EMPLOYMENT TRIBUNALS

Claimant: Mr G Spence

Respondent: Cirrus Logistics Limited

Heard at: Manchester **On:** 18th December 2019 & 12 February 2021 & 23 March 2021 (In chambers)

Before: Employment Judge Hill

REPRESENTATION:

Claimant: **In Person**
Respondent: **Ms L Amartey (Counsel)**

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claims for unfair constructive dismissal and unlawful deduction of wages fail and are dismissed.

REASONS

1) The Claimant brought claims of unfair constructive dismissal and unlawful deduction of wages by way of a claim form (ET1 form) presented to the Tribunal on 31 August 2019.

2) The Respondent resisted the claim by way of a response form (ET3 form) presented on 18 October 2019.

3) The Claimant was unrepresented during these proceedings and at this hearing. At the beginning of the hearing the Tribunal discussed with the claimant and the respondent the issues to be determined by the Tribunal, and for the claimant to confirm the alleged breaches he was relying upon in respect of his constructive

dismissal claim. The Claimant confirmed that he was relying on the following breaches:

a) The Introduction of a new capability policy – June/September 2018
b) Mr Anton Du Preez was rude to the Claimant on 17 December 2018 in a sales meeting.
c) Lead distributions – leads were passed to Ian Searle instead of Gerald Spence in December 2018.
d) The grievance outcome in February 2018 does not state that Simon Shore made an error in the lead allocations
e) It was not fair to arrange for a PIP/objectives set at a meeting on 3 April 2018 due to annual leave
f) Refusal to change the final PIP meeting date
g) That the final straw was that the Yara Fertiliser lead was passed to Ian Searle**.**

4) The claimant is relying on a course of conduct by the respondent which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence entitling him to resign and claim constructive dismissal.

5) The Claimant also claims that he was entitled to commission payments for sales generated prior to his employment terminating.

The Evidence

6) The Tribunal was provided with the following:

a) A bundle of documents page numbers 1 – 381
b) A written witness statement for the Claimant
c) A written witness statement for Mr Simon Shore (Managing Director)

7) Both the Claimant and Mr Shore gave oral evidence. The Tribunal read the witness statements and the documents referred to in the bundle.

8) The hearing was listed for one day on 18 December 2019 and went part heard. It was due to be relisted at the end of January 2020. However, due to Counsel being indisposed at that time, the hearing was vacated and was not relisted until 12 February 2021 due to the pandemic. The decision was reserved and made on 23 March 2021 and the parties sent in written submissions.

Findings of Relevant Facts

9) The Tribunal makes the following findings of fact. These findings relate to the relevant issues the Tribunal is required to determine and is not intended to be a repeat of the evidence.

10) The Respondent is a provider of decision support software solutions to UK and global corporations involved in the supply chain and maritime industries. The Claimant was recruited in late 2014 by Mr Shore, the Respondent's Managing Director. He was appointed on a starting salary of £45,000 with annual uncapped commission.

11) The Claimant was employed as a sales executive and worked primarily from his home attending appointments and meetings as required. The Claimant's main areas of responsibilities were sales of:

a) The Respondent's MES product to clients in the dry bulk products and container sectors of the marine industry and later allocated the container sector.
b) The Respondent's CLASS and COSTSERV products to clients other than those in the third-party logistics industry and those in retail and food and drink manufacturing.

12) The Claimant was provided with sales leads for the sectors he worked in. Leads were usually generated by direct contact into the Respondent business, generated by the in-house lead generation person or leads generated by the Claimant himself.

13) During the first few months of his employment the Claimant was not expected to 'close' any deals but was expected to build a pipeline of work that would likely generate business in the following year. Mr Shore had considerable experience in this area and knew that deals were unlikely to come to fruition in the first few months. The Claimant, however, was an optimist and when setting his sales goals for 2015 the Claimant suggested a target of £500,000. Mr Shore considered that this was not realistic because he would need time to familiarise himself with the products and their capabilities and he was given a much-reduced target of £200,000 for that year.

14) Throughout his employment the Claimant received regular review, supervisions and one to one meetings with Mr Shore. He also had annual reviews/appraisals where his performance was monitored and reviewed. His first annual appraisal took place on 10 November 2015. The Tribunal was provided with copies of the appraisal notes where it was recorded that the Claimants current position was forecasting sales of £44,000 against his target of £200,000. At this meeting Mr Shore discussed with the Claimant his performance and offered suggestions on how to improve. In particular he was asked to increase his product knowledge and also to take a lead on the sales presentations rather than delegating to colleagues. The Claimant did not meet his target for 2015.

15) The following year the Claimant continued to underperform in terms of sales targets. He again forecasted sales much higher than were realistic and suggested sales in the region of £800,00. This again was considered unrealistic, and his target was set at £350,000. The Claimant did not meet this target. At his formal review in August 2016 the Claimant said that he did not need any support but accepted that his projections were inaccurate.

