



EMPLOYMENT TRIBUNALS

Claimant: Mr P Broadley

Respondent: Wren Kitchens Limited

Heard at: Manchester

On: 4, 5 and 8 November 2019

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person

Respondent: Adam Willoughby (Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The respondent did not dismiss the claimant. The complaint of unfair dismissal is therefore dismissed.
2. The claim that unlawful deductions were made from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 ("ERA") fails and is dismissed.
3. The claimant withdrew his claim for breach of regulation 4 of the Working Time Regulations 1998 and this claim is dismissed on that withdrawal.

REASONS

Introduction

1. This claim is about the claimant's employment by the respondent as a Kitchen Designer. The role of Kitchen Designer is a sales role as well as a design role.

2. The respondent is a nationwide retailer of kitchens. It trades from a number of showrooms around the country and has a head office in Barton on Humber. The respondent also manufactures the kitchen cabinets or units that it sells.

3. In broad terms a sale of a kitchen involves four components: (1) the kitchen units themselves, (2) the worktops, (3) electrical appliances as well as (4) the service of installing the kitchen into a customer's home (the "fitting service").

4. Sometimes customers buy all four components from the respondent; sometimes they buy fewer.

5. Kitchen designers are incentivised to sell kitchens by the remuneration structure operated by the respondent. A low basic wage is paid (little more than the national minimum wage) but it is possible for designers to receive much more in commission payments. Commissions for kitchen designers are based on individual sales. There is no commission or bonus payable to kitchen designers based on overall team or store performance. Sometimes reduced commission payments are made where errors occur; for example where a wrong sized unit is ordered by the kitchen designer and so a different unit needs to be made and supplied to the customer at no extra cost to the customer.

6. An significant issue in this case concerns the sale of the fitting service. The claimant's evidence is that he did not have any confidence in this service which the respondent offered. Consequently he did not generally sell it to customers. The claimant's evidence was that he only sold five fitting service installations in all of his time with the respondent (some 4½ years). The claimant's criticism of the service is that it is expensive and poor. He gave evidence that the respondent's service had featured (badly) on consumer programmes on television in the past. The respondent's witnesses gave evidence that efforts have been made to improve the "fitting service" and they have taken steps to ensure that their kitchen designers promote and sell the fitting service when selling the kitchen.

7. Before his employment ended, the claimant had been based at the respondent's Bolton store. A few months before the end of the claimant's employment, this store acquired a new Store Manager called Sarah McKiernan ("SM"). Shortly after she started, SM reviewed the performance of the kitchen designers at the store and found that the claimant was not selling the fitting service.

8. At about the same time, a customer complaint was also received by SM via a service feedback process. This customer complaint noted that they had been advised by the claimant not to buy the fitting service from Wren but instead to engage a third party kitchen fitter and the claimant had provided them contact details of the fitter that he recommended they use.

9. SM also received information from other employees at the Bolton store that the claimant was engaging an external kitchen fitter to fit the respondent's kitchens and it was also suggested that the claimant was given a "kick back" to encourage him to do this (in other words that he was receiving a secret payment from the external fitter).

10. This was SM's first management position. She did not act immediately on receiving this information because she knew she had a meeting coming up shortly with the respondent's Head of HR. She decided that she would raise her concerns at that meeting. The Head of HR is Victoria Fairbairn ("VF").

11. The claimant was then suspended and the respondent undertook an investigation.

12. The respondent's investigation had not finished when, on 25 July 2018, the claimant sent his written resignation to the respondent. This is at page 244 of the bundle of documents used at the hearing. References to page numbers below are references to this bundle of documents.

The Issues

Constructive Unfair Dismissal

13. A list of proposed issues was provided by the respondent's solicitors in their email of 28 October 2019 to the Tribunal and the claimant. They are as follows:

- (1) Did the actions of the respondent, individually or cumulatively, destroy or seriously undermine the relationship of trust and confidence between the claimant and the respondent?
- (2) If so, were such actions without reasonable and proper cause?
- (3) If so, did the claimant resign as a consequence?
- (4) If so, did the claimant otherwise affirm the contract by delaying his resignation after the last incident which amounted to or contributed to the breach?
- (5) If so, was there a potentially fair reason for the dismissal?
- (6) If so, was dismissal for that reason reasonable in all the circumstances of the case?
- (7) If the claimant was unfairly dismissed, should any compensatory award made be reduced on the basis that:
 - (a) the claimant would have been dismissed in any event as provided for by *Polkey v A E Dayton Services* [1987] IRLR 503;
 - (b) the claimant's actions amount to contributory conduct as provided for by section 123(6) ERA?

14. The claimant responded to the proposed List of Issues by stating that there were three additional issues he specifically wanted the Tribunal to consider. These are:

- “(1) Was I ever going to get a fair investigation bearing in mind they had already decided I would not be returning the day they suspended me?
- (2) Was this covert filming the culmination of a concerted plan to manage me from the business?
- (3) Have Wren Kitchens followed ACAS procedure in their desire to remove me from the business?”

15. The three issues identified by the claimant really fall within main issue (1) identified by the respondent (i.e. whether the actions of the respondent destroyed or seriously undermined the relationship of trust and confidence). However, at the end of this judgment I do address each of these individually.

Issues – Unlawful Deductions Claim

16. In the same email, the respondent noted the following issues:

“Did the respondent make any unauthorised deductions from the claimant's wages contrary to section 13 ERA 1996?”

- (1) Does the Tribunal have sufficient jurisdiction to hear such claims or were such claims presented before the Tribunal outside of the prescribed limitation period?
- (2) Did the respondent made unauthorised deductions in relation to commission payments made to the claimant between September 2014 and September 2017?
- (3) Was the claimant entitled to be paid average commission whilst suspended?

17. The respondent's solicitors set out the unlawful deductions claim in those broad terms. At the beginning of day one of the hearing attempts were made to clarify the basis on which the claimant made this part of the claim.

