



EMPLOYMENT TRIBUNALS

Claimant: Mr R Websdale
Respondent: W J King Garages Ltd

Heard at: Ashford

On: 23 November 2018

Before: EMPLOYMENT JUDGE CORRIGAN
Sitting Alone

Representation

Claimant: In Person
Respondent: Mr William King, Managing Director

RESERVED JUDGMENT

The Claimant was not constructively unfairly dismissed and his claim is dismissed.

REASONS

1. By his claim dated 9 February 2018 the Claimant brings a complaint of unfair dismissal against the Respondent.
2. The issues were set out in the Case Management Order dated 18 July 2018 and are as follows:
 - 2.1 Did the Respondent fundamentally breach the Claimant's contract by, without reasonable and proper cause, acting in a manner calculated or likely to seriously damage the relationship of mutual trust and confidence between employer and employee?
 - 2.2 In particular the Claimant relies on:

- 2.2.1 harassment by his colleague (SO), which was upheld as a result of the Claimant raising a grievance;
 - 2.2.2 being hit by a van driven by SO on 7 September 2017;
 - 2.2.3 being transferred to Bromley on 8 September 2017 after the van incident;
 - 2.2.4 the way he was treated by Mr King in a grievance meeting on 24 October 2017;
 - 2.2.5 Mr King being very rude to him in a phone call on 10 November 2017 and refusing to provide a copy of grievance meeting minutes, then hanging up on him;
 - 2.2.6 being escorted off the premises at the Dartford branch without good cause; and
 - 2.2.7 being banned from all branches of the Respondent in November 2017.
- 2.3 Alternatively, was the Respondent effectively acting as referee between two equally matched employees, the Claimant and his colleague SO. Neither was happy with the result and both wanted the other dismissed. SO received a warning and although no action was taken against the Claimant he did accept some culpability. Both were removed from the Dartford branch and relocated to branches nearer their respective homes. The Claimant was performing the same tasks and it is within the terms and conditions that the Respondent can require employees to move between branches.
- 2.4 Was Mr King courteous in the meeting on 24 October 2017 and did he give the Claimant an opportunity to read and comment on the minutes?
- 2.5 Was the reason that the Claimant was banned from all branches that he was randomly visiting branches whilst off sick including Dartford (where the incidents with SO had occurred) and Welling (where he approached SO's wife directly which she found embarrassing and intimidating).
- 2.6 Did the Claimant resign in response to any breach of contract? The Claimant asserts that he did. The Respondent asserts that the reason the Claimant resigned was because he wanted SO dismissed.
- 2.7 Did the Claimant affirm the contract after one or more breaches? The Respondent argues the Claimant resigned and then retracted his resignation and decided to stay a number of times leading up to his resignation.
- 2.8 If the Claimant was constructively dismissed, what was the reason for the Respondent's actions in breach of contract? Was it a potentially fair

reason for dismissal? The Respondent argues that the reason for its conduct was the Claimant's conduct, a potentially fair reason.

- 2.9 If the Respondent's actions were for the potentially fair reason of misconduct, were the Respondent's actions reasonable in all the circumstances?

Hearing

3. I heard evidence from the Claimant on his own behalf. I heard evidence from Mr W J King, Managing Director of the Respondent.
4. There was an agreed bundle. As a result of questions asked during the hearing and the answers given by Mr King, Mr King also obtained further relevant documentation during the hearing in relation to SO's disciplinaries.
5. In the facts which follow I refer to other staff by their job title and/or initials as they have not participated in the proceedings and this Judgment will be publicly available online.
6. Based on the evidence I heard and the documents before me I find the following facts.

Facts

7. The Claimant began employment with the Respondent on 24 August 2015 as a Driver Valet. The Respondent operates car dealerships in the South East, with 15 branches and about 300 staff.
8. The Claimant submitted a grievance on 10 May 2017 in respect of behaviour by a colleague (SO). He said if he could not get the matter resolved he would have to resign. The allegation was that the colleague had been photographing the Claimant's car when it was parked on site and reporting him. It was generally against the company policy to park on site (and the Claimant had signed to confirm understanding of this). The Claimant also said the colleague was obstructed him taking photos on site as part of his duties.
9. The grievance was acknowledged and the Claimant invited to a meeting on 12th May 2017. Other colleagues were also interviewed. The Claimant also had an opportunity to comment on the colleague's response. At this stage the Claimant accepted he had sworn at the colleague, that he had on one occasion responded to his colleague threatening to "smash his face in". When asked if he had been threatening and abusive to his colleague he also accepted that he had "given the same back" to his colleague in retaliation. Other colleagues who were interviewed confirmed the issue was two way with both responsible.
10. The Claimant was informed on 26 June 2017 that his grievance was upheld but that he was also partly culpable. No action was taken against the Claimant. He was told that the Respondent could not tell him what action was being taken in respect of his colleague but that guidelines for behavior were to be sent out (p55). The

written confirmation of the outcome (dated 26th June 2017, pp56-57) said his grievance was upheld in full. It said a notice would be sent to staff reminding them that staff were to be treated with respect at all times. Line Managers were to encourage staff to bring any issues to their attention to avoid escalation. It was noted that the Claimant had also acted in a confrontational manner, and had brought his car onto the premises in contravention of policy, which it was believed caused or exacerbated the situation.

