THE EMPLOYMENT TRIBUNALS

Claimant: Mr J Henderson
Respondent: The Great Annual Savings Company Limited

Heard at: Newcastle Hearing Centre **On:** 7 October and 16 November 2021

Before: Employment Judge Morris (sitting alone)

Representation:
Claimant: Ms H Hogben of counsel
Respondent: Ms V Brown of counsel

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. By consent, the claimant's complaint that, contrary to Regulation 14 of the Working Time Regulations 1998, the respondent did not pay him compensation in respect of his entitlement to paid holiday that had accrued but not been taken by him at the termination of his employment is well-founded.

2. In that respect, further to Regulation 30(4) of those Regulations, the respondent is ordered to pay to the claimant compensation in the agreed sum of £527.80.

3. The claimant's complaint that he was dismissed by the respondent by reference to Section 95(1)(c) of the Employment Rights Act 1996 is not well-founded; and his complaint, by reference to Section 94 of that Act, that his dismissal was unfair contrary to Section 98 of that Act is also not well-founded and is dismissed.

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant was represented by Ms Hogben of counsel, who called the claimant to give evidence.

3. The respondent was represented by Ms V Brown of counsel who called the following employees of the respondent to give evidence on its behalf: Mr C Shields, Operations Director; Mr PA Johnson, Finance Director, although he was employed as Head of Finance during the claimant's employment.

4. The evidence in chief of or on behalf of the parties was given by way of written witness statements. I also had before me a bundle of agreed documents comprising in excess of 170 pages, which by consent was added to during the hearing. The numbers shown in parenthesis below are the page numbers (or the first page number of a large document) in that bundle.

The claimant's claims

5. The claimant's claims are as follows:

> 5.1. By reference to section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act") he had terminated his contract of employment in circumstances in which he was entitled to terminate it without notice by reason of the respondent's conduct, hence he had been constructively dismissed; and, by reference to sections 94 and 98 of the 1996 Act, that dismissal had been unfair.
>
> 5.2. Contrary to Regulation 14 of the Working Time Regulations 1998, the respondent had not compensated him in respect of his entitlement to paid holiday that had accrued but not been taken at the termination of his employment.

6. The respondent's response was as follows:

> 6.1. It denied that the claimant had been dismissed but contended, in the alternative, that if he was dismissed the reason was the potentially fair reason of "some other substantial reason", and that by reference to section 98(4) of the 1996 Act, the dismissal was fair.
>
> 6.2. It conceded that the claimant was entitled to compensation in respect of accrued entitlement to paid holiday in the agreed sum of £527.80, which would paid.

7. In light of the above concession, it is not proportionate that I should address the claimant's holiday pay claim in the remainder of these Reasons, and I have not done so.

The issues

8. The issues to be determined at this hearing are as follows, the references to "the respondent" being read to include, also, relevant managers acting on its behalf:

> 8.1. Did the actions of the respondent either separately or cumulatively amount to a breach of any of its express contractual obligations to the claimant?

8.2. If not, did the actions of the respondent either separately or cumulatively amount to a breach by the respondent of the term of trust and confidence that is implied into all contracts of employment: i.e:

8.2.1. Did the respondent conduct itself in a manner that was calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between it and claimant?

8.2.2. If so, did the respondent have reasonable and proper cause for doing so?

8.3. Was the breach a fundamental one: i.e. was it so serious that the claimant was entitled to treat the contract of employment as being at an end?

8.4. Did the claimant, at least in part, resign in response to the breach: i.e. was the breach of contract a reason for the claimant's resignation?

8.5. Did the claimant affirm the contract before resigning: i.e. did the claimant's words or actions show that he chose to keep the contract alive even after the breach?

8.6. If the claimant was dismissed, what was the reason or principal reason for the dismissal: i.e. what was the reason for the breach of contract?

8.7. Was that reason a potentially fair reason by reference to section 98(1) of the Act?

8.8. By reference to section 98(4) of the Act, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Findings of fact

9. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

9.1. The respondent offers business costs savings services, mainly business utilities, to companies across the UK. It is a large employer of some 270 employees and has fairly significant resources including an in-house Human Resources Department ("HR").

9.2. In oral evidence Mr Shields confirmed that the respondent operates in a hugely competitive market and is sales-driven with its success being dependent on its sales team but he said that although some companies put their employees under pressure to produce results the respondent does not.

9.3. The claimant was employed by the respondent from October 2015 until he resigned with immediate effect on 5 February 2021. The claimant was well-regarded and was promoted during his employment. At the time of his resignation he was employed as Sales Manager (Central Sales). Until 1 February 2021, Mr Shields was claimant's line manager.

9.4. The claimant's contract of employment (41) contained several clauses that imposed restrictive covenants on the claimant, which were intended to protect the respondent's business following any termination of his employment (44). Additionally, that contract provided, amongst other things, as follows:

> "You will be entitled to participate in the Employer's Bonus Scheme in existence from time to time. …. This may be amended by the Employer from time to time upon reasonable notice, the bonus scheme is non-contractual and non-pensionable." (42)

9.5. In accordance with the above provision, the Bonus Scheme was normally reviewed annually and has been changed from time to time.

9.6. Amongst other things, the Bonus Scheme that applied from 1 July 2019 ("the 2019 Scheme") (68) provides as follows:

> "The company reserves the right to change the manner for calculating and the basis upon which, commission is paid from time to time, after providing employees with reasonable notice."

[Note: As set out above, the contract of employment refers to a "Bonus Scheme" whereas the scheme itself is referred to as a "Commission Scheme". In evidence it was apparent that the parties used the word "bonus" as being synonymous with "commission" and I have done likewise in these Reasons.]

9.7. The details of the 2019 Scheme are complicated. In essence, it comprised two principal parts: acquisition of business and renewal of business. In respect of acquisitions, an employee could earn 7.5%, 15% or 20% commission of the Total Contract Value ("TCV") of business sales secured by him or her each quarter. The percentages were paid by reference to three 'bands' into which the TCV was divided, being up to £100,000, £100,001 to £200,000 and above £200,000. Suppliers that were categorised by the respondent as Tier 1 were more profitable to the respondent than Tier 2 or Tier 3 suppliers in that Tier 1 suppliers paid money 'upfront' at the start of the contract. That being so, 25% of the commission earned in respect of Tier 1 suppliers would be paid to employees in the month after the contract went 'live' with the balance being paid in instalments over the following 11 months. Tier 2 and Tier 3 suppliers paid in arrears and, therefore, the commission paid to employees in respect of contracts with those suppliers was paid over the duration of the suppliers' contracts.

