



EMPLOYMENT TRIBUNALS

Claimant: Mr A Wilkinson

Respondent: Peninsula Business Services Limited

Heard at: Manchester

On: 6 & 7 August 2018

Before: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: In person

Respondent: Ms G Roberts, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of constructive unfair dismissal is not well-founded and is dismissed.
2. The complaint of breach of contract is not well-founded and is dismissed.
3. The complaint in respect of unpaid holiday pay is dismissed having been withdrawn.

REASONS

1. By a claim presented to the Tribunal on 22 November 2017 the claimant brought complaints for constructive unfair dismissal, breach of contract and unpaid annual leave contrary to the Working Time Regulations. The respondent defended the claims. The matters came before Employment Judge Warren on 16 February 2018 and she defined the issues and gave directions; her order is set out at pages 44-48 of the bundle. In particular, she identified the claims for constructive unfair dismissal and breach of contract.

2. So far as the claim for unpaid annual leave is concerned, I was informed that that was been settled between the parties and that claim was withdrawn.
3. Neither was it in dispute, that if the claimant succeeded in persuading me that he was dismissed then it must be held to be unfair. The issue on which the parties focussed was solely that of whether the claimant was dismissed.
4. The issues were set out thus by Employment Judge Warren:
 - 4.1. Did the claimant act promptly in resigning in response to a fundamental breach of contract?
 - 4.2. What was the reason for dismissal?
 - 4.3. Did he contribute to the dismissal by culpable conduct?
 - 4.4. Does the respondent prove it adopted a fair procedure and the claimant would have been fairly dismissed in any event?
5. The breach of contract claim was more difficult to elucidate. It appeared certainly from the claim form and the claimant's witness statement that the issue was whether the claimant was entitled to commission which he alleged earned during his notice period. At some point in these proceedings it appeared to be the case that the claimant was saying it was a different claim. I was satisfied that, as just described, that was the claim that he brought and intended to bring, and that there was no good reason for considering it was being advanced in some alternative way.
6. The claimant gave evidence on his own behalf and in accordance with his written witness statement. The respondent called three witnesses: Mrs Monica Sharples, Floor Manager; Mr Richard Prior, who conducted the claimant's grievance hearing and investigation; and Mr James Potts, who conducted the appeal albeit, as I understand it, that took place after the claimant had tendered his resignation on 26 September 2017. All those witnesses gave evidence in accordance with their written witness statements. The claimant submitted also a written witness statement from Mr Wayne Lenord who had been employed in an equivalent role from October 2016 to October 2017, concerning an issue which ultimately was not a matter that I had to consider in detail, namely whether staff were required to stand up to perform their work.

Findings of Fact

7. The respondent is a well-known employment law consultancy undertaking which has existed for many years and is based in Manchester. It has effectively two major limbs of business: offering advice on HR matters to clients and matters of that sort, and secondly employment law advice. It has a sales force by which it obtains its work. The work includes "incoming enquiries", people who ring up with an immediate employment law issue; people whom they find by cold calling and by searching the register of the claims lodged with the Tribunal and attempting to secure work in that way, and there are other forms of work as well, one of which is called "intermediaries". Intermediaries are those such as accountants and other consultancies who do not offer advocacy services, whereby the respondent

has contact with intermediaries who could then put them in touch with their own clients with a view to the respondent then pitching for business with those clients. The clients may sign up for either one or both limbs of the service offered by the respondent. If they do it is called a combined deal or service.

8. The way in which the respondent operates is that the country is split into regions. The relevant region for this claim is Scotland and the North East. There are partnerships, Business Development Managers or reps (“BDMs”) who are supported by Business Service Executives (“BSEs”), such as the claimant. It is the BSE’s task to find and book appointments for the BDMs. There were key performance indicators to measure that activity. The remuneration was made up of a combination of salary, which is relatively low, together with commission and, if the individual were particularly successful or the business were successful, bonus.
9. The contractual terms are set out in writing at pages 58 and 59. Under the heading “Remuneration” it provided for Mr Wilkinson on 15 November 2014 when he signed this:

