EMPLOYMENT TRIBUNALS

Claimant: **Ms. L. Deson**

Respondent: **Equifax Limited**

Heard at: **Birmingham** **On: 8,9,10,11 & 15,16,17 & 18 April 2019**

Before: **Employment Judge Butler**
Members: **Mr D.R Spencer**
Mr J. Reeves

Representation
Claimant: Ms. S. Robertson, Counsel
Respondent: Mr S. Crawford, Counsel

JUDGMENT

1. The unanimous Judgment of the Tribunal is that the Claimant's claims of direct race discrimination, victimisation, discriminatory constructive unfair dismissal, breach of contract and unauthorised deductions from wages are not well-founded and are dismissed.

2. The Respondent's counter-claim is not well-founded and is dismissed.

REASONS

The Claims

1. The Claimant submitted two claim forms which were consolidated and both claims were heard by this Tribunal in Birmingham having been transferred from Leeds.

2. The direct race discrimination claim was based on the Respondent increasing the Claimant's commission target but not, at the same time, the "pot" of commission available to her, in circumstances where other non-black employees who had targets increased also had increases in their commission "pots".

3. Her discriminatory dismissal claim was based on the same facts which, together with the Respondent not adequately dealing with her grievance or the appeal against the grievance outcome, amounted to a

repudiatory breach of the implied term of trust and confidence which entitled her to resign. The victimisation claim is based on the treatment of the Claimant by her Line Manager as a result of her raising a grievance.

4. Finally, her unlawful deduction from wages and breach of contract claims are based on unpaid mileage expenses and a difference in commission paid to her by the Respondent and the amount she says she earned being £6,888.62.

5. The Respondent defended all of the claims and submitted a counter-claim in the sum of £177.94 in respect of items on the Claimant's company credit card which the Respondent said it had to pay and which the Claimant was responsible for because they were private payments.

The Issues

6. The issues to be determined by the Tribunal are as set out in the list of issues agreed by the parties before the Hearing (as appended to this judgment) and are considered in detail in the tribunal's conclusions below

The Law

7. Section 13 of the Equality Act 2010 (EqA) provides in regard to direct discrimination: -
   (i) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

8. Section 27 EqA provides: -
   (i) A person (A) victimises another person (B) if A subjects B to a detriment because –
   (a) B does a protected act, or
   (b) A believes that B has done, or may do, a protected act.
   A protected act for the purposes of Section 27(2)(d) includes making an allegation (whether or not expressed) that A or another person has contravened this Act.

9. The Claimant's protected characteristic is race and her protected act was submitting a grievance to the Respondent.

10. Section 136 EqA provides at subsection (2) "If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred".
    Subsection (3) provides that "subsection (2) does not apply if A shows that A did not contravene the provision".

11. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides 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 it without notice by reason of the employer's conduct".

12. The Tribunal also had regard to the Judgments in Madarassy –v- Nomura [2007] IRLR 247 and Talbot -v- Costain Oil, Gas and Process Limited and Others UK EAT/0283/16/LA.

The Evidence

13. There was an agreed bundle of documents running to approximately 1,134 pages which was supplemented by unpaginated and mainly unnumbered transcripts of covert recordings of meetings attended by the Claimant and her Line Manager and also her Grievance Hearing and the subsequent appeal. The bundle comprised many documents which we were not referred to by the parties and there were some surprising omissions, the most obvious of which, was produced by the Respondent upon the Tribunal's own motion ordering it to be produced. Other pages in the bundle were badly copied, illegible due to the size of the print and some holes were punched through relevant pieces of text. This was a sad state of affairs which did not assist the Tribunal in its deliberations or understanding the points the parties were trying to make. References in this judgment to page numbers are to pages in the bundle.

14. We heard evidence from the Claimant and for the Respondent, from Mr G Brown, her Line Manager, and Mrs J Brodie, an HR business partner of the Respondent. They had all provided written statements which were confirmed as being true and were cross-examined.

