



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mr L Odhiambo

v

Cargiant Limited

**Heard at:** Watford

**On:** 2<sup>nd</sup> – 9th May 2017

14<sup>th</sup> – 15<sup>th</sup> August 2017

16<sup>th</sup> – 17<sup>th</sup> August 2017 (in chambers)

**Before:** Employment Judge S Bedeau

**MEMBERS:** Mrs A Brosnan and Mrs G Bhatt MBE

**Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr N Brockley, Counsel.

## RESERVED JUDGMENT

1. The claimant's direct race discrimination claim is not well-founded and is dismissed.
2. The claimant's constructive unfair dismissal claim is not well-founded and is dismissed.

## REASONS

1. By a claim form presented to the tribunal on 29<sup>th</sup> June 2016, the claimant made claims of constructive unfair dismissal and alleged that he had been discriminated against during the course of his employment. He did not, however, tick the race discrimination box.
2. In the response presented to the tribunal on 8<sup>th</sup> August 2016, the respondent denied the constructive unfair dismissal claim as well as the discrimination claim and sought further information in respect of the latter.

3. At the preliminary hearing held in private on 17<sup>th</sup> October 2016, the claimant clarified his claims as being constructive unfair dismissal and direct race discrimination. The parties were able to agree a list of issues. During the course of the hearing on 4<sup>th</sup> May 2017, the claimant withdrew the following claims of direct discrimination in sub-paragraphs 6.1.2 and 6.1.4 to 6.1.8 inclusive. These are included in the Issues paragraph below for information only.

### **The Issues**

4. The issues between the parties which will fall to be determined by the Tribunal are as follows:

5. Constructive unfair dismissal

- 5.1. The claimant alleges that the respondent breached the implied term of mutual trust and confidence and, as a last straw, he resigned from his employment as a Sales Supervisor.

- 5.2. He relies on the following acts:

- 5.2.1. being verbally abused and that his African accent was mocked;

- 5.2.2. being accused by Mr Dario Vieira on 4<sup>th</sup> November 2015 of touching a male employee inappropriately;

- 5.2.3. demotion to the position of Sales Adviser;

- 5.2.4. being denied on a day in or around February or March 2016, the right to seek medical attention until late in the afternoon when he was feeling very ill,

- 5.2.5. being the subject of bullying and/or aggressive and/or intimidating, discriminatory behaviour by the Mr Tony Mendes, Managing Director, on 18<sup>th</sup> November 2015;

- 5.2.6. not offering training in relation to two courses;

- 5.2.7. being targeted due to his family relationship with another employee, Mr Clifford Midega, the claimant's cousin;

- 5.2.8. failure to handle the claimant's grievance appropriately;

- 5.2.9. failure to carry out an adequate investigation;

- 5.2.10. making false accusations of blackmail against the claimant which led to his unreasonable;

- 5.2.11. being barring from his place of employment.
- 5.3. Whether the claimant resigned in response to the respondent's breach on 4 May 2016, the last straw being falsely and maliciously accused of blackmail?
- 5.4. Has the claimant delayed in resigning in response to the breach and thereby affirmed the breach?
6. Direct race discrimination
  - 6.1. Whether the claimant was treated less favourably as a black African when compared with a non-black African male supervisor, in that:
    - 6.1.1 Mr Dario Vieira, Assistant General Sales Manager, mocked his accent by assimilating the South African "clicking" sound;
    - 6.1.2 Mr Vieira and Mr Prince Yeboah, General Sales Manager, coerced the claimant into speaking to his cousin, Mr Clifford Midega, with a view to Mr Midega dropping his grievance against Mr Tony Mendes, Managing Director.
    - 6.1.3 Denying the claimant attendance on two courses as set out in paragraph 5 of his claim form .
    - 6.1.4 Mr Mendes questioned the claimant's African accent by saying that his accent was a problem?
    - 6.1.5 Whether on 18 November 2015, Mr Mendes referred to the claimant as a "fucking prick with your head up your arse"?
    - 6.1.6 Whether Mr Vieira falsely accused the claimant of touching a male employee inappropriately?
    - 6.1.7 Whether the claimant was not allowed to go home until 4pm despite being ill having first put in a request to leave at 11am?
    - 6.1.8 Whether the claimant was wrongly accused of blackmail?
    - 6.1.9 Whether the claimant was demoted from Sales Supervisor to Sales Adviser; and
    - 6.1.10 Whether the claimant had resigned on 4 May 2016, due to the alleged discriminatory treatment?
  - 6.2 Has the respondent treated the claimant, as alleged, less favourably than it treated or would have treated a hypothetical comparator?

- 6.3 Are there facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic, namely race?
- 6.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?
- 6.5 The respondent denies that these events occurred in the way alleged by the claimant.
7. Time/Limitation issues
- 7.1 Whether some or all of the acts relied upon by the claimant in support of his direct race discrimination claim are out of time/ If so, should that time be extended on just and equitable grounds?
8. Remedies
- 8.1 The claimant is seeking a declaration of unlawful discrimination, reinstatement, re-engagement and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

### **The Evidence**

- 9 The claimant gave evidence and called Mr Matthew Thompson, former Sales Advisor ; Mr Jonathan Thomas, former Sales Advisor; and Mr Clifford Midega, former Senior Sales Advisor.
- 10 On behalf of the respondent evidence was given by Mr Dario Vieira, Assistant General Sales Manager; Mr Prince Yeboah, General Sales Manager; Mr David Stanton, Compliance Manager and Company Secretary; Miss Malika Hamid, Human Resources Manager; and Mr Tony Mendes, Managing Director.
- 11 The parties produced a joint bundle of documents comprising in excess of 466 pages. References will be made to the documents as numbered in the joint bundle.

### **Findings of Fact**

- 12 The respondent is a car supermarket. Its primary business is the selling of used cars and additional products such as warranties, gap insurance and GuardX, an anti-corrosion paint protector.
- 13 It employs around 807 people and this includes 150 Sales Advisers in different sales areas of the business referred to as Areas A, B and C.
- 14 The role of the Sales Advisers is to sell cars and the ancillary products. They are on a bonus in addition to a basic salary. Their work is very closely monitored by the Sales Supervisor. They have to follow a sales

script and explain on the respondent's computer system why a particular customer did not purchase a product. Their conversations with the customers are recorded for compliance and training purposes.

- 15 The respondent has many cameras positioned in various parts of its buildings and yards but only a few are monitored by its Security Guards.
- 16 Sales Supervisors manage several Sales Advisers and work in two shifts.
- 17 The claimant is a black Kenyan. Prior to his employment with the respondent, he enlisted into the British Army, Infantry Division, where he served for four and half years. He commenced employment with the respondent as a Sales Adviser on 3<sup>rd</sup> June 2013, on 6 months' probationary period which was reviewed on 26<sup>th</sup> November 2013 and extended by 3 months. He was required, as one of the agreed objectives, to use the respondent's "scripts and punch-lines". (pages 51 and 66)
- 18 On 25<sup>th</sup> February 2014, he successfully completed his probationary period. (page 88)
- 19 On 5<sup>th</sup> October 2014, he was promoted to Senior Sales Adviser by Mr Dario Vieira, Senior Sales Manager at the time, who managed the Sales Advisers in Areas A, B and C. He was promoted to Assistant General Sales Manager in August 2015. (pages 89-90)
- 20 There is a dispute in relation to when the claimant was promoted to Sales Supervisor. His case is that he was promoted in May 2015. He wrote in his witness statement that he was told he was a Sales Supervisor at the end of May 2015, the same day he was informed that his grandmother in Kenya had passed away. He travelled to Kenya for the funeral spending 3 weeks there in total. By the 7<sup>th</sup> June 2015, he returned to the UK. In his written submissions to the tribunal he asked the tribunal to note that he was told about his promotion on 14<sup>th</sup> May 2015 but we find that there is no documentary evidence that he was promoted to Sales Supervisor at any time in May 2015. We accept the evidence of the respondent that he was promoted on 1<sup>st</sup> June 2015 to Sales Supervisor on a 3 months' trial period. This is documented although the claimant did not sign the transfer form but it was signed by Mr Vieira on 17<sup>th</sup> June 2015. This was a failing on the part of both Mr Vieira and the respondent's Human Resources Department, in not chasing up the claimant to sign the form. (page 92)
- 21 We further find that Sales Supervisors when first appointed are put on probation. In the claimant's case, he was on a 3 months' trial period up to 31<sup>st</sup> August 2015. (page 92)
- 22 Having considered the documents, we accept there were issues about the claimant's performance and capability. Although he disputed that he received a letter from Miss Malika Hamid, Human Resources Manager, dated 1<sup>st</sup> August 2015, stating that his probationary period was extended by a further 3 months to 31<sup>st</sup> December 2015, we find that he did attend a