9.8. In respect of renewals, all first renewal business was paid at 10% and subsequent renewals at 5%.

9.9. In addition, outside of the 2019 Scheme, an employee could earn an additional incentive payment of either 2.5% or 5% if he or she contracted revenue worth £40,000 or more in any given month

9.10. As is well-known, on 23 March 2020 the Prime Minister announced the first national 'lockdown' as part of the government's response to the Covid-19 pandemic. The respondent experienced a drop in business activity and made use of the government's job retention scheme ("furlough") in relation to the majority of its employees, albeit 'topping up' salaries to 100%. The claimant was placed on furlough from 1 April to 15 April 2020.

9.11. A further response to the situation at the time was that the respondent's directors decided to freeze, until further notice, making any payments that would otherwise have been due to employees under the 2019 Scheme; although employees were informed that such payments would be made later in the year, which they were in December 2020 (78). This decision to freeze payments under the Scheme was implemented without giving notice to the employees.

9.12. The suspension of the bonus payments impacted upon the claimant's earnings. This was ameliorated by the respondent's chief executive agreeing that, on behalf of the Company, he would make personal payments to the claimant of 3% of the value of certain work that he was instructed to undertake in relation to a particular supplier (72). The position regarding the payments made by the chief executive to the claimant has now been regularised as between him and the respondent.

9.13. The claimant's evidence in his witness statement was that from roughly July 2020 onwards he was subjected to increasing levels of abusive behaviour from Mr Shields and the respondent's chief executive, the latter of whom frequently called him a "fat cunt" and "a failure" whenever he saw the claimant, frequently threatened to take his company car away without notice and reduce his salary; such conversations taking place in several locations including in the chief executive's office, in meetings and when passing around the office and on the stairwell. The claimant said that this behaviour continued until the second week of January 2021 and made him feel stressed and anxious, impacted upon his ability to sleep and upon his relationship with his partner; for the first time in his adult life he suffered from anxiety attacks. In order to maintain chronology, I shall return below to the incident that occurred in the second week of January.

9.14. In about August 2020 Mr Johnson undertook a review of the terms of the 2019 Scheme. Under that Scheme the calculations were made quarterly and if an employee had one bad month he or she could be 'disincentivised'. To address this and other issues, a new bonus scheme (the "2020 Scheme") was introduced in respect of all deals sold from 1 October 2020 (73). One element of the 2020 Scheme, which was introduced to counteract employees being 'disincentivised', was to move to monthly targets so that if an employee had one really bad month he or she would still have the opportunity to earn up to 20% of the TCV the following month.

9.15. Additionally, in the 2020 Scheme more 'bands' were introduced with the result that employees often needed less TCV to 'trigger' the higher percentage commission; for example, an employee who achieved £60,000 in a single month would trigger a bonus payment of 15% whereas he or she would have had to reach the equivalent of £66,666 per month over three months in order to trigger 15% bonus under the 2019 Scheme. Put another way, if, for example, an employee achieved £80,000 in month 1 and then nothing in months 2 or 3, under the 2019 Scheme he or she would earn bonus of 7.5% whereas under the 2020 Scheme he or she would earn bonus of 20%. The 2020 Scheme was also simplified by incorporating the separate incentive payment into the bonus scheme itself. Overall, the 2020 Scheme was considered more beneficial to employees as they often needed less TCV and it was calculated over a month rather than a quarter. The claimant's evidence was that the 2020 Scheme had a negative impact on the commission that he could earn due to the way in which qualifying revenue was calculated. In his witness statement he said that, as a result, his average monthly earnings dropped from £8,255 to £3,308. In cross examination, however, when it was put to the claimant that that comparison was misleading as the former amount was calculated by reference to his gross earnings and the latter amount was calculated by reference to net earnings he accepted that his evidence was not accurate; he explained that it had been done for HMRC and he had thought it was right.

9.16. Although the differences between the two Schemes and the benefits of each was hotly disputed in evidence at the hearing, Mr Johnson was knowledgeable and confident in his explanations (as is to be expected of the Finance Director who introduced the changes in the 2020 Scheme) and was balanced in the evidence he gave. I accept his evidence that although individual points taken in isolation might suggest that the 2019 Scheme was more advantageous, overall the 2020 Scheme did not have a substantial negative effect on the commissions payable to employees, including the claimant, who had more and better opportunities to earn commission under the 2020 Scheme than under the 2019 Scheme. I acknowledge that there was a drop in the claimant's average monthly earnings (although not as significant as his witness statement would suggest given the confusion between gross and net earnings) but I accept Mr Johnson's evidence that that was a consequence of the business climate, which is still impacted by the pandemic with a 20% downturn in sales, and less commissions being available generally.

9.17. In November 2020, Mr Shields approved the claimant's holiday request for five days from 14 to 18 December 2020 inclusive; in the claimant's claim form he refers to 9 days but agreed in evidence that that was inaccurate. Mr Shields confirmed in evidence that the claimant was entitled to take his annual leave. On 10 December Mr Shields spoke to the claimant in the context of the poor sales figures achieved by his team at that time, which needed to improve. In evidence, Mr Shields referred to a second issue of the claimant's intention to have a week's holiday in a cottage outside the local area, which was contrary both to government stipulations to combat the spread of the pandemic and to the respondent being keen that staff should not expose themselves to unnecessary risk in that regard. I am satisfied, however, that the matter of the

poor sales figures was the principal reason for Mr Shields' approach to the claimant. There is a conflict of evidence as to the content and outcome of their conversation.

9.17.1. Mr Shields denied that he withdrew his agreement to the holiday. He said that he had engaged in a genuine two-way discussion and that while he did discuss reasons why a holiday at that time was not a good idea and he would not go, the decision to move the holiday was the decision of the claimant who, after their discussion, "understood", "completely agreed" and "decided and offered to cancel" this holiday. Although disappointed, it was the claimant who offered to cancel his holiday and carry it over to January.

9.17.2. The claimant stated that Mr Shields withdrew his agreement to the holiday as the claimant had not hit his sales target and, in order to do so, he should be staying at work. When he challenged Mr Shields he responded that if he took the week's holiday, he could not guarantee that he would come back to the same role (which Mr Shields denied saying, explaining that the claimant had been with the respondent a long time and that he would not put him under that pressure), and was dismissive of the claimant's explanation of the effect that the cancellation of the holiday would have on his partner. So much so that the conversation made him "feel utterly deflated and upset" and, having worked through the majority of lockdown while everyone else was on furlough and deliberately delayed taking his holiday to help the respondent, he "felt completely duped and undervalued".

