



EMPLOYMENT TRIBUNALS

Claimants

Mr C Midega
Mr J Thomas

v

Respondent

Car Giant Limited

Heard at: Watford

Between: 23 October to 2 November 2017

Before: Employment Judge Manley

Appearances:

For the Claimant: Mr L Odhiabmo, Lay Representative
For the Respondent: Mr N Brockley, Counsel

JUDGMENT having been sent to the parties on 9 November 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013 on 17 November 2017, the following reasons are provided:

REASONS

Introduction and issues

- 1 The claimants bring complaints of constructive unfair dismissal. At the outset of the hearing, we clarified that both claimants relied on an alleged breach of the implied term of mutual trust and confidence. There was no freestanding breach of contract claim made by either claimant. Both claimants had presented detailed claim forms and the particulars of claim were somewhat lengthy with respect to the allegations of the breach of the implied term and I will try to summarise them now.
- 2 Mr Midega resigned on 9 December 2015. In his particulars of claim, drafted by counsel, there were 29 breaches listed. They fall largely into the following areas:-
 - i) disciplinary sanctions being imposed unreasonably, particularly in April 2015.
 - ii) a meeting with Mr Mendes, the Managing Director, and others on 28 April 2015.

- iii) being restricted in how much he could sell, in November 2014 when he was sent to work in the call centre and for training and separately the application of the “CRF lock” in April.
 - iv) the behaviour of Mr Mendes in a meeting with Mr Nazareth.
 - v) being put on an activity plan and other aspects of performance management.
 - vi) that his grievance had not been dealt with properly in how it was progressed or investigated.
 - vii) a final straw which caused him to resign, which was a comment about him made on 9 December 2015.
- 3 Mr Thomas, who resigned on 6 June 2016, had 16 breaches listed. Again, I summarise those as referenced in the evidence or argument before me. They are as follows:-
- (i) unreasonable sanctions imposed upon him in respect of performance including capability procedure and performance monitoring.
 - (ii) being refused a request for a change in start time.
 - (iii) management bullying, harassment threats and bribery
 - (iv) a meeting with managers at which negative comments were made on 27 October 2015.
 - (v) that a music video which he had produced was shown at a sales meeting on 18 November.
 - (vi) the grievance that he presented was not taken seriously.
 - (vii) being moved from one sales area to another without warning.
 - (viii) a meeting on 25 November with Mr Mendes, where questions were raised about his knowledge of Mr Midega and Mr Odhiabmo’s difficulties at work.
 - (ix) a final straw which caused him to resign, which he says was his hospitalization on 6 May 2016.

The hearing

- 4 Those were the matters on which I heard evidence during the hearing. I heard evidence from the two claimants; from Mr Odhiabmo and from Mr Thomson, who is a former colleague particularly of Mr Midega. For the respondent, I heard from Mr Vieira who is Senior Sales Manager; from Mr Cruz who is in the training department; from Mr Yeboah, who is a General Sales Manager and heads the sales department; from Mr Stanton who is the Compliance Manager and the Company Secretary, and dealt with Mr Midega’s appeal against his grievance and Mr Thomas’ grievance; from Ms Hamid who is the HR Manager and from Mr Mendes who is the Managing Director.
- 5 I was made aware that Mr Odhiabmo had been involved in his own employment tribunal claim against the respondent and judgment was still awaited in that case. I made it clear to the parties that I would not speak to that judge about the case and I certainly did not have any prior knowledge of that matter. From time to time some aspects of that were mentioned, but that was very limited.

The facts

- 6 These are the relevant facts. I start first with what I consider to be general facts that are common to both claimants. The respondent is a large organisation. I am told it is the largest independent second-hand car dealership in the world. The respondent has well over a hundred sales staff with about 800 staff in total. They sell a high volume of cars. I have seen an organisational chart, which shows several managers at various levels and, having heard witnesses, it is clear to me that people often progress through from Sales Advisors through the ranks to be Managers. Mr Mendes, as I have indicated, was the Managing Director at the relevant time and there were two other Directors with other responsibilities. Mr Mendes was responsible for sales.
- 7 The respondent also has workplace policies contained in a handbook. I was taken to various parts of it. There are also written contracts of employment. Not many parts of the contract of employment need specific reference save the following;
- “13.2 The company reserves the right to alter the hours/shift patterns in line with market conditions and/or operational requirements”.*
- 18.1 (in relation to termination of employment) *“You are required to notify your immediate line manager in writing of your intention to leave the company giving the date on which you wish to leave and the reason for this decision”.*
- 19.1 *“The company’s disciplinary and grievance procedures do not form part of your terms and conditions of employment”.*
- 8 As indicated there are also workplace policies. The capability procedure was considered as it was implemented particularly in Mr Thomas’ case. This sets out the procedure which should take place, (starting with an informal interview), documenting any meetings and *“documented discussions”* going on the employee’s personal file. It states:- *“If the problem persists, an informal interview should be arranged and the company’s capability procedure applied”.* There is then a structure with respect to meetings, filling out various forms and so on. There is also a job description which both claimants accepted applied to them for Sales Advisors and which contains the sorts of tasks and roles one would expect to see for the position of Sales Advisors. It also says that there can be a reasonable adjustment for respondent to *“meet business needs.”* Sales Advisors were also to be responsible for financial deals and to deal with them in *“a professional and compliant manner.”* Not surprisingly, they were expected to sell vehicles, but also other products such as warranties and upholstery cleaning products as well as referring people for financing which, of course, involved FCA regulatory requirements.
- 9 The respondent has a relatively complex monitoring system of sales which is overseen by the training department. This includes gathering