15. The focus of the Claimant's evidence was on the Respondent's decision to increase her sales target without increasing the pot of commission available to ensure she did not lose out financially. It was her evidence that other account managers whose targets were increased also had their commission pots increased commensurately. Since there was no evidence in the bundle to either prove or disprove this allegation, the Tribunal ordered the Respondent to provide a schedule covering the last two full years before the termination of the Claimant's employment showing which account managers had their targets increased together with an increase in their commission pots and which ones, if any, had targets increased without an increase in their commission pots. The schedule produced by the Respondent in compliance with the order was for the years 2016 and 2017. It did not support the Claimant's contention which it transpired was based on hearsay evidence of other employees/former employees who said that targets would not be increased without an increase in the commission pot. In the light of information contained within this schedule, the Claimant then indicated that what would have established her point must have taken place in 2015. In fact, she said that it must have happened in 2015 which was before her employment commenced. The Tribunal considered this to be rather convenient evidence and not credible.

16. The Claimant alleged that she was discriminated against because she was the only black account manager working for the Respondent. Account managers worked in teams and the Claimant was a member of the SME Team. In terms of ethnic origin, the Team comprised Asian, Chinese, White British and Black African Caribbean (the Claimant) employees. The Claimant suggested in her evidence that the ethnic diversity of this group of account managers did not mean the Respondent did not discriminate against her, since none of the others were black. The Tribunal did not feel this was consistent with her evidence at paragraph 40 of her statement where she said that, at some time between 25 September and 2 October 2017, she came to think that the reason for Mr Brown's dislike of her must have been her sex or colour. She said that "what started me thinking" was Mr Brown being overheard by her saying that "one member of the team who is Chinese should not be talking to customers because they could barely understand her". She continued that another employee, Ms S Khan, had confirmed that Mr Brown had had a similar conversation with her and she was disturbed by it and would be speaking to a manager about it. We found it to be inconsistent with the Claimant's case that she would allege that none of the other non-ethnic British account managers were discriminated against, yet rely on precisely such alleged discrimination to support her case. Further, this was another example of the Claimant relying on hearsay evidence to support her claims and we noted that none of the evidence relied upon was supported by a witness statement or attendance of the relevant witness at the Hearing.

17. The Claimant covertly recorded a telephone conversation with Mr Brown, a subsequent meeting with him, her Grievance Hearing and her Grievance Appeal Hearing. As we understand it, the fact of these recordings and the transcripts which were produced at the Hearing were only identified as being in existence at a late stage in the proceedings. Having considered these in some detail, particularly those involving Mr Brown, the Tribunal struggled to see how they supported the Claimant at all. In fact, in our view, what they did do is suggest that she attempted to provoke Mr Brown. It was, for example, the Claimant's evidence that she was extremely unhappy when told her target would be increased and it was the Respondent's that she expected it and effectively accepted it with a smile. In the transcript of the telephone call with Mr Brown dated 28 September 2017, he points out at page 3 that the Claimant did not challenge the increase in her target and in response the Claimant completely changes the subject. In relation to provocation, in the transcript of her meeting with Mr Brown in Leeds on 2 October 2017, at page 4, she said, "I always feel like you're there with your notebook taking notes to use against me". Also, at page 28 of that transcript, the Claimant seems to accuse Mr Brown of reducing her commission to bolster his own. It is fair to say, however, that Mr Brown did not at any point rise to the Claimant's comments and, indeed, gave a reasoned explanation in response to all of them.

18. The Tribunal also noted that the Claimant indicated in an email to her Solicitors, mistakenly copied to the Respondent's Solicitors, that she

intended to resign on 1 February 2018. This was material to her case because she had not, on the date she sent the email (page 673) dated 24 January 2018 she had not received the grievance outcome. The Claimant seemed adept at a kind of legalistic "reverse engineering" whereby she seemed to work backwards from a particular position to compile an explanation which would then lead to the position she said she found herself in. In the case of the email to her Solicitors, she said the Grievance Appeal outcome was not part of her thinking because she already knew that important witnesses were not being interviewed by the investigating team. The Tribunal did not accept this as a valid explanation because the Claimant would not have known whether the decision-maker thought these witnesses were relevant or whether the whole of her grievance, in relation to race discrimination and her targets, would be dealt with.

