support of a submission of bullying.

In my view it could only possibly be the following; namely:-

(a) the actions taken by Messrs Hurtado / Peñalver Victory with regard to leave / absences by the Complainant amounted to bullying; and/or

(b) the conduct of Mr. Pitaluga at the meeting of the 25th September 2009 amounted to bullying.

By bullying I take it that Mrs Golt is referring to harassment pursuant to Section 14 of the Employment Opportunities Act. The issue is therefore whether jointly or separately Messrs Pitaluga, Hurtado and Peñalver-Victory engaged in conduct which had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Complainant.

Turning therefore to the evidence.

In evidence the Complainant stated as follows:-

> "On the 15th September I came to work I said hello to Melissa. She didn't reply. When I turned on the computer I saw e-mail from Melissa sent 10 minutes before I came into work. I printed e-mail and went to see Sharon. I asked her why Melissa came to see her and I showed her the e-mail and also said that I did not know why Melissa had not asked me about it. Melissa was seated right next to me at that time. I was very upset about the e-mail I didn't understand why Melissa not talk to me. It was an official e-mail like a warning."
>
> "I was very upset after I had this e-mail and all the subsequent e-mails because I didn't understand why they didn't talk to me as it was always before that. Before everything was discussed in a friendly manner. I didn't understand why they accused me of getting into habit of taking time during lunchtime."
>
> "It seemed everything changed with me after the incident with Wayne. This was the first time I noticed a different attitude towards me."
>
> "The absences were never a problem prior to the 15th September and I had never been informed that they were a problem."
>
> "I was not aware that I had to talk to Melissa about my absences from work."

"I would go to Mr. Bowling or Tanya first and if they approved it then I would tell Melissa."

"Between September 2008 to September 2009 the Company accommodated me that they were very understanding."

"Melissa said in her e-mail that I had taken as a habit to work for the hours that I was absent. This was not correct. I also thought it could be talked about and not had to send an e-mail and also she went to see Sharon."

"I did not see why Melissa not talk to me about it when she was sitting beside me. It seemed that they were creating a file on me."

"On the 18th September I met with Melissa and Tanya."

"At the 18th September I did not raise with Melissa or Tanya the issue of bullying."

What is clear from this evidence is that as far as the Complainant was concerned there were no problems before the 15th September with Messrs Hurtado/Peñalver-Victory and that things changed from this date onwards. If this is the case then if Messrs Hurtado/Peñalver-Victory were involved in any bulling/harassment it must had been between the 15th September to the 28th September. During this period the following events occurred between Messrs Hurtado/Peñalver Victory and the Complainant:-

(a) 15th September - an exchange of e-mails

(b) 16th September - an exchange of e-mails

(c) 18th September - the meeting between all three of them.

(d) 25th September - the meeting between Mr. Pitaluga Mrs Hurtado and the Complainant.

(e) 28th September - a telephone conversation by Mrs Peñalver-Victory with Mr Pitaluga in the presence of the Complainant.

Dealing therefore with each of these in turn. I have examined the e-mails of the 15 and 16 September over and over again and can find nothing in them which can be characterised as bullying or harassing in any of its many different aspects. The most that can be said about them is that perhaps the issues being discussed were being put on record as it where but if this was the case that is perfectly understandable and acceptable. It

is also pertinent to note that even on the 15th September after all that had happened earlier in the morning the Complainant asked for a change in her lunch hours for some unspecified days and some accommodation was given to this request.

With reference the meeting of the 18th September there is nothing in the Complainants evidence to suggest or indicate that either Mrs Hurtado or Mrs Peñalver-Victory in any way bullied and/or harassed her or that it was in any manner unfriendly. At the meeting the Complainant informed them why she was unhappy about the exchange of e-mails of the 15/16 September and Mrs Hurtado/Peñalver - Victory informed the Complainant about their concerns with regard to changing of lunch hours/absences.

With reference the meeting of the 25th September the Complainants objections/allegations are directed towards Mr. Pitaluga and not Mrs Hurtado so therefore at this stage of the matter under discussion this meeting is not pertinent.

With reference the telephone conversation of the 28th September between Mr. Pitaluga and Mrs Peñalver-Victory, on the evidence before me there is nothing to suggest let alone show that anything untoward occurred. There may have been an exchange of laughter between the telephone conversationists but to say that such laughter was about the Complainant or designed to bully/harass the Complainant is a factual leap which I am not prepared to take.