capability meeting on 7<sup>th</sup> October 2015 as this was acknowledged by him at the weekly feedback meeting on or around 18<sup>th</sup> October 2015. In the record of that meeting it is recorded that his line manager said that two weeks previously the claimant had attended a capability performance review with Mr Vieira when Mr Vieira highlighted areas for improvement. Mr Nikola Kelic, Sales Manager, who conducted the weekly feedback with the claimant, noted areas requiring improvement, namely that the claimant was not giving enough direction to a particular sales adviser by the name of George Hardan; he displayed ineffective management when it came to dealing with Sales Advisers/Customer Advisers; he did not allocate customer record files to Sales Advisers; he was not open to feedback; he did not make sure Sales Advisers/Customer Advisers were following basic disciplines; and not actioning a particular matter. In the summary, Mr Kelic recorded the following:-

“You have not made a lot if any improvements since your last review. Your basic aspects of the job are not being done correctly. I need you more focussed and start to adapt and implement things your superiors asked you. I cannot allow and will not allow this to continue like this for long. I have to have confidence and you need to prove to me that you can do the job.” (page 93)

23 By 24<sup>th</sup> October 2015, there were improvements in the claimant's performance which were noted. (page 94)

24 On 23<sup>rd</sup> October 2015, he had a meeting with the Compliance Development Manager, Mr Peter Crouch, regarding his performance. In the record of the meeting Mr Crouch noted, amongst other things, the following:-

“In addition, when speaking with people you manage, to establish credibility and an appropriate degree of authority, it is important the message you are giving comes from you. Originally you were going to say that ‘the company would decide’ on any further action, this arguably gives your staff the perception that you are not taking responsibility for key decisions.” (page 95)

25 The respondent has a programme of external training for supervisors and managers: coaching for results (1 day); developing your personal impact and building productive relationships (2 days); and people management skills (2 days). There is also an internal course entitled buyers training for 2 days. A number of supervisors had attended some of these courses up to the end of July 2015 including those recently appointed, namely Mr Swayze Hanson-Townsend, Jerry Lises, and Ali Issazadeh who were all appointed around the same time as the claimant.

26 On 3<sup>rd</sup> August 2015, Mr Adam Da Silva, Training Assistant Manager, was contacted by Miss Felicity Halfpenney, Open Course Co-ordinator, for the Hemsley Fraser Group, training providers, about a list of outstanding bookings made by the respondent and asked how to proceed. It seemed that this followed an earlier discussion between Mr Da Silva and Miss Halfpenney about the outstanding bookings. We find that this followed a decision taken jointly by Mr Tony Mendes, Managing Director, Mr Prince Yeboah, General Sales Manager and the Training Department to suspend

training as the newly appointed supervisors appeared to be struggling in their roles, in particular, controlling the flow of customers, monitoring Customer Record Files and in effectively supervising the Sales Advisers.

27 The claimant's case is that he was singled out for the cancellation of his training due to his race as the only black African Sales Supervisor. He also alleged that it was because his cousin, Mr Clifford Midega, Senior Sales Advisor, had, in June 2015, filed a grievance against Mr Mendes and that he, the claimant, had come under pressure from Mr Yeboah to persuade Mr Midega to drop his grievance, which he refused to do.

28 It is useful to note the racial background of the Supervisors who were affected by the cancellation of training. They were: Mr Bandish Thakor, British born non white; Mr George Hardan, mixed race/white/Lebanese, British born; Mr David Alabi, black British born; Mr Zahir Khan, British born, Asian; Mr Ali Issazadeh, British born, Asian; Mr Sunil Duggal, British born, Asian; Mr Tejnath Sinclair, British born, mixed race black/white; Mr Swayze Hanson-Townsend, British born, mixed race black/white; and Jerry Lises, British born, Asian. The cancellation affected these people irrespective of their race.

29 On 19<sup>th</sup> October 2015, Miss Halfpenney emailed Mr Da Silva regarding those who were listed in the pending file and asked whether Mr Da Silva was now in a position to let her know whether the names should be transferred or cancelled. Mr Da Silva responded on 23<sup>rd</sup> October 2015, stating:

“In relation to the below delegates, we are still working very closely to develop them and as of yet, are not at a stage to re-book them. For now I would appreciate if they could stay in the pending list and I will contact you when we are in a position to book them in on the relevant courses.” (page 414)

30 There is, therefore, no evidence nor do we find as fact that the claimant was singled out when the courses were cancelled and we do not fact that it had anything to do with his race.

31 Mr Matthew Thompson was called by the claimant to give evidence. He commenced employment with the respondent on 21<sup>st</sup> July 2015. He said that towards the end of October 2015, he had a conversation with Mr Vieira about 11 o'clock in the morning and asked him whether there were any openings for Sales Supervisor and how soon would he be eligible to apply. Mr Thompson said that Mr Vieira responded by telling him that there would always be openings for a Supervisor position as soon as he, Mr Thompson, passed his probation because some supervisors, like the claimant, would be gone. Mr Thompson asked whether the claimant had plans to leave the company to which Mr Vieira replied by saying that Mr Mendes did not like him. When Mr Thompson asked why Mr Mendes did not like the claimant, Mr Vieira did not or was reluctant to answer. Mr Thompson did not pursue the matter further.

- 32 Mr Thompson went on to say that in the same month but on a different occasion and in the dining area, he spoke to Mr Vieira again who appeared to be angry. When asked why, he replied that some people were just “pissing him off”. He then said “This Leakey is just pissing me off”. Mr Thompson then said that Mr Vieira referred to the claimant as “a fucking ethnic”, and “these Africans”. Mr Thompson responded by saying that the claimant was not the only African manager whereupon Mr Vieira said, “Well, all I know he’s the only non-British manager” and was laughing.
- 33 In cross examination Mr Thompson went on to say that he disclosed the conversation he had with Mr Vieira to the claimant in or around Christmas 2015 and asked that it should be kept confidential. He knew in May 2016 that he would be leaving and had a conversation with the claimant about being a potential witness in his case. He left on 30<sup>th</sup> May 2016.
- 34 The claimant’s grievance against Mr Vieira was lodged on 19<sup>th</sup> January 2016 and in it he made no reference to the conversation he had with Mr Thompson about Mr Thompson’s conversation with Mr Vieira in October 2015. It could be that this was due to Mr Thompson requesting that it should be confidential but having regard to the fact that the claimant had issued the proceedings against the respondent before this tribunal on 29<sup>th</sup> June 2016, the alleged conversation Mr Thompson had with him in or around Christmas 2015, is also singularly absent from the claimant’s witness statement and from the case management summary of the preliminary hearing. From our observation of the claimant, he is someone who is very meticulous when it comes to the detail. If there was such a conversation with Mr Thompson we would have expected it to have been included in his witness statement. Mr Vieira challenged Mr Thompson’s account of the conversations.
- 35 We do not accept Mr Thompson’s account of the conversation he had with Mr Vieira and of Mr Vieira’s alleged description of the claimant as “a fucking ethnic” and “these Africans”. We further take cognisance of the fact that this is a multi-racial workforce and that Mr Vieira was managing a multi-racial group of Sales Supervisors. It is unlikely that he would have engaged in such a conversation with a newly employed Sales Adviser in the knowledge that rumours do spread among the workforce and that there was a risk that the claimant may approach him in relation to a conversation he had with Mr Thompson.
- 36 On the 4<sup>th</sup> November 2015, an incident was witnessed by Mr Ravi Bhukhureea, Training and Development Supervisor, who was monitoring the CCTV footage of the control tower where the Supervisor would normally sit and where the claimant was working at the time. He drew the footage to Mr Vieira’s attention. According to Mr Vieira, the footage showed that a Sales Adviser, Mr Mahdi Hassan, had his arm around the claimant and rested his head on the claimant’s shoulder. As Mr Hassan was walking away from the claimant, the claimant stopped him by holding him by the arm and moved the arm towards his crotch. Mr Hassan’s



hand did not touch the claimant's crotch. Mr Vieira did not consider the conduct a sexual gesture but was unprofessional.