19. There was a further inconsistency in her evidence in relation to paragraph 40 of her statement when she said quite clearly that the incident with the alleged comments by Mr Brown about the Chinese account manager had started her thinking that Mr Brown disliked the Claimant because of her sex or her colour. When it was pointed out to her in cross-examination that she refers in her grievance (page 379) to matters which allegedly arose well before that date, she changed her evidence to suggest that there were other matters which she then thought she could rely on but had not necessarily thought they were discriminatory at the time. No details of these other matters were provided.

20. It is also notable that in her grievance, the Claimant not only refers to alleged race discrimination, unlawful deduction of wages and breach of contract, but also making a protected disclosure, harassment, and gross misconduct by managers who she alleged were colluding in depriving account managers of income to effectively line their own pockets. These were very serious allegations indeed, particularly in the financial services sector, and the fact that they were made and not pursued does not support the Claimant's credibility.

21 A further example of the Claimant's lack of credibility was noted by the Tribunal in respect of her claim for expenses. It is beyond dispute that the Claimant did not follow the Respondent's expenses policy. She delayed making her claim, which was largely for mileage, and supported it by what seemed to be an estimate of the miles she had allegedly travelled on the Respondent's business. The claim in this regard lacked any clarity and seemed to us to be a rather poor attempt to add a significant amount to her claim. Given the lack of any proper supporting evidence, we were somewhat surprised the claimant chose to pursue this element of her claim.

22 For the above reasons we did not find the Claimant to be a credible witness.

23 In relation to the Respondent's witnesses, Mr Brown, the Claimant's Line Manager, gave his evidence in a calm, straightforward and rational

manner. He answered questions in relation to the allocation of work in his team explaining how work was allocated when 2 team members went on maternity leave and he had to accommodate 2 new starters. This explanation seemed to us to have been made using sound business sense and indicated to the Tribunal that the Claimant's assertions of work being allocated unfairly were ill founded.

24 Mr Brown also explained succinctly how he had assisted the Claimant in relation to some of her accounts. In particular, he explained to the Tribunal's complete satisfaction why there had been issues with one of the Claimant's accounts in that she had made a sale wrongly assuming that the new elements to a customer's existing plan were covered by the existing Master Service Plan when, in fact, because of the nature of the new element it would not have been FCA compliant. Unlike the Claimant's rather garbled explanation and/or justification for her actions, we accepted Mr Brown's explanation that this new plan should not have gone "live" until a separate compliant contract had been completed. What the claimant had done in relation to this customer, known as Hargreaves, represented a substantial risk in compliance terms to both the Respondent and Hargreaves.

25 Mr Brown was questioned about the decision to increase the Claimant's sales target part way through the financial year. We felt he did not duck the issue. He accepted that the Claimant had performed well but the fact that she had achieved her target so early in the financial year indicated to him that her target should be increased. The actual decision to do so was made by Mr Brown's Line Manager, Ms J Edwards, but he said he had input into her decision to increase the Claimant's target. Since Ms Edwards was not called as a witness, it would have been relatively easy for Mr Brown to avoid this issue by failing to address that particular point and the fact that he accepted his own part in the decision reinforced his credibility as a witness.

26 What was significant about Mr Brown's evidence in the Tribunal's view was the comments he made in the transcripts of the covert recordings of a telephone call and an in-person meeting with the claimant. In our view, nothing he said in either of those conversations remotely indicates he was treating the claimant any differently to any other account manager in his team. He accepted that the Claimant had her faults and did not hold back in advising her, for example, that she had more work to do before she could be considered for promotion. He did question her attitude. In his oral evidence, he made clear that he sought feedback from other departments of the Respondent in relation to all of his account managers and that the Claimant was sometimes criticised in that feedback for inadequate instructions being given, for example, to the legal team.

27 Our overall impression of Mr Brown was that he was a credible and truthful witness. Ms Brodie's evidence was also succinct and to the point. She explained in a logical manner her part in the Claimant's grievance and how the issues had been investigated. Further, she gave a lucid explanation of the Respondent's expenses policy, when it changed, and the fact that the Claimant's expenses claim was made too late and submitted with completely inadequate information.

28 Miss Brodie was also honest enough to say that at first she did not quite understand the commission structure in relation to the sales made by the account managers but that when she looked into it she thought the calculations in respect of the Claimant were correct.