The upshot of all of the above is that I dismiss the allegations of bullying/harassment made against Mrs Hurtado and/or Mrs Peñalver-Victory.

Turning therefore to the meeting of the 25th September with Mr. Pitaluga.

In evidence the Complainant stated as follows:-

> "After meeting I went straight away to see Sharon as I was very upset and told her what had happened. I did not know why Mr. Pitaluga talk to me in that manner, why I had to be given another chance."
>
> "The way he talked to me was bullying. He was talking in a higher than normal level of voice. The way he talked to me and what he said to me was bullying. It is not right to raise his voice. He did not shout to me. He was speaking quite loud to me."
>
> "I think Mr. Pitaluga's approach was the same manner as an appraisal meeting. He was not shouting or angry. He was annoyed."

> "I did not raise any issues with him as I did not know what he would do if I asked more questions."

In evidence Mr Pitaluga stated:-

> "Specifically I never said if you don't accept this you will have to leave the firm. I have never in 27 years threatened anyone with dismissal. I would say that after repeated attempts to describe to her the gravity of the situation and her determined resistance to accept any of the criticism's that had been made what I said to her that whilst she was free to discuss with Melissa the ways in which she could remediate her performance the time had passed for further debate on whether she accepted those criticisms or not..... It was not an ultimatum of any kind."

Neither the evidence of Mrs Hurtado and/or Mrs Harford with regard to this meeting is of any assistance.

I have no doubt that Mr. Pitaluga was stern with the Complainant in the course of the meeting and that he clearly emphasised to her that matters were not up for discussion or querying and that she was being given a last chance to improve her performance. Having said this I am far from satisfied that Mr. Pitaluga's conduct was such as to amount factually or legally to bullying and/or harassment and consequently I dismiss such allegations as made against him.

Constructive Dismissal

This is the ground that forms the main plank of the Complainants complaint against the Respondent. It is a ground composed of a lengthy litany of alleged failures on the part of the Respondent in the manner it dealt with the Complainant and which cumulatively resulted in the Complainant allegedly feeling that the trust and confidence which she had in the Respondent had been destroyed thereby leaving the Complainant no choice but to terminate the contract. Mrs Golt on behalf of the Complainant has referred me to the following cumulative failures:-

(a) the Complainant was given ad hoc training and not core and specialist training;

(b) the Complainant was banned from speaking Russian with Mrs Kartkuzakova;

(c) the Complainants appraisal in June 2009 was not conducted as required by or in accordance with the Respondent's procedures;

(d) Mr. Pitaluga's remarks to the Complainant in the August 2009 appraisal meeting were derogatory and oppressive;

(e) the e-mails of the 15/16 September 2009 from Mrs Hurtado and/or Mrs Peñalver-Victory were aggressive and distressful;

(f) Mr. Pitaluga's remarks to the Complainant at the September 2009 meeting were neither fair nor supportive and threatening;

(g) Mr. Pitaluga's e-mail of the 28th September 2009 was an effective demotion of the Complainant;

(h) the lack of enquiry about the Complainants' state of health during the first two weeks of her certified sick leave was indicative of the Respondent treatments of the Complainant;

(i) the Respondent did not investigate fully or at all the Complainants' allegations, of bullying;

(j) members of the Russian team and a partner of the Respondent intentionally made the Complainants life very difficult;

(k) Mr. Pitaluga humiliated the Complainant in front of the other staff by likening her phrasing of words to the character Bruno/Borat;

(l) the Respondent failed to make allowances for the Complainant's lack of experience in an international company environment, her lack of English qualifications or lack of experience in appraisals.

(m) the Complainants' re-assignment to Mr. Tewkesbury was a demotion;

(n) management failed to support the Complainant;

(o) Mrs Peñalver-Victory undermined the Complainant by removing work from her; and

(p) the Complainant was employed under false pretences and set up to fail from the very beginning.

The Respondent submits in reply that there was no constructive dismissal of the Complainant but in the event that the tribunal should not agree with such a submission that the dismissal was for a reason that was fair.