18. Whilst the respondent noted in this list, an issue about average commission during the period of suspension, no reference was made to this by the claimant at the hearing and there is no reference to it in the ET1. Nothing was raised on day one or subsequently and I have not considered the issue further.

19. It appeared clear from the terms of the claim form that the deductions claimed were only until September 2017. They appeared to go back to September 2014 so there was potentially a series of deductions being complained about between these dates.

20. It was also noted that the claimant had not dealt with the unlawful deductions claim at all in his witness statement prepared for the purposes of these proceedings. Even so, I sought further details of the unlawful deductions claims. The time issue was of a concern but the claimant's response to this was that the deductions from

wages had been ongoing and it had been wrong of his solicitors appointed at the time, to have indicated that the deductions stopped in September 2017.

21. The claimant also explained that the unlawful deductions concerned a change in the respondent's commission structure which was brought in part way through the claimant's employment with the respondent. The commission structure was to include deductions from commission where kitchen designers had made errors in their design and those errors had cost money. A given example was where a wrong sized door had been included in a design and, when this was realised on fitting the kitchen, a different door would have to be ordered and fitted. It was the cost of this replacement door (in this example) that was deducted from commission.

22. By day two of the hearing (when the claimant was giving his evidence) further details were provided as follows:

- (1) That the deductions noted in the ET1 (at paragraph 48 of the attachment to the ET1) as going back to September 2014 did not present an accurate picture of the relevant deductions. In fact the commission arrangement only changed in September 2016.
- (2) Prior to September 2016 there were deductions for different reasons (principally concerning the meeting of a threshold before certain commissions applied), and these did not form part of the claimant's claim to the Tribunal.

23. The claimant's position is the deductions complained of started in September 2016 and will have continued up to his dismissal. The list of alleged deductions set out in the document attached to the claim form (para 48) is not what the claimant is claiming.

24. It also became clear that the claimant's complaint was not about a series of ongoing deductions at all. He accepted that where a designer had made an error then it was appropriate that the cost of rectifying that error should be deducted from commission due to the designer for the sale in question. His complaint was about the process by which an employee could challenge these deductions. Under the process that the respondent had introduced in September 2016, there was a potential cost to an employee challenging a deduction if it was determined that the deduction was correct and so the challenge was dismissed.

25. The claimant did not have details of any challenges made by him and deductions made as a result of those challenges. His claim was about the process which he said discouraged valid challenges and was unfair. He did not provide evidence of any deductions from wages.

The Hearing

26. The claimant represented himself at the hearing. The respondent was legally represented by Mr Willoughby of counsel.

27. Generally, where a claimant brings a constructive dismissal a tribunal would hear from the claimant first. In this case and for reasons explained below, the evidence was heard out of the generally expected sequence.

28. Mr Patel, a manager with the respondent gave evidence first, on day one of the hearing. The reason for this was that his wife was about to give birth and he would not be able to be in attendance for the second and third days.

29. The second witness to give evidence (also on day one) was Mr Tchumak, one of the witnesses who the claimant had asked to attend. Mr Tchumak was a former sales manager with the respondent. He no longer worked for the respondent and his new employers would only allow him time off on the afternoon of day one. That is why his evidence was heard that afternoon.

30. On day 2 we heard evidence from the claimant. We also heard from the second of the claimant's witnesses, Mr Browne who was only able to attend on the afternoon of day 2.

31. On day 3, we heard from the remaining witnesses called by the respondent, being Victoria Fairbairn, Sarah McKiernon, Jordon Laville and Mark Cooper. The respondent chose not to call Kevin Selby even though they had provided a statement from him.

32. In addition, at the commencement of day 2, the respondent played some video footage (about 15 minutes) of a secret shopper exercise involving the claimant. The claimant had already viewed the footage and agreed that it was accurate. He did not understand why I needed to see the footage itself. The respondent wanted to provide the tribunal with the opportunity to see the footage due to the manner in which some comments were made. I agreed but also asked that a full transcript of the relevant extracts be provided which the respondent has now done. Having reviewed the footage and now received the transcript, I agree with the claimant. The viewing of the footage (rather than confining the evidence on the secret shopper interview to a transcript) really served no purpose in the light of the claimant's acceptance of the content and has not impacted in any way on my decision.

33. At the end of day 2, the claimant appeared to be unwell. He insisted on continuing which I did but only for a further 5 minutes or so (and this was time spent addressing what needed to be covered and how day 3 would run). Due to Tribunal listing circumstances there was then a break of 2 full days between day 2 and day 3 of the hearing. At the beginning of day 3, the claimant confirmed that he was well enough to attend and continue with the hearing.

34. At the end of day 3, both parties made oral submissions. Mr Willoughby also provided me with a written submission document which I had asked him to share with the claimant at the beginning of day 3 and which he did.

Reasons given for the claimant's resignation

35. The claimant has provided the reasons for his resignation:-

- a. In his resignation letter
- b. In his claim form
- c. At the hearing.

36. On day 2 of the hearing when being cross examined, the claimant became frustrated at the number of questions that were being put to him about why he resigned. Establishing the reason(s) for resignation in a constructive dismissal claim is very important and, as explained to the claimant at the hearing, the questions were relevant.

37. The reasons provided for resignation are recorded below

Resignation Letter of 25 July 2018

This letter was sent at a time when the respondent was trying to arrange a second investigation interview with the claimant.

"I wish to tender my resignation as a Kitchen designer with Wren Kitchens with immediate effect. Unfortunately my position with the company has become untenable due to the unprofessional manner in which my recent investigation has been conducted.

I was informed of my suspension in store mid morning of 23 June. I was told to clear my desk and frog marched to the front door in a very demeaning and unprofessional manner. I felt totally humiliated being treated in this way.

The following week I was asked to attend an investigation which I attended. Before the meeting, I discovered all my monthly sales figures have been removed from the performance charts on the wall as if I had been erased from the company's data.

Once the meeting began I read a prepared statement regarding the accusations I was aware of. Following this I was shown a covert video which I have never agreed to take part in and breaches current GDPR regulations.