data from computer systems and then looking at it in various formats and spreadsheets. In Mr Thomas' bundle there were documents which indicated what might be considered when a capability procedure for performance was envisaged. I was also shown various charts, including one entitled "scheduler" which shows each Sales Advisor and their vehicle and other sales measured by reference to other factors such as whether they had the customer referral form (CRF); test drive ratios to sales and so on. It calculates commission to be paid. Various percentage scores are given and there are triggers for the training department to look further if they are concerned the performance has dipped below a certain figure. I have also seen various examples of documented discussions, which are noted on the employee's personal file. These were generally short and seemed to cover a wide range of matters.

- 10 The layout of the premises is there are three sales areas, which are fairly large and then what is known as "upstairs" where people other than those in sales sit. I understand that it is a large open plan area where the training department, HR and the Directors, presumably as well as many other administrative staff and so on, are placed.
- 11 I also heard about some policies or rules which are not in writing. One of them is something that we came to refer to during the hearing as the "*CRF lock*". CRF is a form which is completed when a customer arrives to view cars and the respondent's case is that a Sales Advisor should only sell cars when either they have completed a CRF or they have been given a CRF by either a Controller or a Customer Advisor. This is relevant to Mr Midega's concern about being put on a CRF lock by Mr Mendes in April. The CRF lock is when a Sales Adviser can only sell if they have been passed the CRF by a controller or customer advisor. Mr Midega's evidence was that it was common place for Sales Advisors to pass deals to each other when they became busy. This was later investigated by Ms Hamid and she spoke to people about what the rule was. It is clearly not a rule that is in writing. I am satisfied that some managers believed that the Sales Advisors were aware that they should not swap deals between each other, but I am not satisfied that all the Sales Advisors necessarily understood that was the position. I accept that Mr Midega thought that this was something that could happen and I find that there was not as firm a rule against it as the respondent said it was. I note that it was not mentioned before the meeting in late April which I come to later. I also note (for example on page 172) that other members of staff appear to have passed deals between themselves at some point.
- 12 Another procedure which was referred to and which is not a policy in writing, concerned a way for the respondent to try to control absence at the weekend. The weekend is, not surprisingly, a very busy time for the respondent and it was difficult if it was left short staffed because people took sick leave then. During 2014 an arrangement was instituted whereby if, somebody had been sick at the weekend when they attended for work the next working day, they were sent to the call centre. This of course had an impact on Sales Advisors whose income

derives not just from basic salary, but also commission on cars sold etc. Ms Hamid accepted that that was the impact, as indeed did other witnesses, and my understanding is that the practice ceased some time towards the end of 2014. I cannot be sure whether or how many Sales Advisors were aware of it.

Facts related to Mr Midega

- 13 Mr Midega started as a Sales Advisor in June 2012. He was recommended to join the respondent by Mr Thomas of whom he was a good friend and who had started three months earlier. Mr Midega appears to have been a successful salesperson, selling a high number of cars, particularly on the months shown to me. There are some incidents before those leading up to the end of employment, but I can deal with them relatively quickly.
- 14 In August 2013, there was an incident for which Mr Midega was given a first written warning for misconduct. There were then some documented discussions. There was a further first written warning in September 2014 for not following the sales script.
- 15 In November 2014, it was decided that Mr Midega needed some extra training and he was sent for it on 11 November. That was triggered by the monitoring form showing that he needed that training and it meant that he could not sell cars until the evening of that day after the training had finished. Mr Midega was then away sick on 23 November and when he attended on 25 November he was sent to the call centre under the policy I have just described at paragraph 12. Mr Midega made a note about this which appeared in the bundle, but it appears that he was again selling vehicles in the evening of that day after the call centre closed. I accept that that might have led to him having lower average sales for November, but it seems only to have related to parts of those two days, so it is not particularly significant.
- 16 In March 2015, the monitoring form for one deal showed Mr Midega achieving a score of almost 49%. When the training department noticed a score of less than 65% it might be referred for possible disciplinary action. There was therefore a meeting on 25 March about Mr Midega's score on that one deal and it was referred to Mr Yeboah for a disciplinary hearing on 21 April. Mr Midega said at that hearing that he had a difficult customer. His evidence was that he believed there was a procedure whereby deals relating to difficult customers would be excluded from the calculation. This did not happen in this case and, after consideration, Mr Yeboah decided that he needed to give Mr Midega a final written warning, partly because he already had the first written warning from September 2014. The letter states that the allegations of misconduct were;
 - *“Not following company's procedures, specifically failing to follow the sales script during the deal for vehicle SY6 1NKL resulting in a score of 48.98% in the monitoring form.*
 - *Failing to advise customers on the cooling off period resulting in*