In Bardellis LLP's letter of the 24th September 2009 it is alleged that the events of the 15th September 2009 onwards are what caused the constructive dismissal. Moreover, the Complainant herself stated in

evidence that prior to July 2009 she had no complaints about the Respondent and that they accommodated her well and therefore, it follows, that events prior to this time could not be the cause of the constructive dismissal. This being the case I immediately disregard from consideration from the alleged list of failures given by Mrs Golt those itemised at paragraphs (a), (l) and (p). With regard to paragraph (h) this is more an observation on the part of Mrs Golt than a ground of complaint and is therefore also disregarded. With reference the remaining items of the list I would make the following brief observations with regard to the following sub paragraphs since I have already substantively dealt with the points above:-

(i) sub-paragraph (b) - in my opinion the Complainant was not banned from speaking Russian and the restriction placed upon Mrs Kartkuzakova speaking Russian to the Complainant was for sound and reasonable managerial controls within an office environment;

(ii) sub-paragraph (e) - in my opinion the exchange of e-mails of the 15/16 September 2009 were not bullying and/or aggressive and were not out of order;

(iii) sub-paragraph - in my opinion the e-mail of the 28th September 2009 whilst it could have been phrased better was not a demotion of the Complainant;

(iv) sub-paragraph (i) - whilst it can be said after the event with some justification that the Respondent failed to carry out a meaningful investigation of the allegation of bullying made, it is my opinion that as the Complainant resigned prior to the Respondent being given any proper chance to carry out and/or complete such investigation such failure cannot be said to have been the ground for or one of the reasons which led the Complainant to resign;

(v) sub-paragraph (k) - in my opinion there is no evidence whatsoever to justify Mrs Golts submission that the Complainant was humiliated by Mr. Pitaluga's likening the Complainants pronunciation of two words to the Bruno/Borat character. Not even the Complainant said that she had been humiliated;

(vi) sub-paragraph (m) - in my opinion the re-assignment of the Complainant was not a demotion or a diminution in status and in any event such an allegation cannot be made in this case since the Complainant went on sick leave before asking and/or ascertaining whether the suppositions she made were in fact correct.

In the light of the above we are merely left with considering the allegations made in sub-paragraphs (c), (d), (f), (h), (j), (n), and (o). Turning then to each of the allegations contained in these sub-paragraphs.

With reference to the issue of the Appraisal Form not being completed in accordance with the office procedures of the Respondent the evidence of Mrs Peñalver-Victory is as follows:-

> "The form was not signed because after the final review with Chris I would have given my grade next to her own she would have included her final comments and then signed it off. I don't know why it did not happen."
>
> "I accept that the form has possibly not been done properly."
>
> "I was quite very generous when completing the form. It was her first appraisal with us and I thought it would be discouraging to her if I put in the full extent of our concerns with her as I thought of covering the points to some extent but the main gist of what had to be said would be done verbally."
>
> "I did not write my comments definitely during the meeting. The summary was done after the meeting. The observations were done before the meeting except for the other comments section."

It is therefore clear from the above that the appraisal form was not fully completed in accordance with the Respondents' office procedures. I do not consider that such an omission was a significant breach of contract.

With reference the content of the appraisal meeting of the 11th August 2009 the evidence is as follows.

The Complainant stated:-

> "On the appraisal Melissa started to make her comments because Mr. Pitaluga asked her to because he did not really know me that well or how I performed my work. Melissa mention she did not think I like to take instructions from the same level colleagues. I asked her whether she meant incident that happened in July with Wayne. She said yes.
>
> Mr. Pitaluga when he started talking to me his tone changed. He said his opinion on me and how he sees me as a member of the team. He said that he cannot understand what is in my head, cannot understand me as a person. He said he feel like that. I am a plug in plug out device in the team. He does feel that my job is only temporary and that I am behaving that way. I have never heard the phrase plug in plug out before. I was upset with his tone as I did not know why he was using

that tone. None of this was recorded anywhere. No comments were filled in by Mr. Pitaluga in the form."

"At the August meeting I was surprised at the comments of Melissa and the tone of Mr. Pitaluga. I was taken back about this. It was not repeating of the same criticisms. It was the manner of the way he talked to me. It was a higher tone not serious, not happy with me. The tone was the reaction of Mr. Pitaluga to the exchange between Melissa and me about the Wayne incident. Mr. Pitaluga didn't understand what we were talking about or did not know about Wayne's incident."