It has now come to my notice that customers are being told and emailed informing them I have left the business. I have copies of emails confirming this. This breach is so serious that I have no other option but to leave the company.

I am also aware that the confidentiality of this investigation is common knowledge between staff members within the Bolton showroom

Due to this I feel there is a breakdown in the mutual trust and between the company and myself.

I feel there is clearly no chance of a fair and reasonable investigation under these circumstances and the company have already made a decision about my employment with them.

On 28 June I emailed Victoria Fairbairn informing her I wished for all the points raised in my statement to be addressed as formal grievances. As these points were passed to her in writing they are in accordance with company policy on such matters and should be addressed.

On the 6th July 2018 my solicitor Mark Irlam of Mewies solicitors requested various information and documents including my contract of employment, which has not been forthcoming.

This is not an exhaustive list of the reasons as to why I feel my continued employment with Wren is untenable leaving me with no alternative but to tender my resignation.

Claim Form of 24 October 2018

The relevant passage is at paragraph 45 of the attachment to the claim form headed "Document in Support of ET1"

"45. The claimant was entitled to terminate his contract without notice by virtue of the Respondent's conduct towards him which constituted a repudiatory breach of the Claimant's contract of employment as described further below:

- a. The conduct and behaviour of Mo Patel during a group meeting in Bolton on 29 April, treating employees in a degrading and inhumane way.*
- b. That the claimant's sales figures when he was suspended were removed from all sales boards, making it look as if to all employees he no longer worked in the respondent's company.*
- c. That emails were sent by Sarah McKiernan to the claimant's contacts saying that the claimant was no longer employed by the company when he was still on suspension pending investigation;*
- d. the claimant believes there was a concerted effort by the respondents to manage him out of the business.*
- e. The claimant being put on a performance improvement plan against his wishes due to not selling the Wren fitting service.*

At the Hearing

The claimant confirmed that he stood by reasons (a) to (e) in the claim form as the reasons for his resignation.

The claimant stated his resignation was a culmination of him being managed out of the business and after taking legal advice, letters going to customers and figures removed from the sales board.

The claimant stated that he would have had no problems going to a second investigation meeting rather than resigning without going to a second meeting but

the solicitor's advice was to leave. The resignation letter was written by his solicitor and he doubted that he checked the contents. He trusted his solicitor who was the professional.

The claimant stated that if the customer emails had not gone out at the time, he would have been happy to attend a second investigation meeting but as soon as his solicitor advised him to leave, he was happy to go.

Findings of Fact

I have made findings of fact on a number of issues as set out below. I did so taking account of all of the evidence provided.

Mystery Shopper

38. Employees of the respondent were informed and aware that the respondent conducted mystery shops. An external company was used to do this. Mystery shops are a management tool used in sales environments. The respondent was undertaking mystery shops as part of an introduction to a new method of working which they called the "Wren Way"

39. The claimant confirmed that he was aware that the respondent was undertaking mystery shops. He was also aware that the Bolton store would be assessed.

40. The claimant was the subject of a mystery shop which took place on 8 March 2018. He accepts that in this meeting (which was being recorded without his knowledge at the time) some comments made by him in relation to the owner of the respondent and the owner's family were inappropriate.

41. The claimant alleged that he was "set up" in relation to the mystery shop. As he noted in the 3 additional issues (14 above) he asks "Was this covert filming the culmination of a concerted plan to manage me from the business." He also refers to the footage in his resignation letter.

42. My finding is that the mystery shop was not part of a concerted plan to manage the claimant from the business. The respondent was bringing in changes/improvements to its processes (the "Wren Way") and mystery shoppers were a method being used to support these changes. The respondent had informed its employees that they would take place, including the claimant. Specifically, in relation to this mystery shop, it is striking to note that nothing had been done about the mystery shop until after a customer complaint had been received over 3 months later. There were a number of issues arising from the claimant's conduct during this mystery shop that the respondent had concerns about. Had this been part of a plan to dismiss the claimant, these concerns would have been acted on much sooner.

43. It is also relevant to note that the claimant's concerns of a "concerted plan" are aimed particularly at the respondent's manager Mo Patel ("MP") who the claimant had cause to complain about and disagree with in the recent past (see below). MP took no part in the decision to review the mystery shop recording. This was carried out by the respondent's head of HR, Victoria Fairbairn ("VF") who is based at the respondent's head office, as part of her initial investigations in to the concerns raised. There was no evidence that provided any suggestion that her actions and decisions were being influenced by MP. I find that they were not.

44. During the mystery shop, the claimant provided information about sourcing a kitchen fitter for the mystery shoppers. Whilst he did provide them details of the option of having their kitchen fitted by a Wren fitter (and pointed out the benefit of a 5 year guarantee) he did not encourage them to buy the fitting service. In contrast, he did encourage them to contact his own kitchen fitter and speak to him. The claimant was also able to provide the "customers" with a price for the service.

45. Comments made by the claimant include (but without noting the responses from the mystery shopper)

(MS-Mystery Shopper; PB- the claimant)

PB: *"This will give you a quote for our fit. ...Then I'll pick you up off the floor.....See we were charging you five grand for thatthat's what I mean, it's too much."*

PB: *"...and the guy I give you for this job is called Billy, now anything Billy can't do he'll put you on to someone who can."*

46. A second, mystery shop took place on 5 April 2018 (so still 2 months before the recordings are viewed by VF). This was a follow up to the first mystery shop, involving the same "customers" and the same potential order. Comments made on this occasion include the following:-

MS (referring to "Billy" the fitter being introduced by the claimant): *so what I mean I know you spoke about it earlier on, so I mean do we pay him*

PB: *yeah you have to yeah, it's your deal with him*

MS: *does he give any guarantee*

PB: *yeah listen my jobs worth more, it's worth more than my job for you to be happy.*

MS *but I mean if there's a problem with the installation*

PB: *just come and have a word with me*

MS; *can we come back to you?*

PB: *yeah cos he, you won't have a problem*

MS: *I know, we just, we have to cover ourselves: can you work out how much roughly it would be.....*

PB: *£1800 for the kitchen fitter*

MS: *1800, and what is it if Wren does it*

PB: *four*

PB: *eighteen hundred quid roughly. And he'll be perfect.*

MS: *but we can come back to you.*

PB: *if you're not satisfied tell my manager and he'll sack me. So there you go. I use three different lads, both excellent.*

Boxing Day 2017

47. Evidence was provided about a disagreement between the claimant and MP. The claimant alleges that MP sacked him on the spot. The claimant's version of events is supported to a large extent (although not completely) by Wayne Tchumak.