37 A memorandum had been circulated by Mr Mendes a few days before to the sales floor staff warning them against indulging in horseplay.

38 Mr Vieira and Mr Yeboah held a meeting with the claimant on the same day to give the claimant general feedback and to use the incident as a training issue. The claimant was informed about what Mr Vieira had seen on the CCTV and for him to be conscious of his actions when at the control tower. According to Mr Vieira he made the claimant aware that it was unprofessional to allow a Sales Adviser to act in that way with him as he was a Supervisor and a certain level of professionalism was expected. At that point the claimant stopped listening to the feedback being given and focused entirely on the comment made in respect of Mr Hassan's arm being pulled towards his crotch. He accused Mr Vieira of calling him gay or a homosexual and that as he was from Africa he took such a statement very seriously. Mr Vieira did not accuse the claimant of touching Mr Hassan's crotch.

39 The claimant said in his witness statement that Mr Vieira has accused him of putting his hand towards Mr Hassan's crotch and then later grabbed his hand and put it in his crotch area. He was very hurt by the accusations and could not control his emotions. He asked Mr Vieira why he was being accused of such a thing and that as an African man and someone from his culture, he would not behave in such a way and would not allow anyone to accuse him of such conduct. Mr Vieira then allowed the claimant to view the CCTV footage held by Mr Bhukhureea. According to the claimant, Mr Vieira also accused him of making a sexual gesture towards another Sales Adviser by the name of Liviar. At that point the claimant was lost for words and said that he knew Mr Vieira was after tarnishing his name. He later discovered that the video had been allegedly shown to others in the Training Department. He asked Mr Bhukhureea to play the audio part of the footage but that was not done.

40 Sometime later the claimant spoke to Miss Hamid in the HR office. She had viewed the footage herself and acknowledged that the claimant was upset, but told him that she too felt his actions were inappropriate. She understood from Mr Yeboah that the matter had been resolved and that no further action would be taken. The claimant, however, believed that Miss Hamid would investigate and take appropriate action.

41 We find that later on the 4<sup>th</sup> November 2015, after the claimant's meeting with Mr Yeboah and Mr Vieira, Mr Vieira met with him again as he was aware that he was upset. He said to the claimant that he did not intend to offend him nor was he trying to imply that he did anything sexual. He explained the purpose of the conversation was to give him feedback on his role and what was seen on the CCTV and that if he had offended him then he apologised. The claimant accepted his apology and explanation. They shook hands and had no further discussions on the matter. This is

consistent with the claimant not making any further references to it until he lodged his grievance on 19<sup>th</sup> January 2016.

- 42 We find that it was unfortunate that Mr Vieira used the word crotch but he had not accused the claimant of touching Mr Hassan's crotch area nor of Mr Hassan's hand touching his crotch area. During the course of the grievance investigation conducted sometime later, Mr Hassan said that there was no touching. The "Liviari" allegation was not pursued by the claimant.
- 43 We find that given the claimant's cultural sensitivities, the use of the word crotch conveyed in his mind that he was engaged in sexual misconduct with a man and it had a profound effect on him. He is heterosexual and believed others had perceived him as being homosexual. He became deeply upset because rumours were going around on the shop floor that he was gay.
- 44 A matter of concern to the claimant was that he expected Miss Hamid to investigate Mr Vieira's conduct in relation to the crotch allegation as she had said to him that she would. She spoke to Mr Yeboah who apparently told her that the matter had been resolved and she understood from speaking to him that the claimant had met with Mr Vieira and the matter was not to be taken any further. Miss Hamid acknowledged in evidence that she did not refer back to the claimant giving him her understanding of the crotch allegation. In our view, she should have told the claimant that having explored the matter and after speaking to Mr Yeboah, she understood that the issue had been resolved.
- 45 Every Wednesday the respondent would arrange sales meetings to discuss operational issues with the Sales Supervisors and Sales Managers. On 18<sup>th</sup> November 2015, there was a regular sales meeting chaired by Mr Mendes. At the time sales were slow and it was agreed that the focus should be on a more effective and controlled approach to ensure that sales advisers maximised every opportunity they had with a customer. During busier periods or on weekends it was much more difficult to do this due to the heavy foot flow of customers. Following the meeting Sales Managers were asked to relay the action points to those who did not attend the meeting. Mr Mendes took time to go to the sales areas to speak to the Supervisors and Assistant Managers to inform them of the points discussed at the meeting. Our understanding of the new approach is that more time should be spent by the sales advisers in speaking to customers in the hope that it would generate more sales.
- 46 Mr Mendes spoke to the claimant at 5.30pm that evening about the new way of working. He then went home as his wife was seriously ill and was caring for her. He then, later in the evening, received three calls at or around 9 o'clock, one of which was a call from Mr Yeboah.

47 Before dealing with how Mr Mendes reacted to Mr Yeboah's telephone call, we shall now give an account of events leading to Mr Yeboah's call to Mr Mendes.

48 Early on in the day Mr Yeboah was informed by Mr George Hardan, Senior Sales Supervisor, that the claimant was late back from his lunch and he suspected that he, the claimant, was asleep in the staff room as he had been found asleep previously. Mr Yeboah told Mr Hardan to speak to the claimant and to make him aware that he was late back from his lunch. Mr Yeboah then spoke to Mr Mendes about the claimant being asleep in the staff room. We find that at that stage Mr Mendes was frustrated and upset as he had made it plain to the claimant, prior to leaving work for the day, of the new method of working.

49 In evidence the claimant said that Mr Hardan came to the staff room and told him that he was meant to be back on duty. He, the claimant, looked at his watch and replied that he had a few minutes left. Mr Hardan responded by saying that it was Wednesday and he was only entitled to a 30 minutes lunch break and not 1 hour. The claimant immediately grabbed his iPad and food and rushed downstairs where he met Mr Yeboah. He apologised for being late and Mr Yeboah told him that he had nothing to worry about and that he should let himself into the Control Room and that he should make sure he maintain the good sales figures they were having that night. While engaged in his controller duties, the claimant received a call from Mr Mendes. He said that Mr Mendes immediately began to swear at him asking him why he was late from his lunch break. To which he replied by saying that he had made a mistake and that it would never happen again. Mr Mendes responded by saying that the claimant was one of the managers who were not doing their jobs properly. He then called the claimant "a fucking prick" and repeated it about 4 times during the conversation. He also said that the claimant was useless and that he had "his head up his arse" and should get "his head out of his arse". The claimant said that he was boiling with anger and emotion and felt angry as Mr Mendes continued to insult him but he did not say anything in response. He explained that it was a mistake that he was late as he genuinely believed that it was a Thursday when he was entitled to 1 hour lunch break and that he was only 20 minutes late. The claimant then hung up the phone and spoke to Mr Yeboah about the telephone call saying that Mr Mendes had insulted him by calling him names. Mr Yeboah offered to speak to Mr Mendes the following day. When the claimant asked Mr Yeboah why he had spoken to Mr Mendes about him being late, Mr Yeboah replied by saying that he was on the phone at the time speaking to Mr Mendes when Mr Hardan approached him and told him that he was late. The conversation was overheard by Mr Mendes, according to Mr Yeboah, who then called the claimant.

