EMPLOYMENT TRIBUNALS

Claimant: **Mr Ben Smart**

Respondent: **On Direct Business Services Limited t/a Cloud Direct**

Heard at: **Bristol** **On: 11-14 November 2019**

Before: **Employment Judge Walters**

Representation
Claimant: **Mr Smith, Counsel**
Respondent: **Mr Ohringer, Counsel**

JUDGMENT

1. The Claimant's claim that he was unfairly constructively dismissed is upheld.

2. The Claimant's claim that the Respondent breached section 10(2A) of the Employment Relations Act 1999 is well-founded.

REASONS

Introduction

1. This claim was heard at Bristol on 11-14 November 2019. These are the written reasons of the Tribunal on liability. The Tribunal also makes findings of fact and determinations under the principle in Polkey v AE Dayton Services Limited in order to assist the parties in addressing the question of remedy. At the conclusion of the judgment the Tribunal intends to consider the directions necessary for determining the question of remedy.

2. The Claimant commenced proceedings in the Bristol Employment Tribunal on 7 December 2018 alleging inter alia that he had been unfairly dismissed and that his right to be accompanied as established by section 10 Employment Relations Act 1999 had been infringed. Other claims were also made but those are no longer proceeded with and have already been dismissed by the tribunal at preliminary hearings.

3. In considering the outcome of this case I had regard to the ET1, the ET3 grounds of response, the revised response from the Respondent, the bundles of documents prepared by the parties,[1] the evidence provided by the witnesses and the written and oral submissions of the parties.

4. The Claimant relied upon his own evidence. The Respondent called evidence from Mr. Corboy, Mr. Bowen, Mr. Raynes and Ms. Hall.

5. At the conclusion of the evidence counsel made submissions both in writing and orally I need not set them out here as the written submissions are in the possession of the parties. However, I should make these observations:

   a. The submissions of counsel for the Claimant strayed into territory which exceeded the agreed issues.
   b. Counsel for the Respondent conceded that if a repudiatory breach had occurred it would be very difficult to persuade the Tribunal that the dismissal was fair.

6. I should add that at the outset of the hearing it became apparent that both parties wished to deal with the question of liability separately from remedy. I agreed with their proposal as there did not seem to be adequate exploration of that matter in the witnesses' evidence or the bundles of documents. Accordingly, with the consent of the parties it was decided that I would focus only on the question of 'liability' and that if there was a need for a remedy hearing then that would be addressed subsequently. However, notwithstanding the fact that the question as to whether to make a Polkey deduction from compensation is essentially a matter for a remedy hearing and compensation, it was agreed that the parties should make representations in respect of the same at this juncture and that a determination would be made in respect of the issue to assist a proper and expeditious conclusion of these proceedings. Accordingly, evidence was heard which would permit conclusions being reached in respect of Polkey deductions and submissions were made by both counsel to me in respect thereof.

The Issues

7. At the outset of the hearing I established that the issues as to the constructive unfair dismissal claim were as set out in the body of the order made at the preliminary hearing on the 12th April 2019 (save with one caveat) as follows:

   "*The Claimant claims that the respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were as follows:*

   a. Dismissing a member of the Claimant's sales team while the Claimant was on holiday without informing or consulting the Claimant

[1] Page numbers of the bundle when referred to in the Reasons are in bold type and bracketed.

b. *Ian Bowen and Brett Raynes telling the Claimant that they didn't want him in his role they wanted to replace him suggesting he took a demotion and Mr. Bowen telling him that if he didn't take a demotion the alternative was they would find a reason to performance manage him*

c. *This behaviour going unpunished in both the grievance and grievance appeal, despite admissions from Mr. Raynes which supported the Claimants case.*

d. *The refusal to uphold the Claimants grievances despite findings of fact in his favour*

e. *The refusal to allow the Claimant his companion of choice at the grievance hearing*

f. *A retrospective change to the Claimant's commission payment*

(The last of those breaches being the outcome of the grievance appeal is said to have been the last straw in a series of breaches as the concept is recognised in law)

- *Did the Claimant resign because of the breach?*[2]
- *Did the Claimant delay before resigning and affirm the contract?*[3]
- *In the event that there was a constructive dismissal was it otherwise fair within the meaning of s.98(4) of the Act*.[4].
- *If it is found that dismissal was unfair should the tribunal make any reduction to the compensatory award on Polkey grounds to reflect the likelihood that the claimant would be dismissed in any event?*

8. In so far as the claim under section 10(2A) of the Employment Relations Act 1999 is concerned the claim is admitted as a result of the concession made by counsel for the Respondent in his closing submissions. Prior to that time the matter had been a live issue as to whether the Claimants request to be accompanied by the particular worker he chose was reasonable. The Respondent's case had been that it was not reasonable because the companion had already resigned and was working a period of notice after protesting at organisational changes: that is no longer pursued.

Legal Principles

9. The parties are not in dispute as to the legal principles. This is a claim of constructive unfair dismissal. It is trite law that the termination of the contract by an employee will constitute a dismissal within the Employment Rights Act

[2] This has ceased to be an issue as a result of concession by the Respondent in closing submissions
[3] This has ceased to be an issue as a result of concession by the Respondent in closing submissions
[4] The caveat was that the Respondent clarified at the outset of this hearing that the case it wished to advance was that the reason for dismissal was capability. And it does not seek to advance SOSR.