48. The incident is not specifically mentioned in the claimant's claim form. The incident is not mentioned as one of the reasons why the claimant resigned (a list of reasons is in the resignation letter of 25 July 2018 at page 244, and a different list is in the claim form at paragraph 45). The incident is part of a grievance raised by the claimant with the respondent prior to his resignation. The grievance statement is at pages 167-8. It is also relevant to note that the resignation letter states that the list of reasons provided is not an exhaustive list and the claim form includes a widely worded term "*the claimant believes there was a concerted effort by the respondents to manage him out of the business.*"

49. The Claimant provided the evidence to the tribunal to support his contention that there had been a breakdown in working relations between him and MP and that MP wanted him out of the business.

50. My findings in relation to this incident are as follows:-

- a. Boxing day is a very busy day in the respondent's showrooms
- b. The claimant had spent some time initially with a customer and was hoping to be able to meet them a second time in order to secure a sale.
- c. The claimant was busy with another customer when the customer in question returned to the store. The customer was waiting for some time and approached MP who told the customer that they did not need to wait for the claimant and could see another designer instead.
- d. That led to a disagreement between the claimant and MP. I have had the benefit of seeing both give evidence. Both are robust characters

who are unlikely to back down readily from a position about which they feel strongly. In this instance the claimant felt strongly. He wanted his commission. That was part of the sales environment operated by the respondent. If another designer achieved the sale, the claimant would not get recognition for the initial work and time he had put in.

- e. MP also felt strongly. He took action because he wanted to ensure that the customer was being looked after. It did not really matter to MP which designer secured the sale as long as a sale was secured.
- f. I am sure that matters became heated and that strong words were used in the heat of the moment. The claimant claims that MP sacked him on the spot. It is likely that, in the heat of the moment, words along the lines of “*if you don't like it, you know where you can go*” were said by MP to the claimant and it is likely that the claimant did take those words, in the heat of the moment, as an indication that MP was dismissing him. However the matter was resolved in a calmer environment in the board room.

Staff Meeting April 2018

51. This incident also involved MP. On this occasion MP conducted a team meeting at the Bolton Showroom. There is not a great deal of dispute about the facts in that MP accepts that the words he used at that meeting were at times inappropriate. He accepts that he should not have spoken to the staff in the way that he did.

52. I find that the claimant was upset about this meeting, at the language and messages provided. The claimant has explained that he was upset because comments were made in front of more junior and potentially more vulnerable employees than him.

53. It caused the claimant to try to group together with some colleagues and write a collective letter of complaint about the incident.

54. The evidence is unclear as to what happened to this letter and who ended up endorsing it. MP's evidence is that he was shown the letter by an employee (not the claimant) on a mobile phone but it was never actually sent to him. The claimant's evidence is that it was not signed by any of the designers but that he placed a hard copy of the letter on MP's desk. The claimant states it was unsigned because there was a fear of retribution amongst those who had agreed the letter.

55. The incident is mentioned in the claim form (paragraph 45a) as one of the reasons for the claimant's resignation “*the conduct and behaviour of Mo Patel during a group meeting in Bolton on 29 April treating employees in a degrading and inhumane way.*”

56. The incident is not one of the reasons for the claimant's resignation listed in his resignation letter. As already noted, the letter included the comment that the list was not an exhaustive list.

Performance Reviews

57. A number of documents in the hearing bundle related to performance reviews for the claimant. In his witness statement the claimant noted that some of these were false. The claimant claims *"Monthly reviews of my performance were filled in without any consultation and documents falsified as management were nervous what I would include if asked. Indeed my last review two months before I resigned was re written due to the rubbish put on it."*

58. The claimant's concerns about these documents did not form part of his reason to resign – and the claimant did not suggest that they did. At the point of his resignation he had not been provided with these copy documents.

59. The performance improvement plan does feature in the reasons for resignation provided in the claim form but not in the resignation letter. The claim form includes the following reason at para 45:- *"the claimant being put on a performance improvement plan against his wishes due to not selling the Wren fitting service."*

60. The performance review documents show that the need to sell the fitting service was raised with the claimant.

61. The claimant accepted that a number of the performance review documents were genuine and accepted that he was placed on a performance improvement plan (PIP) in relation to sales of the fitting service. For example, in a review at the end of 2017 (recorded at page 130 and a document which the claimant accepts as genuine) the following is noted *"Pete needs to consider the installation % required for next year as the figures need to change and push more on this KPI. 3 every month which is very low but it's a start, Peter has committed to pushing to behaviours on the installs. Target has been agreed and he knows what to do/how many to sell to achieve this target."* There are other examples of the fitting service being raised with the claimant at pages 124,125.

62. No complaint or grievance was raised by the client in relation to the PIP until the grievance raised during his suspension.

63. The claimant's concerns about some of the performance review documents relate to certain of them containing a signature for the claimant that he says is not his signature. It is accepted that there is some difference in signatures but not so that the differences are obviously those of a different signatory. The claimant has accepted that regular performance review meetings did take place between him and his manager at the time. The claimant has accepted that he was on a PIP in order to encourage him to sell more kitchen fittings. That is relevant to the claim. It is possible that some signatures are not the claimants but possibly added by the former manager to complete the paperwork . If that is the case then it is very poor practice

indeed but not relevant to the issues in the claim. I understand the manager in question is no longer employed by the respondent.