29 In view of the above, we found Miss Brodie to be a credible witness.

30 Accordingly, where there was a conflict in the evidence between the parties, for the above reasons, we preferred the evidence of the Respondent's witnesses.

The Facts

31 In relation to the issues before us, we find the following facts:

(i) The Respondent is a data analytics provider. The Claimant commenced employment with the Respondent on 24 October 2016 and resigned with notice on 1 February 2018, her employment terminating on 1 May 2018. She was employed as an account manager in the SME team and was responsible for selling the Respondent's data analysis solutions. The Claimant was remunerated by way of a basic salary plus commission which was dependent upon a sales performance in relation to all revenue and new business revenue subject to the terms of the Respondent's sales incentive scheme.

(ii) Towards the end of April 2017, Mr Brown became the Claimant's Line Manager. He took over an existing team and began to familiarise himself with the team and individual team member performance. The team itself was ethnically diverse including Asian and Chinese ethnicities. The Claimant was the only black member of the team being of African Caribbean ethnicity.

(iii) The commission structure of the Respondent was complicated but essentially involved each team member being given a sales target with variable commission depending upon whether sales were to existing customers or were new business. Commission was subject to a cap which could be exceeded only at the discretion of the Respondent's Remuneration Committee.

(iv) The Claimant was successful in achieving her sales target quite early in the 2017/18 financial year. As a result, at a meeting with Mr Brown and his Line Manager, Ms J Edwards, VP Sales, she was advised that her target would be increased from £250,000 to £350,000. The Claimant was not surprised by this turn of events which was permissible under the Respondent's Sales Incentive Plan and accepted it in light hearted fashion. Subsequently, however, she indicated to Mr Brown that she would like to re-negotiate this new financial arrangement because, whilst her sales target had been increased, there was no commensurate increase in the amount available to be earned by the Claimant in commission. In the ordinary course of the Respondent's business in relation to the SME team, this was in line with what had happened

previously when account managers had their targets increased. The treatment of the Claimant was no different.

(v) On 27 September 2017, the Claimant emailed Mr Brown asking him to speak to her regarding potentially re-negotiating her sales target increase. The following day Mr Brown telephoned the Claimant which call the claimant covertly recorded. Mr Brown told the Claimant that the increase was not negotiable but they agreed to meet at a later date.

(vi) This meeting took place at the Respondent's Leeds Office on 2 October 2017. Again, the Claimant covertly recorded the conversation. During this conversation she expressed her dissatisfaction with the new financial arrangement and they discussed various financial calculations in relation to the Claimant's commission. The Claimant also criticised Mr Brown for not being a supportive manager and they also discussed some individual sales. The Claimant also questioned the role of Mr Brown in the Hargreaves Sale.

(vii) During the course of 2017, Mr Brown had assisted the Claimant in connection with her sale to Hargreaves. She had sold a product to the customer which she wrongly insisted required no further paper work in legal terms because it would be covered by the Master Service Plan for that client. In fact, this was not the case as Mr Brown had identified since a new contract for this product was necessary to be FCA compliant. Mr Brown also obtained feedback from other departments on the Claimant and other team members and was told the she sometimes failed to communicate adequately with other departments by giving imprecise instructions.

(viii) On 2 October 2017, the Claimant raised a grievance (page 341) against Mr Brown alleging race discrimination in that her target had been increased without a commensurate increase in potential commission earnings. She also alleged that there had been unlawful deductions of wages, harassment and sex discrimination. A grievance hearing was held on 17 October 2017. The outcome was that her grievance was not upheld. The Claimant had covertly recorded the grievance hearing.

(ix) The Claimant appealed the grievance outcome and her appeal was heard on 20 December 2017. She also covertly recorded the appeal hearing. After the hearing, her grievances were investigated further under the direction of Ms S Lowther, Strategy and Transformation Leader – International Operations. By letter dated 25 January 2018, the Claimant's appeal was dismissed except that the claw back of commission resulting from her increase in sales target was reversed so that she did not suffer any loss and the target itself was reduced back to £250,000 for that financial year.