11. In mid-July the other colleague was invited to a disciplinary which ultimately led to a written warning, communicated on 9 August 2017. I was shown the letter to the colleague. He was issued with a First Written Warning for (in part) unreasonable behavior and harassment of the Claimant. He was advised that this behavior must stop immediately and that a repeat of such behaviour could lead to further formal action.
12. At some stage the other colleague also brought a grievance against the Claimant on the basis that the Claimant's grievance was malicious. The Claimant was interviewed in that process. In it he said he was considering resignation as he considered his "harassment" claim was not fulfilled.
13. The Claimant offered his resignation around 25 August 2017 because he said he could no longer take the harassment from his colleague and he felt the complaint had done nothing. He said he feared reprisals from his colleague so would escalate the claim higher once he had left (p58). The Group Sales Manager met with him and replied by letter (pp59-60). He asked the Claimant to reconsider. He explained that a notice had been issued to all staff and coaching was planned for Line Managers following the Claimant's grievance. He also told him his colleague had also submitted a grievance and it was being treated in the same way as that of the Claimant. There was not yet an outcome to that process. It was suggested he reconsider his resignation and it was eventually withdrawn (see below).
14. Ultimately the other grievance process found there were grounds for disciplinary action against the Claimant, in relation to his refusing to obey a management instruction, but it was decided not to take any disciplinary action. It would appear this was decided around end of August (see page 57A). The Claimant says he was not informed of the outcome. There is a record in Compass's timeline (p103) of an intention to make it clear to the Claimant that his actions had provoked his colleague and an informal warning being better than a formal warning, along with the agreement to proceed with the do's and don'ts (which were already an outcome of the Claimant's grievance). However there is no record there of this happening. However in the Claimant's own letter to Mr King at page 65 of the bundle he says he was called into the office with the Group Sales Manager who told him "he was throwing me a lifeline because the complaints [SO] made I did not come up smelling of roses because I refused to do what [a manager] was ordering me to do...." I find that the conversation with the Claimant informing him of the outcome and that no formal action would be taken therefore did occur on 9 September 2017.
15. The Claimant says he believed the investigation and possibility of disciplinary action was ongoing, but as a result of my findings above I do not accept this evidence. He was told there would not be disciplinary action (he was being thrown a lifeline) on 9 September 2017. I also find in fact he had been told on 8 September 2017 in the do's and don'ts letter that investigations had concluded and outcomes delivered. The

sense of that letter is moving on to avoid such incidents in the future by “both parties”. This suggests both grievance processes had concluded.

16. Meanwhile on 7 September 2017 the Claimant's arm was hit by the wing mirror of a Company van driven by SO. The Group Sales Manager considered this incident represented an escalation in the conflict between the Claimant and his colleague and decided both should be transferred to other branches (p66). The intention was that each would be transferred nearer their home address.
17. On 8 September the Claimant received the list of dos and don'ts mentioned above.
18. On 11 September the Claimant was told that his statement about the van incident did not agree with SO's who said that the van had not hit the Claimant, but the Claimant had walked into the van. He was told he was being moved to Bromley with immediate effect. The Respondent also moved the colleague. I accept that the intention was to keep the two apart to avoid further incidents and allow things to calm down (reflected in p103). Not only were they moved to different branches but different franchises (the Claimant at Vauxhall, the colleague at Kia/Purgeot) to minimise the need for them ever to interact. The Respondent had sought to choose a location that was a convenient distance from the Claimant's home. In fact the Claimant had moved and so this was not the case, but the Respondent was not aware of the address move. It was not intended to be disciplinary action but a protective measure. The Respondent's contract provides for relocation as directed by the Respondent and says it is a requirement of the Claimant's employment that he be agreeable to transfer and work at any branch in the Respondent's group. (p33, paragraph 3).
19. On the same day the Claimant wrote to Mr King raising all the issues with him (pp 64-65). This was followed by a further email on 15 September. In that the Claimant requested to move back to Dartford as his health was getting worse and he felt he was being mocked as he kept being asked why he was moved from Bromley.
20. On 16 September 2017 HA was tasked with investigating the incident with the van. During that process the colleague (SO) alleged that the Claimant had stepped in front of his vehicle to get him into trouble. The Claimant's account was that he could have avoided the Claimant and had clipped him deliberately.
21. On 28 September 2017 the Claimant retracted his resignation and also chased Mr King's response. By letter dated 28 September the Claimant was formally invited to a grievance hearing on 19th October with Mr King. The Claimant says Mr King told the Claimant that from the letter he thought he must be a trouble maker but then having spoken to the Claimant's manager he found he was hard working. Mr King disputes saying trouble maker and as it is not a discrete part of the breach of contract alleged it is not necessary for me to make a finding of this. I do note however that in the timeline there is reference dated 29 September that the Claimant “had visited John King unannounced”, which supports a previous meeting and that it was likely to have been considered an inconvenience by Mr King, being unannounced.
22. On 6 October the Claimant saw his GP who signed him off sick due to stress and depression due to the issues at work, which included headaches. He was signed

