Case No: 2404232/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr J J Richards

Respondent: Newbury Data Recording Limited

Heard at: Liverpool **On:** 12, 13 &14 November 2018

Before Employment Judge Wardle

Representation
Claimant: In person
Respondent: Mr K McNerney - Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's complaint of unfair constructive dismissal is not well founded.

REASONS

1. By his claim form the claimant has brought a complaint of unfair constructive dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA") contending that there had been a fundamental breakdown in the trust and confidence that he had previously held for his employer by their conduct in the 16 months prior to his resignation, which had served to demoralise, destabilise and demotivate him in his sales role. He further contends that the respondent failed to follow the ACAS Code of Practice On Disciplinary and Grievance Procedures (2015) and its own code of practice during redundancy situations and the suggested code of conduct on an investigation; that there has been a process of cover-ups and collusion since his complaint against the company in order to present an unified stance and to paint a picture of an employee who has failed to grasp the situation at hand and that the company had in his belief forcibly tried to alter the terms of his employment on two occasions in the last 12 months whilst at no point offering him any credible assistance to help him be a success in his role.

2. The respondent by its response denies that (a) there has been a fundamental breakdown in trust and confidence (b) its conduct in the 16 months prior to the claimant's resignation had served to demoralise, destabilise and demotivate him (c) it failed to follow the ACAS Code of Practice (which in any event it points out

does not apply to redundancy situations) (d) there has been a process of cover ups and collusion (e) it forcibly tried to alter the claimant's terms of employment.

3. It further contends that the time lapse between the dates of the alleged breaches between 1 December 2015 and 7 March 2017 as ascertained from the claimant's ET1 and his resignation amounts to excessive delay and that the claimant thereby affirmed the contract. It also contends that his resignation was not in response to any act that could constitute a repudiatory breach of contract and that if, which is denied, the tribunal were to find that there was such a breach that it was not sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement to treat the contract as terminated with immediate effect. It also contends that in the event of a finding of a repudiatory breach that the claimant by his conduct waived such breach and was not entitled to terminate the contract without notice and that in any event the claimant's resignation was not in response to any alleged breach and indicates that if it is found that the claimant was entitled to terminate his contract by reason of its conduct it will argue that the dismissal was fair having regard to section 98(4) of ERA for the reason of capability and that it acted reasonably in all the circumstances. Finally it contends that if, which is denied, it were found that that the dismissal was unfair that any compensation awarded to the claimant should be reduced to reflect the claimant's unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures and pursuant to Polkey v AE Dayton Services Ltd [1987] ICR 142 to reflect the fact that he would have been dismissed in any event.

4. The Tribunal heard evidence from the claimant and on behalf of the respondent from Mr Noel White, Financial Director, Mr William Johnston, Managing Director. Mr Mark Lymer, Technical Director and Mr Robert Bond, Sales Manager, which was given by written statements and was supplemented by responses to questions posed. It also had before it a bundles of documents, which it marked as "R1".

5. Having only concluded the taking of evidence late on the third and final day of hearing and not being in possession of the claimant's written submissions, which were emailed later in the afternoon the parties were informed that judgment would be reserved. The Tribunal has since had time to consider the evidence, the submissions and the applicable law in order to reach conclusions on the matters requiring determination by it.

6. Having heard and considered the evidence the Tribunal found the following material facts.

Facts

7. The claimant, whose employment began on 10 October 2005 and ended on 11 April 2017 by reason of his resignation, was employed by the respondent as a Field Sales Manager covering the Midlands, which role he had carried out since 1 October 2011. The role involved him visiting customers in order to identify potential requirements and opportunities and nurturing relationships with existing customers and sourcing new customers to sell the company's non-manufactured products and services to.

8. The respondent is a manufacturer of thermal ticket printing and encoding solutions including desktop, OEM and mobile printing and self-service ticket

vending machines (manufactured sales) and a distributor of other manufacturers' printers and scanners etc (non-manufactured sales). It operates from one site in Winsford, Cheshire and as at the time of submission of its response in October 2017 it had 26 employees, which was a reduction of 10 from April 2017 when the claimant's employment terminated, as a result of redundancies.

9. The events which gave rise to this claim began towards the end of 2015. The claimant had a monthly sales target of £11,000 and at a board meeting on 22 October 2015 it was noted that his sales were not consistent and that he did not have sales in the pipeline. In September of 2015 he had achieved sales of £10,045, which was the third consecutive month that he had failed to hit his target. It was noted though that he was working closely with Mr Bond, the Sales Manager, to improve his performance. However, in October he again missed his target with sales of £8236 and at a board meeting on 26 November 2015 it was agreed that his role would be re-defined and he would be taken off field sales and that Mr Timothy Stewart, Field Sales Support Engineer and Mr Bond would cover. In addition Mr Johnson, Managing Director, Mr White, Finance Director and Mr Bond would meet to consider manning in the sales team.

10. Subsequently on 1 December 2015 Mr White wrote to the claimant with reference to a discussion that they had had in which the claimant had been made aware that the company was looking at the structure of the sales department in the light of difficulties it was currently encountering and to inform him that his position was now under consideration for redundancy and to invite him to a consultation meeting on 3 December 2015. On this date a preliminary redundancy meeting was held with the claimant by Mr White and Mr Bond, when according to the brief note at page 53 of the bundle it was explained how the redundancy process would unfold and the claimant indicated that he was happy with his understanding of the process. On this occasion a second meeting was arranged for 9 December 2015. However, in the interim the claimant on his evidence at the suggestion of Mr Bond wrote an email to him on the evening of 3 December 2015 stating that whilst he understood the reasons for the field sales role being made redundant he believed with the customer base and relationships that he had that he still had something to offer the company from an internal role and asking that if such a role became available he would like to be considered for it.