a breach of the FCA regulations

- *Failing to achieve the minimum of 65% on the monitoring form”.*

- 17 Either on the same day as Mr Midega got that written warning, or very close to it, towards the end of April 2015, there was a meeting between Mr Midega and Mr Mendes. This is an important meeting and there are various versions of it. There were no notes of this meeting and it led to the grievance which I will come to. According to Mr Midega, Mr Mendes started the meeting by suggesting that Mr Midega was a bully because he had taken deals from a probationer. Partly because there are no notes, I had some difficulty deciding what was or was not said. Mr Mendes does not deny that he referred to Mr Midega as a bully and he accepts that he might well have used bad language including some swearing, although it is accepted that this was not directed at the claimant. I will come to the details of that meeting in a moment, when I deal with the grievance which followed.
- 18 At the end of that meeting or some time a little later, Mr Mendes applied the CRF lock which I have previously described, because he said he was concerned that Mr Midega was taking deals from others. The CRF lock was said to mean that Mr Midega could only sell where he had either completed or been given the CRF for a customer by a controller or customer advisor. This all happened in the same month as the claimant had, in fact, sold a very high volume of cars, that is 130, which was either a record or very close to it.
- 19 Mr Midega took some holiday. Unfortunately, his grandmother then died and he went to Kenya and was granted unpaid leave for that visit. On his return, there was a meeting with Mr Mendes in early June, who told him that he would take him off the CRF lock. I mention here that, if as the respondent argue, it was a rule that salespeople could only sell where the CRF had been given to them by a controller or customer advisor in any event, I do not really understand what a CRF lock means or what it might mean to be taken off it. In any event, Mr Midega recalled that Mr Mendes told him that he would be micro-managed, I am not sure whether he said it using those words, but certainly Mr Midega had the impression that he was going to be closely watched.
- 20 In any event, Mr Midega put in a grievance about a number of these matters. It was dated 16 June and is a long document, so I will not read it all but I will read some extracts. It is headed “*Grievance against Tony Mendes*” and it goes on;
- “I would like to raise a grievance against Tony Mendes, the Director of Car Giant.*
- I feel like I have been pushed to the limit and I have not only been bullied but I have been targeted and treated completely unfair”.*
- 21 The letter then goes through some history and makes reference to a meeting on 22 April with Mr Nazareth about which I did not hear that

much detail. The letter then mentions the meeting around 28 April and says:

“In the meeting present was Tony Mendes and my Area Manager, Prince Yeboah. The 1st thing Tony Mendes says to me “Why am I hearing that you are bullying other sales staff into giving you deals.” I quote, again I am in a great SHOCK! As I have never bullied anyone in my life, let alone at work”.

- 22 The grievance then went on to say that Mr Mendes mentioned “Velichko”, which is the name of a probationary employees and who had apparently said that he had passed some sales deals to Mr Midega. Mr Midega continued:

“During this meeting Tony Mendes has spoke to me in a very aggressive tone and swore multiple times, which I find it very unprofessional especially as a director of a company, I definitely do not talk to him in that manner as I am in professional place, does he not respect me.”

- 23 He then said that Mr Mendes made a comment about the claimant leaving and that VW are hiring. He also commented that he complained about the CRF lock because he says, “60% of my deals come from CRFs that I did not create from the beginning.” He goes on to say that means he will take a 60% cut in his income. He went on, “Tony Mendes then continues to say “Velichko is going to lose his job now, I going to fail his probation for being a fucking dickhead, how’s that for a fix and its all because of you.” Mr Midega added, “I quote exact words used.” He stated that he believed that he was one of the best salesmen.

- 24 Ms Hamid was the person appointed to investigate that grievance. She met with Mr Midega on 1 July. Mr Midega gave more details of the meeting with Mr Mendes largely in line with his grievance. Ms Hamid also spoke to Mr Vieira about whether deals should be passed between Sales Advisors and he said “it has to go through Controller.” She also spoke to Mr Cruz, but I cannot see anything much of relevance in the very short notes of the discussion with him. She also spoke to a Michael Mekonen particularly as Mr Midega had said that Mr Mekonen had been forced to write a statement. Mr Mekonen said that he had not been forced to write a statement. Mr Mekonen was a Customer Advisor who said he had seen deals being passed to Mr Midega.

- 25 In her witness statement to the tribunal, Ms Hamid does not state that she spoke to Mr Mendes but the outcome letter to the claimant suggests that she did. When she was asked questions about this, she said she thought that she must have spoken to him. There is no note of a conversation with Mr Mendes. She could not really recall what they discussed. When Mr Mendes was asked about this, he seemed to believe that he might have been spoken to, but, again, could not really recall what was discussed. Ms Hamid also thought she must have

spoken to Mr Yeboah, but there is no note of any conversation with him either and I do not recall or have a note of Mr Yeboah being asked in the hearing whether he was spoken to by Ms Hamid.