off sick from 7- 12 October 2017. He informed Mr King on 9 October and asked that the matter be resolved as soon as possible. Instead the meeting was then postponed to 24 October 2017.

23. On 23 October the disciplinary outcome was communicated to the Claimant's colleague. The conduct being considered was "collision with another member of staff whilst [sic] in your parts delivery van [and] failing to drive with due care and attention whilst driving on Company premises". The panel found as follows:

"We consider that the responsibility of ensuring pedestrian safety lies with the driver of the vehicle...We have no evidence to support your claim that [the Claimant] leaned in to your vehicle deliberately

We are extremely concerned at the content in the statement from [a colleague] who stated that you had claimed you had driven your vehicle [into the Claimant] as he would not get out of the way..."

24. A final written warning was issued for failing to drive with due care and attention whilst driving on company premises. The letter said the offence was treated as careless actions resulting in a colleague receiving physical injuries and an act of gross negligence/misconduct involving careless or reckless driving whilst in a Company vehicle. He was relocated to the Sidcup branch. Again he was told that this type of conduct should cease and a repeat could lead to further action including dismissal.
25. This was not communicated to the Claimant who was not involved in the disciplinary process. This time the disciplinary process was not as a result of a grievance by the Claimant.
26. In the grievance meeting on 24 October 2017 Mr King challenged the Claimant about his own behaviour and that it might be considered generous that he had not faced disciplinary action whereas the other colleague had. The Claimant felt that he was focusing on historic issues and not on the fact the Claimant had been hit with the van. The Claimant draws attention to the ticks on the copy of his grievance to Mr King which are alongside references to the Claimant's alleged culpability. The minutes themselves show the meeting began with those quotes (p72) and Mr King said that by his own admission the Claimant was partly culpable for the situation and he asked the Claimant for his response. Mr King also said the Claimant had not been disciplined whereas his colleague had, and that had been generous in respect of the Claimant. Mr King also said that the colleague's version of events was that the Claimant had stepped out in front of his vehicle. He said that no colleague had come forward supportive of the Claimant. He also said that as the Claimant had said he got on with everyone wherever he worked it was not an issue he had been moved. Mr King drew the meeting to an end saying he was Managing Director of a substantial company and he needed the Claimant to be a team player. The Claimant says that Mr King had said how dare he contact him the CEO as he had better things to do. That is not supported by the minutes but there is a suggestion in the reference to being Managing Director of a substantial company that the situation was an inconvenience. I find that the notes do read more like the Claimant was being accused than a formal grievance meeting exploring his grievance. Mr King confirmed in evidence he was not aware of the outcome of the SO disciplinary process from the day before, and that the outcome had been

further disciplinary action against SO. The Respondent's version of the meeting minutes are at pages 72-75 bundle). It was not made clear at the time but before me Mr King said he believed he was conducting an appeal into what the Group Sales Manager had done and the process carried out in respect of the Claimant's grievance. The Compass timeline records a discussion on 29 September in which it is said that the Claimant was discussed and that although disciplinary hearing might be justified it might be better for Mr King to emphasize in the "strongest terms that he may have instructed formal action and this situation must now end". The meeting notes are consistent with this aim.