11. Following this email Mr White and Mr Bond met again with the claimant on 9 December 2015 as planned when discussion took place around an internal sales role for him and the claimant accepted an offer of alternative employment as an Internal Salesperson working for Mr Bond, as a result of which he was told that the redundancy process was now cancelled and that he would start in his new role as of 1 January 2016. In the letter sent to him by Mr White dated 9 December 2015 in confirmation of these discussions he was advised that his basic annual salary for the new role would be £23,000 (as against £28,774.08 in his Field Sales role) and that in respect of commission the structure and targets were to be agreed with Mr Bond. All other terms and conditions were stated to remain the same aside from his company vehicle, the use of which would end on 28 February 2016.

12. This alternative job offer did not fit with the statutory redundancy payments scheme which encourages the offering of alternative or renewed employment in that the respondent had not given notice of dismissal because of redundancy to the claimant but having worked in the new role seemingly from a point in

December 2015, according to the board minutes of 23 December 2015 in which it is recorded that he was settling in well in his new job, the claimant wrote to Mr White and Mr Bond on 27 January 2016 to advise them that he did not wish to continue with the alternative job trial and that he wanted to revert back to the redundancy process with immediate effect. Separately and earlier that day he asked to be provided with a copy of the company's redundancy policy procedure, the minutes of any meetings, company policy for the notice period and payment terms during the redundancy notice period and how the redundancy payment would be calculated. He also asked for the terms and conditions of his current trial period. In response Mr White emailed the claimant the same day inviting him to a meeting on 29 January 2016, with representation if he so wished, when he would explain the way forward and the redundancy payments etc. The meeting went ahead as planned and subsequent to it Mr White wrote to the claimant to say that having had a trial period employed as an Internal Sales Executive, which he had decided wasn't what he wanted to do the redundancy position was now activated and it had been agreed that his job would be made redundant and he would leave the company on 22 April 2016, which was a 12 week notice period, 2 weeks more than his statutory entitlement. The letter was, however, silent in respect of the role that the claimant would fulfil over this period.

13. At a board meeting on 10 February 2016 Mr Bond reported that he had re-organised his sales team and that (inter alia) Mr Rhys Green, Internal Sales Executive, was taking over as Midlands Accounts Manager from the claimant who was leaving. However, on the claimant's evidence there followed meetings between him and Mr Bond and him and Mr Johnson in mid February, in which they both indicated that they wanted him to stay with the company. On Mr White's evidence this was because the board decided to rethink the situation and being very conscious that he had been with the company by that point over 10 years and was very experienced they decided that they did not want to lose him and wanted to do what they could to retain his skills and experience. His gross profit in January 2016 from his internal sales role had also been good, achieving sales of £16,637. Whilst on the claimant's evidence he made known to Mr Johnson his anger about the situation and despite his believing that throughout the process people had not been honest with him he agreed to stay on with the company in his Field Sales role. On Mr White's further evidence this saw the company reimbursing the claimant with the salary that he had lost out on for the month of January 2016 as his basic salary had been lower. However, it is noted that his instruction in this regard at page 173 dated 7 February 2016 which states that the claimant is now staying as field sales does not fit with this timeline. Confirmation was provided to the board on 16 March 2016 that the claimant was staying on as field sales.

14. On the claimant's case the period between mid February and October 2016 was relatively quiet with the odd meeting and email with Mr Bond for mid-month figures updates, day to day business and the occasional gee up regarding figures. However, it was Mr Bond's evidence that from April 2016 onwards the claimant's figures reduced significantly, which was not strictly the case as the claimant achieved sales of £12,701 and £10,900 in April and May respectively but thereafter for the months of June, July, August and September 2016 his figures being respectively £8787, £8044, £8910 and £4891 did drop, which he says led him to speak to the claimant on many occasions to ask what they could do to help him. He says that it seemed to him that the claimant was not putting in sufficient effort and that he told him several times that his number of customer visits had to increase. He also says that as 2016 went on the sales forecasts that

the claimant was required to provide twice a month were being provided later and later and that on a number of occasions he had to chase them. In this connection he referred to an email that he sent to him on 8 October 2016 at page 181 asking him to resend his forecast with an extra three columns and to provide a quarterly forecast as well as monthly ones because his recent sales forecasts had been very inaccurate and so he wanted more information about the information he was putting into his forecast.

15. On 18 October 2016 the claimant sent to Mr Bond his mid-month sales forecast with apologies for not getting it to him the previous day giving a Reseller forecast of £2400 and an Enduser forecast of £7500. Mr Bond emailed him back that evening at page 183, which he blind copied to Mr Mike Walker, Internal Sales Executive, who was another member of the sales team, which plainly ought not to have been done given the personal nature of the communication saying that he had gone from £13,700 to £9,900 in only two weeks and that his figures never go up only down before adding that he did not believe that he had a clue, which is why he had asked him for detailed monthly and quarterly forecasts and that just a figure was not acceptable anymore and nor were excuses. He finished by saying that they had a very important meeting the following day and that they would discuss at length all of this and more. In terms of the blind copying of the email it was Mr Bond's evidence that he had done it in error.

16. The claimant's account of this meeting was that he was questioned by Mr Bond about his sales figures, which he acknowledged he was entitled to and also the number of times he was visiting customer sites and told that he was not putting in enough work outside of hours. He also says that he was asked if he knew what was going on with Richard Hamer, Internal Sales Executive, to which he responded affirmatively having been told by him some time before that he was being made redundant before being told by Mr Bond that it had been his decision to make him redundant and that he had the full backing of the board in running his department as he saw fit and that he was sick of the same names i.e. the claimant and Mr Hamer coming up in the board meetings and that he was making him redundant unless he hit a monthly average of £10,000 gross profit by the end of November, which the claimant says would have required him to bring in a gross profit figure of £17,000 in the month of November.