1996 (ERA 1996) if the employee is entitled to terminate it because of the employer's conduct. The dismissal is a 'constructive' dismissal.

10. Unreasonable conduct by the employer can only justify the employee in resigning if that conduct amounts to a fundamental breach of a term or terms of the contract see **Western Excavating (ECC) Ltd v Sharp *[1978] IRLR 27***.

11. In order for the employee to be able to claim constructive dismissal, four conditions must be met:

    1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
    2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify him leaving.
    3) He must leave in response to the breach and not for some other, unconnected reason.
    4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

12. If the employee leaves in circumstances where these conditions are not met, the tribunal must hold there was no dismissal. The test of whether or not there has been a breach of contract by the employer is a purely contractual one albeit the reasonableness of the employer's actions is not wholly irrelevant see ***Courtaulds Northern Spinning Ltd v Sibson*** **[1987] ICR 329** in which case it was stated that:

    "Reasonable behaviour on the part of the employer can point evidentially to an absence of a significant breach of a fundamental term of the contract; conversely wholly unreasonable behaviour may be strong evidence of a significant repudiatory breach. Nevertheless, it remains true that conduct however reprehensible, may not necessarily result in a breach of a fundamental term of the contract."

13. In **Malik v Bank of Credit and Commerce International SA [1997] IRLR 462**, the implied term was held to be as follows:

    "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

14. In **Baldwin v Brighton and Hove City Council [2007] IRLR 232**, the EAT considered whether in order for there to be a breach the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of the requirements needed to be satisfied. The view taken by the EAT was that the relevant test is satisfied if either of the requirements is met i.e. it should be 'calculated or likely'.

15. In **Leeds Dental Team Ltd v Rose [2014] IRLR 8**, it was held that:

"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

16. Furthermore, in **Malik** the House of Lords also held that.

    a. the trust and confidence may be undermined even though the conduct in question is not directed specifically at the employee.
    b. the term may be broken even if subjectively the employee's trust and confidence is not undermined in fact. It is enough that, viewed objectively, the conduct is likely to destroy or seriously damage the trust and confidence see **Tullett Prebon Plc v BGC Brokers [2011] IRLR 420**. The term may be broken even where the employee actually remains indifferent to the conduct in issue. Similarly, it also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail see **Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493**.

17. Furthermore, the employer has to act without reasonable and proper cause see for example **Amnesty International v Ahmed [2009} ICR 1450 at para 72**.

18. In **Omilaju** the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. As a result, if the final act did not contribute or add anything to the earlier series of acts it was not necessary to examine the earlier history; this can be seen in the result on the facts in the subsequent Court of Appeal decision in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833** where the claimant relied on her being disciplined as the last straw to various earlier alleged instances of employer misconduct but it was held that on the facts the employer had acted entirely properly in activating the disciplinary procedure and so that could not constitute a last straw at all.

19. **Kaur** contains an important discussion of the last straw doctrine. The following passages from **Omilaju** were approved at pages 838-839:

"15. The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 157. Neill LJ said (p 167C) that 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. Glidewell LJ said at p 169F:

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular 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? … This is the 'last straw' situation."

16. 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.…

19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

20. As indicated above, the employee must leave in response to a breach committed by the employer. However, the repudiatory breach or breaches need not be the sole cause of the resignation. The tribunal will simply need to determine whether the breaches were an effective cause. In **Nottinghamshire County Council v Meikle [2004] IRLR 703** the Court of Appeal held that what was necessary was that the employee resigned in response, at least in part, to the fundamental breach by the employer.

21. In **Abbeycars (West Horndon) Ltd v Ford UKEAT/0472/07** Elias P held that the tribunal has to consider whether the breach 'played a part in the dismissal' and this means that if the employee resigns in response to several complaints about the conduct of the employer (some of which may not amount to contractual breaches) it is not necessary for the tribunal to consider which was the principal reason for leaving. If, however, the alleged reason was not the genuine reason for leaving then there can have been no constructive dismissal.

22. As to waiver/affirmation it was held in **Air Canada v Lee [1978] IRLR 392** that an employee is entitled to a reasonable period to decide whether to leave employment or not. However, it was held that "*Where the breach does not involve new terms being imposed on the employee but instead consists of a simple act such as an unlawful suspension, or failure to pay a bonus payment, the courts might require the employee to make up his mind more quickly. He does not then require a trial period to consider the suitability of the new terms, though he will still need an opportunity to weigh up the consequences which will be involved in his response to the employer's breach."*[5]

23. A repudiatory breach cannot be remedied albeit remedial action may prevent a concern becoming a repudiatory breach see **Assomoi v Pub Co (Services) Limited UKEAT/0050/11 at para 36**.

24. Where the dismissal is held to be a constructive dismissal under s.95(1)(c) ERA 1996, so that the employer is not in fact intending to dismiss at all, it is sometimes difficult to attribute a reason for the dismissal. In a constructive dismissal case, the employer is almost always denying that there was a dismissal. Nevertheless, it an error of law to conclude that all constructive dismissals are necessarily unfair within the meaning of the ERA 1996.