16) In 2017 there was no real improvement in the Claimant's performance. He had been set a target of £430,000 but had only achieved sales of £71,000. The Respondent became concerned at the claimant's poor performance and the Claimant was invited to a meeting on 18 January 2018 at which Mr Anton du Preez was in attendance. At this meeting the Respondent discussed with the Claimant his poor performance and the need for him to meet his targets. The Respondent's evidence was that the direct costs in employing the Claimant exceeded £60,000 and in addition there were indirect costs which needed to be covered. The

Respondent's view was that the Claimant performance was below what was expected and that the Claimant had now been with the company for over three years and he should be able to meet the targets set.

17) The Claimant conceded during evidence that his performance was well below what would have been expected and that he consistently underperformed in terms of his target.

18) At page 55 of the bundle, the meeting notes set out his performance for each year of employment
- 2014 – budget 180,000 – achieved 31,500
- 2015 – budget 350,000 – achieved 34,000
- 2016 – budget 420,000 – achieved 60,207
- 2017 – budget 430,000 – achieved 71,000

19) The Claimant's target for 2018 was £407,000. In order to monitor progress regularly, the Claimant agreed to an interim target of £55,000 by the end of March 2018 and a further £200,000 by the end of June 2018. These targets were suggested by the Claimant and were targets that he considered realistic.

20) The Claimant was informed at this meeting that the company would be monitoring his progress as part of the capability process and that his future with the company was at risk if there were no improvements.

21) On 21 February 2018, the claimant was invited to a further capability meeting to discuss the shortfall in his performance. The meeting was held on 6 March 2018. Notes of this meeting were set out in the bundle at pages 71-72. Mr Anton du Preez was also in attendance along with the Claimant and Mr Shore. The Claimant assured the Respondent that he had opportunities and work in the pipeline that would mean he would be able to meet his targets. He was asked if he needed any support, to which the Claimant referred to support from two colleagues and also said that the container industry was a difficult market. Mr Anton du Preez acknowledged that was the case but reminded the claimant that he had other sectors to sell into and that ultimately it was up to him (the Claimant) how much time he committed to the container sector.

22) A follow up meeting took place on 26 April 2018. The Claimant had not closed any sales and therefore not met his target of closing sales of £55,000 by the end of March. The Claimant considered that he was on target to meet the full target of £255,000 by the end of June and that he would still achieve his annual target of £407,000. The Tribunal finds that the Claimant throughout his employment and at this hearing had an unrealistic view of his ability to achieve targets.

23) The Respondent's view was that the targets set had been proposed by the Claimant and on occasion the suggested targets had been reduced but that he had still failed to achieve. The Respondent considered that now was the time to 'draw a line' and issued the Claimant with a final warning with a further review meeting scheduled for 13 June 2018. This was confirmed in writing and the Claimant was informed of his right to appeal which he did not.

24) At the review meeting it was noted that the Claimant had only achieved sales of £37,196, which meant that in order to be on target by the end of June 2017 he would need to achieve sales of £217,804 in around three weeks. The Respondent was not confident that this was possible although the Claimant again was confident that this could be achieved. The Tribunal finds that again this demonstrated the Claimant's lack of awareness in his abilities.

25) In addition to the poor performance in respect of sales, the Respondent also now had concerns over his lack of product knowledge and the impact this had on his ability to achieve sales targets. Mr Shore had had reports from other staff that the Claimant was not taking the lead at meetings with customers and that this in part may account for the lack of sales. The Claimant acknowledged his lack of knowledge around the container sector and the Tribunal finds that he was focused on this area of sales but had other options to explore but chose not to.

26) Shortly after this meeting a new Head of HR was appointed and as a result, she made some changes to the capability policy. An amended version was implemented which included a two stage Performance Improvement Plan; First PIP and Final PIP.

27) The Claimant's poor performance had been managed under the old policy and he had already been issued with a final warning. Mr Shore spoke to the HR department to determine the best way forward in respect of continuing the capability process with the Claimant. It was agreed that it would be unfair on the Claimant to make a decision under the old policy at the next meeting and that in the circumstances Mr Shore should adopt the new policy and implement the First PIP if, at the next meeting the Claimant had not satisfied the requirements of the old capability process.

28) The Tribunal finds that this was a reasonable course of action for the Respondent to take. Not only did it not disadvantage the Claimant in any way it also provided him with the opportunity of more time to improve on his sale figures. The Claimant suggested that the only reason he was moved to the new process was because he was close to closing a deal and that if he had left the Respondent would have lost that business. The Tribunal did not consider that theory was credible and someone else in the business could and would have picked up that lead if the Claimant had completed the old process and ultimately been dismissed. The Tribunal finds that there was no ulterior motive in the mind of the Respondent at this time and that Mr Shore had reasonably taken advice from HR and followed their recommendation.