The Suspension

64. The claimant complained about the act of suspension (specifically how he was treated at the point of suspension) in his resignation letter. It is the first of 5 items listed as his reasons for resigning. *“I was informed of my suspension in store mid morning on the 23 June. I was told to clear my desk and frog marched through the front door in a very demeaning and unprofessional manner. I felt totally humiliated being treated in this way.”*

65. The claimant’s evidence provided in the tribunal hearing about the suspension was very different. The manager who conducted the suspension was Gareth Bolton (GB). The showroom manager SM was also involved. The claimant accepted that he was treated courteously by both managers and that GB also apologised for having to undertake the suspension. The evidence at the hearing painted a very different picture to the terms of the resignation letter quoted above. My finding is that he was (as the claimant admitted) treated courteously and appropriately by the 2 managers involved at the time of suspension.

The Investigation process

66. A number of issues relevant to the investigation are raised in the resignation letter:-

“the following week I was asked to attend an investigation meeting which I attended. Before the meeting I discovered all my monthly sales figures have been removed from the performance charts on the wall in the canteen as if I had been erased from the company’s data.

Once the meeting began I read a prepared statement regarding the accusations I was aware of. Following this I was shown a covert video which I have never agreed to take part in and breaches current GDPR regulation.

It has now come to my notice that customers are being told and emailed informing them I have left the business. I have copies of emails confirming this. This breach is so serious but I have no other option but to leave the company.

I am also aware that the confidentiality of this investigation is common knowledge between staff and members within the Bolton showroom”.

67. The reasons provided in the claim form also mention the removal of sales figures and the contact with customers. I deal with these issues below.

68. As for the confidentiality of the investigation, it is clear that the respondent's investigations were wide. They interviewed a number of employees at the Bolton Showroom and it was perhaps inevitable that employees will have realised with a combination of the claimant's absence and the questions being asked of them, that he was suspended. However there is no concern raised by the claimant about the handling of the investigation itself (which was being carried out by Victoria Fairbairn) other than that she should have interviewed more or different individuals.

The Removal of Performance Figures

69. The claimant claims that monthly sales/performance figures are posted in the staff canteen at the Bolton showroom for all kitchen designers to see and that when he attended his investigation meeting there he could not see any figures posted under his name. He claims that they had been moved on the basis that a decision had already been taken that he was dismissed.

70. SM provided evidence on this point. At the time it would have been SM who was responsible for the posting of the figures. She had no animosity towards the claimant and (in fairness to the claimant) he did not suggest that she did. There was no evidence that she was being influenced by others (particularly MP) who the claimant says wanted him out of the respondent business.

71. SM's evidence was that the figures posted were 4 weekly and 12 weekly. They were figures for individual designers. The figures were updated every Sunday and new printouts of figures replaced the figures posted the previous week. SM explained that the figures under the claimant's name and photo would have become out of date and she did not keep the out of date figures up on the notice board. SM noted that the same action would have been taken when a designer was off ill for a period of time.

72. In short, the respondent's position is that there was nothing wrong with this action and, as it is suggested that the issue over figures was an indicator that the respondent had already decided to dismiss the claimant, evidence was provided which indicated that the respondent remained in the systems for example in relation to rotas and the circulation of sales figures.

73. I accept that evidence of SM. The figures were removed when they became out of date and for that reason. The claimant's name and photograph was not removed.

Correspondence with Customers

74. It is clear that a number of customers received a message whilst the claimant was suspended to point them in the direction of another designer. The bundle included an example of one letter sent but it is clear that a number of other letters in the same terms were sent.

75. On 16 July 2018, the claimant received an email in to his personal email account from one of the respondent's customers called Phil. It attached a letter the customer had just received from the respondent which read:-

"Dear Phil

Thank you for choosing Wren for your recent kitchen purchase.

Peter Broadley who was previously handling your kitchen design, is no longer a Designer at Wren Kitchens Bolton.

One of our top designers, Stuart Reeves, will now be taking care of your kitchen. Please contact Stuart or myself, the showroom manager, if you have any questions.

Stuart will also give you an introductory call in the next few days

Yours sincerely

Sarah McKiernan"

76. Evidence was provided by the respondent's witnesses (SM and Jordon Lavelle) to explain why these messages had been sent to customers. Jordan Lavelle ("JL") is an operation manager based at the respondent's head office who is responsible for managing business change. JL explained the "Reassign Tool" operated by the respondent.

77. In summary, JL explained that the Reassign Tool generates automated emails to be sent to customers where customers are being assigned to a new kitchen designer. JL's evidence was that reassignment did not just occur when a designer leaves. Reassignment also occurs where there is long term absence, due to sickness or maternity leave; also where a designer moves to another position (for example is promoted).

78. JL explained that the wording selected for the automated emails was intended to cover all of these circumstances. It was not wording that referred to resignation or termination of employment because that was not the only circumstance when the Reassign Tool would be used. JL accepted that the wording was not ideal and it may well be that, following this case, different wording is selected for different circumstances.

79. SM gave evidence that she wanted a number of customers reassigned as other designers were spending time with these customers in order to further the design and sale of the kitchens and they would reasonably expect financial recognition for their work. SM's evidence was that these steps were not taken because a decision had already been made to terminate the claimant's employment. Reference was made to emails to support the evidence including the email at p213

“Hi Jordan

one of all designers Peter Broadly has been suspended for nearly 4 weeks now I was just wondering if you know if I am able to re-assign his orders which other designers have been looking after and sorting out.

There is getting to be quite a few now which other designers have been redesigning and contacting so deserve the 2% but I’m not sure where we stand on this.

I thought it had been mentioned at one of the meetings that orders can be reassigned if a design is on long-term sick and so unable to look after their customers so just wanted to check if this would be okay as it is a lot to manage and I’m concerned the customers aren’t getting any one full attention at the moment.

I’d really appreciate any help with this.

Kind regards.

Sarah”

80. I find that the letters to customers were generated automatically via the Reassign Tool and that the reason the Reassign Tool was used are as set out in SM’s email above. The Respondent had not decided to dismiss the Claimant.