25. In **Savoia v Chiltern Herb Farms Ltd [1981] IRLR 65,** the EAT indicated that a tribunal should not artificially attribute a reason for the dismissal but merely consider whether, even although the employer has acted in fundamental breach of contract, it had, in all the circumstances, acted fairly. In effect, the tribunal needs to apply the test of s 98(4) When the case went to the Court of Appeal **([1982] IRLR 166),** the court took the view that there was, even in a constructive dismissal case, an obligation on the employer to establish the reason for dismissal, but Waller LJ commented that 'this goes

[5] Harvey on Industrial Relations and Employment Law

beyond the simple circumstances of the employer's conduct which amounted to dismissal and involves looking into the conduct of the employee and all the surrounding circumstances'.

26. However, in **Berriman v Delabole Slate Ltd [1985] ICR 546** the Court of Appeal adopted a simpler approach to the question of determining the reason for dismissal in a constructive dismissal case. Browne-Wilkinson LJ, put it as follows:

> *"…in our judgment, even in a case of constructive dismissal, [s 98(1) of the ERA 1996] imposes on the employer the burden of showing the reason for the dismissal, notwithstanding that it was the employee, not the employer, who actually decided to terminate the contract of employment. In our judgment, the only way in which the statutory requirements of the [Act of 1996] can be made to fit a case of constructive dismissal is to read [s 98(1)] as requiring the employer to show the reasons for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer. We can see nothing in the decision in Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166 which conflicts with this view…"*

27. This approach was adopted by the EAT in **Crawford v Swinton Insurance Brokers Ltd [1990] IRLR 42.** A similar approach was adopted by the Court of Appeal when the employer alleged that the employee had voluntarily resigned whereas in fact he had not resigned at all. The fact that the employer did not realise that as a matter of law he had dismissed the employee was irrelevant: the facts which caused him to act as he did were treated as the reason for dismissal see **Ely v YKK Fasteners (UK) Ltd [1993] IRLR 500).**

28. In **Wells v Countrywide Estate Agents UKEAT/0201/15** (HHJ Shanks presiding) is an example of a case where it was held that even if the employee's demotion for an act of gross misconduct did constitute a constructive dismissal, that dismissal was for a potentially fair reason (conduct) and was reasonable in all the circumstances.

29. The Tribunal has to apply sections 94 and 98 of the Employment Rights Act 1996.

30. I shall set out section 98 here:

"*Section 98 general:*

(1) In determining for the purpose of this part whether dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or if more than one the principal reason) for the dismissal;

(b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

(a) relates to the capability or qualifications of the employee for performing work of a kind which she was employed by the employer to do;

(b) relates to the conduct of the employee;

(c) Is that the employee was redundant.

(3) Is that the employee could not continue to work in the position which he held without contravention (either on his part or that of his employer) of a duty or restriction imposed by or under an enactment.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee;

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

31. In applying that legislation I have adopted this approach:

(1) It is for the Respondent to prove the fact of its belief in the [lack of capability].

(2) At the time of dismissal did the Respondent have in its mind reasonable grounds on which to sustain that belief?

(3) Had the Respondent carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

32. I would then ask myself the question as posed in **Iceland Frozen Foods v Jones 1983 ICR 17:** did the employer act reasonably or unreasonably in treating the matter as sufficient reason for dismissing the employee? I have to determine whether or not dismissal was within a band of reasonable responses to the alleged lack of capability.

Polkey deduction

33. The Tribunal is under a duty to consider making a deduction in relation to compensation if it is just and equitable to do so. I refer to the guidance set out in **Gover and ors v Propertycare Limited 2006 ICR 1073** and **Software 2000 Limited v Andrews 2007 ICR 825.** Furthermore, I should not shy away from making a deduction because a degree of speculation is required. However, there must be some material basis for making a deduction and in rare cases no deduction can be made because it is simply impossible for the

Tribunal to make even a speculative decision see **Swanton New Golf Club Limited v Gallagher EATS 0033/13.**

THE EMPLOYMENT RELATIONS ACT 1999 CLAIM

34. The claim being admitted I need not set out the legal principles applicable thereto.

Factual findings on the unfair dismissal claim

35. I have only made findings of fact in respect of such matters as provide context and which are relevant to the issues as identified above.

36. The Claimant is aged 42. He was employed by the Respondent for seven years until his resignation on 23 October 2018.

37. The Respondent company was founded by Mr. Brett Raynes who is the CEO. It is a company which assists the development of small and medium sized businesses by providing inter alia Microsoft cloud computing systems. The Respondent is a growing company. In mid-2018 it had acquired six companies and it was in the process of consolidating them into one company. There was therefore a period of uncertainty for a number of its staff.

38. The Claimant was originally employed by the Respondent as a Solution Consultant in Sales and from July 2016 he was promoted to the role of Sales Manager. He had been a successful sales person and was clearly highly regarded by the Respondent in that role.

39. The Claimant's terms and conditions of employment were dated 24 February 2017 **[56-74].** He was provided with a Job Description **[75-76]** and the Staff handbook **[77-78O]** which included a Performance Improvement Procedure (PIP) and a Grievance Procedure.

40. From about March 2017 the Claimant reported to Mr. Ian Bowen who had been brought into the Respondent as Sales and Marketing Director. Previously, the Claimant had reported directly to Mr. Raynes.