29) The Claimant therefore moved to the new process and a meeting was scheduled for 13 September 2018. Due to the Claimant being absent from work the meeting was rearranged for 13 October 2018. Prior to the meeting the claimant was provided with all relevant documentation in respect of his performance including his previous annual reviews from 2016 to date. The Claimant had a good understanding of the issues that he was facing. He admitted in evidence that his sales figures were poor and also confirmed that he had several leads.

30) At this meeting, the Claimant was informed that the previous final warning had been revoked and that he was now being placed on the new procedure and that the Respondent was implementing the Frist PIP.

31) At this meeting discussions around his continued poor sales performance were discussed and that once again he had not met his end of June target. In addition to his poor sales performance Mr Shore also had other performance concerns including his record keeping and not keeping the Salesforce data base up to date which included details of leads and how negotiations with potential customers were progressing. The Claimant stated that there were issues with the system and whilst Mr Shore agreed there were problems, it was possible to ensure that entries were up-to-date, and data could be inputted manually. The Respondent was not provided with any genuine reason as to why the Claimant was unable to keep his records up to date.

32) The Claimant was provided with a completed First PIP form. This document is set out at pages 110-115 of the bundle. It clearly set out the performance concerns in respect of his sales targets and other issues relating to his product knowledge. The Claimant accepted that it was appropriate for him to be placed on a performance plan. He also accepted this during cross examination at this hearing. The Tribunal finds that the Respondent acted entirely reasonably in monitoring the Claimant's performance and had reasonable grounds for doing so.

33) The objectives set for the claimant were:

a) To achieve his sales target of £304,430 by 31 October 2018 (again as forecasted by the Claimant)
b) To have a credible pipeline to support £407,000 of new business in 2018 by 14 November 2018
c) To Demonstrate Product knowledge by giving a product demonstration to include the major product features and handling basic customer enquiries and
d) Maintain accurate Sales Force Records

34) The Tribunal considered that the objectives were reasonable and indeed the sales figures were figures that the Claimant himself considered he could achieve. The Claimant was confident and did not indicate to the Respondent at any point (or at least until near to the end of his employment) that the figures or objectives were unrealistic or that he had any concerns which would prevent him from meeting those objectives.

35) A review meeting was then held on 31 October 2018. The Claimant had not achieved any further sales and at that point his sales were £74,000 against a target of £407,00 for the year. Despite this poor result, the Claimant was again confident that he would still achieve his target because he expected a sale to close for Port of Taranaki. However, at this meeting it was again pointed out to the Claimant that he was still not keeping up to date with salesforce and this was one of his objectives.

36) On 14 December 2018 Mr Shore and the Claimant had a one to one meeting where for the first time the Claimant raised some concerns over whether he would be able

to reach his target. The Claimant raised concerns about leads not being passed to him and being excluded from meetings. The Claimant alleged that he had been deliberately excluded from a meeting in connection with Inconso. The Claimant cross examined Mr Shore extensively on why he had not been invited to the meeting or given the lead. The Claimant argued that he was the only person in the business who worked across three of the company's products and suggested that it would have been entirely appropriate for him to attend the meeting on that basis alone. Mr Shore's recollection was that it was for the oil, chemical and gas sector which was not one of the Claimant's areas of responsibilities. The Claimant referenced a document in the bundle at page 187 where Mr Ian Searle (who the claimant alleged had been passed the lead) had been interviewed as part of his grievance. (see below) When questioned on whether he felt it would have been beneficial for the Claimant to have been at the meeting, Mr Searle agreed. The claimant argued that this 'proved' Mr Shore had deliberately excluded him and that he was giving leads away to other colleagues. However, the meeting notes go on into page 188 and show that when Rachel Montgomery stated 'so the aim of the meeting was to explore what Inconso did and the capabilities', Mr Searle responded by saying 'Actually all about Dow chemicals so GS (The Claimant) wouldn't have been invited. To do with oil and gas, only then transpired container POA capabilities'. The Tribunal finds that the claimant was selective with his references to what Mr Searle said at the meeting and that Mr Shore's recollection was in fact correct.

37) The product demonstration was rearranged due to health reasons and was scheduled for 17 December. The Claimant again asked to reschedule the demonstration on the day it was due and refused to do the meeting until his 'complaints' had been dealt with. Later the claimant sent an email again raising concerns about leads not being passed to him and that Helen had referred to an exit strategy. The grievance is set out at pages 154-155 and he also raised concerns in the grievance meeting. In summary his concerns were:

a) Allocation of leads – the Claimant alleged that four leads had been passed to colleagues when they should have been passed to him
b) Helen Parkinson referring to exit strategy
c) Exclusion from meetings
d) That Anton du Preez was rude to him at a sales meeting on 18 December 2018. The Claimant stated that Mr Du Preez spoke to him like dirt on the bottom of his shoe.
e) He was unhappy that a PIP had been implemented

38) The matter was dealt with by way of a formal grievance by HR and the capability process was paused whilst this was underway. The Tribunal finds that this was the correct way to deal with matters and a reasonable response from the Respondent.