"There were other issues raised. They did raise concern about my performance at that meeting ..... Mr. Pitaluga did not know how I perform as he was not sitting in the office and I did no work for him. He respected Melissa's words. He said that he didn't think I was there other than temporarily. He said he thinks I was very quiet and that I was a plug in plug out device."

"Of course reasonable and appropriate for partner to voice concerns but it depends on the tone used. He said I belong to Melissa just if I was something. He said any instructions coming from Melissa will be instructions coming from me."

"The way I was talked to was very upsetting to describe me as a plug in plug out device."

Mrs Peñalver-Victory stated:-

"At the appraisal meeting with Chris the tone was a serious one because we had to deliver serious issues, things were explained to her clearly and without any disrespect."

"In that meeting I would not at all characterise anything as bullying."

"I was telling Xenia that she had not settled down and then Chris used the phrase plug in plug out device. He used the phrase as a description."

Mr. Pitaluga stated:-

"I was asked to become involved as a second reviewer as a result of the need to communicate to Xenia as clearly as possible that there were certain specific areas of her performance which required improvement."

"At the meeting we would have referred to the specifics of Xenia's self assessment and subsequently to the comments made by her reviewer Melissa ..... I was struck by an apparent inability to understand that the Management Team had genuine concerns about her abilities and that far from taking on board the feedback as very carefully and sensitively expressed in the appraisal form she seemed unable or unwilling to accept things."

"The general tenor of the meeting was positive designed to encourage changes focused on strengths and weaknesses and in my opinion in the nature of a very typical review meeting I did not raise my voice. I have never in 27 years raised my voice in the office. My tone was I believe caring and intended to persuade Xenia that there were issues she needed to focus on if she were to persuade her managers that hers was indeed the high performance that she had assessed herself as demonstrating. I did not say to Xenia you belong to Melissa or anything like that. I would not have spoken so disrespectfully to anyone. I did explain how the chain of command would work going forward ..... I did explain to her that Xenia should come under Melissa. I did say words to the effect that an instruction from Melissa was an instruction from me."

"I have never used the phrase plug in plug out device. I have no idea what it means. I did not say I don't know what is going on in your head."

It is clear to me from the evidence that (a) the Complaint was primarily upset by the tone rather than the content of Mr. Pitaluga's remarks (2) Mr. Pitaluga ill advisedly used the phrase plug in plug out device in the course of the meeting and (3) there was a gulf of misunderstanding between both sides as to what was being said. Having said this I do not find that the nature and content of the meeting was oppressive although I do not doubt that the Complainant left it feeling upset. Whilst Mr. Pitaluga's comment with regard to the device was out of order I do not consider it to be conduct which was significant enough to terminate the contract.

With regard to the meeting of the 25th September the evidence is as follows (I give little weight to the file note of the 30th September since it, was prepared by Mrs Hurtado two days after the events of the 28th September):-

The Complainant stated as follows:-

"I didn't understand from the beginning the statement made on the 25th September meeting that Mr. Pitaluga was going to

give me another chance. I did ask to clarify what I was being given another chance for as I hadn't been aware that I had any serious issue with my job. Mr. Pitaluga said if I want to clarify this for the matter of arguing he would ask me to leave the job immediately. If just for understanding and improving my task for job then I should speak to Melissa on Monday. He said he would draw the line now and that on Monday I would start with a new team. After meeting I went straight away to see Sharon as I was very upset and told her what had happened. I don't know why Mr. Pitaluga talk to me in that manner, why I had to be given another chance for. I said to Sharon that I would start on Monday to work with Kevin as I was happy to do this....."

"At 25th September meeting I didn't understand why I was going to see Mr. Pitaluga in the first instance. I think Mr. Pitaluga's approach was the same manner as the appraisal meeting. He was not shouting or angry. He was annoyed."

"I was being monitored. I didn't understand what improvement I should be having or they expected me to have in that five week period. My question was why they were giving me another chance for and he said if you are arguing you can leave now."

It is clear from this, and indeed other evidence, that for one reason or another the Complainant did not understand and/or appreciate either that her employers had concerns about her or indeed what those concerns were. Thus, on the Complainant's side, she felt upset and hard done by when criticised and asked to change either as to the work she was doing or as to who she had to report to and, on the Respondents' side, they could not understand why the Complainant was seeking explanations when they believed matters had been explained and therefore took it as the Complainant resisting authority or simply being argumentative.

