EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4109137/2018

Held in Glasgow on 20, 21, 22 and 23 May 2019

Employment Judge C McManus

Mr Peter Burns	**Claimant** **Represented by:** **Mr F H Lefevre - Solicitor**
Entcorp UK Limited	**Respondent** **Represented by** **Mr R Bradley - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's claim for constructive dismissal under Section 95(1)(c) of the Employment Rights Act 1996 is unsuccessful and is dismissed.

REASONS

Introduction

1. The claim is for constructive dismissal. An ET1 application form claiming unfair (constructive) dismissal was submitted to the Employment Tribunal on behalf of the claimant against the Entcorp UK Ltd t/a Micro Focus on 19 June 2018. The claimant had complied with the requirement under the Employment Tribunals Act 1996 Section 18A to contact ACAS before instituting these proceedings. The claim was acknowledged, the ET1 form sent by the Employment Tribunal office to the respondent and an ET3 form was lodged in response to that claim on 23 July 2018. The position in that ET3 was that the correct name of the respondent is Entcorp UK Ltd. That was confirmed at this Final Hearing. Further Particulars of the claim have been lodged and accepted.

2. At the respondent's representatives' request, Orders for information and to provide documents were issued on the claimant on 31 August 2018. Those related to the claimant having secured alternative employment. Prior to the full hearing dates being fixed, the respondent had raised a preliminary issue by way of an application to strike out the claim, on the basis that it had no reasonable prospect of success, and, in the alternative, the respondent sought a Deposit Order, on the basis of the claim having little reasonable prospects of success. These matters were argued before Employment Judge D. Hoey on 29 November 2018. His Judgment dated 18 December 2018 is a finding that both applications failed. Parties' representatives are in agreement that the findings in fact and chronology from that Preliminary Hearing are relevant to this Final Hearing. Some have been included here for ease of reference.

3. Parties' representatives had helpfully liaised to prepare a Joint Inventory of Productions (JIP), with pages 1 - 383. The numbers in brackets in this Decision refer to the page numbers in that JIP. Not all documents were referred to in evidence. Evidence was heard on oath or affirmation from all witnesses. For the claimant, evidence was heard from the claimant only. For the respondent, evidence was heard from Sarah Ambrose (HR Lead UK I & East), Francisco Javier Manzanero, known as Fran, (Senior Director, Digital Sales EMEA) and Shaun Briggs (Digital Sales Operations Lead EMEA) .

4. Prior intimation of proposed witnesses for both parties had been made, indicating for the Respondent that they were to call the above named witnesses and also Stephen Bryans (the claimant's former line manager and formerly employed by the respondent simultaneously in the roles of Senior Digital Sales Manager and Erskine Digital Sales Hub Leader) and Simon Musgrave (Director Solutions Consulting UKI). The Claimant's initial response was that he himself would be his only witness. The claimant's representative later requested a Witness Order for the attendance of Stephen Bryans, to give evidence for the claimant. That Witness Order was granted and issued on 16 May 2019. The claimant's representative's position at the Hearing was to no longer insist on that Witness Order.

5. This case was scheduled for a Final Hearing on 20,21,22 and 23 May 2019. The evidence was concluded on 23 May 2019. It was agreed that both parties' representatives would prepare and exchange written submissions, with each representative's final submission to be sent to the Tribunal office by 8 June 2019. That was done and those written submission are referred to in this Judgment.

6. The Tribunal was grateful to both representatives for their professional and able representation of their respective clients.

Issues for Determination

7. The parties' representatives agreed that the issues for determination are as follows:-

    (i) Did the respondent conduct itself in a manner calculated to destroy or seriously damage the relationship of trust and confidence between the parties?

    (ii) Was the conduct of

        (a) A calculated effort by the Business (EMEA Digital Sales) to engineer a desired outcome that was neither fair nor reasonable;

        (b) inappropriate action and comments by Senior Management said to have caused the claimant to feel harassment in the form of bias towards age, stress and anxiety: and

        (c) Territory Alignment that was unfair and unreasonable leading to Potential Performance Management due to territory alignment,

    calculated, and did it cause or significantly contribute to the claimant resigning his employment?

    (iii) Did the claimant resign in response to that conduct or for some other reason?

(iv) Did the claimant resign because by 9th March 2018 he had accepted an offer of alternative employment?

(v) Was the claimant dismissed by the respondent?

(vi) If the claimant was dismissed by the respondent, was that dismissal by reason of his conduct or for some other substantial reason?

(vii) If the claimant was unfairly constructively dismissed to what compensation is he entitled?

Findings in Fact

8. The following material facts were admitted or found by the Tribunal to be proven:-

9. The respondent is one of the largest software companies in the world. Its' worldwide business builds, sells and supports software for a range of business uses in many and varied sectors. The respondent is a wholly owned subsidiary of Micro Focus.

10. The claimant has approximately 20 years of experience in IT sales. He was employed by the respondent from 9 March 2015 until 9 March 2018. He worked within the respondent's EMEA (Europe, Middle East and Africa) Digital Sales team, in its Erskine location. He was initially employed as a Digital Sales Representative (which is an individual contributor role) and then became a Digital Sales Manager (which is a management level role). He reported to Stephen Bryans, who was employed as Senior Digital Sales Manager / Erskine Digital Sales Hub Leader.

11. In financial year 2017 ('FY17'), EMEA Digital Sales did not reach its budget. As a result, the budget for financial year 2018 ('FY18') was decreased, with a focus on productivity improvement to deliver budget going forwards. This reduced funding led to reduced headcount across the EMEA business, in various country locations and at both individual contributor ('IC') and management level. As a result, the respondent was undertaking a workforce management ('WFM') restructuring exercise from around November 2017. This is as set out in the

PowerPoint presentation at JIP 113 – JIP 118). That PowerPoint presentation was used as the basis for information given to employees on this WFM process, which was being applied in various locations in the UK and in other countries, and the reasons for this. A number of roles were affected, including the claimant's role at that time. At that time there were three managers at MG1 level working within the Erskine Digital Sales team, including the claimant. Stephen Bryans was at that time an MG2 level. It was proposed that in Erskine this group of MG1 level managers be reduced from three to one.

12. Fran Manzanero is a Senior Director within the respondent's business. He has responsibility for Digital Sales across the respondent's business in Europe, the Middle East and Africa ('EMEA'). He attended a Skype meeting on 22 November 2017 to discuss and approve the implementation of this WFM process across various of the respondent's locations, including in Barcelona and in Erskine. The claimant and the other MG1 managers in Erskine affected by this redundancy situation were advised of this proposed workforce reduction ('WFR') in a meeting with Stephen Bryans on 24 November 2017. At this meeting, Stephen Bryans spoke to the PowerPoint presentation at JIP 113 – JIP 118.). At this meeting they were told that a decision had been taken on the need for a reduction in the management team at Erskine from three then current MG1 roles, to one such role.

13. On 27 November the Claimant attended a meeting with Fran Manzanero There was discussion on the WFM process. Fran Manzanero said to the claimant words to the effect that he '*shouldn't panic'* if he wasn't selected for the one remaining managerial role, and that if he were not selected for that role, then there would be other jobs within the respondent's business to explore. Fran Manzanero told the claimant that he wanted him to stay with the business because of his knowledge and experience. Fran Manzanero did not state to the claimant words to the effect that a decision had been made that the claimant would not be successful in being appointed to the one remaining MG1 role. On 29 November the Claimant sent an email to Fran Manzanero saying *"Thanks for taking the time to meet with me on Monday. I saw our conversation as positive and I'm looking forward to a successful FY18 under your leadership.*

Talk soon." (JIP 126). Fran Manzanero replied on the same day saying "*Great! It was my pleasure. Please I need your help to deliver a fantastic FY18*" (JIP 126).

14. During December 2017 the Respondent progresses this WFM / WFR (work force reduction) program. It was intended that the two MG1 managers in Erskine who were not successful in being selected for the one remaining MG1 role would be appointed as Sales Representatives. The manager who was selected for the one remaining MG1 role in Digital Sales in Erskine was considered by the respondent to be to be the outstanding candidate. That position is as set out by Stephen Bryans in the investigatory meeting which later took place with Simon Musgrove (Director Solutions Consulting UKI) (at JIP 346). The individual who was selected for the one remaining managerial role had been employed the respondent for a shorter period of time than the claimant. Selection was made on the basis of agreed selection criteria. The completed selection criteria form in respect of the claimant records under the section 'role competencies' issues with the claimant's forecast accuracy (JIP 123).

15. The consultation with the claimant was a joint consultation meeting on 24 November 2017, an individual consultation meeting on 7 December 2017 and a one to one meeting on or around 16 January 2018. What had been arranged as a second individual consultation meeting with the claimant on 18 January 2018 was cancelled. In the course of this individual consultation process, the claimant was informed that a Digital Sales Representative ('DSR') role was available. The claimant was offered that role. He was given the choice of accepting the DSR role, or being made redundant, with an enhanced redundancy package. The claimant was informed that his existing salary for his management level role would be maintained in the DSR role. The claimant agreed to take on the DSR role as an alternative to being made redundant and accepting a settlement agreement.