17. Mr Bond's account differed to the extent that he says that the claimant informed him that he wanted to be made redundant and that he told him that he was due to attend the board meeting the following day and that he would propose it. He also denies that he told the claimant that he would be made redundant unless he achieved a gross figure of £17,000 in November but claims rather that he said to him that if he did not reach an average of £10,000 by the end of November (which equated to his achieving £17,000 gross profit in the month) then his average of just over £8,000 per month would mean that he would propose a move to Internal Sales to the board. This version of events was supported to some degree by the minutes of the board meeting held on 20 November 2016, in which it was recorded that the claimant was called into an emergency meeting the previous day and that Mr Bond had suggested moving him to internal sales if his figures were not up to an average of £10,000 by the end of November.

18. In regard to the board meeting on 20 October 2016 it was Mr Bond's evidence that he told the directors what the claimant had asked and that after discussion about his poor sales figures he was told that they would support him

with whatever he thought best. On the claimant's case he says that he spoke with Mr Bond that evening to ask him whether he had spoken to the board about their previous day's discussions and what had been said and that he was told that things were as he had stated in their conversation and that any decision he made had the board's backing. He also says that they spoke again on 24 October 2016 when he sought to clarify that he had the backing of the board regarding redundancy, which he confirmed and that he told him that he would not be taking the internal role and asked for the redundancy process to be started, in response to which Mr Bond said that he would get back to him shortly with the next steps.

19. On 25 October 2016 Mr Bond left a voice mail for the claimant, a transcript of which is at page 184 in which he said " You're (sic) customer order spread sheet, I need you to add a column in there for me.....Obviously we don't know when your date is to leave, or any of those things just yet so I am sure that have got a bit of time but I will need from you a column... that says whether they are in the North, Midlands or the South... and then I'm going to need to work out what I am gonna (sic) do with what and where..... Oh, by the way....Bill (Mr Johnson) did mention about you being able to keep the car with that internal position but we never really got much further." Mr Bond's explanation for this voice mail and the request for him to update his customer order spread sheet was that at this point it was his understanding that the claimant might be leaving the company.

20. Following this voice mail it was Mr Bond's evidence that he was told by Mr Johnson that the board had considered the request by the claimant to be made redundant and that their decision was that they could not agree to it as there was still a definite need for the field sales role in the Midlands. This news was communicated to the claimant by Mr Bond on 27 October 2016, in response to which on the claimant's evidence he voiced his displeasure in strong terms stating, among other things that this was another attempt to get him to take an internal role except this time they had created a situation where he had put his cards on the table and that they had gauged his decision and would then make a decision on what to do with him.

21. On the claimant's further evidence Mr Bond also told him that as he now saw the situation he was faced with 4 options (1) walk away from the company (2) take the internal role (3) be disciplined from the business (4) let him negotiate some sort of deal and suggested that he stay in the business until Christmas and that he would then negotiate with the board a payment that was perhaps part of what he could expect from redundancy. He also says that a meeting was arranged for the next day between him and Mr Bond and Mr White.

22. Mr Bond, for his part, denies that their conversation took this track but accepts that he did say to the claimant that if he was determined not to be with the business then he would go back to the board and propose a deal but that it would not be his decision and that he was pretty sure that it would not be anything like the value of a redundancy package.

23. The claimant attended the meeting arranged for 28 October 2016 but Mr Bond was not present. The meeting was abandoned as the claimant only wished to discuss the 'withdrawn redundancy' which he felt required Mr Bond's presence and Mr White's focus was on the claimant's figures. It was re-arranged by Mr White for 7 November 2016 and he emailed Mr Bond with the new date that day explaining that he had abandoned the meeting with the claimant as he was disagreeing with what he (Mr White) had been told by him (Mr Bond). Later that

afternoon Mr Bond, on the claimants evidence, rang him to say that he was surprised that he was still talking to Mr White about redundancy given that he had previously told him that the board had taken the offer off the table and that shortly afterwards he received an email, also sent to Mr White, regarding his sales figures and procedure. The document in question is at page 185 and informed him that his sales for the year to date were running at less than an average of £8,900 per month equating to 80.9% of his target of £11,000 and asked him to accept the email as a reminder to previous emails that commission is only paid at 80% of target and that sales achieved of less than 80% result in disciplinary action. It ended by saying that if sales fell below this threshold in October then both of these existing conditions applied.

24. On 7 November 2016 the claimant attended the re-arranged meeting but again Mr Bond did not turn up. He claims that he was told by Mr White as the reason for his non-attendance that he was busy, whereas Mr Bond in his oral evidence claimed that he was in hospital with a broken ankle, of which the claimant was aware. This meeting too was abandoned as the claimant and Mr White continued to have different agendas.

25. On 9 November 2016 the claimant says that he was called into Mr Johnson's office for an informal chat and was told by him that he had been made aware of the current situation and that he wanted him to stay in the company before going on to ask what could be done to re-motivate him. He also says that he did not offer much of a response and that he was told to go away, have a think and get back to him if he had any answers. He also claims that Mr Johnson said to him that it did not matter whether Mr Burns had said he was being made redundant or not, it could not happen as long as there was going to be a Midlands sales area as he would be leaving himself open to a tribunal claim, at which time he claims the penny dropped as to why there had been an about face on the redundancy in December 2015 as it was never a redundancy situation.

26. On the claimant's case after these meetings he began to get increasingly stressed and anxious about his time in work and on 21 November 2016 he decided that he needed a few days away and emailed Mr Paul Budgen, Internal Sales Supervisor, rather than as required by his contract his manager, Mr Bond, to let his colleagues know of his absence. This saw Mr Budgen emailing Mr Bond that morning to inform him that the claimant had had two previous periods off sick that year (14 March for 3 days and 6 September for 3 days) and Mr Bond then emailing the claimant to advise him that as this was his third period of absence since March he would not be paid for it. In this regard the claimant says that the respondent had always operated a '3 strikes and you're out' rule with sickness meaning that employees were allowed three periods of absence over a year (paid up to 10 days) and that it was only on the occurrence of a fourth period that they would not be paid. Such an arrangement was not provided for in the claimant's contract, which referred only to the company possibly paying up to a maximum of 10 days sickness in one year at its discretion and additionally the claimant did not at the time choose to challenge Mr Bond's application of the scheme.