9.18. The first day on which the claimant attended work when he had expected to be on holiday was 14 December 2020. In oral evidence he confirmed that he was annoyed and very unhappy at this; and, additionally, that was in the context of the increasing levels of abusive behaviour to which the claimant said he had been subjected from roughly July 2020 as is referred to above. On that same day, 14 December, the claimant completed a detailed employee survey containing 73 questions (80). Employees were not required to answer all questions and the claimant did not answer a number such as in relation to training, coaching and discussing any problems confidentially. Of the questions the claimant did answer, there is little in his responses that could be described as being negative about the respondent or his role: for example, he would recommend others to work at the respondent; he awarded 4 out of 5 to the statements, "I am proud to say I work at GAS" and "I am happy and motivated when at work"; he felt valued as part of his team and the GAS family, and in respect of the new monthly recognition campaigns; he was given opportunities to develop and grow alongside the company; his immediate manager inspires and leads the team; he received regular coaching and review meetings and felt confident in discussing any concerns with his immediate manager. The claimant explained that the survey was not anonymous and he felt unable to raise his concerns openly fearing that if he did he would have been made 'redundant', as he said had occurred with an administration manager who had filled in such a survey anonymously. In oral evidence, the claimant explained these and other

fairly positive responses he had given by commenting that he had no option; if he had declined to answer a question or given a negative response he would have been asked why and that would have led to confrontation, which he wished to avoid, "I just wanted to get away and get on with life". That said, these answers given by the claimant do tend to support Mr Shields' evidence that at no time did the claimant give any sign that he was unhappy or that he had concerns about his job.

9.19. As the claimant had not taken his holiday in December 2020 he was allowed to take the first week of January 2021 as holiday although he cut that short. He said that was in order to return to work to help out the respondent as the majority of staff were on furlough.

9.20. As intimated above, the claimant's evidence in his witness statement was that he was subjected to abusive behaviour from roughly July 2020 until the second week of January 2021 when, he said, the "last act took place". There is a significant conflict of evidence as to what occurred on this occasion and, as this represents what is referred to as being 'the last straw', it is appropriate that I should set out that evidence in some detail.

9.20.1. The claimant's evidence was that he was in the office with Mr Shields who took a call from the chief executive after which he told the claimant that the chief executive had summoned him to a meeting and told him "to tell the fat cunt to come with you". On entering the chief executive's office he was verbally attacked by him taking his holiday and for his business results saying, "Who do you think you are?" and "You're in a senior position in the company and you just go swanning off". The chief executive laughed at him, called him lazy and useless and suggested that his girlfriend would likely leave him. The claimant was shocked and humiliated and spoke to Mr Shields after the meeting who had simply chuckled and stated that he knew it was coming and thought the claimant had got off lightly. The claimant said that he felt utterly humiliated and let down; he had taken holiday in January with Mr Shields' agreement and felt as though he had set him up to fail.

9.20.2. Mr Shields denied that he told the claimant that the chief executive had told him "to tell the fat cunt to come with you", had said to the claimant, "Who do you think you are?", "You're in a senior position in the company and you just go swanning off", laughed at him, called him lazy and useless or suggested that his girlfriend would likely leave him. His evidence was that he was astounded to read the claimant's account of the meeting and the number of lies, commenting that if the claimant did have a genuine grievance it was open to him to raise a formal grievance under the respondent's grievance procedure (67): in this regard claimant's evidence was that he did not feel he could have raised a grievance against the chief executive and Mr Shields without putting his own job at risk. Mr Shields' evidence was that the meeting was predominantly about the sales performance of the claimant's team about which the chief executive had high expectations. He challenged the claimant asking why his sales figures were so poor and what the

claimant was going to do to improve the figures. It was a typical sales meeting. Mr Shields' assessment was that what occurred was well within the reasonable limits of a challenging meeting and that the chief executive was thoroughly professional throughout. In addition, the chief executive did mention the claimant's holiday in December commenting that it was the right decision for him not to take the holiday at that time. The meeting ended positively with the Chief Executive telling the claimant that he would not be challenging him if he did not think as much of him as he did. He felt that the claimant left the meeting quite positive. On the way back to their desks he and the claimant discussed the meeting and the claimant commented that he thought the chief executive had been fair. In oral evidence, Mr Shields denied having laughed off what had occurred at the meeting as there was "nothing to laugh off – it was unremarkable and we returned to work". He did, however, agree that if what the claimant had described had happened it was very serious, no employee should have to put up with it and would be justified in walking out, "I would leave".

9.21. In connection with the above conflict of evidence, it is clearly unfortunate that the chief executive did not attend the hearing to give evidence himself but it was reported that that was a consequence of legal advice he had received; obviously neither I nor the representatives sought any further clarity on that point.

9.22. By letter of Friday 5 February 2021 (89) that was sent to the respondent by email at 17:00 that day (88), the claimant submitted his resignation, to take immediate effect. He thanked the respondent for the opportunities he had been given, wished everyone all the very best for the future and explained that the time had come for him to move on to pastures new. In a text message that day, Mr Shields suggested that the claimant might have handled his resignation better to which he responded, "I've just had enough pal it's time for something new. I'm not going to start slagging the place off i enjoyed working there and made some serious money but I don't enjoy going to work anymore so I'd rather leave than let it get worse". In their subsequent exchange of messages the claimant stated, "I guess it's just my time shields. Thanks for everything you've done I really enjoyed working with you" and "it's nothing personal. I've seen too many people leave that place to know GAS don't like to make it easy. It wasn't an easy decision at all but I tried to do it as professionally as possible".

9.23. The following working day, Monday 8 February 2021, the claimant commenced employment with a key competitor of the respondent. He had started speaking to his new employer two weeks previously and received a verbal offer of appointment on 5 February, which was confirmed in writing on 8 February. The claimant's evidence was that his remuneration package was "about the same" as although he received £5,000 more salary, he was not provided with a company car. He had received a payment of £7,500 for joining his new employer, which was to be in lieu of what he could have been owed by the respondent.