(x) Prior to receiving the appeal outcome, the Claimant emailed her solicitors, inadvertently copying in the Respondent's solicitor, to indicate she intended to resign on 1 February 2018 which she subsequently did giving 3 months' notice.

(xi) The Claimant had not presented her expenses claim in accordance with the Respondent's expenses policy and was asked to provide a breakdown of her mileage expenses by reference to her diary. This was completed in a somewhat haphazard way without proper evidence of expenditure and the Respondent did not pay the claim.

(xii) The Claimant also claimed that she was due £6,899 (page 680.1) and this being above the commission cap for the Claimant was referred to the Respondent's Remuneration Committee which did not exercise discretion in the Claimant's favour.

Submissions

32 Both Counsel helpfully provided written submissions and gave further oral submissions. For the Respondent, Mr Crawford submitted that there was no evidence from which the Tribunal could conclude that discrimination based on race had occurred. The claim fell away because other account managers had their targets altered during the relevant period and, in the case of increases, their commission pots were not increased commensurately. He also submitted that there was no "without more" element in that Mr Brown's reference to her attitude did not imply race discrimination and the reference to Mr Brown criticising another account manager's Chinese accent was not supported by the evidence.

33 Mr Crawford further submitted that the Claimant had been unable to demonstrate that the decision to change her target was motivated by race. Her contract of employment provided that the bonus target could be altered and this was done in accordance with the Sales Incentive Plan (page 158) which has the objectives of new growth, winning new business and new customers.

34 In relation to constructive unfair dismissal, he submitted that the Claimant had to establish that it was an act of discrimination. The Claimant had said it was as a result of the outcome of her grievance and grievance appeal, but before she received the appeal outcome, she had already indicated to her solicitors she would resign on 1 February 2018.

35 In relation to unauthorised deductions there had been no such deductions and in relation to her mileage expenses she had failed to comply with the Respondent's expenses policy.

36 In relation to the claim of victimisation, Mr Crawford submitted that the acts relied upon by the Claimant were not corroborated by the evidence.

37 Generally, Mr Crawford submitted that the Claimant had not been a credible witness.

38 For the Claimant, Ms Robertson, submitted that on 2 October 2017, the Claimant legitimately and genuinely believed that two of her peers had had targets and commission pots increased and, as she had not, this was because of race discrimination. The fact that one of these increases in pots was not reflected in the documents produced by the Respondent made the Claimant think that one of these increases might have been in 2015. The

Respondent was "race blind" and produced no statistics on the ethnic composition of its workforce and what had happened to the Claimant supported this view.

39 The "something more" required in relation to the discrimination claim was established by the Claimant in the difference in treatment between her and these two other account managers.

40 In relation to constructive dismissal, Ms Robertson submitted that preventing the Claimant from receiving contractual rewards amounted to a repudiatory breach. There had been a lack of transparency by the Respondent who was "hiding".

41 Regarding unlawful deductions, the Claimant was entitled under the sales incentive plan to the further remuneration by way of the commission she claimed. In respect of the counter-claim, there was no written evidence that the respondent paid the amounts incurred by the claimant on her company credit card.

Conclusions

42 We begin our discussion by considering the judgments in Madarassy and Talbot. In the former, the Court of Appeal held that a claimant has to prove facts from which the tribunal could conclude there has been unlawful discrimination. In other words, in this case the Claimant must establish a prima facie case, but not a conclusive one. If she succeeds in persuading us there is a prima facie case, the burden of proof shifts to the Respondent to establish why there was no unlawful discrimination.

43 In Talbot, the EAT held that the tribunal should consider the totality of the circumstances surrounding the alleged discrimination and what inferences should rightly be drawn. The court noted it is very unusual to find direct evidence of discrimination; the tribunal's decision will depend on what inferences it is proper to draw from all the relevant surrounding circumstances; findings of primary facts should be made and taken into account; the evidence of the parties' should be assessed and form part of the process of inference; the evidence of the alleged discriminator should be assessed on the grounds of credibility and reliability and tested by reference to objective facts, documents, possible motives and the overall probability; and, where it would be proper to draw an inference of discrimination in the absence of any other explanation, the burden lies on the alleged discriminator to prove there was no discrimination.