“Your salary is currently £18,000 per annum payable monthly by credit transfer as detailed on your pay statement. There is a commission scheme, quarterly bonus and monthly bonus applicable to your employment, details of which are issued separately.”
10. Under a separate clause the contract provided that the notice of termination to be given by employee with one month’s service or more was one week. When eventually he resigned the claimant gave significantly longer than that.
11. Within the “Business Sales Team Policies, Rules & Procedures” (60-61) the targets and main accountabilities are set out. The expectation was that the BSE would: “book 3 business appointments per day”, “reach a minimum of 2 hours talk time per day i.e. actual time spent actively contacting and speaking to prospects”, “achieve 30 new contracts each quarter” and “achieve £325,000 sales revenue each quarter”.
12. The respondent keeps records in the form of what is called a “dashboard”, namely a graphic way of showing a number of features. The KPIs identified were the number of appointments made per day, expected to be 3; the number of appointments sat, which it was recognised would be lower at 2.5 a day; a cancellation rate of no higher than 15% and to produce 2.31 deals per week.
13. The claimant’s KPIs were shown in a series of dashboards, charts and descriptors (192-208A). The table set out below extracts the significant evidence. The entries in bold text illustrate where, according to the documents, the claimant had met the KPIs referred to above.

<i>Period beginning</i>	<i>Appointments per day</i>	<i>Cancellation rate %</i>	<i>Average appointments sat</i>	<i>Average deals per week</i>	<i>Total deal value £</i>
01/01/15	1.9	16.071	1.15	0.3	13,896
01/04/15	2.8	26.87	1.85	0.9	65,303
01/07/15	3.0	20.54	2.48	1.2	118,898
01/10/15	3.4	19.65	2.66	2.2	297,603
01/01/16	3.3	18.42	2.7	3.5	129,599
01/04/16	3.2	19.54	2.69	2.7	218,012
01/07/16	3.0	25.86	2.11	0.4	261,730
01/10/16	3.2	14.53	2.76	0.6	267,958
01/01/17	3.5	35.71	2.5	0.8	25,557
01/04/17	2.0	18.68	1.64	0.3	117,930
01/07/17	2.2	19.4	1.73	0.2	50,222
01/10/17	2.4	22.92	1.75	0.3	80,040

14. Clearly the claimant was achieving a high revenue rate in 2015 and 2016 albeit below the target figure. In one quarter, he achieved the opportunity to work on premier leads. Premier leads are those in which people need immediate employment advice. They are highly likely to lead to a contract, because in order to get the advice they are probably going to be required by Peninsula to sign up for the deal, and therefore they are easy to sell and likely to produce revenue. Because such clients need specialist advice and because they are highly likely to be successful, or more likely to be successful, they are only assigned to people performing well, which is why the claimant was only assigned those at one period.
15. In 2017 the KPIs and the revenue show a downturn. The figures for the fourth quarter only represent a partial picture because the claimant's resignation took effect on 31 October 2017.
16. The claimant's case, in his breach of contract claim, was that it was unlawful for the respondent to impose as it did in writing, to which the claimant signed at page 62, this provision:

"All commission/bonus payments will only be made if you are in our employ at the end of the month when the commission becomes payable. This is on your

contractual pay date which is the last working day of the month regardless if the company chooses to pay early.”

17. The essential point in such a complaint, which is not uncommonly made, was this: that an employee who gives notice of resignation and, as a result, is not in the employment when the commission becomes payable will not receive the commission even though he may have been responsible for earning the revenue on which it could be calculated.
18. The commission was achievable at a variable rate. For between 1 and 9 deals in a month commission accrued at 1%, at 10-14 deals a month at 1.5% and above that at 2%. Bonuses depended on revenue and attendance. BSEs are paid commission in the month following the deal being signed. The BDMs have to wait for the end of a nine month lead in period and their commission may be subject to claw back if, for example, the client goes into liquidation or decides to determine the contract.
19. Against that background the claimant's case throughout was that he enjoyed working for Peninsula and he wanted to remain there. However in about March 2016 Mrs Sharples received a complaint from three separate female managers to the effect that they considered that the claimant had stared at them inappropriately by staring at their breasts. Mrs Sharples recorded that as being around April or May 2016, ultimately nothing much turns on the date, but the claimant says that as a result of this complaint being raised with him and because of the way in which it was dealt he formed the view that he would resign, at that stage, from his employment. But he did not then do so.
20. The evidence of Mrs Sharples, which on this point was not seriously challengeable or challenged, was that the three women said they did not want formal action taken but they wanted the “ogling” to stop and Mrs Sharples was tasked with speaking to Mr Wilkinson informally.
21. Much of what then happened is common ground. There is a dispute of fact as to whether it took place at Mrs Sharples’ desk on the floor surrounded by other people but in low tones, almost whispered, to use the claimant's language, or whether it took place in a separate meeting room, the green room, which is a separate room in which staff can be taken to have meetings. There is no contemporaneous record by either side. It seemed to me much more likely that this is a conversation that Mrs Sharples, who clearly found it embarrassing to have to speak to a gentleman of the claimant’s age about such a matter, would not wish to take place at her desk.
22. The claimant’s case was that it not only happened at Mrs Sharples’ desk, but that it was in such whispered tones that it would because of the way it was conducted cause those around to be aware of what was going on.
23. Balancing the probability of the manner of the conversation contended for by Mrs Sharples against the improbability of it happening in the way the claimant said, I preferred the evidence of Mrs Sharples on that point.
24. As to the rest of the history, there is not much dispute, although the claimant objects to what then happened.