9.24. By letter that same day, 8 February 2021 (93), which was sent by email to the claimant at 14:57 that day (92), the respondent's HR Manager informed the claimant that the respondent had not accepted his resignation with immediate effect but would place him on garden leave for his six months' notice period, and advised him that for him to commence employment prior to 5 August 2021 would "result in a serious breach of your terms and conditions of employment".

9.25. Solicitors acting on behalf of the respondent wrote to the claimant on 16 February 2021 (112), to remind him of his contractual obligations including the restrictive covenants that he had entered into and sought reimbursement of some £1,900 in relation to the costs of having his company vehicle valeted and the early termination fee charged by the hire company. Certain undertakings were required of the claimant failing which court proceedings would be issued against him.

9.26. The claimant responded to the solicitors by email of 22 February 2021, which he said in oral evidence he had written after having received legal advice; as appears to be borne out by his holding reply to the respondent's solicitors of 19 February (124). In his email the claimant offered to contribute £50 to the cost of the valet service of his company vehicle but disputed that the early termination fee should be attributed to him. More importantly in the context of these proceedings, he asserted that he had been constructively unfairly dismissed and, as such, the restrictive covenants in his contract of employment were no longer applicable. The claimant relied upon three points set out in his letter as the bases for his assertion that he had been dismissed:

9.26.1. The respondent had not paid him any commission between March and September 2020, which he said was a fundamental breach that eroded the trust and confidence required in their employment relationship.

9.26.2. In October 2020 the respondent had introduced a new commission structure which had a substantial negative affect on the commissions payable to him, and did not seek his consent to this fundamental change to his salary, which again eroded the trust and confidence required in their employment relationship.

9.26.3. In December 2020, he was owed nine days' holiday, which the respondent refused to allow him to utilise and did not remunerate him for them.

9.27. In his letter the claimant also raised other matters (mainly alleged bullying and harassment by the respondent's chief executive, Mr Shields persisting in trying to contact him by telephone despite him having asked for communication to be made in writing and an assertion that the respondent had fraudulently placed his signature on a previous car usage acknowledgement) but in his letter he only relied upon the three matters set out above as the basis for his assertion that he had been dismissed. In oral evidence the claimant

confirmed that he was not relying upon the issue of the return of the company vehicle or the signature on the car usage acknowledgement as part of his claim.

9.28. The correspondence between the claimant and the respondent's solicitors continued for a while but as that came after the date of the claimant's alleged dismissal, I do not address it any detail except that in an email to those solicitors dated 3 March 2021 (126) the claimant repeated that the cumulative effect of the breaches that he had referred to in his email of 26 February had had the effect of eroding the trust and confidence required in their employment relationship and, "The final straw was when I was not paid for the nine days holiday own to me by GAS". In cross examination, however, the claimant stated that this was written "in error" and that the final straw was the meeting with the respondent's chief executive: "I had never been spoken to by anybody in that manner, let alone an employer", "It was quite vicious".

Submissions

10. After the evidence had been concluded, the parties' representatives made submissions, which addressed the issues in this case. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to my decisions. That said, the key points in the representatives' submissions are set out below.

11. On behalf of the respondent, Ms Brown made submissions by reference to a detailed skeleton argument in which she referred to many leading authorities in this area of the law. Her submissions included the following:

11.1. In relation to credibility, for the reasons set out in her skeleton argument, in cases of conflict of evidence the Tribunal should prefer that of the respondent's witnesses.

The breaches

Stopping bonus/commission from March to September 2020

11.2. The claimant did not have a contractual right to participate in a commission scheme, which refers to amendment powers and it being non-contractual and non-pensionable. Exercising powers in accordance with the contractual documentation is not calculated or likely to destroy the relationship of trust and confidence. Indeed the claimant had been better off as a result. The claimant never complained to the respondent which had no opportunity to explain or address his concerns.

11.3. It is wholly unrealistic to suggest that urgent suspension of commission due to a global pandemic and national lockdown but replacing it with an overall more advantageous scheme might not amount to reasonable notice, not have

reasonable and proper cause and be calculated or likely to destroy or damage the relationship of trust and confidence.

New commission structure

11.4. The above contractual points apply equally. The new scheme was not calculated or likely to destroy the relationship of trust and confidence. Mr Johnson's evidence was that the new scheme was more advantageous: it was monthly instead of quarterly and would address peaks and troughs. Once more, the claimant never complained to the respondent which had no opportunity to explain or address his concerns.

11.5. As Mr Johnson had explained, in any two commission schemes there will be better and worse aspects but the new scheme was more financially advantageous for employees. Overall, the claimant was financially better off under the new scheme. Additionally, the 2022 figures must be adjusted for the downturn in business of utilities sales during and following a global pandemic.

December holiday

11.6. The respondent accepted the claimant's proposal to work, which is not calculated or likely to destroy or damage trust and confidence. The respondent had reasonable and proper cause to acquiesce to the claimant's request as his sales were low and he was requesting it. The claimant may have felt pressure internal to himself but that is not any act of the respondent.

Bullying

11.7. The respondent's evidence should be accepted in light of the credibility points previously made. The claimant's allegation in this respect changed materially during his evidence including regarding the number of occasions that the chief executive was said to have been abusive towards him, where, when and whether it was face-to-face or over the telephone. In oral evidence, the claimant said that he had raised a grievance with Mr Shields about this but that allegation had never previously featured in his account and was later abandoned.

11.8. It would be very serious indeed to call someone "a fat cunt" and "a failure", and is inherently unlikely. Mr Shields' evidence was that he would not work at the respondent, which would not have a business if the chief executive behaved as alleged, which was common sense.

11.9. The respondent's evidence is externally consistent with the answers the claimant gave to the employee satisfaction survey by which time every breach relied upon, except for the last straw, had already occurred.

The last straw – the January 2021 meeting

11.10. The respondent's version of this meeting is inherently more likely. If the claimant's account is correct he would have raised it in any of his post-termination explanations for his resignation, which featured in the context of a

range of sophisticated communications when the claimant explicitly alleged constructive unfair dismissal and purported to identify breaches of contract. He did not mention it in his resignation letter or in his text messages with Mr Shields and, although bullying and harassment is mentioned in the claimant's email of 22 February, it is not relied upon as a fundamental breach resulting in an unfair dismissal claim and the meeting is not mentioned; and in the claimant's email of 3 March he claims that the holiday issue was the last straw. The first mention of the incident is in the claimant's claim form.