27. The Claimant says he felt he could not get a word in (though some detailed comments are recorded in the minutes) and the meeting exacerbated the Claimant's headaches. The Claimant went home sick afterwards. The Respondent had intended for the minutes to be printed and signed there and then but the Claimant left before this could be done. He was said to have said to a member of staff at Bromley that he was "going sick" and "won't be back".
28. He then went and spoke to his former manager at the Dartford Branch. He handed in his keys as he considered he would not be returning there. He says he said "I won't be needing these". It was reported to Mr King that he said "I'm leaving, I won't be needing these again". Mr King understood from the Claimant's words and behaviour that he had resigned.
29. The Claimant was signed off sick for a further 2 weeks.
30. He wrote to Mr King on 27 October complaining about how he had been treated in the meeting, reiterating what had happened between himself and his colleague and requesting that he return to Dartford and be paid full pay for his sick leave. He included that he was not happy that the colleague had been moved nearer his home.
31. Mr King replied on 31 October 2017 explaining that he had understood from the Claimant's behaviour that he had resigned and inviting the Claimant to call him to confirm his intentions. He also asked the Claimant to meet on 3 November to sign the grievance meeting minutes, including potentially amending them if the Claimant considered them inaccurate (p80). It was clear in the letter this meeting was subject to the Claimant's confirmation. Mr King said that once the notes were signed he would enter further discussions about the Claimant working at an alternative branch.
32. The Claimant did not reply to confirm whether he would attend the meeting on 3 November 2017. On 1 November the Claimant said to Mr King he would not sign the notes so Mr King considered there was no need for the meeting.
33. On 3 November 2017 the Claimant attended to meet Mr King, but found he was not there so the Claimant left a note. This is at page 81. It states he did not intend to sign the notes until he had a meeting where he was treated with respect. Having waited half an hour, he said he was leaving and "many thanks for NOT turning up or even having the mind to contact me."
34. On 6 November 2017 the Claimant again attended Dartford to deliver a sick note and I accept Mr King's evidence that he was told that the Claimant also spoke to the

branch manager to ask (either directly or indirectly) that he withdraw his statement about the Claimant verbally resigning. The Claimant denies this, and it is not necessary for me to make a finding about what was actually said. I accept that it was reported to Mr King that that was the branch manager's perception.

35. Around the same time the Claimant attended Welling and spoke to the colleague SO's wife who worked in the Welling Accounts department. The Claimant says this was done reluctantly due to his needing a form for statutory sick pay but I accept that she rang the Group Sales Manager straight afterwards to say she was concerned and unsettled and that from her side she thought the Claimant was asking for something he did not need. The Respondent had concerns that the Claimant's visit made her feel uncomfortable given all that had happened between the Claimant and SO. The Claimant also spoke to the Sales Manager, who also found it "disturbing". Again the Claimant disputes this and it is not necessary to find what actually happened, only that the impression relayed to Mr King was that the Sales Manager found it disturbing.
36. The Claimant attended Dartford a third time to pick up his belongings such as a steam cleaner and jet wash. He also wanted his car repaired. The Claimant says no one was allowed to talk to him, that they would not look at his car and that he was escorted to his belongings and then off the premises. The Claimant found this humiliating. The Respondent agrees that a colleague was in attendance to have some control over the visit, who helped the Claimant with his belongings and walked him to his car.
37. On 7 November Mr King wrote to the Claimant and referenced the above visits to different premises. He said he was concerned that the Claimant's behavior was erratic and was having an unsettling effect on staff. He said the Claimant was not permitted to attend any branch of the Respondent and that doing so would be considered gross misconduct. He asked the Claimant, once he recovered from his sickness, to confirm whether he intended to return and to make an appointment with him. He said the purpose of the meeting would be to sign the grievance notes, though he would be open to any amendments. The Claimant would then work at Bromley until such time as it was appropriate to relocate him (pp82-83).
38. Also on the evening of 7 November the Claimant wrote to Mr King requesting a temporary transfer to Brent or Welling, asking why the matter was taking so long (he said it had taken 8 weeks and he was still waiting for a decision) and again complaining of his treatment, including by Mr King. He finished by saying "if you think I am breaking company rules so much then please just terminate my employment because I will not leave".
39. On 10 November Mr King and the Claimant had a phone conversation. It began with the Claimant saying he was not happy with the allegations about his harassing/disturbing colleagues. Mr King began reading from a prepared script and had the Claimant on speakerphone with a member of the accounts team present. The Respondent had a note of the call. The Claimant also recorded the call. The call was essentially about the grievance meeting minutes and whether the Claimant would sign them, with the Claimant declining to say whether he would or would not sign them or amend them (saying "he would cross that bridge when he came to it"). The two appear to have been at cross purposes with Mr King asking the Claimant if he would read the grievance notes, the Claimant agreeing he would if they were sent

to him, and Mr King considering he was not answering the question. Whereas Mr King also asked if the Claimant would return the minutes back to him if he was not prepared to sign them. The Claimant said he was entitled to a copy whether or not he signed them which Mr King took as being not prepared to answer the question. Mr King also said that the Claimant's happiness was not a concern, just the accuracy of the notes.