50 Mr Mendes, in evidence, admitted saying to the claimant "fucking prick" but could not recall the entirety of the conversation he had with him. He acknowledged that it was a heated conversation and that he was

emotional as he felt let down by the claimant after having spoken to him about the new way of working.

51 Having heard the evidence, we find that the account given by the claimant of the conversation is more accurate. We, therefore, find that Mr Mendes referred to the claimant on more than one occasion as “a fucking prick” and that “he had his head up his arse” and that he should get “his head out of his arse”; he also referred to the claimant as “useless”. The claimant was upset and angry at having been spoken to in that way by Mr Mendes.

52 The following day, 19 November 2015, a meeting was held between the claimant, Mr Mendes, Mr Vieira and Mr Yeboah. The claimant conveyed to Mr Mendes that he was upset at having been referred to as “a fucking prick”. Mr Mendes replied by saying that he deserved it. The claimant said that if he had referred to a member of staff as “a fucking prick” he would have been sacked by Mr Mendes but no one was in the position to sack Mr Mendes for doing the same to him. He wanted Mr Mendes’ assurance that if he was to remain in the respondent’s employment as a Sales Supervisor, such behaviour would not be repeated.

53 What precisely was said during this conversation was in dispute. The claimant said that Mr Mendes did not give him the assurance he asked for and invited him to take a break and to come back with an answer to the question whether he wanted to remain as a Sales Supervisor or be demoted to Sales Advisor. The claimant then left the room. After 5 minutes, he returned whereupon Mr Mendes asked him whether he was ready to give him an answer. The claimant repeated that he would only answer the question if he could be assured that as a Supervisor he would not in the future be mistreated or abused. He then said in evidence that Mr Mendes told him that he would be demoted from a Sales Supervisor to Sales Adviser. He replied saying that it was his decision and he respected the fact that Mr Mendes had the authority to do so. He was instructed by Mr Mendes to return to the shop floor as a Sales Adviser in Sales Area B.

54 Mr Mendes told the tribunal that he apologised to the claimant during the meeting but could not give the claimant the assurance that he was seeking as he felt that “he was being lead up the garden path”. He denied demoting the claimant to Sales Adviser and asserted that the claimant was not prepared to move on from the abuse and needed the assurance he was asking for. He said that the claimant agreed to return to the shop floor as a Sales Adviser in a different area.

55 We find that Mr Mendes did demote the claimant, albeit temporarily, to the position of Sales Adviser for a day. In his witness statement at paragraph 17, he stated the following:-

“The claimant is not responsive and the meeting was not progressing so I told the claimant to take a breather and work as a Sales Adviser in Area B to consider his position, and whether he was committed to working as a Supervisor. He was not

in the right frame of mind to operate as a Supervisor/Controller, however this was in no way a demotion or related to his race.”

56 To demote the claimant was a significant act and amounted to a disciplinary sanction without going through the disciplinary procedure.

57 On 20<sup>th</sup> November 2015, the claimant had a conversation with Miss Hamid to make her aware of the conversation he had with Mr Mendes and their subsequent meeting. Miss Hamid’s response was to say that Mr Mendes was under a lot of pressure and that he would, at times, use a strong language to put his points across. The claimant replied that he was a Legal Executive and intended to lodge a formal grievance against Mr Mendes and Mr Vieira. Miss Hamid advised him that he should follow the respondent’s internal grievance procedure and write a letter detailing all of his concerns which would then be investigated.

58 We are satisfied that at that stage as the claimant clearly indicated that he was going to lodge a formal grievance against Mr Mendes and Mr Vieira, there was no need, therefore, for Miss Hamid to investigate any of his concerns until the grievance had been lodged.

59 On 24<sup>th</sup> November 2015, he met with Mr Mendes and Mr Yeboah. During the meeting Mr Mendes said that he, the claimant, and the other Sales Supervisors were on capability and that he had seen little improvement in performance. He alleged that as a supervisor, he had been speaking to his work colleagues on the shop floor attempting to rally support regarding the decision taken to demote him. He said that such conduct by a supervisor cannot be tolerated and invited the claimant to go away and think about his position and to let him know in “what direction you want to go”. Mr Yeboah informed the claimant that he was within his rights to raise a grievance if he so chose but the respondent could not have a supervisor acting inappropriately or lobbying colleagues. The claimant denied speaking to anyone on the shop floor. According to Mr Mendes, he asked the claimant to move to sales to the position of a Sales Adviser for a day and that the claimant needed to think about his position and to revert to him with a decision. (Pages 96 – 96)

60 On 25<sup>th</sup> November 2015, the claimant again met with Mr Mendes and Mr Yeboah and was asked by Mr Mendes whether he had come to a decision. The claimant said “Based on the experience I have had, not just yesterday I gave you the opportunity to decide my role and you asked me to go back to Sales”. Mr Mendes denied asking the claimant to move to sales, and said that he had only asked the claimant to go back for a day. The claimant insisted that Mr Mendes had instructed him to go back to the Sales Adviser position and that would be where he would go. There then followed the following exchange:-

“TM: No I did not but if that is what you want, so be it. You are an acting supervisor on a temporary contract as such till December. If you want to move back to Sales that is fine but there is an expectation from the company for you not to do certain things on the sales floor or anything such as lobbying colleagues

against the business. If that was to happen you will still be brought upstairs for a formal meeting to address it. Can I have an undertaking that this will not be the case.

LO: I was not doing that anyway so there is nothing to undertake.

TM: Fine your move to Sales will be formalised.

PY: You will be moved to Area B (Sales).

TM: Anything else?

LO: No” (pages 98 – 99)

61 From the above exchange, we find that the claimant was given the option of continuing in his role as a Sales Supervisor or returning to the shop floor as a Sales Adviser. He he elected to work as a Sales Adviser.

62 Mr Clifford Midega, Senior Sales Adviser, commenced employment with the respondent in June 2012. He lodged a grievance in June 2015 against Mr Mendes alleging bullying by him. As a consequence, Mr Midega resigned and issued employment tribunal proceedings against the respondent. He is the claimant’s cousin and they both live in the same house. Mr Jonathan Thomas, who was employed by the respondent as a Sales Adviser but later resigned in June 2016, is Mr Midega’s best friend. The claimant is also a good friend of Mr Thomas.

63 Mr Thomas alleged that on 25<sup>th</sup> November 2015, he was summoned to a meeting with Mr Mendes who asked him about Mr Midega’s intention in relation to his grievance and whether the claimant was receiving legal advice regarding his situation and his intended grievance against Mr Mendes. According to Mr Thomas, he told Mr Mendes that he had no idea what the claimant’s intentions were. At that point he alleged that Mr Mendes became aggressive and frustrated. He then lowered his voice and said to Mr Thomas that he understood that he, Mr Thomas, had an interest in music and was engaged as a musician. According to Mr Thomas, Mr Mendes said that he had seen some of his music videos and could help him if Mr Thomas was prepared to give him the right information. He suggested that the Security Guards would be able to provide cars for use in Mr Thomas’ next video shoot. Mr Thomas felt that this was a bribe in exchange for telling him what he knew about the claimant’s plans but insisted that he did not have any information that would be helpful to Mr Mendes. Mr Mendes then gave up and instructed Mr Thomas to return to the shop floor.

64 Mr Mendes said in evidence that Mr Thomas was a carer for his mother like he was for his wife and they had a conversation about their respective caring roles. In the past he had adjusted Mr Thomas’ hours to take into account the fact that he was caring for his mother. He acknowledged that he was aware that Mr Thomas was engaged in shooting a music video on the respondent’s premises. He listened to the lyrics and felt that they would not be appropriate but was prepared to give some

support in the form of offering cars as part of the shoot if the lyrics were changed. The offer was made in good faith to stop the claimant, Mr Thomas and Mr Midega, from turning others against the respondent. He referred to them as a clique and he was just trying to get them on board. There was no bribe or attempted bribe.

65 Mr Thomas was cross-examined by Mr Brockley on his witness statement, in particular, paragraph 3 when compared with the wording in Mr Midega's witness statement at paragraph 5. In paragraph 3, the final sentence read as follows:-

“As an empathetic and hard working manager, Leakey was well respected across the Sales Floor by Sales Advisors, something that really improved sales performance while Leakey over saw sales floor as the controller.”