16. The email from Stephen Bryans to Sarah Ambrose (then HR lead for North, being UK, Ireland, Nordic countries and Israel, with responsibility for Digital Sales in Erskine), Shaun Briggs (then Sales Ops WW (World Wide)) and Fran

Manzanero (then Senior Director Digital Sales EMEA) on 17 December 2017(JIP 134) shows that as at that date it had been decided that the claimant would not be successful in being appointed to the one remaining manager role (referred to therein as FLM1 role). That email shows that at that time the respondent's proposed course of action was to appoint the claimant to a Digital Sales Representative role, and in particular to the Digital Sales Representative role which was expected to become vacant following the dismissal of a particular individual on capability grounds. At that time that individual was absent from work due to ill health. That particular individual was at that time line-managed by the claimant. That email referred to the prospect of losing the claimant, in addition to other circumstances, being a loss which *"..would impact greatly to the business.*" Guidance was sought by Stephen (known as Stevie) Bryans on "*…what we can do to mitigate the risk to business."* In reply, on 3 January 2018, Fran Manzanero emailed Sarah Ambrose and Shaun Briggs requesting that they discuss with Stevie Bryans "*evaluating the options and trying to retain Peter*" (JIP 180).

17. Shaun Briggs is a highly qualified employee of the Respondent. He has a postgraduate qualification in Financial Planning and a Masters in Business Administration. Shaun Briggs was involved in the allocation of appropriate territories to Digital Sales Managers, including the allocation of territory to the claimant. Shaun Briggs received an email on 9 January 2018 (JIP 189) containing names of the respondent's employees in the UK who were affected by this WFR process. This email included the statement, "*Peter Burns, - Redeployed as Digital sales rep*."

18. Forecasting is an important part of the respondent's business. It is important to the respondent that forecasting is accurate because that impacts on the company's share price. As part of that, it is important that pipeline figures are accurate. On 16 January 2018, Shaun Briggs emailed Stephen Bryans, the claimant and others with the FY18 Q1 (financial year 2018, Quarter 1) forecast file with pipeline data (JIP 195A & B). That forecast showed the five accounts that the claimant had requested to be retained by him in his Digital Sales Rep (JIP 195B).

19. Following being appointed as Senior Director Digital Sales EMEA from the start of the respondent's FY18 (on 1 November 2017), Fran Manzanero had one to one meetings with many individual employees in various countries. He was in Erskine on a mainly fortnightly basis. Fran Manzanero met with employees in the Digital Sales team in Erskine on a one to one basis in Erskine on 16 January 2018. These meetings were similar to meetings he carried out with employees in several locations. These meetings were not intended to undermine the claimant's position. When questioned in the context of the investigation into the claimant's grievance, the claimant's then line manager, Stephen Bryans, did not see those meetings as being an issue.

20. As at 16 January 2018, Fran Manzanero was taking steps to try to ensure that in his Digital Sales rep role the claimant would be retained on the same salary he had had in his management role. Fran Manzanero's email of 16 January 2018 to Shaun Briggs (JIP 201) confirms this.

21. The email correspondence from Fran Manzanero and from Stephen Bryans on 16 January 2018 (JIP 199-200) shows the importance to Fran Manzanero and the respondent business of being given accurate figures in respect of forecasts and what level of sales were being committed to. The email from Stephen Bryans at JIP 199 confirms that all the individuals to whom the email was sent, which included the claimant, had *"…committed to Fran today for your Q1*". Stephen Bryans noted in that email that the claimant had not spoken directly with Fran. The chart which was attached to that email shows that the claimant had committed to total sales of a minimum of $988k and a maximum of $1251k. Those figures included a particular deal where the commitment from the claimant was a minimum of $180k and a high of $240k.

22. The document at JIP 202 shows that the claimant's final consultation meeting on 18 January 2018 was cancelled. This document includes the statement "*Due to the re-deployment, I will have a 1 : 1 with Peter*..". That was written by Stephen Bryans. The claimant and Stephen Bryans had one to one meeting on or around 16 January 2018. In that meeting it was confirmed that the claimant would be redeployed as Digital Sales Representative. That position was the position of Stephen Bryans in his later investigation meeting with Simon

Musgrove (at JIP 346). That meeting was held in the context of an investigation into a grievance later raised by the claimant. The claimant had accepted the Digital Sales representative role. In his email to Sarah Ambrose and others of 25 January 2018 (JIP 204), Stephen Bryans confirmed that he had "…concluded the Meeting 3 WFR/M" for the claimant and another. Under the heading in that email "Peter Burns", he stated:-

> "*Peter will be re-deployed as a rep into the UK ADM team under my management. Maureen when we last spoke, you mentioned it was a simple job code / job grade change in Workday, can you advise the new job code and job grade I should use for this change for Peter.*
>
> *I am mindful that everything needs to be in pace* (sic) *one week from now, and I worried* (sic) *that we miss something."*

23. Workday is the respondent's HR IT system. During this time the respondent was experiencing issues with the Workday system which affected a number of employees, including the claimant. The reference in that email to 'one week from now' is a reference to the second quarter of the respondent's financial year, which begins on 1 February. The claimant's redeployment to the role of Digital Sales Representative was effective from 1 February 2018, which was the start of FY18 Q2. From that time, the claimant was working in the redeployed role of Digital Sales Representative, as an outcome of the redundancy (WFR) process. It was not the respondent's then normal practice to issue written confirmation of redeployment. The claimant did not appeal against redundancy or redeployment. The claimant was not made redundant. He agreed to his redeployment to the role of Digital Sales representative.

24. On 23 January 2018, Fran Manzanero met the claimant on a one to one basis. This meeting took place in a meeting room in Erskine. In that meeting room there is white board which displays the forecast figures which members of the sales team have committed to. Fran Manzanero uses that as a tactic to remind the sales teams of the importance of the forecast figures. On 23 January 2018, the claimant told Fran Manzanero that he was going to deliver sales of $20K. Fran Manzanero was very concerned about the significant discrepancy in the

claimant's forecast then to the figures he had previously committed to. Fran Manzanero was very concerned that the claimant had been inconsistent in what he had said about his forecast. Fran Manzanero told the claimant that that was unacceptable. Fran Manzanero believed that given the claimant's experience in a sales role, he should understand the importance of being consistent in his forecast figures and, in the event of a significant change, that he should provide details on how those figures would be recovered in alternative ways. In the previous week, the claimant and Fran Manzanero had had daily discussions about his forecast, during which there had been no indication from the claimant that there would be this substantial change to his forecast figures. It was for those reasons that Fran Manzanero told the claimant on 23 January that his revised sales figures were unacceptable. During this meeting on 23 January, Fran Manzanero was standing up and walking about on the side of a boardroom – type table. He was pointing at the claimant's forecast figures on the whiteboard in the room. After about 5 minutes, Fran Manzanero asked Stephen Bryans to come into the meeting. He did so because the claimant had not volunteered any way of finding replacement work to make up the difference between his previous forecasts and the £20K now being delivered. In that meeting, Fran Manzanero said that the claimant was "..*not a junior person"* and that he was not *"26 or 27 years old"*. Fran Manzanero's reference to age and seniority was intended to convey that the claimant should know the significance of dropping his forecast figures. Fran Manzanero did not conclude that the claimant would then be leaving the respondent. Fran Manzanero had previously taken steps to persuade others in the business to retain the claimant.

25. On 24 January 2018, the claimant sent an email to Sarah Ambrose. He raised concerns about what he reported Fran Manzanero to have said to him at the meeting on 23 January. That email is at JIP 206 – 2017. Specifically, in that email the claimant stated that in the meeting on 23 January Fran Manzanero had said; "*with this level of inconsistency I'll have to think about your future*" (reported to have been said before Stephen Bryans came into the room). He also reported that while Stephen Bryans was in the room, Fran Manzanero had said ; "*it's not personal, its business*" (twice); "*you're not 25 or 27 Peter, now come on" (*twice) and *"we can't have this level of inconsistency*".

26. On 24 January 2018 the claimant agreed to attend a telephone interview with another company for alternative employment.

27. By about 30 January 2018, the claimant and Sarah Ambrose had discussed by phone his email to her of 24 January and the meeting of 23 January referred to therein. They agreed that the claimant would '*leave matters'* but if it happened again, i.e. there was a repetition of the behaviour about which the claimant had complained, he would revisit the issue. Sarah Ambrose advised the claimant that he could if he chose to raise a grievance in respect of the concerns he raised as to his treatment by Fran Manzanero. The claimant did not pursue the matter through the grievance procedure at that time. As indicated in the claimant's later grievance document, the claimant decided at that point not to raise the issue under the respondent's grievance procedure, unless he believed that Fran Manzanero were to treat him in the same manner again. Sarah Ambrose referred to that conversation in her later interview meeting with Simon Musgrave, which took place as part of the investigation into the grievance which the claimant later raised. The final version of the notes of the investigation meeting with Sarah Ambrose are at JIP 354- 356.