27. The claimant having self-certificated for the first two days of his absence was then signed off up to and including 7 December 2016 because of anxiety. He returned to work on 8 December 2016 and that afternoon was called by Mr White into his office, when he says that he was criticised for his figures being told that they were not good enough and that if he did not take the option of the internal

role he would happily go down the disciplinary route. By way of contrast the claimant's ET1 states that this reference by Mr White to the disciplinary route took place at their earlier meeting on 7 November 2016 and Mr White in his written evidence accepts that he used words something similar to this on this occasion but that they have been taken out of context stating in cross examination that he said that he would gladly go down the disciplinary route if it got the claimant back on track. In point of fact, however, in regard to the time of this reference it would appear from an email that Mr White sent to Mr Bond on 8 December 2016 at page 189 that it is more likely that it took place on this date as he informs him that in the light of the claimant's reaction to his attempts to discuss his lack of sales that he was going for disciplinary but would wait for Mr Bond's comments first.

28. A further meeting was arranged for 12 December 2016 between the claimant, Mr Bond and Mr White, the purpose of which according to the claimant was to discuss the conversations that he had had with Mr Bond and redundancy. He claims that immediately prior to the meeting Mr Bond called him into his office and told him that he was sorry about all this - it was the board's fault - they agreed to the redundancy and then took it back and that they had now told him to lie about it in the meeting. He also says that at the meeting he explained to Mr White again that Mr Bond had told him that he was going to make him redundant and that he had confirmed that the board had agreed his redundancy at its meeting in October 2016 before being told a few days later that it had now been taken off the table. Mr Bond's position, as recorded in the notes of the meeting taken by Mr White/Mr Bond and Mr Budgen, who attended as the claimant's witness, was that he told the claimant that he would propose redundancy to the board. The notes of Mr Budgen further indicate that Mr White was minded to have another person investigate the respective versions of events and that following the claimant playing a recording of the voice mail left by Mr Bond for him on 25 October 2016, as referred to above at paragraph 19, he stated that he would ask Mr Mark Lymer, Technical Director, to investigate, which he did by an email to him dated 13 December 2016. By this he asked him to carry out an investigation of the events surrounding the misunderstanding about the claimant's proposed redundancy, identifying the people involved as the claimant, Mr Bond, Mr Johnson and himself.

29. The claimant was absent the following day and Mr Lymer began his investigation of the issue referred to him, which he said in evidence he treated as a grievance, by interviewing Mr Bond first. Later that day he emailed him to say that because of the hurried nature of their earlier meeting and his quickly scrawled notes he had done his best to turn it all back into respectable English presented as a question and answer session leaving nothing out and that if he asked him to sign it as a fair summary would he? Mr Bond, upon consideration of the notes at pages 56-57 asked for an amendment to the fourth paragraph of the answer he gave to the first question asked of him, which was 'the claimant believes he is being considered for redundancy - what might you have said, or written, to lead him to conclude that?'. Mr Lymer had recorded his response as being 'I suggested that if field sales was the problem then in order to bring him back into the office maybe his field sales position could be made redundant'. Mr Bond amended it to read 'I suggested that if field sales was the problem, as there was clearly not enough activity (emails outside of hours as an example) to justify it then I would propose to the board to make his field position redundant and give him first refusal on an internal position should it be approved'. Mr Lymer subsequently confirmed that the notes had been amended in line with Mr Bond's

precise wording as at pages 58-59 but expressed some concerns about the legality of what he had said in an email sent on 15 December 2016 at page 196.

30. On this date the board had its regular monthly meeting, the minutes of which record at page 115-116 that the problem of the claimant's poor performance and attitude were discussed and that it was agreed that Mr White should take action using a compromise agreement to terminate his employment with the company. Later that day this Mr Lymer interviewed the claimant. The notes of this interview are at pages 60-61, which were also subjected to amendment this time by the claimant as evidenced by the exchange of emails between Mr Lymer and him on 15/16 December 2016 at page 198. This interview introduced as a piece of evidence the voice mail that Mr Bond had left with the claimant on 25 October 2016, a transcript of which was provided to Mr Lymer, who by his evidence did not see fit to go back to Mr Bond to ask him why he was referring to a date to leave stating he saw it as a bad choice of words before acknowledging that the obvious step would have been to have asked him what he meant by them.

31. On 20 December 2016 the claimant was written to Mr White requesting his attendance at a poor performance hearing on 9 January 2017 to consider the allegation that his performance in his role of Field Sales Manager had fallen below the required standard, the reasons for this and to decide what, if any, action should be taken. The basis for the allegation was that he had not met his monthly sales target of £11,000 since April 2016 and that his sales for November 2016 were as low as £1,511. It was also stated that there was concern as to what steps he was taking to cement relationships with existing customers and to obtain new business.

32. On this same date Mr Lymer, having been emailed by the claimant seeking to confirm if he had received his email forwarding the transcript of the voice mail, wrote to Mr White at page 199 attaching the claimant's email and setting out what he would say if he had announce official findings in relation to the claimant's complaint. These were that (a) the current problem had arisen as a result of a misunderstanding between management, Mr Bond and Mr Richards based on ideas voiced 12 months ago when serious consideration was being given to closing down the field sales operation which would have resulted in at least one redundancy (b) assumptions had been made that the same rules could be applied now having forgotten that field sales were still required (c) consequently we now find ourselves in the position that the claimant believes that he was to be made redundant based purely on discussions with Mr Bond, whilst since having been advised that redundancy was not an option.