44 Subsequent to the Preliminary Hearing in this matter, the parties agreed a list of issues which they presented at the Hearing. It is convenient for the tribunal to deal with these issues as set out in the agreed list as they are more specific than those agreed at the Preliminary Hearing. We deal with each of them in turn applying the principles set out in Madarassy and Talbot above.

45 Did the Respondent subject the Claimant to less favourable treatment than a hypothetical comparator (in whose case there was no material difference in circumstances compared with the Claimant) because

of her race by increasing her bonus target? The starting point in answering this question is to look at the Sales Incentive Plan and the Appellant's contract of employment. At page 134 her contract states "The Company reserves the right to vary, decline, withdraw or replace payment of sales incentive at any time at the Company's sole discretion". At page 159 the Sales Incentive Plan states "Equifax may use its discretion to make changes to an individual's sales targets at any time by giving 30 days' notice to Scheme participants". Contractually, therefore, it was open to the Respondent to adjust the Claimant's sales target. The decision to do this was that of Ms Edwards with input from Mr Brown. The policy was open to all account managers and the Claimant must establish that it was applied to her (even if by inference) because of her race. She relies on Mr Brown's comments regarding a Chinese account manager which she says she overheard and which were repeated to another employee. We found the Claimant's evidence in this regard to be unreliable. Firstly, she admits to not having heard all of the conversation and, secondly, the employee she alleges was also upset by the comments was interviewed in connection with the Claimant's grievance (pages 390-391 and denied that any comments attributed to Mr Brown were in any way racist. We have also found that the Claimant accepted the increase in target light-heartedly and said she was expecting it. Given the sales driven culture of the Respondent, our findings of fact and the fact that other account managers had also had targets increased with no associated increase in their commission pots, we can find no basis upon which to infer any race discrimination of the Claimant. Whilst not stated as an agreed issue, we record that the reference by Mr Brown to the Claimant's poor attitude was not an act of discrimination. We find it a big leap from being a stereotypical comment about black employees generally.

46 What was the reason or principal reason for the Claimant's resignation? Did she resign in response to any discriminatory treatment by the Respondent? We found the Claimant's evidence as to her resignation to be unreliable. She seems to have been caught out by the fact she mistakenly sent an email to her lawyers and copied in the Respondent's lawyer saying she intended to resign on 1 February 2018. This was before she received the grievance appeal outcome. Her email (page 673) states, inter alia, "I definitely which (sic) to resign. If you could help me draft the resignation letter as discussed with the aim of resigning on Wednesday 1st February". This email is quite clear in its intent. The Claimant's explanation at paragraph 113 that the "rushed quality" of the grievance outcome "reinforced my desire to resign" is clearly inconsistent with the content of her email. Her further comment at paragraph 113 that, "I now know this (the rushed quality) was because they had seen my email to Hatton James and this was simply a ploy to weaken my case" is nothing more than illogical speculation which in our view was intended to rescue the situation caused by mistakenly copying in the Respondent's legal team. It is clear from the email sent by the Claimant that negotiations had been underway in respect of the termination of the Claimant's employment. We consider it likely that she had this in mind when resigning and hoped to receive an improved offer. We do not accept that the Claimant had a genuine belief that she had been discriminated against by Mr Brown or anyone else. Indeed, apart from the allegations of discrimination, the Claimant's grievance in respect of her increase in sales target was actually upheld as not being in accordance with the Respondents policy on such increases. Her allegation that others were

treated differently was made without any evidence and on the basis of hearsay. This was firmly established by the schedule provided by the Respondent upon Order by the tribunal to do so. The fact that the increase was made outside the relevant policy does not, in our view, allow us to infer any act of discrimination. In any event, the Respondent reinstated the Claimant's original target with the consequence that she suffered no financial loss.

47 Did the Claimant's oral grievance in or around 25 September 2017 constitute a protected act for the purposes of s. 27(2) EqA? We prefer the evidence of Mr Brown and conclude that nothing in what was said constituted a protected act. It was merely a discussion between the Claimant, Ms Edwards and Mr Brown about the decision to increase her target. We emphasise that this was clearly a discussion and nothing more and cannot see why it is relevant to the issues before us. The grievance of 2 October 2017, however, clearly does amount to a protected act.