26 Ms Hamid also looked at the figures with respect to Mr Midega's complaint about being disciplined in March 2015 because he had fallen below 65%. She saw that some other people had been referred for disciplinary action as well as the claimant. A document produced for this hearing shows that some people had been disciplined and some had not, for which there is some explanation which I will come to.

27 As time went on, Mr Midega was waiting for an outcome of his grievance and I have seen that there were some more documented discussions about several matters. He was moved to area C on 1 August.

28 He was told the outcome of his grievance on 5 August and he got a letter the same day. This is relatively long document and it goes into some detail. It appears between page 213 and 216 of the bundle. The letters starts:-

"I write with reference to the grievance hearing held on 1 July 2015 in relation to the formal grievance you raised with regard to Tony Mendes".

29 The letter then deals, in part at least, with some of the concerns raised. In relation to the meeting with Mr Nazareth, she said this:-

"Whilst I was unable to verify the exact conversation had, my investigation indicated the context of the conversation was missing".

She continued

"As the Managing Director of Car Giant, Tony is directly responsible for the recruitment for the selection of the management team across the company and to ensure that staff in these positions have the required skills, knowledge and conduct to effectively manage their teams".

30 She dealt with the question of others not being disciplined for falling under 65%. Mr Midega had mistakenly referred to his score at being 44% when in fact it was closer to 49% and she repeats that mistake in this letter. Her decision on this was as follows;

"Having investigated this further, I can confirm that other Sales Advisors who were monitored during the same period was also disciplined and therefore your claims are rejected."

31 There is further discussion about the CRF procedure and his level of test drives. With respect to the complaint about the meeting in April, she says this;

"You stated at the meeting and within your letter that you felt aggrieved

that Tony Mendes had referred to you as a 'bully'. When discussing this further you admitted that Velichko had given you deals, but argued that he had the right to pass his deals to other Sales Advisors if he wasn't able to do them. We discussed the company procedures regarding passing deals to other Sales Advisors rather than the Controller, which you argued is not an established procedure as it is not in writing. Several Sales Managers were spoken to who confirmed that all Sales Advisors were informed at meetings and via i-message, that keys relating to deals that could not be done should be handed to the Controllers for them to assign and prioritise to Sales Advisors under probation. As Velichko was under probation himself there should have been no reason for him to give you his deals directly.

Your argument that Tony alleged you were a bully without investigating was also looked into. Tony stated Velichko had informed him that you had asked Velichko for deals and this was confirmed by Prince Yeboah who was also present. The reasons why a Sales Advisor would give away deals was questioned at the grievance meeting and whilst you stated that it was to help each other put, this seemed unlikely considering you have commissioned based salaries".

32 She went on to talk in further detail about the CRF lock, Velichko's comment and authorisation of leave for the claimant to attend his grandmother's funeral.

33 She concluded:-

"In addition, without have the context of the conversations available, the quotes you have alleged Tony made could be misrepresented and therefore I am unable to substantiate these allegations.....As such I have looked at your grievance with a neutral perspective and believe that I have been thorough, fair and impartial. After the investigation, I find no evidence of bullying and/or unfair treatment by Tony Mendes, but that your conduct and performance warranted a closer management approach

34 She went on to say that Mr Midega's grievance regarding Tony Mendes had not been upheld and she told him of his right to appeal.

35 He did so by letter of 10 August. Again, this is a detailed letter which began:- *"I would like to appeal the grievance outcome as it is an absolutely unfair investigation that was not conducted properly".*

36 Mr Midega repeated much of the grievance about Mr Mendes having allegedly spoken to him aggressively and added:-

"Yes I felt aggrieved as Tony Mendes referred to me as a bully this is a very big thing and should not happen, how can you call me a bully without any proof and if I did where is the statement from which they are confirming this?

This accusation tarnished my character and its ludicrous and unfair, Tony Mendes also called Velichko a fucking dickhead, where is the statement from Tony Mendes denying that he said this?

Did you even question this?"

- 37 Mr Midega continued to raise issues about the CRF lock and concluded:-

"I want a written statement from Tony Mendes denying that he spoke to me like this and that my quotes of these exact conversations are wrong?"

This was nowhere near a fair investigation and I am truly disappointed in your lack of caring and would like to appeal this, otherwise I will have no choice but to go outside of the company and seek justice elsewhere".

- 38 The respondent prepared, for this hearing, a document which was at pages 243 a to d of the bundle, which lists sales people with their relevant scores. Several did indeed score below 65%. Some are said to be exempt from disciplinary action because they are on probation. Others are said to be "Leavers" (although the information about that is not necessarily accurate as Mr Odhiabmo is shown there as a Leaver in 2015, when he did not in fact leave until 2016). There are some people who clearly have not been referred for a disciplinary hearing even though they scored below 65%. Indeed, some had scored below 49% and had not been referred. Conversely, some have been referred. The respondent's witnesses were not able to help me with why some people, excluding those who either had left or were on probation, had not been referred for disciplinary. It was explained to me that there might well be other reasons and I accept that there may be, but I was not told what they might be.
- 39 The appeal was forwarded to Mr Stanton to deal with. Mr Stanton is the Compliance Manager and Company Secretary. Although he is junior to Mr Mendes, my understanding is, and I accept, that he was independent of him. There are no notes of Mr Stanton speaking to anyone with respect to the appeal. He told me that he had considered what Ms Hamid had looked at, but he did not seem to remember that he had read the interview notes, although at a later point he suggested he did.
- 40 His evidence initially was that he did not interview anyone, but when he was taken to the outcome letter which he subsequently sent to Mr Midega, he mentioned having spoken to Tony Mendes, so it appears he may well have spoken to him. Mr Mendes' recollection was that there was a meeting with Mr Stanton about this, but he could not help us with what was discussed.
- 41 In any event, Mr Stanton undertook the grievance appeal and gave an outcome on 4 September, having met with the claimant on 25 August.