39) A grievance meeting was held on 9 January 2019. The Respondent undertook a thorough investigation and interviewed several staff members including Helen and Anton du Preez and all those in attendance at the meeting where the Claimant alleged Mr Du Preez had been rude to him. The Tribunal finds that the Respondent

took appropriate action in investigating the grievance and that it was thorough and fair.

40) The outcome of the grievance was that:

a) Four leads had not been passed to the Claimant in error but had been corrected
b) The meeting that he had not been invited to was not related to the sector he was involved in
c) There was sufficient justification for invoking the PIP
d) Helen Parkinson had denied using the term exit strategy and in the absence of any other evidence it could not be determined
e) Anton du Preez had denied being rude but had offered an apology if the Claimant had considered him to be rude. Mr Preez sent an apology letter.

41) The Claimant did not appeal the outcome of the grievance. The Claimant argued that the grievance outcome did not acknowledge that a mistake had been made regarding the allocation of leads. However, the Respondent argued that this was not the case and that the grievance outcome did in fact state 'the 4 leads allocated to another sales person were re-allocated to (the Claimant) once the error had been identified. The Tribunal finds that the Respondent did acknowledge a mistake had been made and had rectified it. Whilst the Respondent may have used the word 'error' instead of 'mistake', the Tribunal accepts the respondent's evidence that this amounts to the same thing.

42) It is apparent the Mr Du Preez was considered 'robust as usual' in his manner at the meeting by another colleague, Mr Searle, who was interviewed as part of the investigation. It would seem to the Tribunal that Mr Du Preez had a reputation for being forthright and that the Claimant's perception of how he was spoken to could be considered reasonable. However, Mr Du Preez did apologise and the the Claimant did not appeal the outcome or complain about the apology at the time.

43) A review meeting was set for 15 March 2019. The Claimant attended the meeting and the objectives set at the First PIP were reviewed. The Respondent stated and the Claimant agreed that
a) There had been an improvement in his sales figures and the Claimant had closed the Port of Taranaki deal in December 2018 which had resulted in total sales figures for the year of £358,412. This was still short of his 2018 target of £407,000. However, the Claimant had over promised on the number of days the business would give to the project (360 instead of 80) which resulted in the Respondent having to renegotiate the terms of the deal and the profit margin being reduced to £100,000.
b) Whilst the Claimant had developed a pipeline of potential deals it was still very weak and a number of opportunities had very little chance of converting into sales.
c) He had not given a product demonstration and
d) His salesforce records were still not being completed properly and several entries were not up to date or incomplete

44) The Claimant's view was that the Taranaki deal meant that he was (for that year) the second highest performance, at the unadjusted rate for the deal. However,

whilst the Respondent was pleased that the deal had closed there were issues with it and it was not in fact worth the original figures and having looked at the Claimant's pipeline saw no real indication that further sales were on the horizon for him to reach his target of £380,000 for 2019. The Claimant was issued with a final warning and Mr Shore took the decision to move the claimant on to a Final PIP.

45) The Tribunal considered that the Taranaki deal was a significant change in performance for the Claimant. However, the Tribunal accepted the Respondent's evidence that it was not as valuable as first indicated by the Claimant and that this was as a result of the Claimant's mis-selling on the detail of the number of days required for the project. The Tribunal considered that the action of the Respondent to move the Claimant to the next level was a reasonable business decision particularly in view of the lack of credible pipeline leads and the continued failure to keep salesforce up to date.

46) A letter was sent to the Claimant dated 25 March 2019 confirming the outcome of the meeting and that there would be an interim review held on 5 April 2019 and a final review on 26 April 2019 and that dismissal might be an outcome of that final review if the Claimant had not met his objectives which included meeting his first quarter target of £189,000 (again set by the Claimant) and keeping salesforce up to date. The Claimant did not appeal the outcome of that meeting or suggest that he would be unable to meet his objectives.

47) The interim meeting was held on 3 April and again the four objectives were looked at. The Claimant had only achieved one sale valued at £23,126; his pipeline did not include realistic opportunities; the Claimant had not returned product feedback forms that had been requested to be returned by 22 February and salesforce was still not up to date. This was not satisfactory and the Respondent moved to further meeting as previously stated for 26 April 2019.

48) The claimant received written confirmation of the meeting and that a final meeting would be held on 26 April 2019 at which dismissal was a possible outcome. He was required to achieve the targets as set out in his Final PIP which had been in place since 15 March but which were based on the targets the Claimant set himself in October 2018. This was the same target that was on the first PIP and on 15th March 2019 was to be completed within the 6-week Final PIP review period. The Tribunal finds that in effect the Claimant had had a period of nearly 6 months to achieve this objective.