40. The Claimant alleges that Mr King hung up on him. Mr King says he did not think the conversation was helpful and that he did pause the conversation by putting the Claimant on hold while he took a minute to reflect. The Claimant's account says that he heard music before the phone went dead. This is consistent with Mr King putting the Claimant on hold first and I accept he did this, and losing the connection was not deliberate.
41. Mr King wrote to the Claimant on 13 November (pp85-86). For the first time in the documentation he described the Claimant's letter as an appeal of the previous grievance. He said the Claimant's appeal was deemed invalid and the previous decision by a senior manager still stood (the letter of 26 June 2017) The Claimant had exhausted the process and the decision was now final. The letter went on to ask the Claimant to be in touch once he was fit to return and to set out some boundaries in respect of which departments the Claimant could not visit, including the Sidcup branch. Mr King said that after two weeks at Bromley he would consider moving the Claimant to Welling, which was nearer the Claimant's address. He said he was unable to move the Claimant back to Dartford as he wanted a balanced approach between the Claimant and SO and to remove the probability of the two meeting in the course of a working day. Again he reminded the Claimant of his previous instruction not to visit any branches of the Respondent and that it would be gross misconduct if he did so.
42. The Claimant submitted his resignation on 20 November 2017 (p92-93 – incorrectly dated 20 December). He said he was resigning with immediate effect due to:
 - 42.1 the harassment from [SO];
 - 42.2 the false allegations and inappropriate behaviour towards [the Claimant] by CEO John King where he has stated that he does not care about [the Claimant's] happiness or health;
 - 42.3 John King ignoring the Claimant's complaints of harassment including the last incident where he was struck on his right arm by the wing mirror;
 - 42.4 Ignoring his requests to return to Dartford Vauxhall;
 - 42.5 Approximately 10 weeks had passed without any indication what was happening or what action was taken against the driver;
 - 42.6 Abusive phone conversations with Mr King where he put the phone down on the Claimant;
 - 42.7 Informing employees at Dartford not to speak to the Claimant and that the Claimant should be escorted from the premises; refusing to repair or look at his car;
43. Mr King replied on 22 November (p94) saying that the grievance procedure was adhered to with flexibility to allow for the Claimant's condition. He had hoped that the offer to relocate to Welling demonstrated the desire to retain the Claimant. He said as the Claimant had offered his resignation twice before, he reluctantly

accepted it. He enclosed a very positive reference and said if he wanted to return they would gladly welcome him back.

44. In the timeline of calls between the Respondent and their HR advisor (Compass) there is reference to SO's wife saying he was going to leave and getting very upset. She was urged to tell him to attend his disciplinary hearing. The timeline also records that SO was off sick with stress for one month.
45. The Claimant obtained alternative employment from 22 November 2017 but this was part time and not at the same level of pay.

Relevant law

Constructive dismissal

46. Section 95 of the Employment Rights Act 1996 states:
(1) For the purposes of this Part an employee is dismissed by his employer if . . . _

 . . .

 (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
47. The leading authority is *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221. For section 95 (c) to apply the following must be shown:
 - 47.1 a repudiatory breach of contract by the employer (i.e. a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract and which entitles the employee to leave without notice);
 - 47.2 the breach caused the resignation; and
 - 47.3 the employee did not delay so long before resigning that he is regarded as having affirmed the contract and lost the right to treat himself as discharged.
48. There was an implied term in the Claimant's contract of employment as described in *Malik v Bank of Credit & Commerce International* [1997] IRLR 462 that the employer shall not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
49. A breach of the implied term involves conduct which seriously damages or destroys the trust and confidence between the employer and employee. Both sides are expected to absorb lesser blows (*Croft v Consignia Plc* [2002] UKEAT 1160_00_3009).
50. A series of actions culminating in a "last straw" can cumulatively amount to a breach

of the implied trust and confidence, but the “last straw” must contribute something to the breach, it cannot be entirely innocuous (*Omilaju v Waltham Forest LBC* 2005 ICR 35).

Unfair dismissal

51. In relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and**
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

(2) A reason falls within this subsection if it-

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
- (b) relates to the conduct of the employee,**
- (c) is that the employee was redundant, or**
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

(3) . . .

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
- (b) shall be determined in accordance with equity and the substantial merits of the case.**

52. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer’s decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The band of reasonable responses test applies both to the substantive decision to dismiss and to the procedure followed by the employer (*Whitbread plc v Hall* [2001] ICR 699).

53. Where any action by the Claimant to any extent caused or contributed to the dismissal the compensatory award may be reduced by such amount as the Tribunal considers just and equitable (s123(6) Employment Rights Act 1996). For conduct to be the basis of a finding of contributory fault under s123(6) it must be culpable or blameworthy (*Nelson v BBC (No 2)*[1980] ICR 110).