Causation

11.11. The claimant's explanation for his resignation had consistently changed. His resignation letter was bland and expressed gratitude for the opportunities he had been given; in the text messages to Mr Shields the claimant had said that it was "nothing personal" despite now claiming that he stood by during bullying and denied the claimant's annual leave; in his email of 22 February 2021 the claimant only refers to the commission and the holiday as being fundamental breaches and, in the email of 3 March, he refers to the holiday issue as the last straw.

11.12. The claimant did not resign in response to any act upon which he now relies as a breach: the inconsistency of his account undermines his case; he resigned on the Friday and began a new job on the Monday at greater pay, more favourable commission and a £7,500 signing bonus; he confirmed that he would have stayed with the respondent until he got a new job.

Affirmation

11.13. All allegations were affirmed. Some go back almost one year before his resignation, he never complained about any of the acts and, to the contrary, described the commission paid to him during furlough as "life changing".

12. On behalf of the claimant, Ms Hogben made submissions including the following:

12.1. The claimant's case is based on a series of acts, which together amounted to a breach of trust and confidence (London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493) and the last straw itself is sufficient to be a repudiatory breach (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978).

12.2. The respondent had presented no evidence as to the basis for its decision to stop paying bonus, such as whether it was justified by the respondent being in difficulty; and at the start of the pandemic it would be expected that customers would be seeking to limit their outgoings on, for example, utilities and precisely at that time would need the respondent's services.

12.3. The credibility of the respondent's witnesses was questionable. Both were supporting the actions of the one person who could directly answer with

details, the chief executive, but the Tribunal had not heard from him. The following points arise more particularly as to the credibility of Mr Shields:

12.3.1. His account had varied.

12.3.2. It was questioned how his witness statement had been prepared. Only when pressed did he accept discussing matters with the chief executive, which was a great concern as it was supposed to be his account not a combined account. His evidence as to the claimant's role necessitating restrictive covenants could only have come from the chief executive.

12.3.3. His evidence that the payments made by the chief executive to the claimant and others reflected commission under the 2019 Scheme was demonstrably false. It must have come from others such as the chief executive.

12.4. More concerning was Mr Johnson's silence regarding these payments in his witness statement: he is the Finance Director and was Head of Finance at the time.

12.5. Stopping the claimant's bonus, which Mr Johnson accepted had been without notice, had been extremely detrimental to the claimant and had had an immediate impact. It was part of a series contributing to a repudiatory breach of contract.

12.6. The introduction of the new bonus scheme had resulted in a reduction to the claimant's net pay. The decision had been unreasonable and amounted to a course of conduct and was repudiatory.

12.7. The claimant's evidence regarding the holiday should be preferred. Primarily Mr Shields' account does not stand up to scrutiny. It makes no sense for the claimant to cancel his holiday the day before when costs had been incurred, and given the impact on his partner. The evidence of Mr Shields had shifted when comparing that in his witness statement and his oral evidence between the claimant having offered to cancel his holiday and having agreed to cancel the holiday. Most tellingly, Mr Shields agreed that he knew it was the right thing to do, which betrays the mind-set of the respondent (the chief executive and Mr Shields) putting pressure on a junior employee to cancel his holiday; this is supported by Mr Shields' evidence in his witness statement that the chief executive had said at the meeting in January 2021 that it was the right decision for the claimant not to take his holiday at that time. The respondent had put a gun to the claimant's head and threatened him with the loss of his role if he refused to cancel his holiday. The claimant's evidence makes more sense than the alternative of him agreeing to cancel. Mr Shields had forgotten that the claimant was entitled to his annual leave.

12.8. Turning to the incident in January 2021, from July 2020 onwards the claimant had suffered increasing levels of abuse from the chief executive and Mr Shields: a cumulative series of events at the same time. In that context,

when the claimant completed the survey, it is hardly surprising that he did not want to put his head above the parapet and have it shot off by giving give full and frank feedback in light of senior managers subjecting him to abuse and threatening his job.

12.9. Finally, in January 2021 he was summoned to a meeting to be berated. In the context of the pressure in December to cancel his holiday and the discontent of the chief executive and Mr Shields regarding the sales figures, the claimant received the level of abuse he has described. As Mr Shields accepted, that alone was sufficient to justify his leaving. It was deeply concerning that the chief executive had not answered the allegations and sent Mr Shields instead to answer on his behalf.

12.10. The claimant had resigned in response to the breach. The last incident was in the second week in January. He had had enough and secured alternative employment on 5 February 2021. There was clear cause and effect. With a mortgage etc he was not expected to up-sticks and leave and to take 2 to 3 weeks to find alternative employment was not unreasonable. He resigned in response to the breach and did not wait too long.

The Law

13. The above are the salient facts and submissions relevant to and upon which I based my judgment. I considered those facts and submissions in the light of the relevant law being primarily the statutory law set out below and relevant case precedents in this area of law many of which were relied on by either or both of the representatives.

14. The principal statutory provisions (with some editing so as to be relevant to the claimant's complaint) is as follows:

Employment Rights Act 1996

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"95 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 by reason of the employer's conduct."

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

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

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

…….

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

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

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

Application of the facts and the law to determine the issues

15. As in any case involving a claim of constructive unfair dismissal, the first question is whether there was a dismissal at all. As mentioned above, the claimant relied on section 95(1)(c) of the 1996 Act that he had resigned in circumstances where he was entitled to do so by reason of the respondent's conduct: commonly referred to as constructive dismissal.

16. The decision of the Court of Appeal in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 has stood the test of time for over 40 years. It is well-established that to satisfy the Tribunal that he was indeed dismissed rather than simply resigned, the claimant has to show four particular points as follows:

16.1. The respondent acted (or failed to act) in a way that amounted to a breach of the contract of employment between the respondent and the claimant.

16.2. If so, that breach went to the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract.

16.3. If so, the claimant resigned in response to that breach.

16.4. If so, the claimant resigned timeously and did not remain in employment thus waiving the breach and affirming the contract.

17. To establish the required breach of contract, the claimant relies in part upon a breach of express terms of his contract of employment: namely, his contractual entitlements to participate in the respondent's commission scheme and to take annual holiday.