66 In paragraph 5, Mr Midega wrote:-

“As a new Sales Supervisor, Leakey was very hard working, empathetic and approachable, something that made most Sales Advisors more comfortable to be working with him. As a result, many Sales Advisors were happy working with him which lead to better performance and good sales figures during the time Leakey was in charge as the logged-in sales controller. This meant that Leakey had to be sent to other sales areas when there was poor sales performance for him to motivate the sales advisors in that area.”

67 Mr Thomas said that his witness statement was drafted in December and that he was with Mr Midega when he, that is Mr Thomas, typed up his statement. He denied that he had collaborated with Mr Midega and said that the wording was coincidental. He also denied that all three of them, that is he, Mr Midega, and the claimant, got together to make sure that their witness statements were consistent as they all had employment tribunal claims against the respondent. He said he could not recall any discussions with the claimant about his, that is Mr Thomas', witness statement.

68 Mr Midega accepted in evidence that he had typed up Mr Thomas' witness statement on his laptop as Mr Thomas' draft statement was deficient.

69 We find that all three discussed what should be in the witness statements in order to achieve consistency. We do not accept the account given by Mr Thomas in relation to the conversation he had with Mr Mendes on 25<sup>th</sup> November 2015 and preferred the account given by Mr Mendes.

70 One of the claimant's claims is that he had been verbally abused and that his African accent was mocked. This included allegedly mocking the South African “clicking” sound. We heard evidence from Mr Vieira that early on in the claimant's employment, on about two or three occasions, he, Mr Vieira, had repeated the clicking sound back to the claimant in the context of discussions about their respective languages. Mr Vieira is of Portuguese origin. The claimant's girlfriend at the time was

Angolan/Romanian. Angola is a former Portuguese colony. They, therefore, had a common interest.

71 Mr Midega said that he witnessed the claimant and Mr Vieira engaged in banter in relation to the clicking sound and that it was all as a joke. In the claimant's grievance dated 19<sup>th</sup> January 2016, he made no reference to this allegation. We find that there was no mocking of the South African clicking sound but light-hearted discussions about the different languages.

72 In the course of the hearing it was put to Mr Mendes that during a managers' meeting the claimant was having difficulty pronouncing the name "George". This generated some amusement amongst those present. At that point Mr Mendes stepped in to avoid further embarrassment to the claimant and emphasised the name by saying "It's George" in an attempt to move on the discussion. We find that Mr Mendes, on that occasion, did neither mock nor made fun of the claimant's accent.

73 In a letter dated 16<sup>th</sup> December 2015, to the claimant from Neha Ghaibi, Human Resources Assistant, the claimant's terms and conditions of employment were varied to that of a Sales Adviser following his decision. (Page 105a – 105b)

74 We further find that early on in the claimant's employment, Mr Mendes was the claimant's personal trainer and would arrive for work early at 9am to spend one hour with the claimant in order to develop his skills and to improve his performance. The claimant alleged that Mr Mendes had openly criticised his accent, but having heard the evidence and having looked at the documents in relation to his performance issues, we are satisfied that Mr Mendes was focussed on the claimant following the respondent's sales script and the use of appropriate words to motivate the Sales Advisers. It was more to do with his language and the use of words to communicate more effectively than on the claimant's accent. It was Mr Mendes who tried to improve the claimant's performance, knowing of the claimant's Kenyan national origins. He also signed the transfer form promoting the claimant to Sales Supervisor. As stated earlier the respondent has a multi-racial workforce with many people who have different accents and the accents did not affect their performance, the focus being on following the respondent's procedures in a professional way.

75 The claimant on 19<sup>th</sup> January 2016, formally lodged a grievance against Mr Vieira regarding the incident on 4<sup>th</sup> November 2015. He maintained that Mr Vieira had accused him of sexually inappropriate conduct on two occasions. (Page 107 – 108)

76 On the same day he lodged a grievance against Mr Mendes with regard to the conversation on 18<sup>th</sup> November 2015 and subsequent conversations on 19<sup>th</sup> and 24<sup>th</sup> November 2015. He also made reference to Mr Mendes' meeting with Mr Thomas on 25<sup>th</sup> November. He asserted that



Mr Mendes criticised his accent and that he had been denied training. With reference to the meeting on 25<sup>th</sup> November 2015, he wrote:-

“On 25<sup>th</sup> November 2015 at approximately 11.55am, Mr Mendes called me upstairs to ask me if I would consider going back to my role as a Supervisor. I replied by telling him that my heart was no longer into being a Sales Supervisor after the ill treatment I have received from him and after he ordered me to go back to being a Sales Advisor with no valid reasons. He went ahead and claimed that he never sent me back into Sales permanently, but it was only for that one day. He was trying to say that going back to Sales was my own decision and not his. Mr Mendes claimed that I was still considered as Supervisor and he would treat me as a supervisor who has abandoned his post.” (page 109 – 111)

77 On a day either in February or March 2016, the claimant arrived for work but was not feeling well from 10.30 in the morning and informed Mr Vieira. He said that later on his condition got worse and he approached Mr Yeboah and requested that he should go home. Mr Yeboah refused. The claimant approached him again and repeated his requests at least four times but Mr Yeboah again refused to allow him to go home and said that if he insisted he should see someone in the Human Resources Department. The claimant spoke to Miss Ghaibi, Human Resources Assistant, who, having been told that Mr Yeboah had refused to allow the claimant to go home, agreed with Mr Yeboah and instructed the claimant to go back to the shop floor. The claimant then spoke to Miss Hamid and explained the position who, at or around 4.30pm, instructed him to go home.

78 The above incident formed part of the claimant’s grievance, the outcome of which was that Mr David Stanton, Compliance Manager and Company Secretary, recommended that Mr Yeboah should undergo training in relation to how he should conduct himself when employees are ill.

79 Miss Hamid, in evidence, said that if an employee complains about being unwell they should be allowed to go home. We find that Mr Yeboah when the claimant first approached him, should have allowed the claimant to go home as he was feeling unwell and his condition had worsened during the day.

80 The claimant went on sick leave from 3<sup>rd</sup> – 14<sup>th</sup> February 2016. (Page 369)

81 On 11<sup>th</sup> February 2016, while on sick leave, he tweeted to BBC Presenters/Journalists, namely Miss Katriona Shearer and Mr Ben Thompson, inviting them to investigate the respondent for bullying of staff, stating that he needed to be contacted urgently and that the cases of bullying required exposure. (Page 132 – 138)

82 The claimant alleged that Mr Yeboah and Mr Vieira put him under pressure after Mr Midega had lodged a grievance in June 2015 and they had approached him while he was working as a Sales Controller in Area B and asked him for a private meeting in Area A. The meeting was held in a small room near the collection area. They spoke to him about his loyalty to

the company and asked what he was going to do to make Mr Midega drop his case against Mr Mendes. They said that he was now a member of management and the fact that Mr Midega was his cousin and was going against Mr Mendes, did not look good. They asked him to try and make sure that Mr Midega withdrew his grievance. The claimant responded by saying he would talk to Mr Midega. After speaking to Mr Midega he decided not to interfere with his grievance and informed him that he should do what he believed was right.

83 Both Mr Yeboah and Mr Vieira denied trying to influence the claimant to get Mr Midega to drop his grievance against Mr Mendes. They further denied that the cancellation or suspension of the training was in any way connected with trying to persuade the claimant to get Mr Midega to drop his grievance.

84 From the evidence which we have already considered and made findings, Mr Yeboah had informed the claimant during the meeting on 24<sup>th</sup> November 2015, that if he wished to raise a grievance it was within his rights to do so. The claimant was also advised by Miss Hamid of his right to raise a grievance in relation to being a Sales Advisor at the meeting on 1<sup>st</sup> December 2015. They were prepared to allow their staff to pursue a grievance if they choose to do so. (Page 105)

85 We find that the respondent was not against the claimant lodging a grievance and encouraged him to do so. It is, therefore, very difficult to see why the respondent would be concerned about Mr Midega's grievance against Mr Mendes.