25. Mrs Sharples explained to him that it was being raised as an informal matter and that whatever happened it was not going to be taken any further. She then explained the allegation. The claimant was clearly embarrassed by the fact it had been raised with him. He denied that he had done any such thing. Either by way of informal advice or more directly, as the claimant said, Mrs Sharples advised him to look people in the eye when he was speaking to them. She then explained that it was not going any further and that was the end of the matter.
26. The claimant was later to complain about the way Mrs Sharples had spoken to him, but the matter ended there. The three women I do not believe were identified to the claimant at the time. The claimant and Mrs Sharples both went about their work.
27. The claimant was in a team managed by Elizabeth Malarky in turn reported to Mrs Sharples. They were the managers of the BSEs, whereas within the North East region, Mr McLaughlin, the claimant's colleague and assigned partner BDM, was responsible to Mr Smith who was in charge of the region overall.
28. At about this time Mr McLaughlin had a heart attack. He was off work for about three months. He came back on a phased return.
29. At about the time Mr McLaughlin went off work, the claimant, as he told me consequent upon being spoken to by Mrs Sharples, emailed and got in contact with another company, Avensure, with the intention of seeking to work for them at that stage. That was evidenced by Mr Wilkinson's evidence and by the fact that on 29 March 2016 he was emailing Yasmin-Eusuf Redmond of Avensure saying:
- "I will need to put things on hold for now. I do still have interest. I'm afraid Andy had a heart attack on Friday, so it's really not appropriate to vacate the partnership at present. He's hoping to be back in six weeks. If it's ok I'll get back in touch when ready. Kind regards."
30. So it was clearly in the claimant's mind prior to Mr McLaughlin's ill health to leave the respondent. However, he continued with them. After about three months Mr McLaughlin came back on a phased return working limited hours with limited travel, limited number of appointments and no targets. Mr McLaughlin progressed to the point where by January 2017 he was working 4½ days a week with time off for physiotherapy but still with those other adjustments: limited travel, limited number of appointments and no targets.
31. The respondent's case, which I accept on this point, is that such an event should not affect the targets that a BSE such as the claimant is required to achieve because if an assigned BDM is away because illness, holiday or maternity for example, the BSE can make appointments for other BDMs. They might need assistance because they are not being supported appropriately by their BSE.
32. A common theme of this factual history is that throughout the time that Mr McLaughlin was coming back and getting up to speed the claimant wanted to continue to work with him. He said they were friends, they had a good relationship and that was good.