41. There was a tension in the relationship between Mr. Bowen and the Claimant almost from the outset. **[82B-82D]**

42. The tensions rumbled on until a point in December 2017 when the Claimant raised a formal grievance. **[107-108]**

43. The grievance was about inter alia Mr. Bowen but nevertheless he proceeded to deal with the grievance. There was a grievance hearing on 9 January 2018 although there was no written outcome. The Claimant appealed what he had

been informed to Mr. Raynes on 11 January 2018. The Claimant felt he had been able to get matters off his chest at the appeal hearing but he was not informed of any formal outcome.

44. However, and inadvertently Mr. Raynes sent to the Claimant an email intended for his senior management team after the appeal meeting in which he set out the nature of his discussions with the Claimant. **[121]** I note that grievance procedures are meant to be confidential. I find that generally the content of the email is an accurate description of the nature of the conversation. I cannot conceive that Mr. Raynes was intending to deceive his own senior management team in that email about the nature of the discussions.

45. However, neither the Claimant nor anyone from the Respondent took any meaningful steps to address the content of that email. The email does indicate, however, that the Respondent was by that stage expressing views about the Claimant's performance as a Sales Manager. The Claimant could not have been in any doubt after receiving that email that the Respondent was unhappy with his performance whether that criticism of him was fair or not.

46. I find that during the time of his employment as Sales Manager there were very many contacts between the Claimant and Mr. Bowen as per the schedules prepared by the Claimant **[C1]** or by Mr. Bowen **[241-244]**. Whether one calls the meetings 1-2-1s or not is irrelevant.

47. On some of those occasions the question of sales, targets and performance was raised. However, I am not satisfied that there was any really constructive work done by the Respondent's management to address the difficulties which existed for the Claimant in attaining his targets. I note that he himself had been proactive in managing one of his team of two who was under performing. He had placed Greg Thompson on a PIP and he had apparently responded well to that such that by the summer of 2018 he was no longer underperforming.

48. I am also satisfied that there was a difficulty with recruiting an adequately resourced sales team and that to an extent this impacted on the sales performance. However, by the summer of 2018 the sales team consisted of the Claimant and three line reports. Notwithstanding its concerns, the Respondent did not do anything meaningful to address those concerns and the matter was simply allowed to drift.

49. Despite the relative inactivity of the Respondent in managing the Claimant in 2018 I am satisfied that the Claimant would have been aware that the sales performance was not as expected. **[356A]** He had ready access to the figures in respect of sales and how they compared to targets. He also managed the underperformance of one of his own team members at that time.

50. I am also aware and I find that anyone in a sales background would understand that consistent underperformance could be employment ending. It is not surprising that the Claimant accepted in evidence he knew what the repercussions might be if he underperformed.

51. I am satisfied that the Respondent by the spring of 2018 was considering the restructuring that is often necessary when a company expands by way of acquisitions. The Claimant was aware of some of the proposals **[138,139]** and he raised genuine queries about their impact on him and others.

52. In the summer of 2018, the Respondent continued to have concerns about sales performance **[142]** and without any real discussion with the Claimant the Respondent started to consider proposals for a restructure.

53. I find that by 9 August 2018 the Respondent had, in effect, decided upon a course of action which included completely removing for the time being the Claimant's role and dismissing Gregg Thompson one of his sales team. **[161-162]**

54. I do not accept the evidence of Mr. Raynes that the email from him to the senior management team on 9 August 2018 was a straw man proposal because by 13 August 2018 Mr. Bowen was seeking to put into effect what it contained. It had clearly been given a lot of thought and discussion see first line on **[161].**

55. I also do not accept his evidence or the evidence of Mr. Bowen for that matter that at that time the Respondent was content to follow a PIP in respect of the Claimant and that they wanted him to succeed in the role. Had that been the case the organisational structure would not have been developed as it was proposed and nor would Mr. Raynes have written "*Sales manager role – removed for now and a search takes place for a senior replacement over the coming months*."

56. I find that by no later than July 2018 some employees were going to be made redundant. **[144-156].** At that time it was not envisaged that the Claimant would be made redundant. There was no reference to a settlement agreement in the spreadsheet prepared by the Respondent for its own use. **[144]**

57. In respect of the Claimant I find that by early August 2018 a decision had been taken by the senior management team that the Claimant needed to be removed as sales manager because he was underperforming. I also find that they envisaged that he should revert to being a sales person because they felt that he was good at that job and that he could achieve good sales results which is why Mr. Raynes wrote "*BenS -> quota sales person taking over Greggs pipeline*" it having been decided to dismiss Gregg Thompson. Mr. Raynes' view about him was succinctly expressed as follows: "*Gregg – removed- will never cut it*" **[162]**

58. I have seen no evidence of any further discussions or debate amongst the senior management team as to the content of the email from Mr. Raynes on 9 August 2018.In my judgment the was none.

59. On 13 August 2018 Mr. Bowen met with the Claimant in an unscheduled meeting. The Claimant was not aware of what was to be discussed before he attended the meeting. I find it was not a formal meeting. There was no HR support for Mr. Bowen. I am satisfied that at the meeting Mr. Bowen started

the conversation by saying, "*This is an official .. hold on is it?" Yes, this is an official meeting."* He continued to explain that Brett Raynes and Jane Hall were meeting with investors who knew that the company was not meeting the growth targets which had been set.