49) The Claimant was due to go on annual leave from 8 April 2029 until 23 April 2019. The Claimant's evidence was that under normal circumstances achieving the objectives as set out in the Final PIP would be achievable (Claimant's witness statement para 14) due to his annual leave this only gave him three days to achieve his objectives. The Tribunal finds this statement not to be credible. The Claimant had had nearly six months to achieve his objectives and to suggest that he would have been able to complete all the objectives within that period but for the period of annual leave indicate the Claimant's unrealistic view of his own performance and abilities.

50) During cross examination the Claimant asserted that the objectives were not documented during his final PIP which the Tribunal finds is not the case. The Claimant was fully aware of the objectives and the ongoing underperformance issues that had been ongoing throughout his employment.

51) The Claimant also made his request for leave after the interim final PIP meeting and the Claimant did not raise any concerns at the time his leave was authorised, that his leave would impact on his ability to meet his objectives despite knowing that a final PIP meeting was due to be held at the end of April. Indeed, all employees are entitled to and take annual leave and manage their sales targets and other workload and the Claimant was fully aware of the time scale that had been set.

52) The Claimant only raised concerns about the timescale on 18 April 2019 when he had already been on leave for 10 days. The Claimant says he raised concerns on 10 April 2019 however, the Tribunal finds that the Claimant did not respond to the email dated 8 April 2019 until 18th April by letter. The evidence from the Claimant in respect of the timing of this communication was confusing and lacked credibility. The Claimant said that he had not emailed it but sent it as a letter and got his daughter to post it. In the letter as set out at page 268 of the bundle the Claimant asked for an extension of time until 24th May. The Claimant also raised further concerns about not being passed leads and suggested that this was the reason he did not have leads in the pipeline. This had not been raised before. This had not been raised at the meeting. The Claimant specifically referred to a lead for Yara Fertilizers which had been passed to Mr Searle. The Claimant also complained that he had not been offered any training on salesforce although again this had not been raised with Mr Shore at any of the meetings.

53) Despite the Claimant's assertions that the letter had been posted on 18 April, Rachel Montgomery (HR) acknowledged receipt on 18 April saying that she would speak to Mr Shore and revert to the Claimant early the following week. On 23 April Ms Montgomery sent a further email to the Claimant informing him that he should keep to the previously arranged review meeting where he could discuss the points with Mr Shore directly and he could then decide on whether to agree to an extension.

54) The Claimant attended the meeting on 26 April 2019. Shortly after the meeting started the Claimant handed the Respondent a pre prepared letter of resignation, claiming constructive dismissal. The meeting ended and no discussions around the Claimant's performance took place.

55) The Claimant stated in his letter that he considered that he had no choice but to resign in light of his recent experiences and that he had been deprived of making a living. The Claimant stated that he considered he had been constructively dismissed.

56) The Claimant's evidence was that he typed the letter during his meeting. The Claimant stated that Mr Shore opened the meeting and started discussions around salesforce and that he interrupted so that he could talk about the allocation of the Yara lead to his colleague. He stated that when asked why this had happened Mr

Shore offered no explanation and he said that this was the final straw and so he wrote his resignation there and then and had not attended the meeting intending to resign.

57) The Tribunal does not find this evidence credible. Firstly, the Respondent produce evidence of the meta data for the resignation letter which clearly showed that the letter had been written prior to the meeting and secondly the Claimant was evasive and vague in cross examination on this point and the in respect of the letter he allegedly posted from his holiday. The Claimant changed his evidence throughout cross examination and in submissions suggests that when Mr Shore did not provide an explanation on the Yara lead he considered he was 'summarily dismissed'. The Tribunal preferred the evidence of the respondent in this regard and finds that the Claimant had prepared his resignation and intending resigning at the meeting to avoid dismissal. The Tribunal does not accept that the reason the Claimant resigned was because of the Yara lead.

Commission Payments

58) When cross examined on this point the Claimant said that the Taranaki commission payment was outstanding. The Respondent referred to the terms of the commission payments and that no invoice for the deal had been raised prior to the Claimant's resignation and therefore it was not payable. The Claimant conceded that point but said he considered there was a moral obligation.

The Law

59) Constructive Dismissal

Section 91(1)(c) of the Employment Rights Act 1996 provides:
"Circumstances in which an employee is dismissed:
(1) For the purposes of this Part an employee is dismissed by his employer if –
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice or by reason of the employer's conduct."

60) The leading case in respect of constructive unfair dismissal is **Western Excavating (ECC) Limited v Sharp [1978] QB 761**. The Tribunal should ask itself the following questions:
(a) Did the claimant resign in circumstances in which they were entitled to resign without notice by reason of the respondent's conduct?
(b) If so, what was the repudiatory breach that entitled the claimant to resign?
(c) Was there a series of breaches which entitled the claimant to resign, and if so what was the last straw in such a series?
(d) Did the claimant resign in response to this breach?
(e) Did the claimant delay in resigning and re-affirm the contract?