33. As the figures show, although the claimant's performance for 2016 was good, at the end of the first quarter of 2017 it had dropped. True it was within that quarter the claimant had managed to book 3.5 appointments a day and 2.5 of them, on target, were being sat, nevertheless the percentage rate for cancellation of appointments had risen to 35.71% and the average deals of the week were down from the high figures they had been.
34. At about that time Ms Malarky spoke to the claimant and, according to the claimant, and it seems to be fairly common ground, told him that he must concentrate more on cold calling and place less reliance on intermediaries and premier work. Ms Malarky in effect instructed or required the claimant to change his method of work in order to improve his figures. The problem with intermediary work was that it was a less certain source. The claimant's other work stream that he used a lot, although he says he did it outside normal hours, was LinkedIn, of which the respondent was not particularly enamoured. There was a removal of incoming leads and premier leads from the claimant at that point in time. The claimant says that that was unfair and as a result his performance effectively became even worse.
35. In August 2017 Mrs Sharples spoke to the claimant again because she alleged that Paul Smith on his own behalf, and on behalf both of Mr McLaughlin and of Mr Murphy, another Business Development Manager in the North East region, had complained that the claimant was jeopardising their prospect of doing deals by overzealously contacting and pressurising their prospective clients. Mrs Sharples would speak to Mr Smith as a Regional Team Manager several times a week.
36. In evidence Mrs Sharples explained that a complaint of this nature was a not uncommon occurrence. Often when Mr Smith is talking to his team of BDMs and trying to get them to improve performance they will pass the buck, as it were, saying "Well, if the BSE didn't jeopardise my leads or did this or that or the other it would be better". At all events the claimant was subsequently to speak to, or make contact with both Mr Murphy and Mr McLaughlin who denied they had ever complained to Mr Smith in that way. Mrs Sharples explained that was sometimes the way it was because of such variances between what BDMs might say to Mr Smith compared to what they say to their BSEs.
37. At all events, Mrs Sharples' evidence was that she mentioned this to the claimant. The claimant said that he was told if it turned out to be right there would be serious consequences, but that is the high watermark of what he says that Mrs Sharples said to him. What Mrs Sharples told me, and which I accept was, that she looked at the records to see whether there was any evidence of the claimant overzealously calling particular clients, checking phone numbers, matters of that sort. Not finding anything she spoke to Mr Smith again and asked him for specific instances. He said he could not provide any. For that reason, Mrs Sharples came to the view that there was nothing in the allegation and there was no criticism in this regard that the claimant would be required to answer in any way.
38. On 23 August 2017, but it is not clear to me how this relates in time to the previous allegation, the claimant sent an email to a female employee to whom I refer only as, "S". It was an email which it appears was subsequently forwarded,

because there was a follow up email in November, by S to the claimant's manager, Ms Malarky, on 6 June 2018, presumably in preparation for this case. The claimant objected to this document being put before me but I explained in the course of the hearing that the way in which the evidence was sourced was really nothing to the point. What his email said was:

“Hello S

I got your email off linkedin. I shouldn't really do this but im leaving Peninsula in October I think at the end of the quarter. Please dont mention it to them they don't know yet. They do know I'm looking at my options....

... I just didn't want to pass an opportunity up if it was there.”

39. He went on in the email to explain why he was writing to her. Beyond the quotation I have set out the remainder of the detail of the email is irrelevant to any issue in the case.
40. The respondent contends that the natural reading of the second sentence shows that at that stage the claimant had made a definite decision to leave Peninsula. The claimant says it should be read as suggesting that he had not fully made up his mind.
41. There is no proper punctuation in the sentence as often happens in emails. In trying to draw a proper inference as to the proper reading of the email I considered that two things were significant. The claimant on his own admission had already been thinking about leaving the respondent at this stage for well over a year because of the evidence of the email to Aventure in March 2016. Secondly this email, taken as a whole, conveys the sense of being written by a man who has made up his mind to leave a particular employment. The expression, “I just didn't want to pass an opportunity up if it was there” taken together with the natural reading of the lines that I have quoted, suggest to me that the reading attributed to it by the respondent is more likely to be an accurate reading.
42. However, it is clear that the claimant did not at this stage resign. The relevance of this is to indicate what was in the claimant's mind at that stage, if I find he had made a determined decision to leave then.
43. On 16 September 2017 and in a slightly revised form on 18 September 2017, the claimant submitted a grievance, and that grievance (74-77) contains, as the claimant accepts, the five principal reasons about which he was complaining about the conduct of his employer. These were:
 - 43.1. The conversation with Monica Sharples because of the complaints from the female members of staff the previous year.
 - 43.2. The fact that at about the end of the first quarter of 2017 he was told he had to find his own leads and would become, as Mrs Sharples was to describe it and said (this is her language) a “hunter gatherer”.