The outcome letter is again a fairly detailed four-page letter. Mr Stanton said:-

"I have conducted a thorough review of the facts and circumstances surrounding this case and have considered your appeal very carefully and gave you every opportunity to put forward your case".

- 42 He stated that he considered Ms Hamid's outcome and repeated some of the discussion that he had with Mr Midega about the disciplinary hearing for achieving less than 65%. A large part of the outcome letter is an explanation of the respondent's position rather than a direct reply to Mr Midega's grievance. In relation to the allegation of how Mr Mendes had spoken to Mr Midega in April, Mr Stanton said this in the outcome letter:-

"You then expressed concerns over the manner Tony Mendes had communicated with you. You felt it had been aggressive and you objected to the use of the a swear word. I explained that we did not have recordings of the discussion you referred to and as I was not present, I cannot be certain what was or was not said. I have spoken to the Managing Director about this and he confirmed that at no time did he intend to come across as aggressive. He was trying to make the case for you needing to change your behaviour and whereas you cannot recall exactly what was said, he accepts he could have come across as firm and direct. He is still of the of the opinion that had you taken his instructions in the spirit intended then this grievance would not have arisen. He totally denies any allegation of bullying, he stresses that he simply wants you to improve and work to the company rules and guidelines".

- 43 Mr Stanton rejected the grievance appeal.
- 44 During August, September and October there were several of documented discussions with Mr Midega, but having heard from other witnesses, I do not think that they were at a particularly unusual level.
- 45 In October, Mr Midega was told by Mr Yeboah that he was being placed on an 'activity plan'. He was very concerned about this and completed a document called Complaint on Harassment. He then had a meeting with Ms Hamid and Mr Yeboah. Ms Hamid's note of the meeting records that, when matters were explained to him, the claimant *"confirmed he understood reasons for the activity plan and change in days"*. That appears to have been taken no further.
- 46 There was then an incident on the 9 December 2015. A manager, Mr Durgal called across the room, in front of others, and said to one of the sales advisers referring to Mr Midega - *"Don't speak to him; he is one of Car Giant's most wanted."* Mr Midega complained about that to Ms Hamid and said two witnesses; Mr Ryan and Mr Armah were there. Mr Ryan confirmed that he heard Mr Durgal using those words. Mr Midega decided to resign and he completed a resignation letter which read;

"I am writing to inform you that I am resigning from my senior sales advisor position.

I feel I am left with no choice but to resign in the light of being bullied, harassed, treated unfair and in breach of contract.

I have tried to resolve my issues within the correct procedures, but I am made to feel like I am the person causing these problems.

I have worked and dedicated myself 100% to Car Giant for the last 3 and a half years and I am unable to see myself continue to perform well in a restricted work environment.

It breaks my heart to be put in this position, Car Giant has put me in a position where I feel extreme stress and depression that I can no longer continue to perform my role.

The last 7 months have been the worst period of my life and I now wish to end it so I can function and live peacefully.

As per my terms in my employment contract this is my two week notice from the date above (09/12/2015".

- 47 As I understand it, there was then a meeting with Ms Hamid. She wrote a letter to Mr Midega, which recorded his concerns about the 'Car Giant's most wanted' comment. She indicated that a thorough investigation would be concluded and she accepted the two-week notice period. Mr Midega was paid in lieu of that period which is part of the contract and which Ms Hamid said, and I accept, was something which was common particularly with sales staff. Mr Midega therefore left work on that day.
- 48 The comment made by Mr Durgal was subsequently investigated. He admitted making the comment and gave an explanation that he thought it was a 'tongue in cheek' remark. He said that he had a good rapport with Mr Midega and thought that it was a joke. He was given a first written warning for inappropriate and unprofessional conduct.
- 49 I heard evidence from Mr Thomson who used to work with Mr Midega. His impression was that, for a period of months, Mr Midega, had been called upstairs or to the controllers on more occasions than others. This may well have been his impression, but I really have no concrete evidence that Mr Midega was spoken to any more often than anyone else.
- 50 Mr Midega also mentioned the possibility of a compromise agreement within discussions with Mr Yeboah but it was not resolved in that way.