61) In order to be successful in a claim for constructive unfair dismissal the claimant must show that there has been a repudiatory or fundamental breach of contract going to the root of the contract, and it is not enough to show that an employer has merely acted unreasonably. Further, in cases where an employee is relying upon

the implied term of mutual trust and confidence the Tribunal must consider the House of Lords decision in **Mahmood v BCCI SA, Malik v BCCI SA (in Liquidation) [1998] AC20 1997 3All ER 1** where it sets out that an employer shall not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between an employer and an employee.

62) A course of conduct may have the effect of undermining mutual trust and confidence and consequently amount to a fundamental breach following a last straw incident. Guidance is provided to the Tribunal in the Court of Appeal case of **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978** as set out at paragraph 55:

"(a) What was the most recent at or omission on the part of the employer which the employee says caused or triggered his or her resignation?
(b) Has he or she affirmed the contract since that act?
(c) If not, was that act or omission by itself a repudiatory breach of contract?
(d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach of the Malik term?
(e) Did the employer resign in response (or partly in response) to that breach?

63) Therefore, an employee claiming constructive dismissal on the basis of a last straw is entitled to rely on the totality of the employer's acts as a continuing cumulative breach of the implied duty of trust and confidence notwithstanding a prior affirmation of the contract, provided that the last straw formed part of the series, thus a last straw can revive the right to terminate the contract.

64) Further in ***Omilaju v Waltham Forest London Borough Council [2005] IRLR*** 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. In the same case, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence.

65) The Tribunal is further assisted by the case of Wood v Wm Car Services (Peterborough) Limited EAT 1981 where it states that the function of the Tribunal is to 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 an employer cannot be expected to put up with it. The Tribunal when considering whether an employer's conduct has destroyed the relationship of trust and confidence must follow this objective test, and the burden of proof rests with the claimant.

<u>Submissions and further findings of fact</u>

66) Both parties provided written submissions which address each act the Claimant relies upon to show that there had been a course of conduct by the Respondent

that was likely to destroy or seriously damage the relationship of trust and confidence between an employer and employee:

a) The Introduction of a new capability policy – June/September 2018
b) Mr Anton Du Preez was rude to the Claimant on 17 December 2018 in a sales meeting.
c) Lead distributions – leads were passed to Ian Searle instead of Gerald Spence in December 2018.
d) The grievance outcome in February 2018 does not state that Simon Shore made an error in the lead allocations
e) It was not fair to arrange for a PIP/objectives set at a meeting on 3 April 2018 due to annual leave
f) Refusal to change the final PIP meeting date
g) That the final straw was that the Yara Fertiliser lead was passed to Ian Searle**.**

<u>The Introduction of the new capability procedure</u>

67) The Claimant argued that the introduction of the new capability procedure was unfair and that he was only moved onto the new procedure so that he could complete the deal with the Port of Taranaki. The Claimant said that it was never explained to him why the previous process was unfair or why he had to move to the new procedure.

68) The Respondent's evidence on this point was clear. After the introduction of the new procedure implemented by the new Head of HR the Respondent considered that it was appropriate and indeed fairer to allow the Claimant to move to the new procedure. The effect of this is that the Claimant had more time to meet his objectives and show that he was capable of meeting his sales targets and keeping salesforce up to date, in particular.

69) The reason the new procedure was introduced was explained to the claimant and the Claimant has not been able to establish any disadvantage suffered as a result of the change or how this could be considered a breach of contract. Had the Respondent continued under the old procedure it is clear that as a result of the Claimant's continued under performance he would have been dismissed sooner.

70) The Claimant accepted that the targets he had been set were fair and realistic and at no time during either process did the claimant appeal any decisions made in respect of the targets or change in process.

71) The Tribunal therefore concludes that the actions of the Respondent does not amount to a breach of contract or a breach of trust and confidence and cannot be relied upon as part of a continuing act of behaviour likely to destroy the employment relationship.

<u>Mr Anton Du Preez was rude to the Claimant on 17 December 2018 in a sales meeting.</u>

72) The Claimant argues that Mr Preez was rude to him during a sales meeting in December 2018 saying in his grievance that Mr Du Preez was harsh and

condescending. The Respondent carried out a through investigation and interviewed all the staff that were present at the meeting and it is accepted that one other member of staff, Mr Grange, did support the Claimant's accusation. Mr Du Preez agreed to apologise to the Claimant and did so. The Tribunal also notes again that the Claimant did not appeal the decision.

73) The Tribunal has found that the Claimant was supported in his view that Mr Preez was rude but that he did apologise and the Claimant accepted that apology. He did not appeal or raise any further concerns. The Claimant states that he considers that the apology was insincere because he received a photocopy of the letter. The Tribunal does not consider that this is evidence of insincerity and Mr Preez when asked to send an apology did so.

74) The Tribunal has considered whether this amounts to a fundament breach of contract or even a breach of contract and finds this not to be the case. Whilst the Tribunal finds that it appears Mr Du Preez did speak to the Claimant harshly it cannot be said that this is sufficient reason for the Claimant to resign and indeed the Claimant did not appeal the decision or complain about the apology at the time. The Tribunal therefore concludes that the actions of the Respondent does not amount to a breach of contract or a breach of trust and confidence and cannot be relied upon as part of a continuing act of behaviour likely to destroy the employment relationship.