28. On 5 February 2018, Shaun Briggs emailed the claimant with the accounts listed for retention as well as those in his defined profile for FY18 (JIP 219 – JIP 234). As a part of his role with the respondent at the time, Shaun Briggs worked to define the respondent's go to market strategy and assign appropriate targets to territories. The spreadsheet attached contained a list of about 730 accounts allocated to the claimant. On 6 February 2018 the claimant sent an email to Shaun Briggs in reply (JIP 235). The claimant's target for FY18 was pro-rated down in comparison with the targets for the other reps (JIP 236). Shaun Briggs' view was that the territory was a good alignment for the claimant's skills and experience. On 6 February 2018, the claimant emailed Shaun Briggs (JIP 235) requesting a 3+ year spend report for this territory. The target allocated to the claimant for this territory was approximately 30% less than the targets for the other sales reps in the team. This target was pro-rated in accordance with the respondent's normal practice.

29. On 2 March 2018, Sarah Ambrose was approached by a third party seeking a reference for '*ex- employee Peter Burns'*. This surprised her. She contacted the claimant. The email at JIP 263 accurately sets out in type written form the communication on 2 March 2018 between the claimant and Sarah Ambrose, which was as follows:-

> "Ambrose, Sarah 12:25
>
> *Hi*
>
> Burns, Peter 12:28
>
> *Hello*
>
> Ambrose, Sarah 12:29
>
> *have you resigned? I just got contacted by a company asking for a reference for 'your ex employee Peter Burns'*
>
> Burns, Peter 12:30
>
> *I am just about to send you an email*
>
> Ambrose, Sarah 12:30
>
> *It's not me you need to send to – you'll need to send it to your manager*
>
> Burns, Peter 12:31
>
> *they asked for HR contact*
>
> Ambrose, Sarah 12:31
>
> *I've given them the address they need to send to, but at the moment the team won't be aware of this unless you have resigned to your manager*
>
> Burns, Peter 12:32
>
> *thanks. Once you read my email happy to chat*

30. The claimant then sent an email to Sarah Ambrose on 2 March 2018 (at 12.53) (JIP 264 – 265). In this email he states

"This email is a formal request to be made redundant due to the points below and outlined in the remaining body of this email.

- *Calculated effort by the business to engineer a desired outcome that was neither fair or reasonable*
- *Inappropriate action and comments made by senior management that caused stress and anxiety*
- *Territory alignment that is unfair and unreasonable*
- *Potential performance management due to territory alignment*

I verbally agreed to a change in my employment from FLM to DSR making a realistic assumption that I would be given a fair and reasonable opportunity to be successful. I put my faith and trust in my management team that this would be honoured, however, I now believe that this has been broken. Had I been provided at this time with the information and data now in my possession, I would have accepted redundancy and actively pursued other career opportunities."

In this email the claimant sought agreement to termination of his employment on 9 March 2018, with payment to the claimant of (i) sums referred to in a previous settlement agreement; (ii) TIA Bonus and (iii) continuity bonus. In his email the claimant's position was that the process that had been undertaken by the Respondent (which had been ongoing in November 2017) was unfair and unreasonable. He relied on conduct by Fran Manzanero towards him, in particular on 27 November 2017 and 23 January 2018. He further stated:-

"As of 2nd March I do not have a Q1 Managers Sales Letter or a Q2-Q4 Rep sales Letter or a territory assigned to me in CallidusCloud, AnaPlan or SFDC. I do have a spreadsheet with my name assigned to a territory. If I have been provided with this spreadsheet data during the WFM process I would have raised my concerns and redundancy (sic)."

31. By another email also dated 2 March 2018 (sent at 13.28) the claimant accepted an offer of employment to commence on Monday 12 March (JIP 270). That

email shows that on 2 March 2018 the Claimant had signed a contract of employment to commence as Account Development Manager Scotland / Wales for NGA Human Resources, from 12 March 2018. That offer of employment was sent to the claimant by email on 20 February 2018 (JIP 247). There is email correspondence between the claimant and individuals at NGA Human Resources at JIP 247 – JIP 253). That includes emails sent on 20 February 2018 (JIP 254). The claimant sent a copy of a presentation that he had spoken to. In that email, the claimant stated "*I am looking forward to joining NGA HR*". Nicholas Eaton (Senior Talent Acquisition NGA Human Resources) replied "Welcome on board snr Burns".

32. In the period between 2 and 9 March 2018, the claimant and the respondent exchanged emails on the matters relied on by the claimant in his email of 2 March 2018, the territory allocated to him in his redeployed role and on the claimant's expectations on a payment being made to him on termination of employment. There were internal emails and other communications on the issues between involved individuals within the respondent's business, including Sarah Ambrose and Fran Manzanero. The documents at JIP 302 – 323 show the substantive communications.

33. Sarah Ambrose's email to the claimant sent on 6 March 2018 includes the following:-

> "*When you were selected for redundancy previously it was due to the number of manager positions decreasing. We do not operate a 'last in, first out' approach; all individuals in the pool were scored on the same, relevant criteria to determine who would be selected for redundancy. That process has concluded and therefore redundancy is no longer an option - you were given the opportunity to take redundancy or be redeployed into an individual contributor role at that time, and you took the redeployment route. Consequently, as the role you are now performing is a go-forward role, we cannot make your position redundant."*

34. In his email of 7 March 2018 to Stevie Bryans (JIP 308 – 309) the Claimant stated:-

"Following our conversation this morning relating to my response from Sarah Ambrose on my request to be made redundant, I am in the process of sending you my resignation letter. The foundation of this letter will be constructive dismissal, however, I would prefer not to make reference to this and therefore suggest the following as a severance package:

- *previous CR Settlement Agreement updated to 9th March*
- *TIA and salary guaranteed for Q1 and Q2*
    - *Draw liability removed*
- *Continuity bonus for orders booked by my previous team in Q2*
- *Last working day 9th March"*

35. On 8 March 2018, Sarah Ambrose sent an email to the claimant, including the following:-

"Our position still stands as per my original email based on the information received from yourself, Stevie and Fran. I am satisfied that the selection criteria was the reason you were selected for redundancy. The company offered you an IC position and made an exception to normal practice by keeping your salary at the existing manager level in order to retain you in the company - we would not have done this if there was a plan to do performance management when this was being approved. I have no recollection of your conversation with Fran being disclosed to me as stated in your email. The territory assigned to you as an IC is a territory that the business are continuing to operate in, and given your experience use should be able to grow the business in that area. I also understand you have a lower target in comparison to your peers as a result (you have the lowest quota) in the group. You referenced stress and anxiety in your original email - my point regarding your sickness is that you have not been off work as a result, nor were we aware of this previously in order to engage you with Occupational Health / take steps to offer assistance.

However, as I outlined, if you raise a grievance an independent manager will do a thorough investigation into the points you raise. You have indicated that you will be doing this so please send this to me ASAP and I will get a hearing scheduled which you will need to make yourself available for."

36. That email was sent after Sarah Ambrose confirmed the accuracy of the picture it reflects with Fran Manzanero and Shaun Briggs. When confirming his position on this in his email to Sarah Ambrose of 8 March 2018 (JIP 302), Fran Manzanero referred to the claimant's position then being stated as being opposite to the claimant's written feedback to him shortly after the November 2017 meeting.

37. There is no indication in correspondence from the claimant to the respondent at this time to the claimant having accepted an offer of employment from another employer. He had done so, and was due to start that new employment on 12 March 2018.

38. On 9 March 2018 the Claimant wrote to the Respondent "*resigning from my position of Digital Sales Rep with Micro Focus with immediate effect".* He stated in that letter "*I feel that I am left with no choice but to resign in light of my recent experiences regarding a fundamental breach of contract and breach of trust and confidence*." (JIP 320). That resignation letter was sent an attachment to an email to Stephen Bryans sent on 9 March 2018 at 14:25 (JIP 319).

39. Also on 9 March 2018, at 4:26PM, the claimant sent an email to Corrado Sterpetti informing that he wished to raise a grievance and attaching a completed grievance form. That email is at JIP 325 and the claimant's grievance form is at JIP 327 – 339 . The covering email stated that he considered 4 points (and the grievance details) to amount to a fundamental breach of contract that led to him resigning with immediate effect. That grievance ran to 13 pages. The grievance stated that it was "*based on the following concerns*":

(1) Calculated effort by the Business (EMEA Digital Sales) to engineer a desired outcome that was neither fair nor reasonable

(2) Inappropriate action and comments made by senior management that have caused the claimant to feel harassment in the form of bias towards age stress and anxiety

(3) Territory alignment that is unfair and unreasonable

(4) Potential performance management due to territory alignment making his position untenable and forcing him to resign from his job

40. In his grievance, the claimant made a number of complaints about his redeployment. He says his final consultation meeting was cancelled; he did not receive written confirmation from Stephen Bryans on his redeployment; he received no paperwork relating to his right to appeal his redundancy or redeployment, which in turn caused him stress and anxiety. In his grievance, the claimant asserted that the territory assigned to him was not viable and was unfair. He suggested that it offered little or no opportunity to be successful "*therefore possibly setting me up for performance management at some point this year which may culminate in the termination of my employment.*" The claimant maintained in his grievance that the outcome had been predetermined. He referred to the meeting with Fran Manzanero on 27 November 2017 and alleged he was told by him then that he would not be successful in the selection process. As at 9 March 2018, the only communication he said he had received was a change of job role notification and he that had not received any paperwork regarding his appeal or redeployment. He says he verbally agreed to redeployment. At paragraph 8 of the grievance he says:

> "*Had I been provided at this time (January 2018) with the information and data now in my possession, I would have accepted redundancy actively pursuing other career opportunities."*

41. The respondent carried out an investigation into the matters raised by the claimant in this grievance letter. The respondent reasonably investigated and dealt with the claimant's grievance in terms of their internal grievance procedure. An investigation was carried out by Simon Musgrave (Director Solutions Consulting UKI). Simon Musgrave interviewed a number of individuals as part of this investigation, including the claimant (grievance

meeting's at JIP 361 – 364), Stephen Bryans (final version interview notes at JIP 345 – 349), Fran Manzanero (final version interview notes at JIP 350 – 353), Sarah Ambrose (final version interview notes at JIP 354 – 356).