Conclusions

Did the following occur:

harassment by his colleague (SO), which was upheld as a result of the Claimant raising a grievance;

54. The Claimant's grievance of constant harassment/victimization by SO was upheld in full though it was also considered that he was partly culpable as it was found the Claimant had also acted in a confrontational manner, and had brought his car onto the premises in contravention of policy, which it was believed caused or exacerbated the situation. His colleague was given a written warning but no action taken against the Claimant. He was told the Respondent could not tell him what action was being taken against SO.

being hit by a van driven by SO on 7 September 2017;

55. On 23 October 2017 a final written warning was issued to SO for the incident on 7 September for failing to drive with due care and attention whilst driving on company premises. The letter said the offence was treated as careless actions resulting in a colleague receiving physical injuries and an act of gross negligence/misconduct involving careless or reckless driving whilst in a Company vehicle. I accept the Claimant's arm was hit by the wing mirror of the van.

being transferred to Bromley on 8 September 2017 after the van incident;

56. The Claimant was transferred to Bromley after the van incident. SO was also transferred. It was not punitive but to keep the two apart and to minimize the chance of their coming into contact. The intention was to move each closer to their home.

the way he was treated by Mr King in a grievance meeting on 24 October 2017; alternatively was Mr King courteous in the meeting on 24 October 2017 and did he give the Claimant an opportunity to read and comment on the minutes?

57. I accept that the grievance meeting on 24 October 2017 did not proceed as a grievance usually would, with the panel seeking to understand the Claimant's grievance. A decision had been taken to explain to the Claimant in "strongest terms" that he could also have been disciplined and the situation must stop. Mr King was not discourteous but he did therefore focus on pointing out the Claimant's culpability, not on finding out more about his grievance. He focused on pointing out that the Claimant could have been disciplined but had not been, which had been generous. He explained SO had been. He explained why the relocation should have satisfied the Claimant as it had removed him from SO, the source of his stress and anxiety. He was seeking to show the Claimant why he did not have grounds to be aggrieved. "So, what is your grievance" (page 73) after pointing out the Claimant had not been disciplined. "So there are no grounds to that part of your

grievance (relocation) – you are happy wherever you work and we have relocated you to a branch closer to where you live” (page 74). “Please explain what is your ongoing grievance” (page 75) after pointing out SO was disciplined, he was not and both have been separated. In terms of the van incident he emphasizes that SO had said the Claimant knowingly stepped out in front of the van (despite the disciplinary outcome against SO the day before, of which he was not aware). The Claimant was given opportunities to attend, amend and sign the notes. He was not initially provided with a copy to consider in his own time. This was provided on 13 November 2017.

Mr King being very rude to him in a phone call on 10 November 2017 and refusing to provide a copy of grievance meeting minutes, then hanging up on him;

58. I do not consider Mr King was rude in the phone call and I have not found that he hung up. If either party was slightly rude it was the Claimant, for example “am I on a quiz show or something”. The parties were at cross purposes. The Respondent was insisting the Claimant be given the notes to read and sign them on the spot, whereas the Claimant wanted to be sent a copy of the notes to consider and then would decide whether to sign them. The Respondent said more than once that the Claimant was not prepared to answer a question when that was not what the Claimant was saying. The Claimant was then sent the grievance minutes on 13 November 2017, despite not signing them.

being escorted off the premises at the Dartford branch without good cause;

59. The Claimant was not asked to leave and forcibly escorted from the premises. He was allowed to find his things and was accompanied while he did so, and he was then accompanied back to his car. The reason for this was that this was the fourth time the Claimant had attended a branch of the Respondent at which he was not based whilst off sick. On previous occasions staff had been unsettled by his visits and concerned about his intentions.

being banned from all branches of the Respondent in November 2017. Was the reason that the Claimant was banned from all branches that he was randomly visiting branches whilst off sick including Dartford (where the incidents with SO had occurred) and Welling (where he approached SO’s wife directly which she found embarrassing and intimidating) (as the Respondent asserts).

60. Mr King was concerned that the Claimant’s behavior in visiting premises to which he was not assigned was unpredictable and was having an unsettling effect on staff. The Claimant had visited SO’s wife at Welling, and the Dartford branch three times (from which he had been relocated to minimise the chance of meeting SO). At least three staff members including SO’s wife had reported concerns. Mr King wrote on 7 November 2017 saying the Claimant was not permitted to attend any branch of the Respondent and that doing so would be considered gross misconduct. He asked the Claimant, once he recovered from his sickness, to confirm whether he intended to return and to make an appointment with him. The Claimant would then work at Bromley until such time as it was appropriate to relocate him (pp82-83). The Claimant was therefore asked not to attend other premises whilst on sick leave. He would be able to return to his own branch at the end of his sick leave and then be relocated in due course. In that sense the request was temporary.