<u>Lead distributions – leads were passed to Ian Searle instead of The Claimant in December 2018.</u>

75) The Respondent accepted that four leads had been passed in error to Mr Searle. These leads were returned to the Claimant. The Claimant also acknowledged during cross examination that he had the most leads and the tribunal has found that this allegation had no impact on his ability to meet his target and would have made no difference. The Tribunal found no evidence that this had been done deliberately. The Claimant suggested to Mr Shore during cross examination that this had not been acknowledged in his grievance but the Tribunal has found that this is not the case and the Respondent did acknowledge that errors had been made and the leads were passed back to the Claimant.

76) Again, the claimant has been unable to show that he suffered any disadvantage for example that the leads that had been given to his colleague resulted in large sales and that the error meant that his performance could have been improved. The Claimant appeared to be implying that Mr Shore was deliberately not passing him work but the Tribunal finds that the evidence does not support that view.

77) Throughout his employment and conceded during this hearing the Claimant confirmed that he had the most leads in the company. Whilst the Claimant stated that he had generated those leads himself via LinkedIn, the Claimant's own evidence is that he was able to generate leads but was unable to convert those leads into sales.

78) The Respondent stated in submissions; 'In the Claimant's 2015 performance review it was recorded that the Claimant was confident his performance would

improve [pg. 46]. In addition, the performance review states "Gerald confirmed he was receiving enough leads to meet his target, both self-generated and from demand gen" [pg. 47]. Similarly, in the Claimant's 2016 review he confirmed his underperformance was not related to the number of opportunities but the lead time [pg. 54]. In 2017 C was allocated the container sector which he accepted increased his pool of possible deals. The Claimant received a lot of support to enable him to achieve his targets and in fact, during the PIP procedure C denied he required additional support [pg. 109].' The Tribunal agrees with this submission. The Claimant had and still has an unrealistic view of his abilities to achieve sales, particularly in the timeframes given to him.

79) The Claimant conceded in evidence that the leads were allocated during a period of sickness leave and that it was common practice to cover during periods of leave. The Claimant also conceded that the leads were returned to him but that they did not convert into sales.

80) The Tribunal accepts that there were errors and that the errors were rectified and did not cause any disadvantage to the Claimant. The Tribunal therefore finds that this did not cause the Claimant any disadvantage and that the Respondent did not act in a way likely to destroy the employment relationship.

<u>The grievance outcome in February 2018 does not state that Simon Shore made an error in the lead allocations</u>

81) The Claimant argued that failing to acknowledge the mistakes in the grievance demonstrates a flagrant lack of regard by the Respondent. However, the Tribunal has found that the grievance does in fact acknowledge that mistakes were made and the leads were returned. The word used by the Respondent may not be the same as the word the Claimant would use but it is clear on an objective view that the error and mistake have the same meaning. Furthermore, the Claimant accepted during his oral evidence that once he raised a grievance highlighting this mistake the leads were reallocated to him and again the Claimant did not appeal the grievance outcome or raise any concerns about the language used in the grievance outcome with anyone at the time.

82) It cannot be said that this was a breach of conduct or part of a course of conduct likely to destroy the trust and confidence between the parties.

<u>It was not fair to arrange for a PIP/objectives to be set at a meeting on 3 April 2018 due to annual leave</u>

83) The Tribunal has some sympathy with the Claimant in that his annual leave meant that he had little time to achieve his sales targets. However, the targets had been in place for some time and had been suggested and set by the Claimant himself at the meeting on 10 October 2018. The claimant had throughout stated that he would be able to meet his targets, and in his statement suggested that without the annual leave period 'this would not have been a problem'. The Tribunal had no evidence before it that the Claimant was on track to hit his target even had there been an extension to the final meeting. The Claimant has not suggested that he had deals that were due to close in the near future.

84) The Claimant also knew in the review meeting on 15 March 2019 that the final meeting was due to be held on 26 April 2019 and did not at that time raise any concerns about his impending annual leave or that it would cause him any difficulty. The Claimant appeared to suggest that the objectives/targets in the email on the 3rd of April introduced a whole new set of targets of which he was unaware of previously. The Tribunal has found that this was not the case and that the Claimant was fully aware of the expectations of the Respondent and were targets/objectives that he had for at least six months. In oral evidence the Claimant 'withdrew' his assertion that he had had entirely new targets given to him on 3 April 2019 but would not expand on that further.

85) The Claimant had several weeks to approach Mr Shore to discuss an extension if he considered that he had a realistic opportunity to meeting the targets in a further short period of time but did not do so until he had already been on annual leave for 10 days. The Tribunal accepts that he requested an extension which was refused but with the caveat of discussing it further with Mr Shore at the meeting. The claimant did not do this.