Facts related to Mr Thomas

- 51 Mr Thomas started work for the respondent in 2012 and is a good friend of Mr Midega. Mr Thomas had a history of performance reviews with the respondent which have led to the commencement of the capability procedure. Mr Thomas was, on the face of it, a less successful car salesman than Mr Midega. It is clear to me that Mr Thomas is a more reserved personality and that may impact on his volume of sales. He has also latterly had some health issues. Like Mr Midega he had the contract and the job description. I have seen documents relating to various performance reviews and capability reviews.
- 52 Mr Thomas was concerned because the period of consideration of sales advisers' performance changed from the end of the month to the mid-point of the month and he thought that was confusing. I accept it might have been initially, although it should have become clear later. There were some concerns about Mr Thomas's performance and his lateness. I accept that lateness appeared to improve as he commenced the capability process.
- 53 Mr Thomas's evidence was that he believed the important measure on one of the monitoring documents;- "*Minimum Performance Review*", was that for "*APPS*". His case is that, looking at those documents for the duration of the capability review period, he could only be said to have underperformed three out of the eight times. The respondent's case is that that is not the important measure. Its case is that there are several measures and APPS is one of them, but others are also important. The respondent's case is that he had only performed at an acceptable level in two out of the eight occasions when he was on capability. It is clear to me that Mr Thomas' performance did improve in several areas, but there were still some areas where the respondent reasonably felt that he could improve.
- 54 In August 2015, Mr Thomas' grandmother, for whom he has some responsibility, became unwell. He put in a request, which Ms Hamid considered, that he be allowed to start work 30 minutes later in case the carer was late arriving for his grandmother. Ms Hamid refused that request on the basis she felt it was unlikely that the carer would arrive late on the days he was working given that Mr Thomas was only working two days per week. I accept that Mr Thomas may well have been a little upset with that response but can also understand Ms Hamid's reasons.
- 55 By October 2015, which was the eighth month of capability process, Mr Thomas was put on an activity plan and managers were becoming increasingly concerned with his performance. It was decided that it might be an idea to take him off the capability procedure and he was called to a meeting with Mr Mendes, Mr Yeboah and several other managers to talk to him about how he was performing. This was an attempt to try to get Mr Thomas to understand what they perceived was troubling about his performance. In that meeting, they talked about

his demeanour and other matters. I can understand how Mr Thomas might well have felt that was an upsetting meeting, given that it was critical of him. I also accept that Mr Thomas does present as a quiet and reserved person, although I am aware he has been unwell before coming here. However, it does seem to me that the meeting was a reasonable management response given the difficulties that were still happening with Mr Thomas' performance. One of the explanations given by Mr Mendes was that there had been an incident with Mr Thomas coming to work and swiping in before he parked, which was against the rules. This explanation is slightly confusing because documents which I have seen relate to an incident on 3 November which post dates the meeting in October. However, it does seem as if there may well have been a previous incident or it is possible that people were just confused when they were later asked about it.

- 56 Mr Thomas was later moved to area A and he complains that insufficient notice was given about that. I accept the respondent is entitled to move Sales Advisors and I am not satisfied that there was any detriment with respect to that move.
- 57 There was then an incident on 18 November. There was a sales meeting at which a music video which Mr Thomas had made in his own time out of work was shown. This music video also included Mr Midega and Mr Yeboah gave evidence, and I accept, that he thought it would be a good idea to show the creative skills of employees. He discussed with Mr Mendes whether it could be shown who agreed. Unfortunately, he did not mention either to Mr Midega or to Mr Thomas that he wanted to show the video, which is apparently freely available on You Tube, at the sales meeting. Neither of them was present at the meeting. It came to the attention of Mr Midega and Mr Thomas when one of the Sales Advisors, who also was not present at the meeting, spoke to them about it and apparently told them that there had been mocking and laughter when people saw the video. The respondent's explanation was that they wanted to showcase talent of those working for them outside work and they might consider sponsorship and so on. My Yeboah admitted that, with hindsight, it was unwise not to either inform the employees or ask for their permission. Whilst the video might well have been available on You Tube, that is not the same as showing it in the workplace to a group of colleagues. This is likely to lead, as indeed it did, to misinformation and workplace gossip, particularly as Mr Midega and Mr Thomas were not present. That was not the wisest move that Mr Yeboah made and I do find that it was an error of judgment.
- 58 Mr Thomas later complained about a meeting he had the following week with Mr Mendes, on 25 November. There was a conflict here about who asked for the meeting. Mr Yeboah's evidence was that Mr Thomas said he wanted to meet Mr Mendes. Mr Thomas's evidence was that he was told by Mr Yeboah to go and meet Mr Mendes. I am not sure that it matters greatly whose idea it was. In any event, Mr Thomas met with Mr Mendes and the discussion started to be about Mr Thomas' knowledge of Mr Midega's complaints and indeed something

about Mr Odhiabmo, which I have not heard the detail of. Mr Thomas told Mr Mendes immediately that he did not want to be involved and, to a large degree, Mr Mendes accepted that, although he may have said something like - *“go away and have a think and come back if you have anything to say”*. I accept that Mr Thomas might have interpreted that as applying some pressure, but I also accept that it was not meant in that way. It is possible that Mr Mendes might have been trying to find out how matters could be resolved.