42. The claimant was advised of the outcome of his grievance by letter from Simon Musgrave sent by email on 11 April 2018 (JIP 366 – 370). The claimant's grievance was not upheld, following investigation, for the reasons set out in that letter. The claimant was advised of his right to appeal, but did not do so. In respect of territory alignment, Simon Musgrave stated in that letter:-

> *"I have clarified that the territory assigned to you was the one that you would have been very familiar with as it was previously held by one of your team members in your management role and I understand that you didn't raise any concerns with it when it was previously assigned to one of your team. The territory also had a lower target than the other territories, reflecting its status and in proportion to the install base compared to other territories. The account base was considered to be a good alignment to your skills and experience and you were also assigned to additional accounts with qualified opportunities, again judged as a good fit for you."*

His finding on territory alignment to the claimant was stated in that letter in summary as:-

> "*My finding is that the territory alignment wasn't unfair or unreasonable. The territory allocation was reflective of your known skills, experiences and customer relationships and the targets were reduced proportionately and you were given two additional qualified accounts. You would also have known the territory being discussed as you previously managed the Rep assigned to it. I'm not aware that you've raised any concerns about the territory prior to your email of 2nd March."*

43. As at the date of resignation, the claimant had not been issued with a 'Sales letter'. Within Micro Focus, which is the name commonly used for the

respondent's business within which the claimant worked, sales letters are issued containing information on targets, bonus and territory assigned. When he was in his managerial role, the claimant had information on the territory for all reps who reported to the claimant. This included information on the territory which was later assigned to the claimant in his redeployed role as Digital Sales Representative. The claimant had not taken issue with that territory while managing the Digital Sales Representative to whom that territory had been assigned, prior to the territory being assigned to the claimant. When in his management role with the respondent, the claimant's target was based on the collective targets of all the Digital Sales Representatives in his team. The claimant was aware of the territory information for those Digital Sales Representatives, which was captured in software, including CallidiusCloud, which is linked to AnaPlan. As at the time of his acceptance of the role of Digital Sales Representative, the claimant knew that the role he would be carrying out would be largely the role which had been carried out by the Digital Sales Representative who was managed by the claimant and whose role was expected to become vacant following the dismissal of that individual on capability grounds. On 5 February 2018 the claimant was provided with information and spreadsheet data in respect of the territory assigned to him in his redeployed role as Digital Sales Representative. This was sent to him by email from Shaun Briggs of 5 February 2018. The claimant was then in email communication about the assigned territory with Shaun Briggs (JIP 219 – JIP 237). When the territory was assigned to the claimant, additional accounts were added. The territory was assigned to the claimant on the basis that it was reasonable and a good fit for the claimant's skills and experience. The target set was considerably lower than that for the claimant's peers, to take into account the nature and potential of the territory. The target was pro-rated to take into account that the claimant's start date in the digital sales representative role was the start of FY18 Q2, on 1 February 2018. Shaun Briggs had been in email correspondence with Michael Graves (Sales Ops EMEA) on 5 and 6 February 2018 in respect of agreeing an appropriate profile and target for the claimant in his new redeployed role (JIP 236 – 237). Stephen Bryans was asked about the reasonableness of the territory aligned to the claimant in his interview

with Simon Musgrave, which was held in the context of investigating the grievance raised by the claimant. The notes at JIP 346 record his position as being that the target and accounts assigned to the claimant were reasonable.

44. The claimant resigned on Friday 9th March with immediate effect. He did so because he was committed to start employment with another employer on Monday 12 March. The respondent dealt with the claimant's grievance raised under their internal grievance procedure, although that grievance was raised after the claimant's resignation. The Claimant started his new employment on 12 March 2018. The Claimant left that new employment in October 2018 and was then unemployed. He was not in receipt of benefits and was seeking new employment. The claimant later secured further employment.

Relevant Law

45. Section 95(1)(c) of the Employment Rights Acts 1996 ('the ERA') sets out that where the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct, then that employee shall be taken as dismissed by his employer. This is known as constructive dismissal. Case law has developed in respect of constructive dismissal and which is relevant to the tribunal's determination of a claim under section 95(1)(c). The issues agreed by parties' representatives as being the issues for determination by the Tribunal in respect of claimant's claim of constructive dismissal are identified with reference to the Court of Appeal's decision in *Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.*

46. There was no dispute on the relevant case law. The authorities relied on in particular by the parties' representatives were:-

Western Excavating v Sharp [1978] ICR 221
Woods v WM Car Services (Peterborough) [1981] ICR 666
Lewis v Motorworld garages Ltd [1986] ICR 157
Malik v BCCI [1997] ICR 77
Omilaju v Waltham Forest LBC [2005] ICR 481
Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978

Leeds Dental Team Ltd v Rose [2014] IRLR 8
Mahmud v BCCI SA [1997] ICR 606
Bournemouth University Higher Education Corp v Buckland [2009] ICR 1042 (EAT)

47. The applicable legal principles were concisely set out in the respondent's representative's submissions. Following *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, for the purposes of a claim of unfair dismissal, an employee is dismissed by his employer if the employee terminates the contract (with or without notice) in circumstances in which he is entitled to do so without notice by reason of the employer's conduct. The test of whether an employee is entitled to do so is a contractual one. There must be a breach of contract by the employer. It may be either an actual breach or an anticipatory breach. That breach must be sufficiently important or serious to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. The employee must leave in response to the breach and not for some other, unconnected reason. Following *Leeds Dental Team Ltd v Rose [2014] IRLR 8,* the test of whether there has been a breach of the implied term of trust and confidence is objective. Following *Mahmud v BCCI SA [1997] ICR 606,* and *Bournemouth University Higher Education Corp v Buckland [2009] ICR 1042 (EAT),* in a claim in which the employee asserts a breach of the implied term of trust and confidence, he must show that the employer had, without reasonable and proper cause, conducted himself in a manner calculated, or likely, to destroy or seriously damage the relationship of trust and confidence between them. Following *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978,* in a case involving the 'last straw', the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. In such a case, the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general

application. The claimant's representative also made submissions on the legal position, as referred to below.

48. I additionally note that for a successful claim of constructive dismissal, there must be a causal link between the employer's breach and the employee's resignation – i.e. the employee must have resigned because of the employer's breach and not for some other reason, such as an offer of another job. It is a question of fact for the Employment Tribunal to determine what the real reason for the resignation was. To be successful in a constructive dismissal claim, the employee must establish that (i) there was a fundamental breach of contract on the part of the employer (ii) the employer's breach caused the employee to resign; and (iii) the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

49. Where the Tribunal makes a finding of unfair dismissal, it can order reinstatement, or in the alternative award compensation. In this case the claimant seeks compensation. This is made up of a basic award and a compensatory award. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

Submissions

50. There was no dispute on the relevant law. Both representatives lodged comprehensive written submissions. The claimant's representative relied on the grievance lodged by the claimant prior to his resignation (at JIP 13 – 25). His position was that the summary of the claimant's concerns set out at JIP 13 was acceptably recreated in the first two issues identified for determination by the Tribunal. He submitted that the conduct of the Respondent amounted to a

fundamental breach of the implied term of trust and confidence. Specifically, he asserted:

(i) That the Respondent had at a stage well in advance of undertaking the necessary process to allow arrival at a conclusion as to which of three managers would be the one retained in that role had, at the hands of Fran Manzanero intimated to the Claimant a decision to exclude him from that position.

(ii) That in the course of a meeting with the Claimant on 23rd January 2018, a director of the respondent had, by his action and comments towards the Claimant, exposed him to harassment in the form of bias towards age, stress and anxiety and fear as to the safety of his future employment with the Respondent.

(iii) That, pursuant on his loss of a managerial position, the claimant was allocated to a territory alignment that was neither fair, reasonable nor viable, causing the Claimant to resign his employment.

51. The claimant's representative submitted that this was a series of three acts on the part of the respondent which amounted to a repudiatory breach of the claimant's employment. The last act in the series was categorised as 'the last straw'. Reliance was placed on the implied term of any contract of employment that the employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee, with the test of whether there has been a breach of the implied term of trust and confidence being an objective one. It was submitted that it is not unusual to find that the erosion of trust and confidence involves the employee leaving in response to a course of conduct that has taken place over a period of time. It was submitted that the last straw principle may or may not in itself justify his taking that action, but it requires to be sufficient to allow a tribunal to find the resignation as a constructive dismissal.