In evidence Mr. Pitaluga stated:-

"I would say that after repeated attempts to describe to her the gravity of the situation and her determined resistance to accept any of the criticisms that had been made what I said to her whilst she was free to discuss with Melissa the ways in which she could remediate her performance the time had passed for further debate on whether she accepted those criticism's or not. We needed to move on from continuously having to explain to you why you are not performing to the standard required. It was not an ultimatum of any kind. Lets move on lets draw a line under this."

I do not find that the meeting was held in a threatening or intimidating manner although I do not doubt that Mr. Pitaluga was stern.

With reference the allegation made that Messrs Pitaluga, Hurtado and Penalver-Victory intentionally made the Complainants life very difficult this is a wide sweeping accusation lacking particularisation. There is no evidence whatsoever to indicate let alone prove that these people conspired to make things difficult for the Complainant or individually tried to do so. Prior to the 11th August 2009, Mr. Pitaluga had very little if any contact with the Complainant and subsequent to this date his only real contact with the Complainant was at the 11th August and 25th September meetings. With regard to Mrs Hurtado, apart from the exchange of e-mails of the 15/16 September and her secondary like presence at the meeting of the 25th September not much more appears to have occurred. With regard to Mrs Peñalver-Victory, who was the person with whom the Complainant had most contact from August onwards, the position is less clear. My view on the evidence is that following on from Mrs. Peñalver-Victory's own appraisal which required her to improve her own managerial skills, and following on from the Complainant being put under her wing so to speak, Mrs Peñalver-Victory decided to impose discipline/adherence to the rules on a person which quite clearly by then she did not have a high regard of viz a viz work performance was concerned and who she believed was resisting her authority. Having said this, I do not accept that Mrs Peñalver-Victory acted out of order and/or outside the strict parameters of her duties as line manager or that she was intentionally seeking to have the Complainant dismissed or make her resign. For the Complainant who had been given considerable leeway with regard to changing of lunch hours etc it must have been an unwelcome shock to suddenly have people telling her to adhere to the company rules and procedures.

With reference the accusation that Mrs Peñalver-Victory undermined the Complainant by removing work from her I believe that this is a reference to the one off incident of the 14th July 2009 the evidence for which is as follows.

The Complainant in her statement states:-

> "Few minutes later I received an e-mail from Melissa asking me to list the jobs I am doing. I e-mail her back the list of the jobs. She sent me another e-mail - asking to write estimated time I need for each task and I replied to her with estimated time and also mentioned that I have started to do billing for the Company which Tessa asked me to do and it will take all my free time. It was a big company and before I could do the billing I have to go through a few correspondence files. Melissa called Leyla who was senior associate and who gave that billing to Tessa and asked

whether she could take billing from me as I need to help Wayne ..... Leyla asked me to give the billing back to her and help Wayne."

I was very upset that the job what I want to do was taken away from me."

In her evidence the Complainant stated:-

This was first time I said I am very sorry but I have a lot of tasks to do before I start my leave tomorrow. In the next few minutes I received e-mail from Melissa which she asked me to list all the pending jobs I had to do. I did this and send her an e-mail. She was in a different office. She called Leyla and asked her to take away from me the invoice given to me by Tessa because it was Leyla's company I was preparing invoice for. Leyla took away the files and gave them to some else. I was then able to complete my tasks."

During the course of her evidence Mrs Peñalver-Victory was not questioned about this incident but in her statement she says:-

"On the 13th July 2009 I was informed by the Complainant that she would be on annual leave later that week. I therefore asked the Complainant to supply me with a list of the work she had been asked to do, in order to allow me to assess the priority of her tasks and provide her a list denoting the order in which she should perform them. After providing her with this list, she requested further leave from Mrs Hurtado, without conferring with me. Leave was subsequently granted and the Complainant did not complete the tasks assigned to her ....."

Even assuming that the Complainants' version of events is the correct one I fail to see how in the circumstances of the case it can be said that (1) it was not reasonable and/or a justifiable managerial decision to have asked someone else to take over the billing and (2) it could be viewed or indeed was intended as an attempt to undermine the Complainant. Certainly, the Complainant seems to have been overly sensitive about the issue if indeed she was at the time as upset over the issue as it is now being portrayed. Within large companies such as the Respondent the daily re-distribution of work is a usual event especially amongst the lower grades.

Turning therefore to the law on constructive dismissal.

Section 64 (2) (c) of the Employment Act ("the Act") provides that an employee will be treated as having been dismissed where:-

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

To this one has to bear in mind that:-

"Whether there has been a repudiatory breach by an employer entitling the employee to leave is essentially a question of fact for a tribunal in the circumstances of the individual case ..... and reported cases should not be regarded as precedents."

(Halsbury's Law of England, Fourth edition, Volume 16 (1B) Para 638).

Whether an employee is entitled to terminate his contract of employment by reason of the employers conduct and so be treated as having been dismissed is to be determined by the tribunal in accordance with the law of contract (Western Excavating (EEC) Ltd v Sharp (1978) QB 761). As Lord Denning stated:-

"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 discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed ..... But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

The legal test to be applied is therefore a four stage one:-

(a) *There must be a breach of contract by the employer, which can be either an actual or anticipated breach;*

(b) *The breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of incidents, which justified the employee leaving;*

(c) *The employee must leave in response to the breach and not for some other unconnected reason; and*

(d) *The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise waiving the breach and agreeing to vary the contract.*

The burden is on the Complainant to establish on a balance of a probability that there has been a sufficiently important breach of contract and lawful conduct by the employer is not something which is cable of amounting to a repudiation.

(Spafax v Harrison (1980) IRLR 442)

The test whether there is a breach or not is said to be a 'severe' one and for an employee to become entitled to claim that he has been constructively dismissed on this ground, it is not enough to prove that the employer has done something which was in breach of contract or 'out of order' or that it has caused *some* damage to the relationship; there is a need to prove that the conduct of the employer is sufficiently serious and calculated or likely to cause such damage that it can fairly be regarded as repudiatory of the contract of employment, that is to say, so serious that the employee is entitled to regard himself as entitled to leave immediately without notice .

The above quoted latter words of Lord Denning in the Western Excavating case are particularly relevant in the present case. Had the Complainant presented her case on the basis of individual and separate acts by the employer it is clear from the Complainants own evidence that even if one were to accept that the Respondent had significantly breached the Complainants contract of employment during any one or more of the incidents complained of during the period upto and including the 25th September 2009, the Complainant had actively decided to affirm the contract. The only incident to which such a comment could possibly not have applied is that of the 28th September when on receipt of the e-mail from Mr. Pitaluga she went on sick leave. However, here again it is pertinent to note that it was not until the 22nd October that the Complainant actually resigned. But this is not the basis upon which the Complainant brings her case. The Complainant's case is that there were a series of actions by the employer culminating in the e-mail of the 28th September which cumulatively caused a fundamental breach of contract which entitled the Complainant to consider her contract as terminated.

So what is the significant term of contract complained of by the Complainant as having been breached. It is the Complainants' contention that the Respondent through a cumulative series of acts acted in a manner which destroyed her trust and confidence in the Respondent.

In Mahmud v Bank of Credit and Commerce International SA (1997) ICR 606 as applied in Baldwin v Brighton and Hove City Council (2007) 1RLR 232 it was held that the employer must not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test to be applied is an objective one and the tribunal's function is to consider on the totality of the evidence the employers conduct as a whole and thereafter to determine, applying common sense, whether its conduct and its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

In Lewis v Motorworld Garages Limited (1986) ICR 157 Glidewell LJ at 169 stated that:-

> "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amounts to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term."

Bearing in mind the above, I have taken into careful account the entire series of acts which the Complainant has raised and considered them not only individually, but, more importantly, cumulatively and I have come to the conclusion on the totality of the evidence and looking at it objectively and with common sense that the Respondent acted overall in a reasonable and proper manner, although not perfectly, and that its conduct was not such as to enable me to conclude that it was seeking to and/or did destroy or seriously damage the relationship of trust and confidence between employer and employee. In saying this I do not for a second doubt that as far as the Complainant was concerned the relationship between the parties was to an extent damaged but not in my opinion to the extent required by the law. I therefore dismiss the complaint.

Dated the 28th January 2011

J Nuñez
Chairman