61. A further letter on 13 November 2017 went on to set out some boundaries on the Claimant's return from sick leave in respect of which departments the Claimant could not visit, including the Sidcup branch and the Welling and Bromley accounts departments. Sidcup was the branch where SO was now assigned. The accounts departments were where SO's wife was based. Mr King said that after two weeks at Bromley he would consider moving the Claimant to Welling, which was nearer the Claimant's address. He said he was unable to move the Claimant back to Dartford as he wanted a balanced approach between the Claimant and SO and to remove the probability of the two meeting in the course of a working day. Again he reminded the Claimant of his previous instruction not to visit any branches of the Respondent and that it would be gross misconduct if he did so.

By the above, did the Respondent fundamentally breach the Claimant's contract by, without reasonable and proper cause, acting in a manner calculated or likely to seriously damage the relationship of mutual trust and confidence between employer and employee?

Alternatively, was the Respondent effectively acting as referee between two equally matched employees, the Claimant and his colleague SO. Neither was happy with the result and both wanted the other dismissed. SO received a warning and although no action was taken against the Claimant he did accept some culpability. Both were removed from the Dartford branch and relocated to branches nearer their respective homes. The Claimant was performing the same tasks and it is within the terms and conditions that the Respondent can require employees to move between branches.

62. Firstly the Claimant's original grievance against SO was investigated and disciplinary action was taken against SO. Other steps were also put in place to seek to avoid such a situation developing again including encouraging Line Managers to ensure issues were raised promptly to avoid escalation and a list of do's and don'ts for the Claimant and SO. The Claimant was also found to have been culpable in that he had been confrontational and provocative in bringing his car on the premises against policy. There was evidence the confrontation was two-way. The Claimant accepted he had sworn at the colleague, that he had on one occasion responded to his colleague threatening to "smash his face in". When asked if he had been threatening and abusive to his colleague he also accepted that he had "given the same back" to his colleague in retaliation. Nevertheless the Claimant was not disciplined.
63. SO also put in a grievance against the Claimant which was also investigated, although it appeared to cover the same incidents as the Claimant's grievance and might have been better explored in SO's disciplinary. As part of that it was found the Claimant had refused to obey a management instruction, and that his actions had provoked his colleague but it was decided not to take any disciplinary action. I have found this was communicated to him on 9 September 2017 when he was told he was being given a "lifeline" despite his own conduct.
64. I do not find that this conduct was likely to destroy or seriously damage trust and confidence and the Respondent in any event had reasonable and proper cause for it. I agree that the Respondent was generous in not taking action against the Claimant when he had threatened violence against his colleague. It would not have been unreasonable to consider the Claimant more culpable in that respect.

65. The Claimant was hit by the wing mirror of the van being driven by SO. The Respondent again investigated in the face of inconsistent accounts by the two employees and ultimately gave a final written warning to SO with a warning that repeat conduct of that nature could lead to dismissal. The Claimant was not informed of this but it was not done as a result of any grievance by the Claimant and it is not unreasonable to withhold details of disciplinary action from colleagues. The Claimant and SO had been relocated so that they would not meet during the course of their duties. I do not consider the Respondent's actions to be likely to destroy or seriously damage trust and confidence. I do consider there were reasonable and proper cause for the Respondent's actions.
66. The Claimant was transferred to Bromley. There was an express term in his contract to cover this. The intention was to separate him from SO, who was also transferred. The Claimant was transferred nearer to the home address which the Respondent had on record. It might have been better to discuss the transfer with the Claimant first. Had this been done the Claimant could have said that he had moved, but it was not unreasonable to rely on the address on record. The onus is on the Claimant to inform his employer of a change of address promptly. Mr King first knew of the change of address in the grievance meeting. Within a week he said he would be prepared to enter discussions about working at an alternative branch. He repeated the possibility of relocation in his letter of 7 November and on 13 November agreed to transfer the Claimant to Welling after two more weeks at Bromley.
67. I consider there was reasonable and proper cause to transfer the two colleagues. Although no disciplinary action had been taken the Claimant had admitted to the serious misconduct outlined above (threatening to "smash his face in"). It was reasonable to separate the two and to seek to be even handed about it. It was unreasonable to rely on the address on record to transfer the Claimant to Bromley. The Respondent acted promptly in considering Welling once the Claimant's address change was known. In any event the Respondent had an express clause requiring employees to be prepared to work at any branch. I also do not consider this was conduct likely to seriously damage trust and confidence.
68. Although I accept that being asked not to come to the Respondent's branches and being warned that doing so would be treated as gross misconduct has the potential to seriously damage trust and confidence, I do consider the Respondent had reasonable and proper cause for this. The Claimant had been moved away from Dartford and yet continued to visit three times uninvited whilst off sick. On one occasion the manager had raised concerns about being pressured to change a statement. The Claimant had also visited Welling and spoken with SO's wife which she found unsettling and which the Respondent found concerning. Two staff members had raised concerns about this visit. The Respondent also wanted to ensure neither SO nor the Claimant met during their duties. In these circumstances the Respondent had reasonable and proper cause to seek to ensure the Claimant stopped visiting branches unannounced and to control his return to his own branch after his sick leave. It was also not unreasonable to accompany the Claimant whilst he obtained his belongings and walked with him to his car.
69. I do consider that the grievance meeting on 24 October could have been handled better. It would have been better to explore the Claimant's grievance in more neutral terms and/or with an open mind before coming to a view. Looking at pages 64-65 the Claimant did go over the history but his new complaints were that SO was able