33. On 4 January 2017 Mr Lymer wrote further to Mr White attaching a summary of his findings in relation to the claimant's complaint asking him if it adequately covered the issue and then on 5 January 2017 forwarded it to the claimant. The document in question is at page 62. His conclusion was that whilst it was evident that the possibility of redundancy was discussed between the claimant and Mr Bond on a number of occasions, there was no evidence that any redundancy process was formerly (sic) opened and that there was therefore no complaint to answer that an offer of redundancy was withdrawn.

34. On 9 January 2017 the claimant accompanied by Mr Budgen attended his poor performance review meeting held by Mr White in the company of Mr Lymer as note-taker. The respondent has no capability procedure and this review was

conducted in line with its disciplinary procedure at pages 46-47. The notes of it as taken by Mr Lymer are at pages 63-66. Mr Budgen also took notes and these were appended to the claimant's witness statement and referred to as appendix 2. An outcome was provided by Mr White to the claimant in a letter dated 11 January 2017 at pages 213-214. He concluded that the claimant had been under-performing, notwithstanding his representations that he had been undermined and demotivated by activities not relating to selling pointing to his failure to produce a targeted level of gross profit each month and referencing particularly the last three months October-December 2016 where he had only achieved 37% of his target gross profit and issued him with a first written warning due to his poor performance. The letter also set out three key targets for him in relation to (a) gross profit (b) visits to customer and (c) email activity. In respect of gross profit he was set a target of £8000 for January, £9000 for February and £11,000 for each month thereafter. In respect of visits he was required as a minimum to visit 5 customers per week for the next three months and to enter the information from these visits on to a database within two days of the visit. In respect of emails he was required to send a minimum of 35 per day to customers/potential customers. In relation to the monitoring of his performance he was informed that Mr Bond would hold weekly meetings with him and that a first review would be held on 3 February 2017 with another planned for the beginning of March 2017 once gross profit figures for February were available.

35. The claimant left work on the afternoon of 9 January 2017 suffering on his evidence with anxiety and having initially self-certified himself as unfit on this and the following day he was signed off on 11 January 2017 with work-related stress causing anxiety until 18 January 2017, which was then extended until 27 January 2017. During this absence on 18 January 2017 he emailed Mr Johnson to advise that he intended to appeal the first written warning that he had been issued with and that he also wished to raise a formal grievance, grounds and reasons for which would follow.

36. The claimant returned to work on 30 January 2017 and Mr Bond sent him an email to remind him that they had their first weekly meeting that morning, which he said would only take a few minutes. He also sent him some further emails at pages 217-218 that he had written while the claimant was off sick but had not been sent. Mr Budgen was asked to take notes, which are at page 69. However, Mr Bond amended these and his version is at page 70, in respect of which he asked Mr Budgen to confirm his agreement or otherwise, whether he did or not was not clear on the documents. One alteration related to the deleting of Mr Bond's comment that "this is a bit like after the horse has bolted." On receiving Mr Bond's version on 1 February 2017 this deletion was noted by the claimant as also was, on his evidence, an addition that they had discussed training, which he says did not happen. He says that he viewed this as being indicative of Mr Bond's dealings with him and of his attempts to alter the record by changing once again what had been said to him, which panicked him resulting in him not going into work the following day. For his part Mr Bond accepted in his evidence that he did use the phrase "this is a bit like after the horse has bolted" explaining firstly that they were now at the end of January and they had not had any performance review meetings, which were supposed to be every Monday that month and secondly that they had no performance to review as the claimant had not been in work.

37. The claimant subsequently self-certified for three days before being signed off on 7 February 2017 for two weeks with work related stress causing anxiety.

During this absence he was emailed by Mr White on 16 February 2017 with a letter dated 15 February 2017 to say that in view of the length and regularity of his absences in recent months they would like him to attend a medical examination with their occupational health advisers on 21 February 2017.

38. Also on or about 15 February 2017 the claimant wrote two letters to Mr Johnson at pages 225-226 registering a grievance by which he raised some 26 matters outlining how he considered that he had been lied to, intimidated, singled out, treated without fairness and consistency and subjected to cover ups running from his immediate superior to board directors and at page 227 appealing against his first written warning, which was based on 6 grounds.

39. The referral to occupational health asked for a medical report to help the respondent to make decisions about the work flow in the company and the claimant's department and to advise about his likely length of absence from work and whether he could return to his current role and, if so, whether any reasonable adjustments and/or a phased return would be required. It also asked for advice on any potential ways in which they could help to alleviate the stress and anxiety that the claimant feels under and ways to facilitate his return to work and in a later request if he was fit enough to attend an appeal and/or grievance hearing.

40. The claimant duly attended a consultation on 21 February 2017 and the occupational health physician provided a report dated 22 February 2017 at pages 74-80 addressing the questions raised. In terms of his fitness to work he advised that the claimant's re-engagement with work was likely to be determined more by how successfully the company could address and resolve the concerns he held about how he was being treated and what he would face on his return than any independently acting medical factor. He also advised that he believed that the claimant was fit to take part in the hearings suggested.

41. On 21 February 2017 Mr Johnson wrote to the claimant at pages 230-231 to advise him that his appeal hearing would be held on 3 March 2017. In regard to his grievance Mr Johnson asked if he could provide some further information and clarification about some of the points he had raised, which he indicated would be heard at a later date. The claimant remained absent from work and obtained a further fit note on 27 February 2017 signing him off until 10 March 2017 because of stress.

42. On 1 March 2017 Mr Johnson wrote further to the claimant at pages 235-237 to say that in view of the medical report and some of the comments and recommendations within it the company proposed to hold the grievance hearing in place of the appeal hearing on 3 March 2017 in an attempt to resolve the difficulties with his employment that the claimant had raised with the occupational health physician.