86 Mr David Stanton was asked by Miss Hamid to carry out an investigation into the claimant's grievance against Mr Vieira. He interviewed a total of 11 employees in the presence of a note taker. Each employee was given the opportunity to read and sign the notes and copies were given to the claimant. The claimant was interviewed on 1<sup>st</sup> March 2016, as he was unable to attend the previous scheduled meeting on 2<sup>nd</sup> February 2016, due to illness.

87 After reviewing all of the evidence Mr Stanton was of the opinion that the claimant did hold Mr Hassan's arm in the course of their sales duties and that this was the root cause of the situation as it developed. Although he did not view the recording, he believed that it was an inappropriate action on the part of the claimant which did not have any sexual connotations. He was further of the opinion that the action did warrant being brought to the claimant's attention and that Mr Vieira was trying to help him as it was Mr Vieira who had given him sound advice, especially during his early days as a Supervisor. Mr Stanton had no reason to doubt the accuracy of both Mr Vieira and Mr Yeboah's accounts of their meeting with the claimant. There was never any intention to discipline the claimant for his conduct and the advice given was part of the general feedback on the claimant's performance. The correct action was taken and it was in good faith but the claimant had misinterpreted it. He found no

evidence to substantiate or verify the claimant's allegations and was, therefore, unable to uphold the grievance as there was no evidence to suggest wrongdoing or that it had caused any detriment to the claimant.

88 Mr Stanton also conducted the investigation into the claimant's grievance against Mr Mendes. He took the view that he was able to investigate the grievance against a managing director because he had conducted impartial investigations during his 35 years dealing with such matters and almost 18 years with the respondent. As Company Secretary, his responsibility included ensuring the company operated legally and within all areas of regulatory control. In addition, as Compliance Manager, he was responsible for compliance with the relevant regulations. In the respondent's organisation chart, his position is not under the direct control of the Managing Director but he is responsible to the owner of the company and the shareholders.

89 A grievance hearing was held on 1<sup>st</sup> March 2016 with the claimant. The claimant did not bring any written documents and the evidence he gave was verbal. Mr Stanton interviewed 12 employees from a wide cross-section including Mr Yeboah, Mr Mendes, Mr Vieira, Mr Da Silva and Miss Hamid. It was agreed to anonymise some of witnesses' details in order to protect their identity. The claimant raised 9 concerns in his grievance letter and each of which was investigated. The issues he raised were as follows:-

Issue 1 – The claimant's return from a lunch break over 20 minutes late.

Issue 2 – The meeting held on the 19<sup>th</sup> November regarding the conversation between the claimant and Mr Mendes the previous day.

Issue 3 – The content of the meeting held on 25<sup>th</sup> November 2015 between the claimant, Mr Mendes and Mr Yeboah, in the presence of Miss Denise Williams, Human Resources Assistant, as note-taker.

Issue 4 – The meeting held with the claimant, Mr Yeboah and Miss Hamid on 1<sup>st</sup> December 2015, to discuss whether or not the claimant wanted to continue in the role of Sales Supervisor or as a Sales Advisor?

Issue 5 – The allegation that Mr Mendes tried to bribe Mr Thomas into giving information about the claimant and his cousin, Mr Midega.

Issue 6 – The allegation of discrimination - in particular, his accent.

Issue 7 – The temporary suspension of the claimant's training.

Issue 8 – The reason for the claimant's return to a Sales Advisor position.

Issue 9 – The final matter was Mr Yeboah's refusal to allow the claimant to leave work due to illness when he was suffering from a headache at the time.

- 90            Having considered the first issue, Mr Stanton concluded that he understood how Mr Mendes felt but that the words he used in his conversation with the claimant on 18<sup>th</sup> November 2015, were inappropriate to which Mr Mendes acknowledged. As a result, action was taken regarding the use of swear words by Mr Stanton at a Directors' meeting.
- 91            In relation to the second issue, Mr Stanton was of the view that the claimant failed to come to a decision on whether he would like to continue in the Supervisor role. Mr Mendes gave time to consider his position. Mr Stanton found that the claimant eventually decided to return permanently to being a Sales Advisor and this was confirmed in writing on 15<sup>th</sup> December 2015.
- 92            The third issue concerned the meeting held on 25<sup>th</sup> November 2015. Mr Stanton believed that Mr Mendes asked the claimant not to talk about his specific situation in front of colleagues, not least because he was still considering whether to return to the Sales Supervisor position with responsibilities within the Sales Department. Mr Mendes was also concerned about the rumours on the shop floor and should anti-Cargiant comments be attributed to the claimant, then the matter would be dealt with formally. The claimant said that he took this as a threat but Mr Stanton was of the view that there was no evidence to support the claimant's belief. Although the claimant was reluctant to attend that meeting because he was considering lodging a grievance against Mr Mendes, the grievance was not lodged until 19<sup>th</sup> January 2016 and it was appropriate for the meeting to have taken place.
- 93            The fourth issue, whether the claimant was to continue as a Supervisor as in accordance with his contract or return to Sales Advisor position, Mr Stanton felt it was appropriate for such a meeting to take place and it could not be considered as constituting harassment by Mr Mendes of the claimant.
- 94            As regards to the fifth issue, the alleged bribe of Mr Thomas, Mr Mendes admitted to having spoken to Mr Thomas as he had heard about his singing ability and appeared in music videos surrounded by cars. He discussed the possibility of Cargiant supporting him and possibly using a video as part of the company's marketing strategy, but the offer was not taken up. The respondent had previously used sponsors as part of its marketing campaigns. Mr Stanton, therefore, could not find any evidence to suggest that this approach was a bribe by Mr Mendes. No information was disclosed to Mr Mendes by Mr Thomas and Mr Stanton believed the opportunity to be part of the respondent's marketing strategy would still be available.
- 95            The sixth issue, the alleged discriminatory treatment of the claimant in relation to his accent, Mr Stanton found that the claimant was unable to give any details other than a general non-specific series of allegations. None of those interviewed could confirm the allegations made by the claimant and Mr Stanton concluded that the claimant might have confused

valid instructions to a manager of the need to speak with clarity, with criticism of his accent.

96 In relation to issue 7, Mr Stanton found that the external training programme was not essential for Sales Supervisors, especially considering the fact that they all receive regular training, as required, by the more senior and experienced departmental managers. There was no evidence to support the claimant's assertion that he had been singled out when training was cancelled. In Mr Stanton's view, Mr Yeboah and Mr Mendes both wanted the claimant to succeed in his role, not least because they would personally benefit from his success.

97 In relation to issue 8, the claimant returning to the Sales Advisor position, Mr Stanton acknowledged that he had received different accounts of what transpired but was certain the claimant could have stayed on in the Supervisor position had he decided to do so. He concluded that it was the claimant who decided that he would continue in his employment as a Sales Advisor.

98 The final issue was in relation to Mr Yeboah refusing to allow the claimant to go home. Mr Stanton found that the matter was raised with Miss Hamid who advised that the claimant should be allowed to go home as he was unfit for work and subsequently the claimant went home. He understood how the claimant must have felt and arranged for Mr Yeboah to take advice from Human Resources on how to handle similar situations in the future. Mr Yeboah assured Mr Stanton that he was endeavouring to act in the claimant's best interests at the time in making the suggestions he did. He was satisfied that Mr Yeboah would have acted in a similar manner no matter who he was dealing with. He was issued with a note from Mr Stanton documenting their conversation. It stated that should he receive a request from an employee to go home, he must simply accept the request and offer appropriate assistance.

99 The above matters were in Mr Stanton's very detailed outcome letter dated 15<sup>th</sup> April 2016, sent by him to the claimant. (Pages 315 – 323)

100 Mr Stanton did not interview Mr Yunus Zina because he had left the respondent on 26<sup>th</sup> January 2016 and did not interview Mr Thomas who was absent from work due to sickness from 2<sup>nd</sup> February 2016 to his subsequent resignation on 6<sup>th</sup> June 2016. He also he did not interview Mr Midega who had left the respondent on 9<sup>th</sup> December 2015. He, therefore, interviewed all relevant individuals and those who the claimant wanted him to interview he was unable to do so as they were either ill or had left the company.