81. I accept that the Claimant will have been concerned by the message. He raised the matter with his then solicitor a few days after receiving it (see below). He did not contact anyone directly at the respondent to query the message.

The use of third party fitters.

82. I heard evidence from a number of witnesses about whether the respondent allowed their designers to arrange for customers of the respondent to have a kitchen fitted by a third party fitter. In summary:-

- a. The claimant’s position is that he refused to sell the Wren fitting service. Moreover, he provided customers with recommendations for an external fitting service (therefore one in competition with the respondent) and provided customers with contact details of one of his recommended fitters. The claimant says that he was open about this, managers knew that he would not sell the Wren fitting service, knew that he used third party fitters and other employees did the same.
- b. WT gave evidence that he was present on more than one occasion when a manager asked the claimant for contact details of a third party fitter. His evidence was that it was not frequent but it did happen. WT also said that Mo Patel (MP) asked for a fitter’s details on a couple of occasions to save a cancellation (the threatened cancellation being

due to fitter costs). WT could not say when these occasions were. The evidence provided by WT at the hearing contradicted the evidence he had provided when interviewed by Victoria Fairbairn as part of the respondent's investigation in to the concerns about the claimant's conduct. He said that was because he wanted to hold on to his job and, when interviewed by VF, he told her what she wanted to hear rather than telling her the truth.

- c. JB gave evidence that he and other designers recommended third party fitters. He had not been interviewed as part of the disciplinary investigation.
- d. MP's evidence is that the respondent only recommends Wren fitters, that the claimant did complain about the fitting service but that his complaints were unspecific, that he was placed on a performance improvement plan because he was not selling fittings and knew that he should be selling fittings. MP also gave evidence that he did not have any evidence that the claimant was recommending third party fitters although he had heard rumours.
- e. VFs evidence is that she interviewed a number of employees at the Bolton store and asked all about the use of third party fitters. The statements are in the bundle. They are from:-
 - i. WT – see above
 - ii. Andrew Falkingham (kitchen designer). Answered no to recommending a Third party fitter, noted rumours that claimant would recommended third party fitter and his low conversion rate on fittings but no evidence. Has 28% conversion rate (kitchen sales with fitting component)
 - iii. Saied Umarji ("SU") (kitchen designer). Wouldn't recommend a third party fitter. Heard "talks and banter" about the claimant recommending a third party fitter. Has 27% conversion rate.
 - iv. Stuart Reeves (kitchen designer) no reason to recommend a third party fitter. No benefit to the designer or to Wren. Had been contacted by a third party fitter called Billy who told him he was Peter's (the claimant's) fitter and offered him "the same deal as Peter" which was £250 (presumably per fitting/referral)
 - v. Frank Whittle (surveyor). would not recommend a third party fitter; had also been contacted by Billy. That contact was to arrange for FW to survey a customer's kitchen. Informed VF that Billy told him that Billy and the claimant had fallen out over money; that the claimant received a commission payment from Billy for a fitting referral.

- vi. SM who also provided evidence that she had been contacted by Billy who told her that he would look after her customers and offered £100 and a bottle of wine for a referral.

83. SM's evidence to the tribunal was consistent with the evidence she provided in the disciplinary investigation. She also gave evidence that shortly after she had been appointed as the store manager at Bolton, she started to receive information that the claimant used third party suppliers. She noted that WT was one of the 4 employees named by SM who alerted her to this.

84. JB's evidence at the tribunal hearing, was supportive of the claimant to some extent. His witness statement stated that there was complete openness within the business that the claimant used third party fitters. At the tribunal (responding to questions from Mr Willoughby) JB provided evidence that SU had provided him with details of a third party fitter and that this had created the an impression to JB that it was open knowledge.

85. My findings in relation to the use of third party fitters are:-

- a. it was not commonplace as the claimant alleges.
- b. The witness statements taken in the course of the investigation are not the product of employees being coerced in to providing false evidence or being too afraid to say anything else. These statements do not just provide one line denials. There are parts of the statement where the witnesses are willing to volunteer information. As already noted, this includes WT.
- c. JB was not interviewed as part of the investigation process. This was not because he was purposefully ignored and that only employees who would give evidence against the claimant were picked to participate in the investigation. JB was a part time employee (he worked 24 hours per week) and, although there was not evidence before me about when JB was in work, I accept that it was likely that he was simply not in the store when employees were being interviewed. Having heard from the investigator (VF) and store manager (SM) and reviewed the large number of statements taken, I find that the investigation was conducted in good faith. I do not find that witnesses were "handpicked."
- d. The claimant was told that he was to sell Wren fittings. He was unhappy about being placed on a performance improvement plan but, especially in the light of the claimant's (admitted) poor record of selling fittings, this was a reasonable management action and instruction.
- e. In terms of the claimant's conduct/performance in relation to the fitting service; it was not just that he did not try hard enough or simply refuse to recommend the Wren fitting service. The claimant actively promoted a third party service having taken steps to discourage customers from engaging with the Wren fitting service.

- f. In addition the respondent had evidence that the claimant was in receipt of kickbacks or referral fees from a third party fitter. The claimant resigned before the disciplinary process could conclude but in the light of the evidence in the respondent's possession it was understandable that the suspension and investigation were continuing at the point of the claimant's resignation.

Knowledge of the claimant's suspension

86. One of the claimant's complaints in his resignation letter was that it was common knowledge in the Bolton showroom that he had been suspended and was being investigated. Given the claimant's ongoing absence and the widespread nature of the investigation, this was understandable which the claimant accepted in his evidence at the tribunal. This specific complaint was not repeated in the list of reasons provided in the claim form.