43. The grievance hearing went ahead as arranged conducted by Mr Johnson with Mr Lymer taking notes and the claimant accompanied by Mr Budgen. The respondent's notes are at pages 81-84 and the claimant's notes taken by Mr Budgen are at pages 85-89. An outcome letter was provided by Mr Johnson dated 14 March 2017 at pages 239-241 in which he informed him that he did not believe that any of the grievances he had raised should be upheld. He had though in the hearing offered the claimant the opportunity to try and resolve their problems at a one to one level and stated in the letter that his door was still fully open to discuss anything with him.

44. On 20 March 2017 the claimant exercised his right of appeal against Mr Johnson's decision by writing to Mr John Steadman, Chairman. The documents show at page 244 that Mr White emailed Mr Steadman, who was away on holiday at the time, forwarding the claimant's letter of appeal and asking him to give him a ring. The following day the claimant wrote further to Mr Steadman with reference to his earlier letter stating that he had not received a response or a suggested date and venue for the appeal. He also wrote on 30 March 2017 to Mr Johnson advising that he had written to Mr Steadman stating his intention to appeal but had not yet received any response and referring to Mr Johnson's offer of a meeting to bring this issue to resolution, which he indicated that he would like to take up and asked for some dates that would be suitable for him. In regard to this request Mr White emailed Mr Johnson, who was out of the country, on 5 April 2017 asking if he wished to reply or if he would like him to reply on his behalf. Mr Johnson seems to have indicated the latter as on 6 April 2017 Mr White emailed the claimant on 6 April 2017 stating that he had spoken with Mr Johnson last night and that he had given the dates of 19 and 20 April 2017 for the requested meeting.

45. In regard to the claimant's correspondence concerning his appeal Mr White forwarded his second letter dated 30 March 2017 to Mr Steadman on 5 April 2017, which saw him emailing Mr White on 6 April 2017 saying could he ask the claimant for his grounds of appeal and that it sounded like he (the claimant) had had a good hearing and investigation with Mr Johnson and that he did not think that he needed to go through the whole 29 points with him. On 7 April 2017 Mr White emailed the claimant to say that Mr Steadman had asked for a statement from him regarding the grounds for his appeal and that once supplied he would make arrangements to interview him. He finished by asking if the grounds could be sent as a matter of urgency so that the appeal could be moved forward.

46. On 11 April 2017 the claimant wrote to Mr White at pages 254-257 by which he tendered his resignation with immediate effect citing a number of issues in the form of delays and timing in relation to his grievance and his appeal; the manner in which his grievance was responded to in that no explanation was provided in respect of why each of his complaints was not upheld; the provision by the company of an inaccurate and misleading brief to the occupational health physician and its failure to act swiftly or at all in response to his recommendation and the creating of a situation by the company's actions where it was impossible for him to trust or accept any credibility in his immediate and senior management.

47. An acknowledgment of the claimant's resignation was given on 19 April 2017 by the respondent's solicitors before they wrote further with a substantive response on 26 April 2017 at pages 260-263.

48. The claimant subsequently submitted his ET1 on 31 August 2017 claiming that he had been unfairly dismissed, which was responded to by the respondent within the prescribed period.

Law

49. The relevant law for the purpose of this claim is to be found in the Employment Rights Act 1996 (ERA). In relation to constructive dismissal section 95(1)(c) ERA states that an employee is dismissed by his employer ‘if the

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

50. The conduct of an employer giving rise to a constructive dismissal must involve a repudiatory breach of contract i.e. a serious breach going to the root of the contract which shows an intention no longer to be bound by one or more essential terms of that contract. A breach of contract capable of amounting to a repudiatory one would be a breach of the term of mutual trust and confidence which is implied into all contracts of employment stating that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. It has been judicially stated that 'to constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.'

51. In order to claim constructive unfair dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning so that he did not then affirm the contract and lose the right to claim constructive dismissal.

Conclusions

52. Applying the law to the facts as found the Tribunal reached the following conclusions. In line with the essential components of an unfair constructive dismissal claim the Tribunal considered first of all whether the respondent had fundamentally breached the claimant's contract of employment. The breach relied upon here was that of the term implied into every employment contract of mutual trust and confidence, arising from the respondent's conduct in the 16 months prior to the claimant's resignation on 11 April 2017 dating back to the choice given to him in December 2015 of accepting an internal sales role at a lesser salary as an alternative to redundancy.

53. The claimant's first complaint in his ET1 is that the respondent failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "ACAS Code") and its own procedures during redundancy situations. In this regard it was failed to be realised by the claimant that the ACAS Code does not apply to redundancy situations. In terms of the allegation that the respondent failed to follow its own procedures it did appear that the respondent had a practice in redundancy situations of (i) placing an announcement on the notice board to inform staff of whatever difficulties the company was facing and what measures were being considered in order to control the situation (ii) writing to all individuals whose jobs may be at risk (iii) beginning a consultation process and (iv) at the end of the consultation process writing to all individuals involved advising them of the conclusion i.e. whether they are to be made redundant or not and, if so, putting them on notice. In so far as these steps are concerned it was clear on the evidence that step one was not undertaken but that the claimant was advised in writing that he was at risk of redundancy and that a process of consultation was then begun which concluded with him being offered alternative

employment and the redundancy process being stalled. Whilst this offer of re-engagement did not fit with the statutory redundancy payments scheme in that it was made in the absence of the claimant having been given notice of dismissal this is not something that the claimant has complained about. Thus in terms of departures from practice the only one established was that the respondent had failed to place an announcement on the notice board, which in the scheme of things did not strike the Tribunal as being anything more than a minor breach of an internal procedure.