18. Additionally, to establish such a breach of contract, the claimant also relies upon on a breach of the term implied into all contracts of employment that the parties

will show trust and confidence, the one to the other. As was said in Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347,

> *"… it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee …. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunals' function 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 the employee cannot be expected to put up with it …. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed."*
>
> *"… the conduct of the employer had to amount to repudiation of the contract at common law. Accordingly, in cases of constructive dismissal, an employee has no remedy even if his employer has behaved unfairly, unless it can be shown that the employer's conduct amounts to a fundamental breach of the contract."*
>
> *"Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of contract"*

19. It is clear from the final paragraph in the above excerpt that with regard to the second of the above factors in Western Excavating (ECC) Limited, in general terms, a breach of the implied term of trust and confidence "will mean, inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract": see Morrow v Safeway Stores plc [2002] IRLR 9 applying the decision in Woods.

20. The decision in Malik v BCCI [1998] AC 20 is summarised by Hale LJ in Gogay v Hertfordshire County Council [2000] EWCA Civ 228 thus:

> "*This requires an employer, in the words of Lord Nicholls of Birkenhead in Malik v BCCI [1998] AC 20, at p 35A and C,*
>
> *'. . . not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages. . . . The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer'. Lord Steyn emphasised, at p53B, that the obligation applies 'only where there is "no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship . . . '"*

21. Similarly, in the decision in Sharfudeen v TJ Morris Ltd t/a Home Bargains UKEAT/0272/16 it was stated that an employment tribunal, "must be satisfied that the employee has lost that trust and confidence as a result of the conduct on the part of the employer that was without reasonable and proper cause; a question that is to be

answered by the ET objectively, not simply by applying a range of reasonable responses test."

22. Clearly, therefore, unreasonable conduct alone will not suffice: see Claridge v Daler Rowney Ltd [2008] ICR 1267, EAT. Likewise, it is insufficient that a decision might be unreasonable, it must be shown to be irrational under the more stringent Wednesbury principles: see Braganza v BP Shipping Ltd [2015] UKSC 17 and IBM United Kingdom Holdings Ltd v Dalgleish [2018] IRLR 4.

23. It is also well-established that, "the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment": see Lewis v Motorworld Garages Limited [1985] IRLR 465. In this case the claimant relies in part upon such cumulative conduct on the part of the respondent and what is sometimes referred to as the 'last straw' doctrine. This was explored in Omilaju in which it was said that a final straw does not have to be a breach of contract in itself but,

> "*it should be an act in a series whose cumulative effect is to amount to a breach of the implied term…. 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*."

24. In light of the guidance that I draw from the above authorities I come to consider the matters relied upon by the claimant in his claim form as being either a breach by the respondent of an express term of his contract of employment or, individually or cumulatively, amounting to a breach of the term of trust and confidence that is implied into all contracts of employment; albeit I record that in both the evidence and the submissions the distinction between the two at times became lost.

25. I first make a general point, however, that the first occasion upon which the claimant raised matters that he asserted amounted to a breach of fundamental terms of his contract of employment was in his email to the respondent's solicitors of 22 February 2021. That email contained the claimant's response to the letter from those solicitors of 16 February which, amongst other things, set out the restrictive covenants that were said to be binding upon the claimant. In his response, which I repeat was written after the claimant had received legal advice, he asserted that those restrictive covenants were no longer applicable given the respondent's breaches of fundamental terms. By that time the claimant had been working for his new employer for some two weeks and in light of my decisions below I am satisfied that it is more likely than not that the claimant raised those alleged breaches not because such breaches had occurred but in the hope that it would enable him to continue in his employment with his new employer free from any concerns as to the legal action that the solicitors had threatened.

26. I now turn to address the acts relied upon by the claimant in his claim form.

Stopping bonus/commission payments

27. As set out above and as the claimant accepted in cross examination, it is clearly provided in clause 9 of the claimant's contract of employment that "the bonus scheme is non-contractual". In light of that contractual provision, in the context of the first national 'lockdown' that was announced on 23 March 2020 the respondent decided to freeze making bonus payments to its employees.

28. Given that contractual provision, I am satisfied that it cannot be said that the respondent's decision in that respect amounted to a breach of an express term of the claimant's contract of employment. To the contrary, as was said in the decision in Spafax Limited v Harrison [1980] IRLR 442: "Lawful conduct is not something which is capable of amounting to a repudiation."

29. It is nevertheless possible that this decision could amount to a breach of the implied term on its own account or, if not, it could form part of a course of conduct that cumulatively amounted to a fundamental breach. In that regard it is relevant that clause 9 of the contract provides that the scheme "may be amended by the Employer from time to time" and the 2019 Scheme itself reserves to the respondent "the right to change the manner for calculating and the basis upon which commission is paid from time to time". Each of these provisions is, however, subject to the qualification that employees will first be provided with "reasonable notice". As was accepted on behalf of the respondent, no notice was given of the decision to freeze the bonus payments. Thus, the decision was not implemented strictly in accordance with the provisions of the contract or the Scheme and I accept the claimant's evidence that losing his bonus payments had a detrimental impact upon him, if only initially until the respondent's chief executive began paying him the 3% commission referred to above. As set out above, however, mere unreasonableness will not be sufficient: Claridge. On the contrary, as also set out above, I need to be satisfied that the respondent engaged in conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence, and that it had no reasonable and proper cause for its conduct: Malik and Sharfudeen.

30. In this connection I bring into account the circumstances as they existed in this Country at the end of March 2020 in light of the pandemic and accept the evidence of Mr Johnson as to the potential and actual impact that had on the respondent's business in terms of the downturn in sales and that, at that time, the respondent was finding it difficult to maintain contact with even existing customers. In that regard, no evidence was presented to me to support Ms Hogben's submission that at the start of the pandemic customers would be in perhaps greater need of the respondent's services; indeed, Mr Johnson's evidence was to the contrary.

31. Also of some relevance in this connection is that the respondent did not wholly abandon the payment of commission in accordance with the 2019 Scheme but delayed making payments, which it was explained would be made in due course, and in September 2012 informed employees that, in December, it would make the payments that were due, which it did.

32. In light of all of the above, I am satisfied that when respondent's directors made their decision to freeze the commission payments, the respondent did have

reasonable and proper cause for its conduct; and I am not satisfied that that conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence.

The new commission scheme

33. As set out above, the claimant's contract of employment provided, "You will be entitled to participate in the Employer's Bonus Scheme in existence from time to time. …. This may be amended by the Employer from time to time upon reasonable notice, the bonus scheme is non-contractual and non-pensionable."