86) The Claimant's evidence on the reason why he had not asked for an extension earlier or raised any concerns with the Respondent prior to going on leave was evasive. He suggested that he had received an email while on leave and this is what prompted him to contact the respondent but rather than email he sent a letter. The Claimant firstly said he had sent the letter himself and then said that his daughter had sent it and was extremely evasive in his responses to Counsel's questions.

87) The Tribunal finds that the Claimant did not raise his concerns about the timing of the meeting promptly, did not try and discuss this again with Mr Shore at the opening of the meeting and that the offer to discuss it at the meeting was a reasonable course of action for the Respondent to have taken. The Claimant pre-empted any discussion on that point by handing in his pre prepared letter of resignation.

88) The Tribunal finds that the Respondent's behaviour cannot be viewed as unreasonable or a breach of contract and even when taken cumulatively with the Claimant's other concerns does not amount to conduct likely to destroy employment relationship.

<u>The 'final straw' - Yara Fertiliser lead was passed to Ian Searle.</u>

89) The Claimant's evidence and submission are that on 8th February 2019 a lead for Yara Fertiliser came into the Respondent Company and was passed onto Mr Searle from Mr Shore. The Respondent accepted this. However, they argue that this was based on the Claimant's mistaken belief that the lead fell within his area of responsibility and that they were a Chemical company. The Claimant suggested that fertiliser was shipped as dry bulk appears to be why he considered the lead should have been passed to him. However, there was no evidence from the Claimant, other than his personal view, that the assertion by the Respondent that this was a chemical lead was not the case.

90) The Tribunal accepts the Respondent's evidence and submissions on this point. The evidence before the Tribunal was that the Claimant was not given leads in relation to Chemical companies and that it was entirely reasonable for the Respondent to have given that lead to Mr Searle.

91) The claimant alleges that at that final meeting he tried to discuss the Yara lead and that Mr Shore offered no explanation which in his view demonstrated that he (Mr Shore) did not care and that is why he then wrote his resignation letter during the meeting.

92) The Tribunal finds that this is not credible and accepts that Respondent's evidence in respect of the meta data that the resignation letter had clearly been typed prior to the meeting.

Conclusions

93) The Tribunal finds that the Respondent did not conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

94) The facts before the Tribunal do not demonstrate that there were a series of acts that viewed objectively amount to a fundamental breach of contract entitling the Claimant to resign and claim constructive dismissal.

95) The Claimant has argued that there were a series of breaches that viewed together, amount to a fundament breach of contract of the implied term of trust and confidence. The Claimant relies upon the 'last straw' principal and has sought to argue that the giving of the Yara lead to Ian Searle amounts to a 'last straw' act.

96) The Respondent argues that an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The Tribunal accepts this submission and agrees that the test the Tribunal must apply is an objective view of whether the employee's trust and confidence has been undermined. In this case the Claimant relies on the Yara lead and firstly the Tribunal has found that that was not the reason the Claimant resigned and that he had prepared his resignation letter prior to the meeting with Mr Shore. The Claimant stated in evidence and submissions that Mr Shore's reaction to his queries regarding the Yara lead demonstrated his disregard for him and he decided to resign there and then. It seems that this cannot be the case because he had already made up his mind to resign because the letter had been written prior to the meeting and the Tribunal has found that this was because he suspected he was going to be dismissed.

97) Further, the Tribunal agrees with the Respondent that whilst it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. The Tribunal finds that the allocation of the Yara Fertiliser lead was such an innocuous act that it is incapable of amounting to a last straw.

98) The Tribunal has considered the Respondent's conduct as a whole and whether the Respondent's conduct prior to the final meeting and Yara lead was discussed amounts to a series of acts that amount to a fundamental breach of contract. Other than Mr Du Preez conduct at the meeting in December 2018 and the error made in respect of the allocation of leads (which was rectified), the Tribunal is not satisfied that judged sensibly and reasonably, it was not conduct that the Claimant could not be expected to put up with.

99) The Tribunal has found that the Respondent implemented perfectly reasonable performance management processes and that the Claimant had many opportunities to hit his sales target and meet the other objectives set and that he consistently underperformed during his employment. The burden of proof rests with the Claimant and the Tribunal finds that the Claimant has not discharged that burden.by establishing the facts necessary for the Tribunal to conclude that there had been a breach of the implied term of trust and confidence.

Commission Pay

100) The Claimant did not present any evidence or submissions in respect of his unlawful deduction of wages claim. The only issue raised by the Claimant was a moral obligation on the part of the Respondent to pay for the Taranaki deal. However, the claimant conceded in evidence that contractually he was only entitled to commission on invoice that were raised during employment and therefore the Tribunal cannot make a finding of unlawful deduction of wages.

Employment Judge Hill
Date 09 May 2021

JUDGMENT SENT TO THE PARTIES ON
14 May 2021

FOR THE TRIBUNAL OFFICE