52. The claimant's representative relied upon the claimant's treatment by Fran Manzanero on two separate occasions, 27 / 28 November 2017 and 23 January 2018, as being two breaches of the implied term of trust and confidence. In respect of the third basis of his complaint, he relied upon the claimant being allocated a sales rep position, while retaining his prior managerial salary, and the customers allocated to him being indicative of a 'potential miniscule commission as against its previous $35k worth' and that 'it was also clear that he would be earning much less than the eight other sales reps'.

53. The claimant's representative submitted that following on the first breach, notwithstanding its seriousness, the claimant elected not to leave his employment, hoping that his belief in his own abilities on a comparison with those of the other two managers might lead to a different result, once proper procedure was carried out before the issue of a decision on who would be retained as a manager. He submitted that the last straw in this case is the third part of a cumulative series of events, and like the other two, is itself a serious matter which destroyed the trust and confidence between the Claimant and his employer. He submitted that they are the reason the Claimant resigned his position. He submitted that the last straw does not of itself require to be of great weight, but when added to earlier breaches by the employer cumulatively there is a situation allowing the employee to regard the contract as repudiated. The tribunal was asked to find that in all the circumstances narrated by the claimant's representative in his written submissions, the respondent acted in a manner which seriously damaged the relationship of trust and confidence between the parties; further that they did this in these three distinct matters, that the Claimant resigned by reason of that conduct only; and that the Claimant was constructively dismissed.

54. The respondent's representative noted the claimant was seeking to rely on the 'last straw' principle. It was the respondent's submission that the claimant was not unfairly (constructively) dismissed and that his claim before this Tribunal should be dismissed.

55. Parties representative's positions in their respective submissions was accepted, or not, as set out below.

56. It was not submitted that there was any issue with regard to a possible uplift under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRA') with regard to non-compliance with the ACAS Code of Practice entitled 'Disciplinary and Grievance Procedures'.

57. The respondent's representative took no issue with the claimant's representative's quantification of the claimant's loss. Parties representatives were agreed that in the event of the claimant's claim being successful, his award would be a basic award of £2,286 and a compensatory award of £15,983.54.

Observations on evidence

58. I mainly accepted the respondent's representative's submissions in observations on the evidence. I accepted that in giving his evidence, particularly in cross examination, the claimant was cautious, even guarded in giving his evidence. In some aspects he was unwilling to accept an obvious point. In other aspects his evidence was confusing and contradictory. In yet other areas, his evidence was lacking in credibility. It did seem to me that the claimant had a tendency to see things from his own perspective, without appreciating the wider business considerations which the respondent had. I found the claimant to be evasive in his response to being questioned on how he could start work with his new employer on the agreed date of Monday 12 March 2018 if he had not resigned from his employment with the respondent with immediate effect on Friday 9 March 2018. I considered that to be very significant, particularly where the claimant sought to pursue a termination payment with the respondent prior to his resignation in circumstances where he had accepted an offer of employment from another employer. I considered it to be very significant that the claimant's position before me that he had not accepted the role as Digital Sales Rep was not supported by the documentary evidence. As referred to in the findings in fact, the claimant had clearly stated in contemporaneous correspondence to the respondent that he had accepted that role (although his position was that would he would not have accepted it had he been provided with information which he later had). I accepted (sometimes in part) the respondent's representative's particular comments on the evidence as follows:-

(i) In cross-examination the claimant was unwilling to accept that the proposal to reduce from three managers to one was a redundancy situation.

(ii) In cross-examination the claimant suggested that in Mr Bryans' email of 28th November 2017 when saying "*I have not completed the scoring yet, but I do know the outcome*", Mr Bryans had meant that he had not started the exercise. I accepted that that interpretation was not supported by the email or its context. I accepted that this was an example of the claimant's tendency to interpret evidence principally so as to suit his case.

(iii) The claimant's evidence on what he believed was the message from Fran Manzanero in the meeting on 23 January 2018 was "*I believed he meant not successful in the Rep's role would withdraw the opportunity of staying with the company.*" The claimant's evidence was that in that meeting Fran Manzanero had said to him "*With this level of consistency, I'll have to think about your future*". I accepted that by 23 January, the claimant had accepted the Rep's role, and thus the redundancy exercise was over. I accepted that the claimant's evidence on that meeting on 23 January was contradictory to his position that the redundancy process had not stopped because he had had no confirmation of the position in writing from the respondent.

(iv) The claimant's evidence in chief about his meetings with Fran Manzanero prior to 23 January was that Mr Manzanero was "*volatile*" and that he was left unsure as to which of his characters was going to turn up, or how he was going to be spoken to. This is contradictory to the contemporaneous correspondence included in the JIP at 362, which records the claimant having told Simon Musgrave in a meeting on 19 March 2018, "*All my interactions with Fran had been pleasant to this point*" (referring to the meeting on 23rd January).

(v) On the issue of challenges with the claimant's behaviour and his management style (referred to in the investigation into his grievance, at JIP 356) the claimant's evidence was that there had been no grievance or complaint against him. In contrast, the cross-examination of Sarah Ambrose said that a grievance had been raised, albeit not upheld. I accepted that the claimant's evidence was evasive on the point.

59. It was the claimant's position that at the earlier meeting in Barcelona, Fran Manzanero and others had decided that the claimant would not be successful in being selected for the one remaining manager role within the Digital Sales team in Erskine. I attached weight to the claimant's email to Fran Manzanero on 29 November in respect of the meeting which had then recently taken place (JIP 126). I considered that the terms of the claimant's email did not support the claimant's position in evidence that he had been told at that meeting that he would not be selected for the one remaining management role. I did not accept as credible the claimant's position in cross examination that he had sent the email to Fran Manzanero after the meeting in those terms because he was "*becoming aware of Fran's volatile nature*" and he "*took the decision to remain positive". ".* I did not accept that as credible or in line with the terms claimant's email to Fran Manzanero on 29 November. It was put to the claimant in cross examination that he had not said to Fran Manzanero that what he was saying re a decision having been made was '*diametrically opposite'* to the process. The claimant's response was that he had not, because he '*didn't know him and what his reaction would be',* and he *'was shocked at the news'.* I did not accept that as credible or in line with the terms of the claimant's email to Fran Manzanero on 29 November. The claimant accepted in cross examination that at that meeting Fran Manzanero had told the claimant that he wanted him to stay with the business because of his knowledge and experience. The claimant accepted in cross examination that after he had been given the PowerPoint presentation WFM process, he had not raised with Sarah Ambrose that he had already been told that he would not be selected. The claimant's response to this was:-

> *"No, I still had faith in the process and my skills and that I would be selected*."

I did not find that position to be credible. The claimant was pressed if this was his view, despite it being his position that it 'his boss and his boss's boss' had decided that he would not be selected. His evidence was:-

> *"Yes. I believe a fair process should happen. I couldn't believe that a company the size of Micro Focus would allow this to happen. I had faith and trust in the organisation I worked for for three years."*

60. I did not accept that the selection process followed by the respondent was a sham. I accepted the evidence that the individual who was selected was selected on a fair basis, based on the competencies set out in the selection criteria. I accepted that there may have been discussions on the most likely outcome. I did not accept that there had been determination on the outcome of the selection process at its outset in November 2017.

61. I considered it to be significant that the claimant's position was that he had no recollection of the email sent to him by Shaun Briggs on 5 February 2018, with information on the accounts and territory assigned to him in his new role as Digital Sales Representative. When that email (JIP 219) was put to the claimant in cross examination, the claimant's evidence was "*I have no recollection of receiving that email. Otherwise I would have analysed the data.".* It was then put to the claimant that Shaun Briggs would say that he had emailed the information to him on 5 February. The claimant's reply was "*I have no recollection of seeing that email and analysing it".* The claimant's position was not supported by Shaun Briggs evidence, or by the contemporaneous emails relied upon as documentary evidence. On 6 February 2018 the claimant had sent an email to Shaun Briggs in reply (JIP 235). The claimant's position in cross examination was that he had been sent spreadsheets by Stevie Bryans, in an email which was not included in the JIP. When asked if it was his position that he had been sent different information to that attached to the email sent to him by Shaun Briggs on 5 February 2018 (JIP 219 – JIP 234), the claimant's answer was "*he more than likely sent me the same spreadsheet"*. In cross examination, the claimant admitted responding to Shaun Briggs' email, saying

"I don't recall receiving it, but I have responded requesting more information." It was put to the claimant that he had not raised any issues with the accounts allocated to him. His response was *"I can't recall documenting any issues but I would have verbally. I was asking for the three years spend so as I could analyse the data."* I did not consider the claimant's position in evidence to be supported in the contemporaneous emails which were before me. The claimant accepted in cross examined that the first time he raised that the territory assignment to him was 'unfair and unreasonable' was on 2 March 2018 (JIP 264). His position was that he had spoken to Stevie Bryans about the matter previously.