60. Mr. Bowen then said that the Claimant would not like what he was about to say. He said that they wanted the Claimant to stay with the Respondent but to step down to the role of sales person. The Claimant asked Mr. Bowen what would happen if he didn't accept the demotion and Mr. Bowen said that the Respondent didn't think that the Claimant was cutting it as a sales manager and if he did not take the position "*we will have to go down the performance route out."* When asked what performance issues the company had Mr. Bowen stated "*it could be targets, or recruitment, or employee development*." He added that "*we don't want someone learning on the job*."

61. I find that the Claimant objected and said he would not take the demotion and he pointed out that every member of his team had hit or exceeded targets in 2018. He highlighted that no appraisal had been undertaken with him and that no one raised complaints about performance.

62. Mr. Bowen then said that in light of the refusal to accept the demotion "*in that case it will take 48 hours to start the performance process and you will have the right to be accompanied to the meeting.*" I accept that the Claimant told Mr. Bowen that the handling of the meeting and the ultimatum and attempting to bully him into accepting a demotion was unreasonable and that he was going to seek legal advice. I find that Mr. Bowen terminated the meeting at that point.

63. Almost immediately after the meeting the Claimant emailed Mr Bowen his contemporaneous account of the meeting. **[159]** An HR response was provided later the same morning without fully answering the points made by the Claimant. Later that day the Claimant asked the HR department and Mr. Bowen to respond to his concerns. **[158]** They did not do so.

64. I note that the Claimant also made a more detailed note of his discussion with Mr. Bowen. **[157]**

65. Mr. Bowen did not respond to the Claimant but he did email Mr. Raynes and the senior management team on the morning of 13 August 2018. **[161]** In the email he indicated he had told the Claimant they "*did not feel he was cutting it as sales manager – learning on the job etc – but we did want him to stay as a sales person."* I note that the former comment is the language he denied using when being cross-examined.

66. In making the findings of fact above I have rejected the evidence of Mr Bowen as to what he says he said to the Claimant. I found hm to be somewhat evasive in his answers as to what had been said in the conversation and I found his suggestion that his preferred outcome would have been to place the Claimant on a PIP which would have led to him being successful as a sales manager to be disingenuous bearing in mind the proposals which had already been formulated.

67. If it had truly been his intention to see the Claimant succeed as sales manager then there would have been no need to mention demotion to sales person at that meeting. Furthermore, if it had been the joint aspiration of him and Mr. Raynes (as suggested by both of them) that the Claimant should succeed as a sales manager I find it surprising that on receipt of the email from Mr. Bowen the response from Mr. Raynes was "Well Done". **[160]** One might have thought a more appropriate response might have been to question why Mr. Bowen had gone 'off message' by suggesting a demotion.

68. I am also satisfied that neither Mr. Bowen nor Mr. Raynes actually thought a PIP would work. They had come to the conclusion that the Claimant could not do the job and they had decided he had to go as sales manager. I accept that they wanted him to revert to being a sales person.

69. By the afternoon of 13 August 2018 Mr Raynes who was on holiday had clearly decided that it might be a good idea to speak to the Claimant **[165B]** and plans were made to discuss the matter whilst Mr. Raynes was on holiday.

70. It was decided to speak on 15 August 2018. In the meantime, it is clear that Mr. Raynes was suggesting that the dismissal of Mr. Thompson should take pace on 14 August and that the Claimant should do a handover either as sales manager or sales person. **[166]**

71. It was clear to Mr. Raynes that Mr Thompson was going to be dismissed at a point in time after he had spoken to the Claimant about his own concerns. **[166]**

72. The evidence of Mr. Raynes in respect of the content of the discussion with the Claimant on 15 August 2018 was less than impressive. He agreed with virtually the whole of the Claimant's account of the meeting as per the Claimant's witness statement at paragraphs 23-27. When it was pointed out to him that his own witness statement, therefore, was not true he agreed that it did appear to conflict with the evidence he had given orally to the Tribunal. I find that the content of the statement provided by Mr. Raynes at paragraph 9 was untrue.

73. In effect, Mr. Raynes had reiterated the same message which had been delivered to the Claimant by Mr. Bowen save that he did not say that the PIP was to manage him out of the business. By that time, I find he was alert to the problem which would be caused if he had said that. He had sought an explanation from Mr. Bowen in that regard previously. See email of 14 August 2018 at 15.17 **[167]**

74. The conversation with Mr. Raynes did nothing to address the concerns of the Claimant as to his future and he then went on his pre-arranged holiday on 16 August 2018 with that cloud hanging over him.

75. Mr. Raynes had not mentioned to him during the telephone call that the Respondent was intending to dismiss Mr. Thompson. Whilst on holiday the Claimant discovered that the Respondent had dismissed him. **[181A]**

76. I find that the Respondent should have consulted or at least informed the Claimant what it intended to do to one of his sales team before he went away

on holiday. There was ample opportunity to do so but the Respondent deliberately delayed it until the Claimant had gone on holiday. **[166]**

77. On 2 September 2018 whilst still on leave the Claimant noticed that he had been underpaid by the sum of about £2,000. This had occurred because the Respondent had introduced a new commission scheme without giving him the requisite contractual notice and it had applied the terms of the scheme retrospectively to him. **[190-191]** On his return from holiday on 3 September 2018 the Claimant raised the matter. **[195]** The Claimant raised this with Mr. Corboy. He in turn contacted Mr. Bowen for an explanation. Mr. Bowen sent Mr. Corboy the email on 3 September 2018. **[199]**

78. I find that Mr. Bowen had genuinely not appreciated that he had not sent the revised commission scheme details to the Claimant previously and inevitably backdating the matter was not therefore acceptable.