34. To a large extent, the reasoning that I have set out in the preceding section of these reasons relating to the stopping of commission payments applies equally to this section. Thus, given that contractual provision, I am satisfied that it cannot be said that the respondent's decision in this respect amounted to a breach of an express term of the claimant's contract of employment: I again refer to the decision in <u>Spafax Limited</u>.

35. I have referred above to the qualification that the Scheme may be amended "upon reasonable notice" and that it is therefore possible that the decision in respect of stopping commission payments could amount to a breach of the implied term. In relation to the introduction of the new 2020 Scheme, however, I am satisfied that "reasonable notice" was given and, therefore, the possibility of a breach of the implied term on that basis does not arise in this case.

36. Even if it were to be the case that the introduction of the 2020 Scheme could give rise to a breach of the implied term if there was a substantial negative effect on the commissions that the claimant earned (as he has asserted) I have recorded above that I accept the evidence of Mr Johnson that overall that Scheme did not have such an effect on the commissions payable to employees, including the claimant. In that regard I also accept that if there was, indeed, any drop in the claimant's average monthly earnings that was not attributable to introduction of the new 2020 Scheme but was more a consequence of the business climate in response to the pandemic and the resultant downturn in the respondent's sales.

37. For all the above reasons, therefore, I am not satisfied that the introduction of the 2020 Scheme can amount to a breach of an express term of the claimant's contract of employment or, individually, to a breach of the implied term of trust and confidence or contribute to a course of conduct that cumulatively amounted to a fundamental breach of that contract.

Cancellation of holiday

38. I have set out above the conflict of evidence in relation to this matter. In that respect Ms Hogben submitted that Mr Shields' account does not stand up to scrutiny and it made no sense for the claimant to cancel his holiday. Having heard the evidence of and behalf of the parties, however, I am satisfied that for the claimant to cancel his holiday does make sense in the following circumstances: he was a loyal and committed employee (as has been shown on his own evidence of working throughout while others were on furlough, delaying his holiday until the end of the year to accommodate the respondent and cutting short the holiday that he did take in January

2021); the culture of the respondent, which is sales-driven with its success being dependent on its sales team, which the claimant would know; the figures of the claimant's team being poor at that time, which he would recognise needed to improve.

39. In such circumstances I accept that not only the chief executive and Mr Shields but also the claimant knew that for him to cancel or postpone his holiday was the right thing to do.

40. In evaluating the evidence, especially in relation to conflict between the claimant and Mr Shields, I have brought into account the claimant's responses to the employee satisfaction survey. As recorded above, the claimant completed that survey on 14 December, which was the very day upon which he was due to start his holiday. His evidence was that at that time he was annoyed and very unhappy; indeed, not being able to go on holiday had made him "feel utterly deflated and upset" and he "felt completely duped and undervalued". The claimant's answers to the survey do not come close to representing the emotions that he said he was experiencing at the time when he completed the survey as a result of having been denied his holiday. I acknowledge that any employee might not give what Ms Hogben referred to as being "full and frank feedback" to a survey that is not anonymous but, as set out above, the claimant went well beyond that. He answered questions when he need not have done and his replies were complimentary and in some cases flattering; a measure of his negative comments being his suggestion that "nicer coffee" would make the respondent a better place to work. In this connection I do not accept the claimant's evidence that he had no option other than to complete the survey in the way that he did.

41. I have similarly brought into account the content of the claimant's resignation letter in which he expressed his thanks to the respondent for the opportunities he had been given and wished everyone the very best for the future, and the exchange of text messages he had with Mr Shields in which the claimant said that he had enjoyed working at the respondent and enjoyed working with Mr Shields. I accept that in that exchange the claimant wrote, "I've just had enough" but that phrase continues "I've just had enough pal". I consider these exchanges with Mr Shields to be inconsistent with the claimant's description of him having renegued on his agreement that the claimant could take holiday, threatening that if he did he could lose his role, being dismissive of the effect of the cancellation on the claimant's partner and setting him up to fail when he had agreed that the claimant could take holiday in January. In these respects also, I acknowledge the point made by the claimant that an employee might want to leave without giving rise to conflict but that can be achieved without saying anything at all or at least being less complimentary than the claimant was.

42. In the circumstances, I am satisfied that it was the claimant's decision to offer to cancel his holiday. I understand that he might have felt some obligation to do so but that does not equate to a refusal on the part of Mr Shields to permit him to take his holiday and even if it might be said that it was unreasonable of Mr Shields to raise the issue, as set out above, mere unreasonableness is not sufficient. I am not satisfied that Mr Shields' role in this matter crossed the higher threshold of being calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust.

43. In the above circumstances, such cancellation cannot amount to a breach of an express term of the claimant's contract of employment; neither am I satisfied that such cancellation can amount, individually, to a breach of the term of trust and confidence or contribute to a course of conduct that cumulatively amounted to a fundamental breach of that contract.

Bullying and harassment

44. The claimant gave inconsistent evidence in relation to this matter. In his email of 22 February 2021 he said that on numerous occasions the chief executive had bullied and harassed him by calling him a "fat cunt" and threatening to take his company car and reduce his salary. In his claim form he said that he was bullied and harassed by both Mr Shields and the chief executive in relation to the refusal to allow him to take holiday and that he was frequently called a "fat cunt" by the chief executive, who also frequently threatened to take his company car and reduce his salary, whenever he saw him and in several locations. Although much of this was repeated in the claimant's witness statement, he stated that what he referred to as being "increasing levels of abusive behaviour" was not only by the chief executive but also by Mr Shields; this occurring from roughly July 2020 onwards. In cross examination, however, he stated that the bullying from the chief executive had stepped up in severity from March 2020 but had occurred previously too, and Mr Shields had bullied him from May 2020 onwards. Additionally, in his email of 22 February he said that he was subjected to such bullying by the chief executive on "numerous occasions", which he said in his claim form was "frequently" but in his witness statement added that it was "whenever he saw me". Further inconsistency was that in cross examination the claimant said that the chief executive never called him a "fat cunt" to his face but would call Mr Shields and say, "tell the fat cunt to get to my office", the clear impression being that that was a regular occurrence whereas previously the claimant had only referred to that occurring immediately before the meeting in January 2021. He then said that the chief executive had never called him that to his face but went on to say that he would pass him in the corridor and say it, later adding that the word "failure" would come whenever the claimant passed him in a corridor or communal space. Later he said that the chief executive had in fact called him "fat cunt" to his face before but never to the magnitude he did during the January meeting, then later still that the chief executive called him names including a "fat cunt" during telephone calls from March 2020 onwards, later suggesting that it was probably two calls, and sought to draw a distinction that being abused over the 'phone was not to his face. He explained that he had not referred to the 'phone calls in his witness statement as he did not have a record of when they had occurred. He also added that what the chief executive had said about him would come from others rather than him hearing it himself. Finally in this connection, the claimant said in cross-examination that he had raised a grievance with Mr Shields about how he was being managed but he had responded that the claimant had nothing to complain about and should be happy still to have a job, "Who did I think I was". The claimant had never previously referred to raising such a grievance (for example in his claim form or witness statement) and did not pursue this point.