to put in a grievance about him going over similar material to his own grievance; that he had been hit by the van and that he had been moved to Bromley. It would have also been better if Mr King had known of the decision to give a final written warning to SO the day before for the van incident, as that would have tended to support the Claimant's grievance about that incident. Instead he did not address the issue with the van, save to point out that SO had had a different account that the Claimant had stepped out deliberately. He then wrote to the Claimant saying his appeal had been invalid, without explanation. On the other hand Mr King did explain that the grievances had been two way, that the Claimant had accepted some culpability yet had not been disciplined, whereas SO had been disciplined. He also explained why both had therefore been moved and that this ensured there would be no future incidents in the future, whilst also exploring the Claimant's objections to the move.

70. I also find that the Respondent took an unnecessarily rigid view to how the minutes should be progressed, escalating the conflict with the Claimant unnecessarily. On the other hand the Claimant could have been more cooperative and agreed to follow that process. In the event the Respondent resolved this by sending the minutes to the Claimant without insisting further on his signature. I do not find the issue of the minutes to be serious enough to destroy or seriously damage trust and confidence.
71. The grievance outcome, communicated on 13 November 2017, was that the previous grievance decision (to uphold the decision in full stood) but that the Claimant could move branches in the near future to be nearer to his home address. His request to return to Dartford was refused due to the need to be even handed between him and SO and to minimize their contact (they were moved to completely separate franchises).
72. I find that overlooking the fresh grievance about the van incident (the most serious of the allegations) and proceeding with a closed mind without first exploring the grievance to understand the new issues it raised is likely to damage trust and confidence. In some circumstances it might seriously damage trust and confidence. However in the context of the Claimant being told SO had been disciplined (without specifics) and that he had not been, despite some culpability, alongside the move away from SO and the offer of a move to Welling, I find this was not likely to seriously damage or destroy trust and confidence. I also find that, SO having been through two disciplinary processes and both the Claimant and SO having followed a grievance process, along with the impact on the health of both the Claimant and SO, and the impact on SO's wife, the Respondent had reasonable and proper cause to try to draw a line under the matter by focusing on the fact that the Claimant had avoided disciplinary action and had been moved away from the source of the problem. I find that Mr King's conduct of the meeting and the way he handled the notes is less serious conduct which parties are expected to "absorb" (*Croft v Consignia*).
73. Stepping back and looking at the conduct as a whole I do not consider the Respondent acted in a manner likely to seriously damage trust and confidence, even if there may have been some areas that could have been improved. The Respondent was dealing with serious conflict between two members of staff and sought to resolve it in an even handed manner, avoiding any further escalation.
74. It follows that I do not find the Respondent in fundamental breach of contract.

Did the Claimant resign in response to any breach of contract? The Claimant asserts that he did. The Respondent asserts that the reason the Claimant resigned was because he wanted SO dismissed. Did the Claimant affirm the contract after one or more breaches? The Respondent argues the Claimant resigned and then retracted his resignation and decided to stay a number of times leading up to his resignation.

75. For the avoidance of doubt I accept that the Claimant did not want SO dismissed and that he resigned as a result of the matters set out in his resignation letter (at paragraph 42 above), which included the alleged breaches of mutual trust and confidence in the list of issues
76. I find however that, even if there were fundamental breaches of contract the Claimant affirmed the contract when he retracted his resignation on 28 September 2017. I also consider he affirmed it again on 7 November 2017 when he put in writing that he would not leave, after Mr King said that he understood that he had resigned and requested that he confirm his intentions. Therefore he affirmed any breaches occurring prior to 7 November 2017, which includes the conduct of the meeting on 24 October 2017.
77. It follows that I do not find the Claimant was constructively dismissed and it was not necessary to consider the remaining issues.

Employment Judge Corrigan
10 April 2019