79. I accept that this was the position known to the Respondent as of 3 September 2018 but no one until the grievance hearing on 26 September 2018 bothered to tell the Claimant what had happened. He initially felt that he was being punished for not accepting the demotion he had been offered and that was an entirely reasonable conclusion in the circumstances.

80. The Claimant lodged a grievance on 3 September 2018. **[201-205]** The Claimant commenced sick leave on 6 September 2018 **[212]** and never returned to work. The grievance hearing took place on 26 September 2018. His first choice of companion was not permitted to accompany him. That was an unlawful refusal. The Claimant was accompanied by his second choice. **[225-226] [231-233]**

81. The grievance was investigated by Mr. Wigley who had received no training in grievance investigations and it showed in the approach he took to fact-finding and process: he sent a draft of his report to the persons complained about for their comments, there was an unexplained change in the evidence he obtained from the witnesses as to the meeting of 13 August 2018 see draft **[257]** paragraph b and final version **[290]** para b. He did not keep any records of conversations he had had with interviewees and therefore didn't share their evidence with the Claimant. I am also satisfied that at the grievance meeting the support provided to Mr. Wigley was by Mr. Dowdell an external consultant. He at least seemed to recognise that what the Claimant had experienced at the hands of Mr. Bowen was an ultimatum whether he used that word or not. Mr. Wigley wanted to avoid reaching the same conclusion.

82. The Claimant had been asked what he wanted as an outcome from his grievance and he indicated at the meeting that he wanted Mr. Bowen to be held accountable for his unreasonable behaviour.**[283]** That is not an unreasonable request. He wanted the Respondent to acknowledge that he had been treated in an unfair manner. That was the essence of his complaint. He had not been demoted at that time: he retained his role and so he was not seeking reinstatement into it.

83. The grievance outcome was provided to the Claimant on 4 October 2018. **[284-292]** The investigation had looked at the accounts of events given by the Claimant and Mr. Bowen and Mr. Raynes. The outcome document, is

however, unusual in that it described there having been a breakdown in trust and confidence on the part of both parties. When pressed during his evidence initially Mr. Wigley could not provide a meaningful answer as to what findings he had made to arrive at that conclusion. In respect of the Claimant's trust and confidence he referred to his finding in respect of the lack of commission payment and how the Claimant appeared to him at the grievance meeting (an irrelevant consideration). He could not properly describe why he had found that trust and confidence had broken down on the part of the Respondent except that he then added that the Claimant had left the meeting on 13 August. He added that he had lost some trust and confidence in the Claimant personally because of the way he had behaved at the grievance meeting. I find that having used the phrase trust and confidence in his report he had no real idea what it meant or what he was supposed to be doing.

84. Mr. Wigley completed failed to make findings of fact on the main issue is the core complaint of the Claimant. He wanted recognition that how he had been treated by Mr. Bowen on 13 August and, to a lesser extent by Mr. Raynes on 15 August was unfair and unreasonable.

85. I suspect that Mr. Wigley did not want to make findings of fact which were adverse to the senior personnel in the business and accordingly he fudged the issue. Even if that is incorrect, I note that he found that the Claimant should retain his position of Sales Manager notwithstanding the fact that he had been a recipient of the email from Mr. Raynes on 9 August 2018 **[161-162]** and from Mr. Bowen on 13 August 2018. **[161]**

86. I do not accept that simply asserting that the Claimant be retained in a job which he already apparently held and which in fact Mr. Wigley knew was deleted from the organisation was in any sense an adequate response to the grievance. It was incumbent on him to reach a finding on whether the Claimant had been the subject of bullying unfair treatment and he singularly failed to do so.

87. I find that the evidence he had in front of him permitted him to make the finding that the Claimant had been treated inappropriately and it is no answer to say "*I do not know what happened as I was not there*."

88. The only aspect of the grievance which appears to have been the subject of proper fact-finding was in relation to the commission. When asked why he didn't direct an apology Mr. Wigley said he did not believe he could do so. The money was repaid to the Claimant on 27 September 2018.

89. The Claimant not surprisingly appealed the outcome of the grievance. **[302-305]** The appeal meeting was held on 18 October 2018 by Jane Hall. Having apparently met and discussed the matter with both Mr. Raynes and Mr. Bowen before the grievance hearing she kept no notes of the meetings and therefore did not share with the Claimant anything they had said. That is a significant breach of the rules of natural justice, a concept Ms. Hall expressed no knowledge of when giving her evidence. She also felt there were no further enquiries she needed to make of the Claimant at the appeal meeting and the whole grievance appeal was concluded in precisely 7 minutes.