62. I accepted the respondent's representative's reliance on a Witness Order having been issued at the claimant's request for the attendance of Stephen Bryans, and the claimant's later decision not to call Stephen Bryans. I accepted the reliance on the documentary evidence before me showing that on 21 March 2018 Stephen Bryans attended a meeting as part of the investigative process into the claimant's grievance (JIP 345 – 349). In those notes he describes the claimant as a friend. The claimant in his evidence agreed with that. I accepted that it is more likely than not that those notes accurately record Mr Bryans' evidence on the various questions asked of him. I accepted that if the claimant believed that those notes were in any material respect inaccurate or not Mr Bryans' evidence, he could have called Mr Bryans to give his evidence. I accepted that the claimant's evidence on those notes not being accurate because they don't reflect what Stephen Bryans has told him is hearsay and I attached no weight to that evidence. I took into account the claimant's representative's reliance on the claimant's evidence that the only reason Stephen Bryans was not called to give evidence for the claimant was in respect of Stephen Bryan's concerns that to do so might seriously affect his new employer's belief in him in acting against the interests of one of their biggest customers. I took into account the claimant's representative's reliance on the respondent electing not to call Stephen Bryans as a witness.

63. I accepted that Fran Manzanero gave his evidence in a direct, unequivocal and clear fashion. I accepted that although English is not his first language, that

was no barrier to him understanding the questions asked of him or in answering them. Mr Manzanero confirmed that his understanding of English was sufficient to enable him to give his evidence and there was no reason during the proceedings to doubt that position. I accepted that on controversial areas (the meetings on 27 November 2017 and 23 January 2018) and in cross examination, he was precise, unequivocal, resolute and consistent without being in any way confrontational, notwithstanding the various efforts to suggest contrary positions. For these reasons I found him to be an impressive witness, who clearly had a wide knowledge of the respondent's business operations and had a high level of care and engagement in working towards the success of the global business.

64. For all these reasons I did not find the claimant to be entirely credible or reliable. I considered these points to be significant in my assessment of the evidence in reaching my conclusions in findings in facts to what had occurred on 27 November 2018, and in ultimately preferring the version of events of Fran Manzanero in respect of that meeting. For all these reasons, I accepted the respondent's representative's submissions that in areas of dispute between Fran Manzanero and the claimant, the evidence of Fran Manzanero should be preferred.

65. I did not accept as accurate the claimant's representative's description in his written submissions of Fran Manzanero as '*big and burly'*. Although both were sitting down most of their time before me, it appeared to me that Fran Manzanero and the claimant are of similar height. I accepted that at the meeting on 23 January, Fran Manzanero was animated. I accepted that he was standing and walking up and down the length of the table, pointing at a whiteboard with figures on it. I accepted Fran Manzanero's description of himself as a passionate person and his explanation that he comes from a culture in Spain were one may have difficult and animated conversations in respect of business matters, and then happily have an amicable coffee with the same individual on a personal basis. In the context of the respondent's business, where accurate forecasting of pipeline sales figures is very important, where the claimant was aware, or ought to have been aware of that, and where no prior

indication had been given to Fran Manzanero by the claimant that he would not even achieve his worst-case scenario figure in respect of forecasting a particular contract, I did not accept that Fran Manzanero's conduct at that meeting was unreasonable. That conduct did not breach the implied term of trust and confidence. In this conclusion I took into account Stephen Bryans' position as stated in the investigatory interview carried out by the respondent (JIP 348). I accepted Fran Manzanero's explanation that his concern at the meeting was not only in respect of then being the first indication of the significant shortfall in the change in the claimant's figure re. a particular contract but also because the claimant made no suggestions as to how that shortfall would be otherwise made up. I did not accept the claimant's representative submission that Fran Manzanero displayed 'an unacceptably extreme reaction'.

66. I found Sarah Ambrose to be a credible and reliable witness. She was open and candid in her evidence, accepting a number of matters which were put to her in cross examination, even when they did not paint the respondent in a particularly good light (e.g. failure to issue confirmation letters of redeployment). She did not seek to portray an unrealistic image of the respondent. In respect of the occasion where she remembered swearing, I accepted her position that he could recollect an occasion when she had sworn in a conversation with Stephen Bryans, and that he had commented on that. I accepted that she could not recollect if that conversation had been in relation to the claimant. I accepted that on the basis of her explanation that she had many and frequent conversations with Stephen Bryans and that there was no particular reason for her to have recollected the context of the conversation in which she had sworn. That was consistent with her position in the investigation carried out by the respondent into the claimant's grievance. I accepted the claimant's representative's submissions that when interviewed as part of the grievance procedure, neither Sarah Ambrose or Stephen Bryans denied that the situation asserted by the claimant was true, only that they had no precise recollection.

67. I found Shaun Briggs to be an impressive witness. He clearly had much wider awareness than the claimant of the respondent's world-wide business and the impact and importance to the business of accurate forecasting and reasonable

allocation of sales territories. This knowledge was commensurate with his role within the respondent's business. I found him to be entirely credible and reliable. I accepted as entirely credible and reliable Shaun Briggs' evidence in respect of the reasonableness of the territory and the fit for the claimant's skills and experience. I did not accept the claimant's representative's submissions that Shaun Briggs evidence cast any dubiety to that central position.

68. I accepted the respondent's representative's submissions in respect of matters raised in cross examination only in respect of (1) questions of both Sarah Ambrose and Fran Manzanero alluding to there being a connection between the treatment of the claimant and the move of business from Erskine to Belfast and (2) questions asked of Sarah Ambrose (but not Fran Manzanero) about coaching received by Mr Manzanero. The claimant had not relied on these matters in his evidence. I accepted the evidence of Fran Manzanero that the move to Belfast was an "*independent process*". In circumstances where Fran Manzanero was not asked about the reason for the coaching which he received, and where there was no evidence before me on the specific nature of that coaching, I attached little weight to Sarah Ambrose having confirmed in cross examination that Fran Manzanero had received coaching.

69. I accepted in part the claimant's representative's submissions on findings in fact. It was the claimant's position that at a meeting on 27 November 2017, Fran Manzanero told the claimant words to the effect that the outcome of the process of selecting one manager to remain from the three then in post would be that the claimant would not be successful. In respect of the meeting on 27 November 2017, I accepted the respondent's representative's submissions that:-

    i. The claimant gave evidence in chief which supported his position. However, aspects of his evidence undermine his credibility on the point. His evidence was that he was "*surprised*", "*shocked*" and "*disappointed*" by something which he regarded as "*completely unfair*". That reaction is consistent with his belief that he should have been selected. However, it is

inconsistent with his evidence that he "*still believed at that point in a fair process.*"

ii. It is also completely inconsistent with his next exchange with Mr Manzanero in which the claimant said (29th November) that he saw the conversation as positive and was "*looking forward to a successful FY18 under [his] leadership*" (JIP 126).

iii. His apparent shock, surprise and disappointment are inconsistent with the fact that he did not complain to anyone else at the time about the conversation.

iv. The claimant's evidence is directly contradicted by Mr Manzanero. His evidence on the point was credible, and consistent with the surrounding events; he had been asked by Mr Bryans to meet all three managers individually; he prepared for "*the conversation*" with each of them; he told them the same position; he "*cut and pasted*" the same message to each of them there would be a selection process and that they should not be panicked if they were not selected as there would be other options to explore within the business; and he told the claimant that he was a valuable asset to the business so if not selected he wanted to retain him.

v. The claimant's version is not supported by Mr Bryans. He told Mr Musgrave that he had no recollection of the conversations said by the claimant to have taken place afterwards with him (JIP 345), something which, objectively, one might expect him to recall. Nor did he have any recollection of the conversation said by the claimant to have occurred between him and Sarah Ambrose.

vi. Ms Ambrose did not recall that conversation either (as referred to in the investigatory interview re the claimant's grievance, at JIP 354) and which was her evidence to the tribunal.

vii. The claimant's evidence is inconsistent with the message delivered by Mr Bryans the previous business day. Looked at objectively, it would be unusual for an employer to say that it

intended to follow a selection process which was to be "*a fair and objective assessment*" (slide at JIP 116) only for it then to disregard it.

70. I did not accept the claimant's representative's submissions to prefer the claimant's evidence that at that meeting on 27 November, Fran Manzanero had immediately advised the claimant that he would not be selected for the remaining Manager Level 1 position in the process to follow, but that Fran Manzanero wished the claimant to remain as a sales representative since he valued the Claimant's knowledge experience and sales skills. I took into account the claimant's representative's submissions that Fran Manzanero had in his evidence expressly denied that he had made any such statement to the Claimant and that those two individuals were the only persons present and accordingly the foregoing was the only direct evidence heard on the matter. For the reasons set out above in respect of my observations on the credibility of the claimant and of Fran Manzanero, I accepted the evidence of Fran Manzanero. I did not accept the claimant's version of events in respect of the meeting on 27 November because that version was inconsistent with the claimant's position in contemporaneous documents as referred to above, and because I did not find the claimant to be entirely credible and reliable in his evidence before me. I did not accept the claimant's representative submission that the claimant had emailed Fran Manzanero on 27 November thanking him for a positive meeting and expressing hope for a successful FY18 because he regarded this as the appropriate and safer position to take. I took that email to be entirely inconsistent with the claimant's position before me in respect of constructive dismissal. Although it was the claimant's position that he had spoken to his line manager the following day about what Fran Manzanero and had said to him at the meeting, I did not hear evidence from Stephen Bryans to support that position. I accepted Sarah Ambrose's evidence as credible and reliable. Sarah Ambrose could not recollect having had a conversation with Stephen Bryans about what the claimant alleges was said to him by Fran Manzanero on or around 27 November.