45. In this connection also I bring into account the matters of the claimant's responses to the employee survey and the content of his letter of resignation and his

text messages to Mr Shields, as set out more fully above, which I find to be inconsistent with the assertion that both the chief executive and Mr Shields had bullied him from, respectively, March and May 2020.

46. For the above reasons, primarily the inconsistencies and the embellishment of his evidence in cross examination, I did not find satisfactory the claimant's evidence regarding bullying. At best it is possible that the claimant considered that at times the approach and attitude of the chief executive and/or Mr Shields was unreasonable but I repeat that mere unreasonableness is not sufficient to cross the higher threshold of being calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust.

The meeting in January 2021

47. There can be little doubt, as Mr Shields agreed, that if the respondent's chief executive had conducted himself at this meeting as the claimant has described, that would amount to a breach of the implied term of trust and confidence in itself regardless of whether any earlier acts combined with it to constitute a course of conduct.

48. In relation to this issue it is principally only the evidence of the claimant and Mr Shields upon which I can rely in coming to my decision and I repeat that it is at least unfortunate that the chief executive did not attend the hearing. In this connection, Ms Hogben sought to make much of the fact that elements of Mr Shields' witness statement were drawn from information he had gathered from the chief executive. I reiterate that to have heard from the chief executive first-hand would have been preferable but in employment tribunal proceedings it is far from out of the ordinary for a witness to give evidence on behalf of a party that is not his or her personal account (this being provided for in rule 41 of the Employment Tribunals Rules of Procedure 2013) and, in other jurisdictions, would be regarded as being hearsay.

49. As set out above, there is a sharp conflict in the evidence of those two witnesses and I record that both gave evidence in a fairly solid fashion. That said, I found the evidence of Mr Shields (the content of that evidence especially in his answers in cross examination rather than the manner in which he gave it) to be the more persuasive: for example, his clear evidence, upon which he was not challenged, that if the chief executive treated people the way alleged at the January meeting he would not work for the respondent which would not have a business, and that if the chief executive used terms such as "lazy and useless" the respondent would not have the reputation it has as an employer and, once more, would not have a business. In contrast, there were inconsistencies in the claimant's evidence including, importantly, that as set out above he said that the chief executive had called him "fat cunt" to his face before but never to the magnitude he did during the January meeting, whereas, in his witness statement, the claimant makes no reference to the chief executive having used that abuse in the meeting itself but only that he used that phrase when he telephoned Mr Shields to summon him to the meeting. What the claimant records in his witness statement was said by the chief executive in the meeting itself is limited to him being verbally attacked for taking his holiday and his business results and expressly, "Who do you think you are?" and "You're in a senior position in the company and you just go

swanning off". I am satisfied that it is such an offensive and egregious phrase had been used in the meeting, the claimant would have referred to in his witness statement.

50. Although the evidence of the two witnesses is the principal evidence it is not the only evidence as I also have the documentary evidence in the shape of the claimant's resignation letter and the text messages between him and Mr Shields that same day. Even acknowledging, as I have done above, that an employee might seek to avoid conflict when resigning and the claimant's wish to be "civil" (as he put it) that explanation can only be maintained to a point and by the time he submitted his resignation and wrote his text messages he had left the respondent's employment, was not working his notice and had no intention of returning. I am satisfied that in such circumstances, it is reasonable to expect that if the chief executive's conduct had been as he describes it, the claimant would have made at least some, even oblique, reference to that in his resignation letter, and would also have referred to Mr Shields' conduct after the meeting.

51. Similarly, in the text messages with Mr Shields (with whom the claimant said he had had a friendly relationship and socialised away from work) it is reasonable to expect that he would have made some reference to the chief executive's conduct in the meeting having been unacceptable and his having gone too far.

52. Even in the claimant's email of 15 February responding to the pre-action protocol letter from the respondent's solicitors the claimant does not refer to the chief executive's conduct during the meeting in January despite the fact that he does say that the chief executive had bullied and harassed him, giving examples including calling him a "fat cunt", which would have been the perfect opportunity to state that that phrase was used at and/or before a meeting in the second week of January 2021; but he did not. I do not find it credible that if that phrase was used, the claimant would not have referred to it in his letter, and repeat that when he wrote it he had obtained legal advice.

53. In the above circumstances, I find on balance of probabilities that although the meeting in January 2021 was challenging and the chief executive was probably robust in taking the claimant to task about the poor performance of his team in terms of sales, he did not conduct itself as the claimant has described; whether in the telephone call to Mr Shields requiring his and the claimant's presence or at the meeting itself; and that Mr Shields did not conduct himself immediately after the meeting as the claimant has described.

54. As such, I am not satisfied that the conduct of the chief executive and/or Mr Shields can be described as being calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust.

Summary

55. In summary, the question in issue is whether, applying the approach of Lord Steyn in Malik, the respondent's conduct, first, destroyed or seriously damaged the relationship of trust and confidence and, secondly, was without reasonable and proper cause. As Lady Hale noted in Gogay, "The test is a severe one".

56. In that context, for the reasons set out above, I am that satisfied, as to the first two factors in Western Excavating (ECC) Limited that the conduct on the part of the respondent did not constitute a breach of the contract of employment between it and the claimant amounting to a fundamental or repudiatory breach of that contract.

57. Given my decision thus far it is not necessary for me to address the final two issues in Western Excavating (ECC) Limited of causation and affirmation.

Conclusion

58. In conclusion, the judgment of the Tribunal is that the claimant's complaint that he was dismissed by the respondent by reference to Section 95(1)(c) of the 1996 Act is not well-founded. It follows that his complaint, by reference to Section 94 of that Act, that his dismissal was unfair contrary to Section 98 of that Act is also not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS
JUDGMENT SIGNED BY EMPLOYMENTJUDGE
ON 19 December 2021

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