90. On any view of it, Ms. Hall had no intention of conducting a fair and proper grievance appeal. In effect, as she acknowledged in evidence, she simply accepted at face value what Mr. Raynes and Mr. Bowen told her without any meaningful questioning of it. Had she conducted a proper appeal the evidence of the persons complained about would have been the subject of some form of record, and it would have been shared with the Claimant, she would have asked questions about the matter and, on balance of probabilities, the appropriate outcome would have been to have upheld the appeal on the basis of the evidence that was available to her.

91. I should add here that the conduct of the grievance process as a whole by the Respondent was wholly unacceptable. It was quite improper for records not to be kept and documents not be shared with the person making the grievance. I am surprised particularly as it appears to have an HR department who really ought to know that what occurred was a shambles.

CONCLUSIONS

92. I am entirely satisfied that dismissing the Claimant's line report in the circumstances which occurred was wholly undermining of the sales manager and I consider it to have been a breach of the implied term of trust and confidence as it was likely to seriously damage the relationship of trust and confidence. The Respondent had no reasonable or proper cause to act as it did at that time. It had sufficient opportunity to discuss the matter with the Claimant before he went on holiday. I consider that this conduct amounted to a repudiatory breach of the Claimant's contract of employment.

93. I am satisfied that the conduct of Mr. Bowen on 13 August 2018 was wholly unacceptable and his suggestion that if the Claimant did not accept the demotion then he would be performance managed out was a very serious breach of the implied term and that such behaviour would be likely to destroy or seriously damage the relationship of trust and confidence and I find that it did so. Mr. Bowen did not act with reasonable or proper cause: he should have dealt with the matter in accordance with good industrial relations practice and in accordance with the Respondent's own internal procedures. This was a clear repudiatory breach of contract. I consider there to have been a total failure by the HR department to provide meaningful advice to Mr. Bowen as to how to conduct a discussion about performance.

94. As to Mr. Raynes behaviour on the 15 August 2018 I consider that his behaviour was also destructive of the relationship of trust and confidence by in effect conveying his pre-determined view as to whether the Claimant was fit to undertake the role of sales manager. There was no justification for him speaking to the Claimant as he did. He clearly had decided that the Claimant was not fit for the role he was playing without following any PIP. I find that he had no reasonable and proper cause to impart the information he did and the conduct amounted to a repudiatory breach of contract.

95. I am satisfied that the outcome the Claimant particularly desired from the grievance process was that it should be acknowledged that the Claimant had been treated inappropriately by Mr. Bowen on 13 August 2018. I am not

satisfied that there was the same strength of feeling about the behaviour of Mr. Raynes although the Claimant was very disappointed by his stance during the telephone conversation on 15 August 2018 and what he was being told by Mr. Raynes. In effect, he was told he was not capable of doing the role and he should take a demotion. I am satisfied that the Respondent's grievance process should have led to an unequivocal finding that Mr. Bowen had acted inappropriately and that Mr. Raynes had also over stepped the mark when he spoke to the Claimant yet both Mr. Wigley and Ms. Hall did not make any meaningful findings in respect of what had actually occurred.

96. I am satisfied that the failure to acknowledge the same was likely to seriously damage if not destroy trust and confidence. And in fact, it did do so. It was also conduct without reasonable and proper cause. A wrong had been done to the Claimant and an acknowledgment of that fact was an important if not essential part of addressing the grievance.

97. For the reasons set out above I also consider that the failure to uphold the Claimant's grievances amounted to a breach of the implied duty of trust and confidence and a repudiatory breach of contract.

98. The refusal to allow the Claimant his companion of choice at the grievance meeting was an unlawful act. When taken with the other conduct it was a further cumulative act of unreasonableness which of itself would not amount to a fundamental breach of contract but when viewed as part of the overall behaviour of the Respondent it played its part in seriously damaging or destroying trust and confidence. There was no justification for the refusal.

99. I am also satisfied that the failure to pay the Claimant's salary also amounted to a breach of the implied term of trust and confidence. Whilst I am satisfied that it was a mistake rather than deliberate, the deduction from pay coming as it did whilst the Claimant was on holiday and whilst he was in dispute with the Respondent renders the failure to pay him his wages more serious than would otherwise be the case. It gave the clear impression that it was deliberate and it took until the grievance hearing for an acknowledgement of the matter. I consider that such conduct i.e. not paying the correct wages seriously damaged the relationship of trust and confidence. There was no reasonable and proper cause for the act. I consider it was a fundamental breach of the contract of employment.

100. Whether taken cumulatively as a whole or in respect of the matters at a, b, c, d and f individually the breaches of the implied term were so serious that they amounted to fundamental breaches of the contract of employment. The matter at e contributed to the overall picture and taken as a whole the Respondent committed a fundamental breach of the contract of employment entitling the Claimant to resign.

101. It is accepted in written submissions that the Claimant did resign in response to the conduct complained of and it is not suggested that he waived the breaches. Had either matter been suggested then the contentions would have been rejected. I find that there was no waiver or affirmation of contract and that the Claimant resigned because of the breaches of his contract of employment.

102. I find, therefore, that the Claimant was constructively dismissed. What then about the question of unfairness? Counsel for the Respondent rightly in my view conceded it would be difficult to assert a case that the dismissal was fair. That concession was entirely correct. I nevertheless need to deal with the matter.