The Claimant's Resignation

87. Events in the immediate lead up to the claimant's resignation are as follows:-
- a. **16.07.18** - Claimant received email from the customer called Phil, forwarding the automated message that claimant was no longer at the Bolton store.
 - b. **19.07.18** - communication between claimant and respondent and claimant's solicitor and respondent. All indications are that documentation is awaited from the respondent and that the claimant will attend a second investigatory interview.
 - c. **19.07.18** - claimant's solicitor sends (by email) a data protection subject access request. This email also refers to the claimant's grievance and asks what is happening.
 - d. **20.07.18** - Respondent emails claimant's solicitor requesting claimant attends a further investigation meeting on 23 July 2019
 - e. **23.07.18** - Claimant does not attend and respondent writes to claimant's solicitor to note this and the next day writes again to rearrange for 26 July.
 - f. **25.07.18** - Claimant has a meeting with his solicitor and sends his resignation letter, the terms of which are set out earlier in this judgment.

88. On the claimant's evidence it is clear that an important part of the decision to resign was the letter from the customer which the claimant provided to his solicitor when obtaining advice (see under heading "*correspondence with customers*" above).

In his evidence the claimant stated that if the customer emails had not gone out at the time he would have been happy to go to a second investigation meeting (ie not resign) and as soon as his solicitor advised him to resign he was happy to leave. Having regard to the reasons provided by/on behalf of the claimant which he says give rise to a breach of the Implied Term and the claimant's resignation, I find that the act of sending letters to the respondent's customers was the "last straw."

Selling equipment

89. Shortly after suspending the claimant because of concerns about his use of a third party fitter, the respondent received information indicating that the claimant had arranged to supply direct to customers (ie not through Wren) some electrical appliances and had provided a price to those customers for the appliances.

90. This concern formed part of the respondent's investigation.

91. As far as the direct supply of electrical goods is concerned:-

- a. In his evidence to the tribunal, Mr Broadley admitted that he had sold kitchen equipment personally and directly to a customer of the respondent. He accepted that it was a mistake on his part
- b. WT gave evidence that the supply of electrical items direct, would have been completely unacceptable.
- c. Evidence of other witnesses was consistent with the evidence of WT. They too gave evidence that it would have been unacceptable.

Concerted effort to manage the claimant out of the business.

92. This is alleged by the claimant in his claim form. It was clear from the claimant's evidence that this allegation really brings together and puts in to context the historical issues raised by the claimant, particularly those issues involving MP. Having considered all of the evidence, I do not find that there was a concerted effort to manage the claimant out of the business:-

- a. MP was not involved in the disciplinary process. I heard from those who were involved in the process (particularly VF and SM). The concerns about the claimant's conduct were their concerns, the actions in relation to suspension and the investigation were their actions. There was no indication that they were being instructed by MP or anyone else at the respondent.
- b. Neither SM nor VF had any history of dispute with the claimant.
- c. The secret shopper interview took place some months before the disciplinary investigation because VF arranged to view it. The claimant alleged that the secret shopper was part of this concerted effort to

manage him out. Had it been, there were concerns in the footage of the secret shopper interview that the claimant could have been challenged on much more quickly.

- d. The performance review. The claimant was set a target in relation to sales of fittings. He did not meet this target and yet the respondent did not move this performance review process on at all. The respondent would have been more focussed on the performance review process had there been a concerted effort to manage the claimant out as he alleges.

The Law

Constructive and unfair dismissal

93. The claimant claims (1) that his resignation amounted to a constructive dismissal and (2) that this dismissal was unfair under s98 of the Employment Rights Act 1996.

94. Dismissal for the purposes of s98 includes the circumstances stated at s95(1)(c). “an employee is dismissed by his employer if.....the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

95. In his closing submissions Mr Willoughby referred me to the case of Western Excavating (ECC) limited v. Sharp [1978 QC 761]. He reminded me that, in considering the issue of constructive dismissal, I am required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts to a fundamental breach of the contract.

96. It is an implied term of every employment contract that 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 confidence and trust between employer and employee.(see for example Malik v. BCCI (1997) IRLR 462 at paras 53 and 54)

97. The contractual term which the claimant claims was breached is this implied term of trust and confidence (Implied Term). The claimant claims that a series of acts over a period of time have caused a breach of the Implied Term.

98. In considering the Implied Term, Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Limited 1981 ICR 666, said that the tribunal must “*look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.*”

99. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a

“last straw” incident, even though the “last straw” is not, by itself, a breach of contract: *Lewis v Motorworld Garages Limited 1986 ICR 157 CA*. In the judgment of the court of appeal in *Omilaju v Waltham Forest London Borough Council 2005 1 All ER 75*. Dyson LJ stated as follows in relation to the last straw. “A final straw, not in itself a breach of contract, may result in a breach of the implied term of trust and confidence. 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.”

Unlawful deduction from wages.

100. The law is set out in section 13 of the Employment Rights Act 1996.

“Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless-

- a. The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract;*
- b. The worker has previously signified in writing his agreement or consent to the making of the deduction”*

Applying the Law and the findings of fact to the issues in this case – Constructive dismissal claim

Did the actions of the respondent, individually or cumulatively, destroy or seriously undermine the relationship of trust and confidence between the claimant and the respondent?

If so, were such actions without reasonable and proper cause?

101. I have considered whether the actions of the respondent amounted to a breach of the implied Term. As the Claimant confirmed at the hearing that the reasons provided in the claim form are the reasons why he resigned, I have focussed on those reasons provided in the claim form.