48 Was the information false and/or made in bad faith pursuant to s. 27(3) EqA? We note here that the wording of s. 27(3) requires the allegation to be both false and made in bad faith. In considering this, the tribunal had regard to the behaviours of the Claimant and conclusions she allegedly made regarding the matters raised in her grievance. She covertly recorded two conversations with Mr Brown and two hearings. She alleged that the conversations with Mr Brown showed he was discriminating against her. As our findings make clear, the transcripts of the recordings do not, in our view, support the Claimant's contention. Nor do we consider the decision to increase her target to be discriminatory. We find that she was expecting it and, even though it potentially put her in a position where commission earned might be clawed back, it was not discriminatory. As the schedule produced by the Respondent showed, other account managers had had their targets increased without an increase in the commission pot available to them, as opposed to the unfounded assertions of the Claimant to the contrary. We find that the Claimant did not have a genuine belief in her claim to have suffered discrimination at the hands of Mr Brown and she knew this to be the case. We also note that in her grievance outcome meeting with Ms Smith, the Claimant said she had already taken legal advice and at page 440 said in relation to advice about harassment that her solicitors had told her to hold back further information she had. This is a clear indication that the Claimant was building a case without giving the Respondent an opportunity to answer all of the allegations she wished to make and came across as a veiled threat. Consequently, the allegations were both knowingly false and raised in bad faith.

49 If we are wrong in this conclusion, we consider the alleged detriments suffered by the Claimant as set out at 3.3.1 to 3.3.6 of the agreed list of issues. These are:

Micro-management of the Claimant by Mr Brown: 3.3.1.1 Mr Brown asking to be added to all communications the Claimant made to other teams. Mr Brown had already explained to the Claimant that the feedback he had on her performance from other teams indicated her instructions were not always clear. As a result, this was a perfectly sensible step to take and in no way a detriment to the Claimant. We accept Mr Brown's evidence that he asked to

be copied into important communications so he could mediate as appropriate.

3.3.1.2 Telling the Claimant to give diary access to the Vice President of sales. As Mr Brown emailed all of his team of account managers on 5 October 2017 reminding them to give diary access to Ms Edwards, we do not find that this was a detriment to the Claimant. Indeed, she accepted in her oral evidence that Ms Edwards had requested diary access from the whole team.

3.3.1.3 Holding longer, more detailed surgery calls with the Claimant. Again, we do not see any detriment here. Mr Brown's evidence, which we accept, was that all of his team had 30-45 minutes allocated for such calls. We found the Claimant's evidence to the contrary to be unreliable. In fact, she accepted that the calls were allocated 45 minutes but we do not accept her evidence that her's only ever lasted 10 minutes.

3.3.1.4 Requesting that, instead of a weekly email, the Claimant complete a report in relation to her activity. We do not find this to be a detriment. Mr Brown's evidence was that he asked the Claimant to complete a template as the information he was receiving from her was not complete. Another team member was also asked to do this (page 474).

3.3.2 Her line manager ignoring a request from HR to avoid holding telephone calls with the Claimant alone. At page 414 the Claimant asked HR to restrict telephone calls with Mr Brown to group calls with no one to one calls and all other communications to be by email. She alleges Mr Brown ignored this but produced no evidence of this so there can be no detriment.

3.3.3 Unfairly distributing accounts. We accept Mr Brown's evidence that he had to give accounts to two new team members who were appointed when two others went on maternity leave. The Claimant's arguments that she was excluded do not, in the circumstances, bear scrutiny.

3.3.4 Her line manager preventing her from registering her sales performance. The tribunal was unclear as to what the Claimant was referring to here. It may be that she is referring to pages 536-542 which are text messages to Mr Brown to the effect that she needed to submit her sales report in order to get paid in time for Christmas. The messages seem to relate to a form WD6 which Mr Brown confirmed was a forecasting tool he used to prepare reports and not anything to do with payment of commission. We accept that evidence. There was no detriment to the Claimant.