- 43.3. The complaints about him sending emails chasing deals made by Mr Murphy and Mr McLaughlin and Mr Smith.
- 43.4. The fourth complaint had not been formulated before. The claimant said, "I went to Linda Brierley in early August and explained I had had three months low pay as a result my family was suffering I needed advice or help on making changes or I would have to reconsider my future as its not financial sustainable. Nothing was done I also discussed with Libby [i.e. Ms Malarky]". The claimant also said that at a team meeting Monica Sharples was pulling people's performance apart in front of each other "a clear statement from Monica I have people coming to us asking for change or they will need to look for another job well go then the doors there." The claimant's grievance was that Ms Sharples could only mean him and he saw that "as a notion" that he had no future with the respondent.
- 43.5. Finally, the claimant's last point was about commission in respect of a client who had signed for £72,000 through another BDM/BSE partnership although the original care home was on Mr McLaughlin's list of clients.
44. The facts surrounding this last allegation appeared to be as follows. Cleethorpes Care were a Nursing Home operator and they had entered into a business relationship with the respondent some time in the past. This was neither through the work of the claimant nor Mr McLaughlin. What had happened was that this client had been allocated to Mr McLaughlin's because of a change in postcode allocations. There was an incoming lead from the same operator indicating they were setting up some new homes and wanting a new contract with the respondent to cover all their operations, old and new.
45. When that lead came in that was not given to Mr McLaughlin but to Jason Thirwell, a BDM, and his BSE, Chris Sharkey. That was a deal that was said originally to be for £72,000. That would generate, as I understand it, commission eventually if it was for that value at 10% or so for the BDM and 1% for the BSE. The claimant said he had raised it with Linda Brierley. He said he was told by Mrs Sharples, "It stays where it is. "We (i.e. Mr McLaughlin and the claimant) , had done nothing with it. It was Peninsula's lead not mine and Andy's".
46. The claimant said, "So far back as I have been in Peninsula those have been the rules. We get our client's additional businesses. This would show inconsistency in how leads are administered. That's why I put it as a grievance".
47. Before me the claimant submitted an email from another former member of staff, Toqeer Zahid, in the form of an email to him of 5 August 2018 saying he had acted as a team leader for two years in that region, and that he would state that deals for new business for a combined client are always awarded to the BDM and BSE to have it on their client list.
48. This was addressed in evidence, partly by Mrs Sharples and partly by Mr Potts. I find that there is no formal policy as to how leads are dealt with. Even if a lead is assigned to a particular list and the purpose of that is, according to Mrs Sharples, so that in order to service their existing clients or the clients in their area the respondent's staff are expected, through the BSEs, to call existing clients, effectively on a monthly basis, to see whether there is anything wrong, whether

they can provide them with any further service, and to keep the business relationship alive and promote sales. That had not occurred with this client, Cleethorpes Care, at the time that this new lead came in. It came in with the same contact name, but it was an indication that it was going to be a different client, and in fact when it was eventually assigned and commission was paid it was under a different client title. But, whatever the title, however it came in, Mr Potts' evidence was clear: there was no right to a particular lead in any particular BDM or BSE. The leads were allocated by the employer and they had an unfettered discretion as to how to do it, and although Mr Wilkinson in this case talks about a change in the rules and unfair practices which he says are illegal, there was nothing to suggest in this case that it was an unfair practice. Mr Potts accepted that had it been done capriciously and out of some malice it was a matter the Tribunal could take into account as tending to show a breach of the fundamental implied term. Absent that he said it was a matter of discretion. He had confirmed that, as I will recite now, by having at the appeal stage discussed it with one of the senior sales staff, a director I think, Geoff Ford, who explained that there was no right to a particular lead. Whatever the practice is, the company certainly considered it had reserved the right to assign leads elsewhere.

49. Those were the five matters that the claimant raised in grievance and which he accepted in his evidence were the principal reasons, apart from the subsequent rejection of his grievance, that he relied upon in deciding to resign.
50. The grievance was originally assigned to Mr Potts. He could not hear it. It was then assigned to Mr Richard Prior, a Head of the Advisory Team who was an experienced grievance officer.
51. Mr Pryor had a meeting with the claimant on 21 September 2017 promptly. There was a note taker upon whom Mr Prior, and I think Mr Potts, relied for the purposes of the outcome and subsequently the appeal, but both these meetings were subsequently recorded and, so far as they are relevant, transcriptions were made (100A-100Ziii).
52. Mr Prior thoroughly discussed all the allegations with the claimant.
53. On 22 September 2017 Mr Prior discussed with Mrs Sharples the six allegations. He produced a typed version of his notes (103A-103C).
54. Mr Prior also spoke to Libby Malarky. She confirmed that Mr Wilkinson was sitting on a lot of intermediaries. She confirmed the use of the term "hunter gatherer" and income enquiries. She said Mr Wilkinson had said at the beginning of the year that he wanted to work with another BDM and raised about working with another team, but by the time he came back Mr Ford said no: the claimant had a target to hit and there was no reason for it to happen. She confirmed that Mr Wilkinson had said to her he had to look at other options. He was working part-time as well and she confirmed the round robin on incoming leads.
55. That led, on 26 September 2017, to Mr Prior writing a detailed letter to Mr Wilkinson (pages 105-110) in which he gave reasons for not upholding the claimant's grievances. A major attack by the claimant concerned item 3 in Mr Prior's letter, which was how Mrs Sharples dealt with an incident about the three BDMs complaining. Mr Prior understood that this was a complaint made up by