102. My decision is that they do not. These are my reasons:-

- a. In relation to the staff meeting of 29 April 2018 (para 45a of the claim form). This conduct did not in itself amount to a breach of the Implied Term. It was unacceptable but did not destroy or seriously undermine the relationship of trust and confidence between claimant and respondent. Had I found other, unacceptable conduct on the part of the respondent then it could have been part of a course of conduct that amounted to a breach of the Implied Term.
- b. Had it in itself amounted to a repudiatory breach, it is relevant to note that this meeting occurred some months before the claimant's resignation, the claimant had taken some steps to deal internally with his concerns about the meeting and he had not resigned in response to the meeting.
- c. Para 45b of the claim form refers to the sales figures. My findings of fact are under the heading "*the removal of performance figures*" above. As my findings confirm, I found nothing wrong in the actions of the respondent in relation to the removal of these figures.
- d. Para 45c of the claim form refers to the correspondence with the respondent's customers. My findings of fact are under the heading "*correspondence with customers.*" Considering the respondent's actions as a whole and the circumstances in which this correspondence was sent, I found nothing wrong in the actions of the respondent in relation to this correspondence. The correspondence with customers has to be considered in the context of the suspension and disciplinary investigation. It was understandable that SM wanted to ensure that customers were reassigned in the claimant's absence. It was also understandable that neither she nor the respondent, wanted to inform customers of the true position – ie that the claimant was suspended. The respondent provided a pre-programmed message that enabled business to continue and the customers to be looked after. That was an understandable step taken in the circumstances of the ongoing suspension and investigation.
- e. Although not categorised as such by the claimant, as noted above I find that the correspondence to the customer was the "last straw." Of the reasons for resignation provided it is this issue which led to the advice being given by the claimant's solicitor and the resignation letter being drafted and sent. The case of *Omilaju v. LB Waltham Forest* noted above, makes clear that the last straw act has to contribute something to a breach of the Implied Term. Considering all of the circumstances relevant to the sending of letters to customers, that act did not contribute to the undermining of trust and confidence. It was a reasonable step for the employer to take.
- f. Para 45d. of the claim form refers to a concerted effort to manage the claimant out of the business. As my findings of fact indicate (under the heading "concerted effort to manage the claimant out of the business") there was no concerted effort to manage the claimant out.

- g. Finally, para 45e. of the claim form refers to the claimant being put on a performance improvement plan against his wishes due to not selling the Wren service. As my findings of fact indicate (under the heading “performance reviews”) I found nothing wrong in the decision to place the claimant on a performance improvement process and requiring improvement in his performance. The claimant’s performance fell below what was expected in relation to the selling of the fitting service. The claimant was provided with clear instructions to sell the fitting service and he did not do so.
103. Whilst the suspension itself was not referred to in the reasons provided in the claim form, it is relevant to note that a decision to suspend an employee and investigate allegations of misconduct will almost always have an adverse impact on the relationship between employer and employee. In this case the suspension was carried out in accordance with the contract and was due to genuine and reasonable concerns about the claimant’s conduct. In his resignation letter the claimant raised concerns about way that he was treated in relation to his suspension. These concerns were not repeated in the ET1 claim form. At the hearing, the claimant accepted that he was treated professionally when suspended.
104. The investigation was then carried out and was subject to some delay due to further evidence/concerns coming to light and also due to some lack of cooperation on the part of the claimant. The matters being investigated were genuine matters of concern for the respondent.
105. The complaints raised by the claimant in the resignation letter (drafted by his solicitor) concerning the suspension were answered in the evidence provided by the claimant at the hearing.

Other Issues

Given the findings above, the claimant’s claim of constructive dismissal fails and it is not necessary for me to reach decisions on the other issues identified. However I do briefly address the issue in relation to contributory conduct as well as the 3 issues specifically raised by the claimant .

If the claimant was unfairly dismissed, should any compensatory award made be reduced on the basis that:

-the claimant would have been dismissed in any event as provided for by Polkey v A E Dayton Services [1987] IRLR 503;

-the claimant’s actions amount to contributory conduct as provided for by section 123(6) ERA?

106. The matters being investigated were problematic for the claimant:-

- a. He had been instructed to try harder when selling the respondent's kitchen fitting service. This instruction was emphasised through a performance review process. The claimant did not just ignore this instruction. He acted in a way that was contrary to the instruction. He endeavoured to ensure that customers did not buy the kitchen fitting service. He dissuaded them from doing so and then promoted an alternative kitchen fitter that he could introduce the customer to.
- b. He had personally sold electrical equipment to a customer of the respondent. He had done this even though his job with the respondent required him to sell electrical equipment on behalf of the respondent. At the tribunal hearing he accepted that this was a mistake on his part but that it was a one off.
- c. There was evidence from a number of employees at the respondent, that the claimant had been receiving payments ("kickbacks") from a third party kitchen fitter.

107. As far as issues a and b above are concerned, I am satisfied that the claimant did conduct himself as described in a and b and that the claimant's dismissal was inevitable in the light of that conduct. I make no finding in relation to issue c. However, had I been required to consider a reduction on just and equitable grounds or due to contributory conduct, based on issues a and b alone, I would have applied a 100% deduction.

The 3 issues identified by the claimant.

Was I ever going to get a fair investigation bearing in mind they had already decided I would not be returning the day they suspended me?

108. The respondent had not decided on the day of suspension that the claimant would not be returning to work.

Was this covert filming the culmination of a concerted plan to manage me from the business?

109. This is a reference to the secret shopper exercise. As noted, had it been part of a concerted plan to manage the claimant from the business, that footage would have been reviewed and acted on more quickly. In fact it was only after concerns had been raised about the claimant's conduct that VF considered that there may be a secret shopper interview that could be reviewed. My finding is that the secret shopper interview and recording was not part of a concerted plan to remove the claimant from his employment.

Have Wren Kitchens followed ACAS procedure in their desire to remove me from the business?"

110. This is a reference to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) and the ACAS Guide on discipline and grievances at

work (2019). The claimant has not specified which part of these ACAS procedure has not been followed.

111. As far as the ongoing disciplinary investigation was concerned, I have no criticism of the respondent's actions. The allegations were serious and the investigation into these serious allegations was proceeding at the point of the claimant's resignation. Matters had only got so far at the point of resignation.

Applying the Law and the findings of fact to the issues in this case – Unlawful Deductions Claim contrary to s13 ERA.

112. I have already noted the further detail provided about the claimant's unlawful deductions claim. The claimant has not provided any evidence of any deduction made. The claimant clarified his claim and explained that it was about the fairness of a process rather than any deduction made. The unlawful deductions claim fails.

Employment Judge Leach

Date: 3 January 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

7 January 2020

FOR THE TRIBUNAL OFFICE

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