71. The claimant's representative submission was that the email trail at JIP120/1 '*may confirm the probability that the claimant's removal from a managerial position had been made without due process'*. I did not accept that to have been the case.

72. I accepted the respondent's representative's submissions in respect of the 'Workday reporting issue' in December 2017. I accepted that the claimant's evidence that he was the only person affected by "*a problem with Workday*" was contrary to the evidence of Sarah Ambrose and Shaun Briggs. For reasons of credibility, as set out above, I preferred the evidence of Sarah Ambrose and Shaun Briggs that, arising from the move to its current business, the respondent experienced a number of IT issues and that this was a widespread problem, causing issues which affected many employees, including Mr Bryans (with reference to JIP 347). I did not then accept the claimant's position that the problem identified by him was part of the "*calculated*" efforts to break his contract.

73. It was not disputed that Fran Manzanero met with each of the claimant's team on a one to one basis in Erskine on 16th January. I accepted the respondent's representative's submission that that was not calculated to break the contract, or was a straw which along with others broke it. I accepted the respondent's representative's submission that the evidence did not support a finding that the meetings were calculated to undermine the claimant's position as their manager or render him unable to fulfil his role as manager (as claimed in the claimant's grievance). I accepted the respondent's representative's submissions in respect of findings in fact in that regard.

74. In respect of the meeting between the claimant and Fran Manzanero on 23 January 2018, I accepted in part the respondent's representative's submissions on the evidence and the findings in fact which should be made on that evidence. I accepted that the suggestion in the claimant's representative's written submission to the effect that Fran Manzanero "*would likely reach a high level of irritation at the loss of an anticipated financial benefit*" is speculation, unsupported by the evidence, and contradicted by the evidence on which findings in fact are made.

75. Fran Manzanero's evidence that he had '*worked hard'* to convince others to retain the claimant in the business, at his previous manager's level salary although in a new role as sales representative was not disputed and was accepted by me. I considered that evidence to be very significant. That evidence pointed to the respondent seeking to protect a continuing employment relationship with the claimant following him being unsuccessful in the redundancy selection exercise. That evidence, and the undisputed fact that the claimant was being retained on that higher level salary, pointed against the respondent acting in a way which was calculated, or likely, to destroy the employment relationship between the claimant and the respondent. I concluded that, on the contrary, that was a factor indicative of the respondent seeking to protect the employment relationship.

76. The claimant's evidence was that in January 2018, his then colleague Richard Forster had (i) told him about conversations alleged to have taken place in Barcelona on 20th November 2017 involving both Stephen Bryans and Fran Manzanero (which conversations suggested that the decision had by then been taken that he would not be retained as Level 1 Sales Manager) and (ii) shown him an email chain from 28th November 2017 (JIP 120 – JIP 121) in which Stephen Bryans advised that while he had not by that time completed scoring of the claimant or his manager colleagues, he knew the outcome of that exercise. I accepted the respondent's representative's reliance on not hearing the evidence of Richard Forster on either issue, that the claimant's evidence is hearsay only and on the claimant's lack of recollection of when in January this information was provided to him. I accepted that neither issue was a reason for the claimant's resignation (JIP 320) I accepted that neither issue was raised by the claimant in his grievance, nor in his grievance meeting. I accepted that the claimant's position that it had been decided as early as 20 November 2017 that the claimant had not been successful in securing the Manager role was contradicted by the evidence of Fran Manzanero and not supported by Mr Bryans' position at his grievance meeting (JIP 345). I accepted the respondent's representative's submission that , if the claimant's version is correct, then it is surprising that at the point he learned of these issues (which was at latest the end of January), he said nothing to the respondent about them.

I accepted that it was significant, and in contrast to his actions after the meeting on 23 January 2018, that the claimant did not raise that with Sarah Ambrose or anyone else in HR.

77. In respect of the issue of the claimant's redeployment into the role of Digital Sales representative (Individual Contributor), I accepted the respondent's representative's reliance on the position stated by the claimant in his grievance (JIP16), that "*the only conclusion that can be reached concerning the WFM [Workforce management] process …….is that it was a calculated effort by the business to engineer a desired outcome*". I accepted that the documentary evidence did not support the claimant's contention that the exercise was a sham. I accepted the respondent's representative's reliance on Sarah Ambrose's evidence and on the documentary evidence as contradicting the claimant's position.

78. In respect of the claimant's reliance on the territory allocated to the claimant, I accepted the respondent's representative's reliance on this territory being held previously by one of the claimant's own direct reports. I considered that to be very significant. I considered it to be very significant that during the time when the individual who had, in the main, been allocated the territory later assigned to the claimant was a direct report to the claimant, the claimant had not raised any issue with the viability of that territory. On the basis that I found Shaun Briggs to be a wholly credible and reliable witness, with impressive knowledge on relevant aspect of the respondent's business, such as the importance of accurate forecasting and viable targets, I did not accept the claimant's representative's position that the territory 'was completely unfair and did not provide the Claimant with a reasonable chance to achieve against a sales target'. I accepted the respondent's representative's submission that the evidence did not support a finding that the allocation of this territory was done intentionally so as to, even possibly, bring about the termination of the relationship.

79. I did not accept as credible the claimant's position before me that he had not been appointed to the role of Digital Sales Rep. I noted that that was not the position presented at the Preliminary Hearing before EJ Hoey. I did not accept

the position in the claimant's representative's submissions that as at 5 February 2018 the claimant's function was 'to look after a few opportunities while a sales rep (named) was off work and unwell'. I found that the claimant was working at that time in the redeployed role of Digital Sales Representative, as an outcome of the redundancy selection process. I accepted the respondent's representative's submission that, on the evidence, in particular the claimant's responses in cross examination and the claimant's grievance , by 18 January 2018, the claimant had accepted the Digital Sales Representative role. I accepted that while the claimant was not issued with a Sales letter, it would be unusual to issue him with written confirmation on his redeployment. I accepted Sarah Ambrose's evidence that it was not normal practice in the respondent's business to provide confirmation of the redeployed role, although I note that the given the size and changing nature of the respondent's organisation, it would be best practice to do so. It seemed to me to be disingenuous for the claimant in all the circumstances to seek to prove that he had not in fact been appointed in that role. I considered it to be significant that the claimant was aware of the territory previously, having line-managed the individual who had been assigned to most of the accounts in that territory, that the claimant had not raised concerns about the territory allocated to that individual, and that additional contracts had assigned in line with the claimant's own experience. I did not accept that the claimant was not aware of the accounts in the territory for that role on his appointment in February 2018. The claimant's email at JIP 235 was inconsistent with his position that he had not accepted that role.

80. For all these reasons, I accepted the evidence of the respondent's witnesses to the claimant's version of events. The claimant did not prove that Fran Manzanero told him on 27 November 2017 that he would not be successful in the forthcoming selection process. The claimant did not prove that Fran Manzanero's behaviour toward him on 23 January was unreasonable. The claimant did not prove that the territory assigned to him in his new role as Digital sales Representative was unfair, unviable or unreasonable. In all these circumstances there was no breach of contract, either individually or a cumulative basis in respect of the matters relied upon by the claimant.

81. I accepted the claimant's representative submission that the claimant 'gave due consideration to the events of the previous months and to the position he was being required to undertake based on his analysis of the data insofar as that had been provided to him.'. I accepted that those events played a part in the claimant's decision to seek alternative employment and to resign once that alternative employment had been secured. I did not accept that the lack of information relied upon in the claimant's representative's submissions caused the claimant to 'decide that this continual disregard for his interests meant that the respondent had chosen to convey that there was no reasonable future in store for him and that this was the last straw'. I did not accept the claimant's representative's submission that the claimant's resignation 'was unrelated to the fact that he had indicated acceptance of another position'. I attached weight to the fact that on 2 March 2018 the Claimant had signed a contract of employment with his new employer stating, in an email of that date "I am looking forward to joining NGA HR" (the new employer) and in the meantime he continued to seek a termination payment from the respondent.

Decision

82. The first issue identified for my determination was

> *(i) Did the respondent conduct itself in a manner calculated to destroy or seriously damage the relationship of trust and confidence between the parties?*

83. I noted, as set out in the respondent's representative's submissions, that the agreed question distinguishes 'calculated' conduct from conduct that is 'likely' to destroy or seriously damage the relationship. I noted the respondent's representative's reference to *Baldwin v Brighton and Hove City Council* [2007] I.C.R. 680, at paragraph 23, where the distinction between (i) calculated *and* likely and (ii) calculated *or* likely is discussed. I noted the respondent's representative's submission that the issue focusses only on whether the conduct complained of was calculated, that is, intentional, because that reflects the claimant's written case (for example the WFM process was a calculated effort to engineer a desired outcome as set out at JIP 16) and his evidence that

everything else together "*was pre-planned for him to leave*" by redundancy or in a performance review process.

84. For the reasons set out above, I preferred the version of events of the respondent's witnesses to the claimant's version. I made findings in fact based on my assessment of the evidence before me and the credibility and reliability of witnesses. On the findings in fact, the respondent did not conduct itself in a manner calculated to destroy or seriously damage the relationship of trust and confidence between the parties. Had I been asked to so determine, I would also have decided, for these same reasons, that the respondent did not conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the parties.