Mrs Sharples, according to the claimant, because he recorded that, and in his witness statement the claimant had also included that allegation. For that reason, in investigating that, he spoke to Mrs Sharples. He said that Mrs Sharples had confirmed that all three men had spoken to her, although in evidence she accepted that was wrong and it was Mr Smith on behalf of the three of them. It came across to them as pressurising prospects and the constant chasing had too much of a hard sell aspect. If somebody wanted to chase the deals that they were working on it would have to be cleared through them, and it was the BDMs who had the relationship with the prospects and it was their responsibility. Mrs Sharples confirmed she had looked into it but found inconclusive evidence, and the claimant was not subject to any formal procedure. For that reason, he said, he was unable to uphold the grievance.

56. Mr Wilkinson's subsidiary argument was that Mr Prior should have interviewed the three complainants, or some of them at least, because he had evidence from Mr Murphy and Mr McLaughlin there were no complaints made. Mr Prior said that he had not done that. He thought perhaps on reflection it was something he might have done, but it was not something he had done at the time. That grievance outcome was provided to the claimant.

57. On the same day the claimant wrote this brief letter which I quote in full:

"Dear Sir/Madam

It is with regret I must inform you of my resignation from Peninsula with effect from the 31st October 2017.

I realise my notice period is 7 days however I wanted to give you advance notice, in order you could organise for my absence.

A number of issues are a contributing factor and it is no way a reflection on the enjoyment of my role or the company.

I am not financially making enough money at present to sustain my family's lifestyle, in spite of being a high performer over my 3 years tenure.

I have not committed to another role as yet and will be looking for a higher paying front facing sales role.

I do not rule out a return to Peninsula in the future and I am saddened by my departure.

I would like to take the opportunity to thank the company for the last almost three years and wish everybody well in future."

58. The claimant was questioned at some length about that letter. It is not typical of the letters often written by people who are so aggrieved that they believe that the employer has acted in such a way as to seriously damage or destroy the working relationship between them.

59. The claimant was also questioned about a further letter dated 30 October 2017 to Mrs Sharples (167) in which he said:

“Hello,

I am leaving today and begin my new role on 1st November.

I want you to understand that your manner of dealing with people needs to change...”

60. The claimant continued in the letter by saying that many people had left because of Mrs Sharples, who he said had an unsupportive and unhelpful nature, was considered a bully. The letter suggests, as the claimant did before me, that ultimately his complaint was about Mrs Sharples. The claimant described himself as having put in 110% and “Avensure will be getting the advantage of this in future. I had a choice to make between them and a recruitment company until weekend [sic] when James Potts delivered his verdict.” That last is a reference to Mr Potts having responded to the claimant’s appeal against Mr Prior’s decision on the grievance
61. The claimant was questioned about the stage at which he had secured another role. Notwithstanding what he had written to Mrs Sharples on 30 October 2017 and not having set out any facts about this in his witness statement, the claimant’s evidence to me was that he had not at that stage got a start date with Avensure. He had got an agreement in principle but it was waiting upon somebody coming back to him. This was a letter written on Monday 30 October. He did not start on Wednesday 1 November, he in fact started on the following Monday, 6 November, and that was only confirmed on 31 October.
62. The way in which these documents are written by the claimant caused me this difficulty. I am unable to place reliance that the claimant accurately recollects in evidence precisely what he said and why he said it at the time. In a case of this nature that is of some significance. It is not an overriding consideration but I have reservations about the claimant's evidence generally.
63. Also, I have to say that the claimant's case appeared to me to change in relation to the three BDMs complaining. His case was that Mrs Sharples made that up. It seems to me that if Mrs Sharples made up that allegation, intending in some way to disadvantage the claimant, why she would then turn around before she was aware of what the claimant had discovered and say that she had looked into it and there was nothing to it.
64. It seems to me that would be wholly illogical behaviour by Mrs Sharples. Therefore, whilst I recognise that is the claimant's allegation, I suspect it was borne out of his feelings about Mrs Sharples rather than anything else. I also find that having heard Mrs Sharples’ account of how she dismissed the concerns expressed by Mr Smith, having asked him for specifics and him being unable to give any, it seems more likely that this issue arose in the way that Mrs Sharples described.
65. At all events, after the claimant had resigned but before the resignation took effect there was an appeal and that was dealt with by Mr Potts who also rejected the grievance. He set out the reasons for doing so in a detailed outcome letter dated 27 October 2017 (155-162). The claimant also criticised Mr Potts, but that is of no relevance to the question of whether the claimant was constructively