- 59 Mr Thomas later said of this meeting, that he was subject to an interrogation, but I cannot see, on the evidence before me, that there was any such interrogation. He also much later said that there was some sort offer of a bribe, but there is no evidence that anything Mr Mendes said in that meeting which was much more to do with the possibility of supporting any future music videos, could be said to be a bribe. I think Mr Thomas is now very much looking at things after the event.
- 60 As I have indicated, Mr Thomas was concerned about his move to area A and being put on an activity plan and he became unwell. Some of the sick notes referred to work related stress and the respondent was aware of that, through Mr Yeboah. He had a return to work interview where it was discussed.
- 61 On 18 January Mr Thomas presented a grievance. This really covers three distinct areas, as follows. The playing of the video on 18 November; the meeting with Mendes on 25 November and the meeting on 27 October. Mr Thomas set out his recollection of those meetings and what he had been told about the music video.
- 62 There was a grievance hearing with Mr Stanton who was now to deal with this matter on 23 January 2016. I have seen detailed notes of several meetings that Mr Stanton had with potential witnesses. A total of eight people were spoken to, including Mr Mendes, Mr Yeboah, and other managers. Mr Thomas' various concerns were discussed in some detail.
- 63 By letter of 4 February, Mr Stanton gave his outcome. Again, this is a detailed letter which sets out each of Mr Thomas' concerns and the response to them. In summary, the grievance was not upheld as explanations were said to be present for each concern.
- 64 Mr Thomas put in a detailed appeal against the grievance. He said the grounds were as follows:-
- a) The grievance procedure was unfairly biased.*
 - b) I was forced to an answer question in a way which was favourable to the parties being discussed*
 - c) I was unable to express how I felt,*
 - d) I was being fed false facts and made to accept those facts as the truth.*
 - e) I am being penalised throughout this process because of my*

affiliation to Mr Clifford Midega, who also filed a grievance against Mr Tony Mendes for bullying”.

- 65 He asked that the grievance investigation be conducted again to a reasonable standard.
- 66 A meeting was therefore arranged with the appeal manager, who was one of the Directors, Mr Forsdyke, for 8 April. Again, there is a detailed discussion and Mr Forsdyke carried out four further interviews with people, particularly in relation to the showing of the music video at the sales meeting on 18 November. Generally speaking, all those who were asked about the showing of that video said that it was shown in a positive light. Some did make reference to laughing, but most of them said that it was entirely positive. There was then a delay in the outcome which was not sent to Mr Thomas until 6 May. His appeal was not allowed. The letter gives detailed reasons for that outcome.
- 67 Unfortunately, Mr Thomas, who had been unwell for some time, was admitted to hospital on 6 May. He says that this was the final straw, which caused him later to resign. As I understand it, he was in hospital until 18 May. By letter of 6 June, which Mr Thomas said his mother wrote, this is said;

“Dear Sir,

I wish to tender my resignation as a car Sales Advisor at Car Giant with immediate effect. Please forward my P45 and P60 to the above address”

- 68 The employment contract states that a reason should be given when notice is given and that letter does not contain a reason. Mr Thomas told me that he felt that he had to resign because he had been bullied, harassed and treated unfairly. In the hearing for this case, Mr Thomas also gave evidence that he himself had been called ‘*Car Giant’s most wanted*’, although he had not mentioned that whilst he was still at work. I do not accept that that was said to him, I think he has confused matters with the considerable talk about that comment being made to Mr Midega. That was the end of his employment.

Law and submissions

- 69 Section 95(1) Employment Rights Act 1996 (ERA) reads as follows: _

“For the purposes of this Part an employee is dismissed by his employers if (and subject to subsection (2), only if),

a)

b)

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”.

- 70 This is what has become known as “constructive unfair dismissal”. The claimants and Mr Odhiabmo appeared to be well aware of the principle of needing to show a fundamental breach of the employment contract by the employer. In this case, they rely upon the implied term of mutual trust and confidence. They also say that there were “final straws” which forced them to resign.
- 71 The leading case on constructive unfair dismissal remains Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 which sets out the basic principles of the test under S95 (1) c) ERA and which makes it clear that I need to decide if there was a significant breach of employment contract, going to the root of the contract and, if there was, decide whether the claimants resigned because of that breach and did so without delay.
- 72 Mr Brockley also referred me to several cases on different aspects of constructive dismissal. I was referred to W E Cox Toner (International) Ltd v Crook [10981] IRLR 443 which reminds me that delay is not determinative but, if prolonged, may amount to affirmation. Another case, Fereday v South Staffordshire NHS Primary Care Trust UKEAT/0513/10 also about delay amounting to affirmation. With respect to bad language I was asked to look at Ogilvie v Neyrfor-Weir Ltd [2003] IRLR 549. Important guidance on what might constitute a final straw is contained in London Borough of Waltham Forest v Omilaju [2004] IRLR 35. If the final straw is not itself a breach of contract, it must be a series of acts that cumulatively amount to a breach. As was said there:

“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 the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence”.

- 73 I remind the parties and the representatives of Lord Steyn’s expression of the implied term of mutual trust and confidence as set out in Malik v BCCI [1997] IRLR 462;

“The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”.