85. I accepted the respondent's representative's submission that there is no evidence to support that running through the various 'straws' relied on by the claimant is a common thread of deliberate conduct on the part of the respondent designed to break the contract. I accepted the respondent's representative's submission that there is no evidence to support a finding of intentional conduct on the part of the respondent to destroy or seriously damage the relationship of trust and confidence between the parties.

86. The next identified issue for my determination was:-

> *(ii) Was the conduct of*
>
> > *(d) A calculated effort by the Business (EMEA Digital Sales) to engineer a desired outcome that was neither fair nor reasonable;*
> >
> > *(e) inappropriate action and comments by Senior Management said to have caused the claimant to feel harassment in the form of bias towards age, stress and anxiety: and*
> >
> > *(f) Territory Alignment that was unfair and unreasonable leading to Potential Performance Management due to territory alignment,*

calculated, and did it cause or significantly contribute to the claimant resigning his employment?

87. I made findings in fact taking into account the documentary evidence before me and the credibility and reliability of the witnesses' evidence. The claimant's evidence was inconsistent with the contemporaneous documentary evidence, as set out above. The claimant did not prove, on the balance of probabilities that the conduct that he relied on having occurred on 27 November 2017 occurred. The claimant did not prove, on the balance of probabilities that the conduct that he relied on having occurred on 23 January 2018 occurred. The claimant did not prove, on the balance of probabilities that the territory aligned to him was unfair and unreasonable, as alleged.

88. I made my determination on the question:-

(iii) Did the claimant resign in response to that conduct or for some other reason?

89. In considering this issue for its determination, I adopted the approach set down by the EAT in *Wright -v North Ayrshire Council* [2014] ICR 77, not to look for the effective cause of the resignation. It was clear to me that the securing of alternative employment was an effective cause for the claimant's resignation. I use the indefinite article here, rather than the definite article of 'the effective cause', in recognition of Langstaff J comments at paragraph 14 in *Wright -v North Ayrshire Council* and the position set out in the rubrick of that case that :-

"It was an error of law the employment tribunal to look for the effective cause of the claimant's resignation in the sense of the predominant principal major or main cause. The crucial question in establishing whether an employee who had more than one reason for resigning had been constructively dismissed was whether repudiation or breach of contract had played a part in the resignation and that as the tribunal had misdirected itself and its decision was not in any event plainly and arguably right the matter would be remitted to the tribunal to determine whether the

> *employer's repudiatory breaches had played a part in the claimant's resignation. "*

90. The reason for a person's resignation can be multifactorial. The claimant may have had legitimate concerns about his income stream and ability to meet his financial obligations for him and his family which would be relevant factors in the timing of his resignation. In all the circumstances, I considered it appropriate to look at whether there had been a repudiatory breach of contract as at the date of the claimant's resignation.

91. In all the material facts and circumstances, my conclusion as to the answer to the question whether the claimant resigned because of conduct by the respondent was 'partly'. I sought to identify the effective cause of resignation. I found that in the present case, as in *Wright*, there were multifactorial reasons for the claimant's resignation. The trigger for the claimant resigning was certainly because he had secured alternative employment which was starting on Monday 12 March 2018. The claimant clearly could not start that new employment while continuing to be employed by the respondent. The reason for the claimant seeking alternative employment was that he no longer wished to work for the respondent following the redundancy selection exercise on which he had been unsuccessful at securing a position as manager. I was satisfied that part of the reason for the claimant's resignation was that he was redeployed to a sales representative role rather than his previous management role. I attached considerable weight to the fact that the claimant started his new employment on the Monday following his Friday resignation. The claimant was not prepared to resign without first securing alternative employment. I took into account the comments of Langstaff J at paragraph 20 in *Wright:-*

> "*Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."*

92. My consideration of *Wright* led me back to carefully consider the principles in *Western Excavating (ECC) Ltd -v- Sharp* [1978] ICR 221; [1978] QB 761 and whether (per paragraph 2 in Wright)

> *(viii) 'there has been a breach of contract by the employer that the breach is fundamental or is as it has been put more recently a breach which indicate that the employer altogether abandonments and refuses to perform its side of the contract that the employee has resigned in response to the breach and that before doing so she has not acted so as to affirm the contract notwithstanding the breach.'*

In this fact sensitive case, the correct approach was to apply the test in *Malik v BCCI* [1997] ICR 606 per Lord Steyn at paragraph 56, where the obligation is expressed as being "*the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*". I considered it important to consider the chronology of events. I considered that it was important to identify the conduct by the respondent which contributed to the claimant's decision to accept the offer of alternative employment.

(i) For the reasons set out above, I did not accept the claimant's version of events in respect of the matters relied upon. On the findings in fact, t respondent's conduct, even on a cumulative basis, was not calculated and / or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It was not conduct which was in fundamental breach of the contract of employment, on a cumulative basis or otherwise. At the time of the claimant's resignation the respondent had not acted in material breach of contract. The history as set out in the findings in fact did not constitute a material breach of contract entitling the claimant to resign. The actions of the respondent are those of a reasonable employer seeking to manage a workforce reduction process and to retain the claimant in a suitable role. Crucially, the findings in fact support the position that the respondent was seeking to maintain their employment relationship with the

claimant. On my findings in fact, at the time of the claimant's acceptance of the offer the respondent had not acted in material breach of contract. I analysed this on the basis of the cumulative events and last straw relied upon by the claimant as being a breach of the implied term of trust and confidence.

(j) I recognised that following *Wright* there may be a possibility of there being two or more reasons for the claimant acting as he did in resigning. I found that the events leading up to the claimant's resignation played a part in the claimant's decision to resign, but crucially that that conduct was not in fundamental breach of the contract of employment. I concluded that the reason for the claimant's resignation was he had accepted alternative employment. I attached considerable weight to the request for a reference for the claimant (referred to as a 'former employee') was made prior to the claimant's resignation and the fact that the start date of the claimant's new employment was the Monday following his Friday resignation, and in circumstances where the claimant had been seeking to first secure a termination payment from the respondent.

(k) The claimant could have accepted a payment on termination of his employment with the respondent when it was offered to him. He elected not to do so. The respondent took steps which were consistent with their position that they wished to retain the claimant within the business, in the position as Digital Sales Representative. Significantly, they agreed to retain the claimant in that role at a salary commensurate with his salary as a manager. They did not allocate him to a territory which was unfair or where he could not reasonably expect to earn an appropriate level of commission. To do so would have been contrary to the business' interests. The claimant chose not to accept the termination payment offered to him at the time it was available. That indicates that the claimant did not consider that at that time circumstances were such that he could no longer continue in his employment with the respondent. That is contrary to the claimant's position that Fran Manzanero's conduct toward the claimant at the meeting on 27 November 2017 was conduct which was in material breach of contract

which would have entitled the claimant to resign. It was significant that immediately prior to the claimant resigning he sought to have that termination offer reinstated. The claimant acted on the basis that he wished to 'have his cake and eat it' i.e. he wished to move to the alternative employment which he had then secured and also take the termination payment which was previously on offer to him. That offer had expired and was no longer open for acceptance by the claimant. The claimant resigned because he had secured alternative employment and was starting that employment on Monday 12 March 2018. The claimant had not resigned without first securing alternative employment. I appreciated the personal and financial reasons for that, but that does not entitle the claimant to resign without notice in terms of the ERA section 95(1)(c).

93. The next issue identified for my determination was:-

> *(iv) Did the claimant resign because by 9th March 2018 he had accepted an offer of alternative employment?*

94. The claimant had begun to look for alternative employment as an alternative to continuing in a sales role with the respondent because he was unsuccessful in the redundancy selection process. The claimant resigned because by 9th March 2018 he had accepted an offer of alternative employment. In my conclusions, I took into account that following *Wright* there may be two or more reasons for resignation. The events leading up to the claimant's resignation, as set out in the findings in fact, did play a part in the claimant's decision to resign, but crucially there was no conduct that was in fundamental breach of the contract of employment.

95. The next issue identified for my determination was:-

> *(v) Was the claimant dismissed by the respondent?*

96. There was no alternative (*esto*) argument for the respondent that the claimant was dismissed and that that dismissal was a fair dismissal. The claimant resigned. On my findings in fact, that resignation was not in circumstances which amounted to a dismissal in terms of ERA section 95 (1)(c).

97. The next issue identified for my determination was:-

> *(vi) If the claimant was dismissed by the respondent, was that dismissal by reason of his conduct or for some other substantial reason?*

98. On the basis of my determination on the previous issues, that issue did not fall for determination.

99. The next issue identified for my determination was:-

> *(vii) If the claimant was unfairly constructively dismissed to what compensation is he entitled?*

100. On the basis of my determination on the previous issues, that issue did not fall for determination.

101. On the basis of my assessment of the documentary evidence and the credibility and reliability of the witnesses' evidence before me, I concluded that there was no conduct by the respondent which was calculated and / or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, as relied upon by the claimant. For that reason, the claimant's claim for constructive dismissal does not succeed and is dismissed.

Employment Judge **C McManus**

Date of Judgment **21 June 2019**

Date sent to parties **24 June 2019**