dismissed because I have to consider the position at the point at which the claimant did ultimately tender his resignation.

66. I next set out what I apprehend to be the relevant law.

Relevant law

67. In respect of a complaint of constructive unfair dismissal the tribunal has to find that there has been a dismissal within the definition of section 95(1)(c) of the Employment Rights Act 1996.

68. In order to do so it is necessary for the claimant to satisfy the Tribunal that: there has been a breach of contract by the employer; the breach was additionally serious to be repudiatory or in other words, a fundamental breach of the contract; the resignation was, at least in part, in response to that breach; and that before resignation the contract was not affirmed by action or inaction on the part of the claimant.

69. Claimants often rely upon a breach of the fundamental implied term of trust and confidence as derived from **Malik v BCCI** [1997] UKHL 23 and formulated in earlier cases. The implied term is that: "the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously undermine the confidence and trust that should exist between employer and employee."

70. In the case of **Frenkel Topping Ltd v King** [2015] UKEAT 0106/15 the demanding nature and stringency of the test to be applied in considering whether there has been a constructive dismissal was confirmed - see paragraphs 11 to 15 and the earlier authorities referred to there.

Submissions

71. The parties made submissions. I was reminded by Ms Roberts of the test.

72. In order for the Tribunal to decide whether in fact the resignation was a constructive dismissal.

73. The authorities talk of that being a high hurdle because the breach of the fundamental implied term upon which the claimant relies, identified in the case of **Malik v BCCI**, is that the respondent will not, without reasonable and proper cause, conduct itself in a way so as to seriously damage or destroy the relationship of trust and confidence that should exist between employer and employee.

74. The reason for a finding of dismissal, according to the claimant, is based upon the five matters about which he complained in the grievance, and then the rejection of the grievance itself.

Conclusions

75. Against that background I go back to those five issues set out as they were in the grievance and I ask myself the question whether these are things which could be

said to be, or contribute to, that serious undermining of the trust and confidence that is required.

76. For the reasons I have already given, I do not find that the first incident, the ogling incident, can be said to be anything other than the claimant's manager raising with him in a reasonable and proper way matters which had been reported to her. The claimant argued that he should have been given a formal right to put his reply in. But the reality is that when matters of this sort are raised, and the complainants themselves wish them to be done informally, the respondent is in a difficult position. It either does nothing, in which case it faces the possibility that the complainants will say they are not being protected from the harassment they allege, or it takes a step such as this. The way in which Mrs Sharples expressed it precisely, whether it was about "looking people in the eye" seems to me to matter little. I consider that the respondent acted reasonably. It was not a matter which, in my judgment, could be taken to contribute to a finding of a breach of the implied term.
77. The next issue concerns the claimant's performance. The claimant has repeatedly said in these proceedings and earlier that he was a high performer. The figures in my judgment simply do not support that that is the case throughout his employment. It is because he maintained that throughout his employment he was a high performer that I have looked at it. There are some 80, as I understand it, BDMs with an assigned Business Sales Executive. As I understand it, in the financial year beginning with the second quarter of 2015 he was ranked 23rd out of 80; in the following year, although it was a very good year in terms of the KPIs, he was 25th out of 80, and he dropped in the final year. It does not seem to me that the claimant can argue that he was a star performer in any way. I do not state that as a matter of criticism. The respondent employed him to do the work. They were entitled to have it done in a particular way. If his employment in any regard was not up to standard they were entitled to tell him how his work should be managed and performed. In my judgment that is the complete answer to this allegation. I reject any suggestion that the way in which the claimant was to perform the work, as told to him by Ms Malarky at the beginning of the second quarter of 2017, was anything other than a reasonable and proper instruction.
78. I have rejected the allegation that the BDMs' complaints were fabricated by Mrs Sharples. I accept then the account she gives me as to how she investigated those complaints and that she found there was nothing in them. I think, in fairness to the claimant, it would have been proper for her to tell Mr Wilkinson that she had found there was no case to answer on those complaints. Mrs Sharples agreed that she did not do so. So insofar as she failed in some respect in the proper management of the claimant, I find she did so to that limited extent.
79. I consider that the issue raised by the claimant about going to Linda Brierley in early August and asking her to do something about his pay was misconceived. The claimant knew the bargain he made with his employers: it was to have a small salary and then to perform in order to earn commission. That was the deal he had done. He had, both because of Mr McLaughlin's unfortunate absence from work and inability to do that, made a decision, rightly or wrongly, to stick with him when he could have perhaps improved his position by going to work for another BDM. He chose not to do that. It was creditable to want to continue to support his BDM. I suspect that decision may have contributed to his low pay but