3.3.5 Her line manager ignoring emails from the Claimant on 6 and 9 December 2017. We could only find one email dated 6 December 2017 from the Claimant to Mr Brown which he responded to within 2 hours. There are no further emails on either date from the Claimant to Mr Brown. If the Claimant is referring to the text messages at pages 536 – 542, these seem to relate to the fact she had been blocked from accessing the Respondent's IT system after it was discovered she had sent a large amount of data, including confidential client data, to her personal Hotmail account. This matter was out of Mr Brown's hands and his failure to reply while decisions were being made

about reinstating access were being considered does not amount to a detriment to the Claimant.

3.3.6 Delaying dealing with the Claimant's expenses on 7, 14 and 21 November 2017. Mr Brown could not remember if he replied to these messages. His evidence was that he needed to check certain items with the Claimant and was hampered by the fact he could not speak to her on a one to one basis. We accept his evidence and do not consider that the failure to reply, if that was the case, constituted a detriment to the Claimant.

Unlawful deduction from wages: 4.1 Did the Claimant have a contractual right to be paid commission? 4.2 If so, was the amount of commission paid to her on any occasion less than the amount that was properly payable on that occasion? The Claimant did have a contractual right to be paid commission subject to the complex calculations necessary to calculate it and the imposition of a cap on those earnings. The amount claimed by the Claimant is almost exactly the same as the amount calculated by the Respondent. Under the terms of the Respondent's Sales Incentive Plan, this amount could only be paid after referral to the Remuneration Committee as the amount exceeded the "soft cap". Along with 22 other employees the Claimant's commission earnings were referred to the Remuneration Committee who, in exercise of the Respondent's discretion, did not approve the payment. In fact, only 3 of the 22 employees referred to the Committee had the cap lifted (page 700). We find that it was open to refuse payment to the Claimant and this claim is dismissed.

Breach of contract: 5.1 Has the Claimant submitted a reasonable expenses claim of expenses wholly, properly and necessarily incurred in the course of her employment? 5.2 Is the Respondent in breach of an express term of the Claimant's contract in relation to payment of a reasonable expenses claim of such expenses? The Claimant produced no evidence that she had submitted her mileage claim on time. What she then submitted (page 776) was, according to Ms Brodie's evidence, inadequate as the claims went back to May 2017 and did not show start and end destinations or differentiate between company and personal expenses. At page 116 the Respondent's expenses policy states that expenses claims must be made within 60 days of the expense being incurred. We find that the Claimant did not comply with this requirement and her claim for mileage expenses is not well-founded and we dismiss it.

5.3 Has the Claimant used her company credit card for personal and unreconciled purchases totaling £177.94? 5.4 If so, should the Respondent be awarded that sum by way of a counterclaim or should the sum be set-off against any compensation awarded to the Claimant? We find on the balance of probabilities that the Claimant did use her company credit card for personal purchases. Ms Brodie gave evidence that the two payments concerned had to be paid by the Respondent in order to close down the Claimant's company credit card account. The problem here is that the Respondent produced no evidence that these payments had actually been made by it. Accordingly we dismiss the Respondent's claim.

50 It is appropriate to consider and record our views on the submissions made on behalf of the Claimant. It is clear from our findings that we found the

Claimant to be an unreliable witness who, for whatever reason, began building a case against the Respondent, and Mr Brown in particular, when she covertly recorded her first conversation with him and subsequent conversations and hearings. We have already addressed the judgment in Madarassy. Ms Robertson points out that whether we could conclude that discrimination has taken place means "that a reasonable tribunal could properly conclude" it. Our reasoning above is clear. Much of what the Claimant said is based on speculation and nothing more. We have considered all of the evidence and found that the Claimant was treated in the same way as others in accordance with her contract of employment and the Respondent's policies. There is not "something more" or something extra" necessary to shift the burden of proof to the Respondent.

51 In relation to the alleged discriminatory constructive dismissal, we find no fundamental breach of the implied term of trust and confidence. The Claimant pleads the acts of discrimination as being the breach along with failing to address her appeal adequately in not speaking to certain witnesses. We find that the Respondent's investigation was thorough in dealing with the Claimant's allegations. We note also that some of the witnesses interviewed in the grievance process failed in no uncertain terms to support the allegations made by the Claimant.

52 For the above reasons, we dismiss all of the claims before us.

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Employment Judge Butler

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Date 5 July 2019