- 74 I had very helpful submissions in writing from Mr Brockley. Mr Odhiabmo also referred to the evidence and submitted that the claimants should succeed. There is no dispute about the legal tests to be applied.

Conclusions

- 75 Applying those tests and, on the balance of probabilities with the burden of proof resting the claimants, I have found that Mr Midega

does succeed in his claim for constructive unfair dismissal, but Mr Thomas does not. I now explain why I have come to that decision.

Mr Midega

- 76 I have found that there was a breach of the implied term of mutual trust and confidence because of several matters leading to a final straw which was indeed a significant event, for all of which, he was entitled to resign.
- 77 I have taken many factors into account, mostly in relation to 2015. I do not consider the matters which happened in 2014 to be of much importance. I find that the decision to refer Mr Midega for disciplinary action in April 2015 which led to a final written warning was one that which justified concern as it was not consistent treatment. Mr Midega was given a final written warning with respect to his monitoring score when others were not referred for disciplinary action without a reasonable explanation by the respondent. This is not, alone, sufficient to amount to a breach of contract but contributed to the breach as I go on to explain.
- 78 I was particularly concerned about the meeting in April with Mr Mendes. To be called a bully by one's most senior manager might, in some very limited circumstances be acceptable, but I think those circumstances are very limited. Taken with the other language used by Mr Mendes, I can understand why Mr Midega made it clear in his grievance that he was very upset by the contents of that meeting. I also find that that grievance was not properly investigated; either Mr Mendes was not spoken to at all or, if he was, it was not clear what he said about what he did or did not say at the meeting in April with Mr Midega. There was a failure to focus on those very clearly stated concerns which were in the grievance. Ms Hamid decided to try to explain the respondent's position on a number of matters about performance management and so on, rather than considering what Mr Midega says very clearly in that grievance was his big concern, mainly Mr Mendes' behaviour in that meeting. Mr Stanton also failed to focus on that issue. I cannot to understand why questions were not put clearly to Mr Mendes on the allegations about what he said and did. Again, this is a contributory factor to a finding that there was a breach of the implied term.
- 79 I do not accept that there were restrictions of any consequence on what Mr Midega could sell with respect to the time in the call centre and training. I was more concerned about the application of the CRF lock, bearing in mind my finding that the rule was not as clear as the respondent have now sought to persuade me. I do accept it was a factor which contributed to the sense that the respondent was treating Mr Midega harshly.
- 80 I do not find that Mr Midega being put on an activity plan or anything at the meeting with Mr Mendes and Mr Nazareth indicate any real issues of concern.

81 Finally, I look at the last straw with respect to Mr Midega. Again, unfortunately there was a failure to properly appreciate Mr Midega's concern. The phrase spoken by a manager "*Don't speak to him – he's Car Giant's most wanted*" is a completely inappropriate comment and was made in the hearing of other people, including other Sales Advisors. Although Ms Hamid quite rightly suggested that it would be investigated, Mr Midega's resignation was accepted relatively quickly and he was allowed to go that day. I do not think that that is an insignificant last straw. Taken with the language used by Mr Mendes, the failure to properly investigate the grievance or properly explain the disciplinary sanction, this is sufficient for Mr Midega to show that there was a breach of the implied term of trust and confidence. The respondent did conduct itself in a manner likely to destroy or seriously damage the implied term of trust and confidence. That is clearly the reason Mr Midega resigned. He did so without delay.

Mr Thomas

82 Mr Thomas has not succeeded. His circumstances were very different. Whilst I have some sympathy for Mr Thomas and can, to some extent, appreciate how he felt at work, particularly as his friends and colleagues were also having difficulties, I cannot find that any actions of the respondent amounted to a breach of his employment contract. Whilst I accept that it was not wise to play the music video without informing Mr Thomas, and without him being present, I also accept that it was not in any way meant to be negative. It is simply unfortunate that Mr Thomas was told that people had laughed at it when it seems to me they almost certainly had not.

83 I also accept Mr Mendes' discussion with Mr Thomas about his friends and colleagues' work issues may have had a negative impact on him, but again I do not think that was the intention. I am satisfied that Mr Mendes left matters there when Mr Thomas made it clear that he did not want to discuss it. Whilst these matters may have had an adverse effect on Mr Thomas, they do not amount to a breach of contract. They are not matters which show that, without reasonable and proper cause, the respondent calculated or was likely to destroy the relationship between the respondent and Mr Thomas.

84 I do not find that there were unreasonable sanctions imposed upon him in relation to performance or that the refusal to allow a change in start time amounted to a breach of contract. I also do not accept that his grievance was not taken seriously. It was investigated thoroughly as was the appeal. I do not accept that there was anything which amounted to bullying, harassment or bribery. There is insufficient evidence of acts that could amount to a breach of the implied term.

85 In any event, the delay in this case is somewhat significant. Mr Thomas is not able to show something which could amount to the final straw. The fact that he was unfortunately hospitalised is not a matter which can be laid at the door of the respondent and it cannot amount to a

final straw in the circumstances of his case. Mr Thomas' claim must be dismissed.

Employment Judge Manley

Date:

Judgment sent to the parties on
12.01.18

.....
For the Tribunal office