103. Has the Claimant established a potentially fair reason for the breach of contract? Clearly the Respondent had the Claimant's performance in mind when Mr Bowen sought to speak to him on 13 August 2018 and when Mr. Raynes spoke to him on 15 August 2018. I have found that the Respondent had concluded that the Claimant was incapable of undertaking the role of sales manager. The complaints about the grievance process all relate back to the same issues and how the Respondent dealt with the aftermath save in respect of the unlawful deduction point which although it was so serious as to amount to a fundamental breach entitling the Claimant to resign was not the main driver of his resignation.

104. Notwithstanding the absence of a proper appraisal process and investigation into the Claimant's alleged failings I am satisfied that the Respondent has demonstrated that the principal reason if not the sole reason for dismissal was the Claimant's capability. Overall therefore applying the authorities set out above the Claimant has demonstrated that the dismissal came about because of its inept handling of the performance issue which is a matter relating to capability. I find that the Respondent has demonstrated a potentially fair reason for dismissal.

105. However, when one then proceeds to consider section 98(4) ERA 1996, I find that the way in which the Respondent conducted itself was well below the expected standards of fairness. I find that no reasonable employer would have behaved in such a way. It conducted no proper capability process and, in the circumstances, it acted unreasonably in the way it conducted itself. The Respondent did not carry out a proper investigation/appraisal of the Claimant's performance (it never got to apply its own PIP) and failed to identify the exact cause of the problem. Simply asserting that the Claimant could not cut-it assists no one to improve or understand how they are failing. It did not give any warnings in line with its own PIP nor a reasonable chance to improve. It sought to address capability by the 'bull in a china' shop method of issuing an ultimatum of demotion or out. And if that were not bad enough (and it clearly was) it then conducting a shambolic and unfair grievance process: one which no reasonable employer would have considered rigorous or fair.

106. And in those circumstances, I do not accept that dismissal was within a range of reasonable responses. No reasonable employer would behave as the Respondent did towards the Claimant. I am quite satisfied in the circumstances that the dismissal was unfair within the meaning of section 98(4) ERA 1996.

107. I now need to consider the Polkey arguments raised by the parties. I am asked to construct the situation as to what would have happened had the Respondent acted fairly.

108. The Respondent says that it could have dismissed the Claimant fairly for capability because they would have carried out a PIP and the Claimant would not have improved and he would have then been dismissed. I find that had a PIP been carried out it would have commenced in September 2018; it would have taken about three months to have concluded. If there had been a hearing it would have been held within two weeks thereafter and if the result was dismissal the Claimant would have required seven week notice.

109. All of that is probably uncontroversial in so far as the timetable is concerned but is it a correct analysis of the situation? What if the Respondent had conducted a PIP in accordance with its own procedure? Well, firstly the main problem for the Respondent is that I am satisfied that what really rankled with the Claimant was the way in which he was dealt with by Mr. Bowen and Mr. Raynes. It is absolutely right that he rejected the offer of a role of salesperson (unfleshed out as it was at that time) in the circumstances presented to him by the Respondent. It was, in my judgment, entirely reasonable that he rejected the offer.

110. Secondly, I find it somewhat difficult to determine what would have been the outcome if he had undergone a full and detailed and supportive PIP. The Respondent has not really ever explained properly to my satisfaction what it was that the Claimant was doing or not doing which was incapable of remedy with the right support. It is all very well saying he couldn't "cut it" or he was "learning on the job" or even that he was underperforming but the Respondent really hasn't explained why he was underperforming and why a supportive PIP would not have worked.

111. Nevertheless, there must be a residual chance that he would not have succeeded to turn around his fortunes. I assess that chance as being low and around the 20% mark. However, that is not the end of the matter.

112. I find that had it had been apparent to the Claimant that he was underperforming as a sales manager notwithstanding reasonable and appropriate levels of support then I am quite satisfied that if it had been fully explained to him in a proper setting that an alternative job offer would have meant perhaps no reduction of salary and a new job title there was a very high degree of likelihood that he would in those circumstances have reacted very differently to the way he reacted in August-October 2018. I am quite satisfied that the Respondent held the Claimant in very high regard as a salesperson and it would have striven to retain the Claimant as an employee so that although there was a low chance of his failing to improve as a manager the reality is that I am almost certain (90%) that if he had not turned things around he would have been offered an alternative role and the chance of him accepting an alternative role in those circumstances was very high and I assess it as being as high as 85%.

DIRECTIONS

113. The parties being unable to reach settlement as a result of the above judgment and reasons it became necessary to give directions for the determination of the remedy hearing. The following directions were given for the assistance of the parties and were agreed by them:

a. Any application for costs should be made in writing within three weeks of the sending of written reasons
b. Any response to the same should be made in writing no later than 35 days from the date of the sending of written reasons
c. The remedy hearing and any costs hearing be held on **15 and 16 June 2020** and will take place at Bristol Civil Justice Centre commencing at 10.00 a.m. on 15 June 2020. No further notice of the hearing will be sent out. The parties should understand that this document is the notice of hearing.
d. There should be an exchange of documents and witness statements by no later than 12 December 2019
e. The parties should agree and prepare the hearing bundles no later than 14 days before the first day of the hearing.

_____
Employment Judge Walters

Date: 20 November 2019
……..