54. The claimant also complained that the respondent failed to follow the ACAS Code in respect of its investigation of his complaint in relation to the withdrawing of an offer of redundancy in October 2016. In this connection he was unhappy that Mr Lymer had interviewed Mr Bond first and about the thoroughness of the investigation having regard to Mr Lymer referring to the hurried conversation that had taken place between him and Mr Bond. He also had a problem with Mr Lymer advising Mr Bond in relation to the amendment that he wanted to see made to the interview notes and his being at the board meeting on the morning of his interview on 15 December 2016, where the decision was taken to terminate his employment by way of a compromise agreement, which for the record was never given effect. In terms of this complaint it is certainly the case that the ACAS Code envisages that the first step with a grievance is the holding of a meeting with the aggrieved employee, which did not happen here for the reason that Mr Lymer was keen to make progress with the matter and in the absence of the claimant on 14 December 2016 because of sickness and knowing what the issue was decided to begin his investigation by interviewing Mr Bond. Thus again on the claimant's case in terms of departures from the ACAS Code this decision by Mr Lymer was the sum of it, which again did not strike the Tribunal as being anything more than a minor one, albeit that it did consider that Mr Lymer ought reasonably to have gone back to Mr Bond to question him on the content of the voice mail left for the claimant on 25 October 2016 once he had this referred to him by the claimant before he arrived at his conclusion that no offer of redundancy had been withdrawn as none had been made in the first place, which on the face of things did not sit comfortably with the information conveyed by Mr Bond in the voice mail but this is not something that the claimant has complained about. Nor has he complained that he was denied the right of a companion at his meeting with Mr Lymer or that he was not allowed to take his complaint further by way of an appeal, which of course the ACAS Code provides for.

55. The claimant claims further that the respondent has engaged in cover ups and collusion to present a unified stance and to paint a picture of an employee who has failed to grasp the situation at hand. These are serious allegations that require irrefutable proof, which the Tribunal did not feel was demonstrated by the claimant's evidence or the documents. Yes there were instances of notes of meetings being amended by Mr Bond in relation to the investigation undertaken by Mr Lymer into the alleged withdrawing of an offer of redundancy and in relation to the performance review meeting with the claimant on his return to work on 30 January 2017 but in the first instance he was invited by Mr Lymer to confirm that his representation of what he thought him to have said was accurate, which he did not believe it was and in the second instance he had asked Mr Budgen to be his note taker and considered it appropriate to amend his notes. Quite why he thought it necessary to delete his comment about the horse having bolted was not explained but the Tribunal did not consider in the context of the claimant having been continuously absent since he was issued with his first written warning and was set performance targets, which he had been unable to

address that it was necessarily an inappropriate thing to have said. There was also an allegation that Mr Bond had on 12 December 2016 apologised about the withdrawal of the offer of redundancy saying that it was the board's fault - they had agreed to it and then took it back and that he had now been told that he had to lie about it in the meeting. This allegation was denied by Mr Bond and having regard to his credibility as a witness and that of the respondent's other witnesses the Tribunal was unconvinced that there had been any attempt by the respondent to collude to cover up matters regarding this aspect.

56. He also believes that the respondent had forcibly tried to alter the terms of his employment on two occasions in December 2015 and October 2016. In regard to the earlier instance it is the respondent's case that there were concerns about the effectiveness of field sales at this time and in particular in the Midlands area as covered by the claimant, which is evidenced by the minutes of the board meetings held on 22 October and 26 November 2015 at which latter meeting it was agreed that he would be taken off field sales and that his role would be re-defined. Potentially this amounted to a redundancy situation in that there was a diminishing need for employees to carry out work of a particular kind i.e. field sales in this area as it was contemplated that the role would be absorbed by two other members of staff namely Mr Bond, Sales Manager and Mr Tim Stewart, Field Sales Support Engineer, which led to discussions being opened with the claimant and his being informed that his position was under consideration for redundancy. However, in parallel the respondent came up with a new position of an Internal Sales Executive covering the Midlands area, which was offered to the claimant as an alternative to redundancy, which he accepted. Although it was not offered on the basis of it being subject to a trial period and was on the face of things intended as a permanent re-engagement the claimant was allowed to treat it as such and upon his deciding against the job he was advised that his redundancy would be re-activated and he was given notice of termination on this ground, only then during his notice period for him to be persuaded to stay on in his Field Sales role. He suffered no loss of income as a result of these events as his basic salary in the higher earning field sales role was restored to him in respect of the period when he was employed as an Internal Sales Executive. Having regard to these circumstances the Tribunal did not consider that the respondent's actions amounted to an attempt to alter forcibly his terms of employment.

57. In regard to the second instance the events are less clear-cut by reason of the dispute between the claimant and the respondent over how redundancy came into the mix but what is evident is that the respondent continued to have concerns about the claimant's performance as evidenced by the board minutes of 20 October 2016, when the idea was floated by Mr Bond that he might be moved to internal sales if his figures were not up to an average of £10,000 per month by the end of November 2017, which was a tall order, requiring as it did, him achieving sales of £17,000 in that month as against average sales of just under £9000 for the six months between April and September. On the claimant's evidence he was told by Mr Bond the day previously that he would be making him redundant unless he hit a monthly average of £10,000 by the end of November but that he would give him first refusal on an internal role. On Mr Bond's contrary evidence it was the claimant who said that he wanted to be made redundant and that he told him that he would propose it to the board the following day, which he says he did and was told that they would support him with whatever he thought best. It seemed to the Tribunal that Mr Bond reasonably took this expression of support as allowing him a free hand to deal

with the claimant and that all options including redundancy were on the table and that he subsequently conveyed this to the claimant only for matters to be re-thought by the board upon realisation perhaps that allowing the claimant to be made redundant when field sales would still need to be delivered in his area could leave the company open to an unfair dismissal claim. It is understandable that the claimant felt let down by the respondent and it is clear that he was angered over these events but at the end of the day the respondent was within its rights to avoid any potential claim by withdrawing the prospect of redundancy when such a situation did not really exist and to seek instead to address the claimant's performance as a capability issue while he remained in the role of field sales even though it was Mr Bond's preference for him to carry out an internal role, which of course meant that he suffered no change in his terms of employment.