101 As regards the CCTV footage of the touching of Mr Hassan by the claimant, it was not kept as the respondent did not view it as a disciplinary matter but as a training issue.

102 In our view, the grievance investigation should, at the very least, have been conducted by one of the other two Directors, namely Mr Michael

Holahan, Finance Director or Mr John Forsdyke, Buying Director. The outcome in relation to the allegation against Mr Mendes, was a file note endorsed by the directors. It was neither a warning nor a disciplinary sanction.

103 The claimant appealed against the grievance outcome and was invited to a hearing to be conducted by Mr Holahan scheduled to take place on 4<sup>th</sup> May 2016. (Pages 324 – 329)

104 The claimant attended the premises on 21<sup>st</sup> April 2016 to hand in his grounds of appeal. We accept the account given by Mr Yeboah in his witness statement from paragraph 42 onwards. He stated that the claimant was loudly accusing the Sales Advisers of being liars and confronted another member of staff, George Hardan, who had earlier reported that the claimant was asleep in the staff room. Mr Yeboah took the claimant outside as it was getting heated. The claimant had copies of the statements given during the grievance process and accused Mr Yeboah of having betrayed him for the respondent by lying. He said that he had a half naked picture of Mr Hardan's girlfriend. According to Mr Yeboah, the claimant was creating a scene, in that he referred to compromising pictures of a naked female friend of Mr Mendes and threatened to expose him as he was a public figure who should be at home looking after his sick wife. He was asked by Mr Yeboah what he wanted to which he replied, a year's Supervisor's salary and compensation for bullying, harassment and discrimination. He instructed Mr Yeboah to ask Mr Mendes how far he wanted to go.

105 Mr Yeboah was concerned about what the claimant had said and spoke to Mr Mendes because he was aware that there were old, salacious pictures of Mr Mendes and the female friend suggestive of an ex-marital affair in circulation on the shop floor. Mr Mendes considered what the claimant said to Mr Yeboah was blackmail as he was threatening to expose of the pictures in return for money. The matter was discussed at a meeting involving the directors, Miss Hamid and Mr Yeboah, and the decision was taken to inform the Police. The Police conducted an investigation and took witness statements from a number individuals on site. The outcome of their investigation was that no further action was taken against the claimant.

106 Miss Hamid, in her witness statement regarding events from 21<sup>st</sup> April 2016, corroborated Mr Yeboah's evidence.

107 We find that the claimant did attempt to blackmail Mr Mendes by threatening to disclose compromising pictures of an affair he had had with a woman. Mr Yeboah's account is consistent with the claimant's attempts at getting the BBC to investigate the alleged bullying on the part of the respondent's staff. If he was capable of disclosing internal matters to an outside body, he was equally capable of disclosing a personal matter externally. There was no interest in Mr Mendes making such an allegation of blackmail to re-open something that was not only embarrassing but painful to him because at the time his wife was seriously ill. Further, Mr Yeboah described himself as a close friend of the claimant and was keen to

develop the claimant's skills, knowledge and experience as a Sales Supervisor. He would not be interested in acting against the claimant's best interests without good reason. The claimant was upset with the grievance outcome and believed his work colleagues had told lies. When he called at the premises on 21 April he was angry and threatening. He tried to blackmail Mr Mendes but it backfired as the Police were called.

108 We were referred to a number of transcripts initially disclosed by the claimant of conversations he had with various individuals. It transpired that he did not disclose all of the transcripts asked for by the respondent's legal representatives as he, unwittingly, made further disclosures during the course of the hearing. The respondent's representatives could not be sure whether they eventually were given full disclosure of transcribed conversations. In one of the transcripts produced by the claimant during the course of the hearing of a conversation recorded between him and Mr Yeboah on 15<sup>th</sup> April 2016, he was asked by Mr Yeboah whether he was ever going to return to work. The claimant responded by saying:-

"I don't think I'm gonna to come back. I'm just gonna to write my appeal and then with I'm gonna to put my resignation, same time. And then so, I'm not an employee of Cargiant, so I can go full swing. Fight justice. So, hopefully soon you're gonna to hear what goes down."

109 In an earlier conversation held on 11<sup>th</sup> March 2016 between him and Mr Yeboah, he was asked by Mr Yeboah when he was going to come back and he responded by saying that he did not know. He said:-

"Once they've done are what's it called ..... once they've investigated everything. Cause you know you know I'm stressed at that place, Prince. You know I'm stressed at that place, I can't be there, my mind ... I just can't."

110 Further into the conversation and with reference to the Mr Mendes, the claimant said:-

"So, what can you do with someone like that? I'd rather resign PY, (Prince Yeboah) I loved working at Cargiant, you know I loved it. You know I was there, and seeing you there as top dog, I there, I was happy. I was confident, it wasn't even about the three grand, it was just happy doing to the job. PY, this guy just decides to, anyways .... everytime I think of Tony man, I just get emotional." (pages 443 – 456e)

111 The claimant also exchanged WhatsApp messages with Mr Dale Hathaway, Sales Adviser on 22<sup>nd</sup> March 2016. He said that he had not left the respondent in response to a question put to him by Mr Hathaway. (pages 441 – 442)

112 In an earlier exchange with Mr Hathaway, he acknowledged that he had something planned in relation to his future employment with the respondent. (pages 437 – 440)

113 These messages were referred to by Mr Brockley to demonstrate that the claimant had decided to leave the respondent much earlier than on 4 May 2016.

114 The claimant attended the site on 26 April complaining about his treatment and of being excluded from the premises. He spoke to Mr Yeboah who called Miss Hamid. Miss Hamid handed him a letter inviting him to an appeal hearing on 4 May and another letter inviting him to an investigation meeting with Mr Peter Crouch, Compliance Development Manager on the same day in relation to the blackmail threat to Mr Mendes.

115 On 27 April 2016, the claimant lodged another grievance accusing Mr Yeboah of threatening him with physical violence, falsely being accused of blackmail and of employing intimidating tactics to get him to drop his case. (331-332)

116 He attended on 4<sup>th</sup> May 2016 the schedule appeal hearing before Mr Holahan and said that he would not be pursuing his appeal as he had lost faith in the respondent's internal procedures and felt that the matter was best dealt with in court and handed his resignation letter.

117 In his resignation letter dated 4<sup>th</sup> May 2016, he wrote:-

“Dear Miss Hamid,

I am writing to inform you that I am resigning from Senior Sales Advisor with immediate effect. Please accept this as my formal letter of resignation and termination of our contract.

I feel that I am left with no choice but to resign in light of the following:

- Fundamental Breach of Contract; Mr Tony Mendes, who is my employer has subjected me to harsh treatment over a period of time through verbal abuse, constant bullying, harassment and even discrimination against me due to my ethnical background and family association.

Mr. Mendes also unjustifiably demoted me from my Sales supervisor role with no justifiable reason, and justified his verbal abuse towards me.

I have also been subject to unjust, unfair and biased grievance procedure which was not carried out in line with contract when I formally made a grievance against Mr. Mendes and Mr. Viera. Mr. Yeboah also threatened me with physical violence after escorting me out of the Cargiant premises in the present of the HR manager who never intervened.

- Breach of Trust and Confidence; Actions of Mr. Viera and Mr. Yeboah, who are senior members of management, have damaged my reputation and caused me a lot of emotional distress. Mr. Viera accused me of inappropriately touching another sales advisor and shared CCTV footage in question with the entire training team, HR manager, and Mr Yeboah.

Mr. Yeboah also made false and malicious allegations against me, accusing me of criminal blackmail, something that does not only cause me a lot of stress but also led to my suspension and great damage to my reputation and might also affect my career prospect.

I was also denied the right to seek medical attention when I was very ill and forced to stay at my place of work for over 5 hours despite my poor health by both Mr. Yeboah and the HR's representative.

- I have been subjected to abusive and unfair treatment for over 6 months, these have amounted to Cargiant's breach of contract. I gave the internal grievance procedure a



chance to resolve the issues I raised but been betrayed by the whole internal justice system by the way they conducted the grievance investigation and the entire handling of my grievance.

As a final straw, I have been falsely and maliciously accused of Blackmail, which resulted to my suspension. I therefore no longer willing to suffer any more because my reputation has been negatively affected and my health has also been seriously affected. I strongly believe that the false accusation of Blackmail is connected to the grievance I have made against Tony Mendes.

I consider this to be fundamental and unreasonable breach of contract on the part of Cargiant.

I appreciate the time and energy which you have invested in training me. I believe that the skills I have learned will serve me well in the future.

I would be grateful if you could acknowledge this letter at the earliest available opportunity.

I look forward to hearing from you.

Yours sincerely

Leakey Daniel Odhiambo” (pages 354 – 355)

## Submissions

- 118 We have taken into account the written and oral submissions of the claimant and Mr Brockley, counsel on behalf of the respondent. We do not propose to repeat their submissions herein, having regard to Rule 62(5) of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have also taken into account also the authorities referred to us.

## The Law

- 119 Section 95(1)c Employment Rights Act 1996, provides,

“(1) For the purposes of this Part an employee is dismissed by his employer if  
.....

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

- 120 It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the employer’s conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that an employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to

give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

121 It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

122 In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the “last straw” doctrine that,

“...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?”, Glidewell LJ.

123 Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

“A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase ‘an act in a series’ in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

I see no need to characterise the final straw as ‘unreasonable’ or ‘blameworthy’ conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be.... .

If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.”, pages 37 - 38.

124 The test of whether the employee’s trust and confidence has been undermined is an objective one, Omilaju.

125 In the case of Tullett Prebon plc v BGC [2011] IRLR 420, on the issue of whether the first instance judge had applied a subjective test rather than an objective one to the actions of the alleged contract breaker, the Court of Appeal held, reading from the headnote,

“The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a ‘question of fact for the tribunal of fact’. It [is] a highly specific question. The legal test is whether, looking at all the circumstances

objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract-breaker has clearly shown an intention to abandon and altogether refused to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract breaker towards the employees is of paramount importance.

In the present case, the judge had approached the issue correctly. He had not applied a subjective approach. He had objectively assessed the true intention of Tullett and had reached the conclusions that their intention was not to attack but to strengthen the employment relationship. That was a permissible and correct finding, reached after a careful consideration of all the circumstances which had to be taken into account in so far as they bore on an objective assessment of the intention of the alleged contract breaker."

126 Under section 13, Equality Act 2010, direct discrimination is defined:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

127 Section 23, EqA provides for a comparison by reference to circumstances in relation to a direct discrimination complaint:

"There must be no material difference between the circumstances relating to each case."

128 Section 136 EqA is the burden of proof provision. It provides:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

129 In the case of Efobi v Royal Mail Group Ltd UKEAT/0203/16/DA, the Employment Appeal Tribunal, Mrs Justice Laing, held that the wording of section 136 Equality Act 2010, is different from the previous anti-discrimination legislation on the burden of proof. Under section 136, a claimant is not required to show a prima facie case of less favourable treatment. It provides for the tribunal to consider all the evidence, from all sources and at the end of the hearing, to decide whether there are facts from which it can infer discrimination. If there are such facts and no non-

discriminatory explanation from the respondent, the tribunal must uphold the complaint. It is misleading to refer to a shifting burden of proof.

## Conclusions

### Constructive Unfair Dismissal

130 We have found that the claimant was only demoted for one day, namely 19<sup>th</sup> November 2015. Thereafter it was open to him to decide whether he wanted to continue in his role as Sales Supervisor or as Sales Adviser. He elected to work as a Sales Adviser. As a result, his terms and conditions were varied to reflect his new position.

131 We have found in the claimant's favour in respect of the denial of his right to go home having complained of a headache. In addition, we have found that he was subjected to aggressive and/or intimidating behaviour by Mr Mendes in relation to the conversation that took place on 18<sup>th</sup> November 2015.

132 Finally, we have found that Mr Stanton ought not to have conducted the grievance investigations as he was junior to Mr Mendes and that the outcome in respect of the words used by Mr Mendes towards the claimant on 18<sup>th</sup> November, could not be described as a disciplinary sanction.

133 The grievance outcome was on 15<sup>th</sup> April 2016. The Claimant did not resign until 4<sup>th</sup> May 2016. We find that he was hoping that the appeal was going to redress matters as he disagreed with Mr Stanton's outcome. We do not accept that the delay by three weeks meant that the claimant had waived any breaches.

134 Our concern here has been how the claimant put the last straw in his constructive unfair dismissal claim. He stated that it was being accused, falsely and maliciously, of blackmail. We have found, however, that he did threaten to expose Mr Mendes' affair if he was not paid compensation for the way he had been treated.

135 In Omilaju, the critical paragraph is:

“The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase ‘an act in a series’ in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.”

136 The claimant pinned his colours to the mast and wrote in his resignation letter the following:-

“As a final straw, I have been falsely and maliciously accused of Blackmail, which resulted to my suspension. I therefore no longer willing to suffer any more because my reputation has been negatively affected and my health has also been seriously affected. I

strongly believe that the false accusation of Blackmail is connected to the grievance I have made against Tony Mendes.”

137 He repeated the above as the final straw during the course of his evidence. The difficulty here for him is that we have found the blackmail allegation was neither false nor malicious, as we accepted Mr Yeboah’s evidence. The claimant’s behaviour was such that it was reasonable for the respondent to have excluded him from the premises and to consider invoking disciplinary proceedings against him. As a matter of law, the final straw must contribute to the breach of the implied term of mutual trust and confidence in some way. As a finding of fact, the respondent did not behave in the ways alleged by the claimant in relation to the last straw. The claimant, therefore, cannot rely on the false and malicious blackmail allegation as the last straw, Omilaju.

138 Had we not found against him in relation to the last straw issue, we would have concluded that his claim is well-founded but he cannot rely on the last straw. In applying our understanding of Omilaju, his constructive unfair dismissal claim is not well-founded and is dismissed.

#### Direct Race Discrimination

139 On 4 May 2017, the claimant during the hearing the claimant withdrew a number of the allegations referred to under the Issues paragraphs of this judgment. They were sub-paragraphs: 6.12; and 6.1.5 to 6.1.9.

140 In relation to the remaining sub-paragraphs he relied on, we have found against him. The South African clicking sound was part of a limited number of discussions he had with Mr Vieira early on in his employment. They talked about their languages as Mr Vieira is Portuguese and the claimant girlfriend was part Portuguese.

141 The cancellation of the courses applied to all newly appointed Sales Supervisors and was not targeted at the claimant. We accepted the respondent’s evidence in relation to this issue.

142 Mr Mendes did not question the claimant’s African accent but his communication and adherence to the respondent’s procedures, its sales script and to talk in a professional way to its customers and Sales Advisers. We accepted that Mr Mendes would arrive for work at 9am and would spend one hour with him to develop his knowledge and skills. The reference to “Its George” was not abusive or offensive but a statement on the part of Mr Mendes that he wanted to take the discussion forward and it did. The “Its George” comment was not one of the issues the tribunal had to determine from the list issues.

143 The claimant did not resign because of the alleged racially discriminatory treatment of him but for a variety of reasons. He did not accept Mr Stanton’s grievance outcome; he felt that he had been unreasonably excluded from the premises; and the false and malicious accusations of

blackmail. He referred to earlier alleged discriminatory treatments but the catalyst were these three matters.

144 In any event in relation to the alleged acts of racially discriminatory treatment he relied upon as his direct race discrimination claim, having regard to the Efobi case, we have not made findings of fact from which we can infer less favourable treatment because the claimant is a black African. Accordingly, this claim is not well-founded and is dismissed.

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Employment Judge S Bedeau, Watford.

Date: ...22/11/2017 .....

Sent to the parties on: .....

.....  
For the Tribunal Office