I do not find that it was the overall reason for the low pay. I consider that saying that "I went and asked for them to review my position and they did nothing about it" cannot possibly amount to a breach of the implied term. Even if I were to accept that the claimant did make such representation to Mrs Brierley, and I am not sure I can go that far, the response was in effect reiterate the effect of the contract into which he had entered. I asked myself, how can such a thing be said to be something done without reasonable and proper cause? In my judgment it cannot.

80. The final allegation in the grievance concerned the £72,000. It was common ground that if that had been assigned to the claimant it would have been payable to him because it was a deal done in September and it would have been paid as commission in October and the claimant was in employment on the last day of that month. The ultimate deal turned out to be worth less than £72,000 because it was a restructured deal. The question here is whether it was commission that was properly payable to Mr Sharkey and Mr Thirwell or whether the respondent acted unlawfully in assigning that lead. Given the later investigation with Mr Ford at the appeal stage that Mr Potts carried out, it seems to me that the claimant, whilst he may feel aggrieved at the decision, cannot say that there was any illegitimate act by assigning the lead to others. I accept the respondent's case that the leads are theirs and they have the right to assign them as they will. I remember also that this is a lead which appeared on Mr McLaughlin's list by a change of postcode and not because he or the claimant either had done or did anything in fact in relation to that client.
81. Against that background, then, the rejection of the grievance in my judgment cannot be said to be of itself a breach of the implied term.
82. I remind myself that the implied term of a breach of trust and confidence may be breached if a respondent does not investigate a grievance properly and reasonably, or if a respondent does not give a reasonably prompt reply. Nobody could complain about the speed with which the grievance was investigated and dealt with, and indeed the claimant does not do so.
83. In this case the claimant's grievance is in summary that the outcome of the grievance should have been different. An employee is not entitled to a particular outcome, either as a matter of law or fact, he is entitled to a reasoned and reasonable response to his grievance within a reasonable time.
84. But overall, then, the judgment of the Tribunal must be that the claimant has not established that the respondent acted without reasonable and proper cause in a way that was calculated or likely to destroy or seriously damage the relationship of employer and employee.
85. Underlying all this, I have a lurking suspicion that this claimant was, from March 2016, as it were "waiting for his moment" to resign. I consider that the earlier letter to Avensure and the claimant's equivocal evidence about when he in fact did obtain alternative employment and when it started support that suspicion. However it is not necessary for me to make a specific finding. Even without those matters having been canvassed in evidence the claim would still not succeed. For the avoidance of doubt, I do not criticise the claimant in terms of delay between the date when he puts in his resignation and the date when the

resignation takes effect. It seems to me that an employee who seeks to do that in order to protect their financial interests, provided they make it clear that they are resigning, is not to be criticised for doing that unless the period becomes so long that they can be said to have waived the breach.

86. I turn finally to the claimant's claim of breach of contract. That concerned, as I say, an allegation that he was entitled to commission paid subsequently but raised as due in the last month of his employment. Having regard to the written term that is accepted, and his acceptance that that is what that claim related to, I dismiss the claim for breach of contract as well.

Employment Judge T Ryan

Date 5 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

7th November 2018

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.