58. The claimant also alleges that the respondent offered him no credible assistance in order to help him to be a success in his role and that in reality its offers to assist have consisted of criticism and the imposition of targets. Such allegation was not considered by the Tribunal to have been made out having regard to some of the steps pointed to in submissions that the respondent took over the period in question, as accepted by the claimant. These included (i) Mr Bond giving him regular gee ups about his sales figures (ii) his transferring some of his sales to the claimant to boost his figures (iii) his paying commission to the claimant when he was not entitled to receive any (iv) his holding off-site meetings with the claimant to give him pep talks (v) Mr White reducing the claimant's gross profit targets from £11,000 to £8,000 for January 2017 and £10,000 for February 2017 following his poor performance hearing on 9 January 2017, albeit that he was subsequently largely absent over the two months and never worked to them (vi) Mr Bond and Mr Johnson taking time out to speak to the claimant in February 2016 to persuade him to stay with the business and (vii) Mr Johnson calling the claimant into his office on 9 November 2016 to ask what could be done to re-motivate him and his requests at the claimant's grievance hearing for him to say what outcome he wanted and his offers to meet with him on a one to one basis to resolve matters.

59. In terms of the chronological list of events referred to by the claimant in his ET1 as leading to his resignation it is considered that the Tribunal's foregoing conclusions address these up to the claimant being issued with a poor performance letter on 20 December 2016 requiring his attendance at a meeting on 9 January 2017, at which he says that many of the points he made were dismissed including his suggestion that other sales team members had benefitted from supplier subsidies, rebates and kickbacks going into their figures. Notably, however, in his witness statement he makes no reference to his having suggested that others had received kickbacks and restricts himself to saying they were achieving higher targets as a result of manufacturers' rebates and because money from other areas of the business was being moved in order to subsidise results, which assertions it is noted from the minutes of the meeting Mr White countered making the point that a significant proportion of the leads generated by internal sales were being passed to the claimant. The claimant also says that there was an agenda from the outset and that the meeting was a stepping stone to a pre-determined warning. In this regard there can be no dispute that the claimant's performance deteriorated substantially through November and December 2016 both in respect of his sales with figures of £1511 and £2321 respectively as against his target of £11,000 and his customer visits which had seen him make only three visits over the two months, whereas he had previously

been averaging six visits per month. The respondent was therefore justified in addressing the claimant's poor performance at this time under its disciplinary procedure and in issuing him with a first written warning in the light of his performance having fallen significantly short of the required standard and detailing specific areas for improvement.

60. The next matter that the claimant relies upon was his being called to a performance review meeting by Mr Bond on his first day back at work on 30 January 2017 after almost 3 weeks off with work-related stress, which he considered to be unacceptably soon. Such weekly reviews were, however, built into the programme of improvement expected from the claimant and in view of his absence immediately following his poor performance meeting, which meant that this was the first opportunity to hold one it did not strike the Tribunal as unreasonable that Mr Bond should want to take this opportunity to let him know what they would be looking at in future meetings and in terms of Mr Bond deleting his comment 'this is a bit like after the horse has bolted' from the notes taken by Mr Budgen, which he also found unacceptable, the Tribunal has addressed this above at paragraph 55.

61. The claimant also complains in relation to his grievance as heard by Mr Johnson on 3 March 2017 that many of his points were dismissed, skipped over and disregarded. In this connection it seemed to the Tribunal based on the notes of the grievance hearing at pages 81-84 as taken by Mr Lymer that Mr Johnson attempted to gain a genuine understanding of each of the claimant's 26 points of grievance and based on his outcome letter at pages 239-241 that he provided a careful and considered response, which sought to explain why the company had on occasions looked at redundancy for the claimant's role namely because his costs for his sales in his area were not in line with the revenue they were getting from it which led to the suggestion that the area should not be covered, which would have been a genuine redundancy situation but that after a lot of investigation it had been concluded that the area could yield good sales despite these not having been forthcoming for some considerable time. In his letter he also addressed the timing of the claimant being taken down the disciplinary route and his request for training asking him to clarify what training he required and why. He also made it known to the claimant that despite not upholding his grievance his door was still fully open to discuss anything and that he would genuinely like to help him to resolve his performance problems as this would be mutually beneficial to them.

62. He complains too that the respondent's delay in dealing with his grievance and his appeal was a factor in his resignation in that he had grown increasingly disheartened with the whole situation and how long it was taking. The timeline in respect of his grievance had its sending on 15 February 2017, its hearing on 3 March 2017 and an outcome on 14 March 2017. In terms of his appeal against Mr Johnson's decision he sent a letter dated 20 March 2017 addressed to Mr Steadman. In this connection it was acknowledged by Mr White, who appeared to be handling Mr Steadman's mail box in his absence that he belatedly opened the claimant's letter to him. The documents would suggest that this was on or around 29 March 2017 as he forwarded the letter to Mr Steadman on this date. In relation to the claimant's follow-up letter dated 30 March 2017 chasing his appeal this appeared to have been sent by recorded delivery according to the email sent by Mr White to Mr Steadman on 5 April 2017, which prompted the request sent to the claimant on 7 April 2017 for him to provide his grounds of appeal. Such a timescale for the grievance's hearing and determination did not strike the

Tribunal as being unreasonable considering its scope and whilst matters could have been handled more expeditiously in relation to his appeal the Tribunal did not consider that the respondent's failing in this regard was of such significance as to justify the claimant treating it as the final straw.

63. Thus whilst there were some failings by the respondent in the way it conducted itself towards the claimant over the course of his employment from December 2015 to April 2017 as described above they were not in the view of the Tribunal, either individually or cumulatively, sufficiently serious to satisfy the test for determining whether the respondent was in fundamental breach of the implied term of mutual trust and confidence, which requires the employee to show that the employer has without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. This is a very high threshold, which has not been met in this case. The Tribunal therefore finds that the claimant was not constructively dismissed and that his complaint of unfair dismissal is not well-founded.

_____

Employment Judge Wardle
7 December 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

14 December 2018

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS