EMPLOYMENT TRIBUNALS

Claimants: Mr Andrew Souter

Respondent: Arnold Clark Automobiles Limited

HELD AT: Manchester Tribunal (Via CVP) **ON:** 7,8 and 29 November 2022

BEFORE: Judge Miller-Varey (sitting alone)

REPRESENTATION:
Claimant: In person
Respondent: Ms Moretti (solicitor)

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for constructive unfair dismissal is not well-founded and is dismissed.

REASONS

All references to page numbers are to the correspondingly numbered pages of the joint bundle of documents.

Introduction

1. These are my reason given orally at the final hearing which took place via Cloud Video Platform on 7, 8 and 29 November 2022.

2. They have been prepared at the request of the Claimant. Annex A is an **accessible summary** of the reasons. I have explained the purpose of that summary further in paragraph 11, below.

Procedure, Claims and Issues

3. The Claimant seeks compensation for unfair, constructive dismissal. The Respondent contends that there was no breach of contract and the Claimant resigned as a consequence of his own personal, voluntary act.

4. In accordance with paragraph 2.2 of the Case Management Orders of 13 September 2022 the witness statement of the Claimant (received by the tribunal on 22 October 2022) defines the scope of his constructive unfair dismissal complaint.

5. At the beginning of the proceedings I circulated a draft list of issues reflecting the standard list of issues in constructive dismissal cases. To employment practitioners these are well known and derive from a number of previously decided cases. My purpose was to give the Claimant a clear understanding of the key issues I need to resolve, and especially to assist him with his submissions. The issues are attached at Annex B.

6. It is right to say (but no criticism of the Claimant who represented himself throughout with considerable care and thought) that he has not completely spelled out whether his case rests on:

   (a) different acts as founding a fundamental breach attracting in each case the right to resign; or

   (b) (more probably) a last straw event which drew together a series of acts which in aggregate amount to a fundamental breach of contract.

7. I set out my conclusions below examining the question of liability from both angles. This has the benefit that the Claimant can appreciate whether the Tribunal forms the view of any breach at all. Of course, that is not determinative because of the doctrine of affirmation. However, approached in this way, the Claimant can understand whether his allegations about the Respondent's

conduct are borne out and how this then sounds in terms of legal liability for dismissal.

8. I was provided with a 456 page bundle of documents and a separate 62 page bundle of witness statements. The bundle contains transcripts of recordings which the Claimant made (without prior consent) of various workplace meetings. I permitted Mr Souter to add to his witness statement in order to explain the provenance of these documents and to admit them into evidence. Their contents were agreed between the parties after the earlier case management conference. They relate to:

   (a) a meeting between the Claimant and David Platton and Ian Cunningham (sales manager [pp.416 - 426] on 30 November 2020

   (b) a meeting between the Claimant and David Platton and Martyn Whyte (franchise operations manager) and the Claimant [p.427 - 440] on 3 December 2020

   (c) a meeting between the Claimant and David Platton on 7 December 2020 [p.441 - 499]

   (d) a meeting between the Claimant and James Barker (general manager at Winsford Branch) on 8 February 2021 [pp. 450 – 456].

9. The Claimant wished for me to listen to the recordings in their entirety. Given they were agreed, I determined a reasonable and proportionate approach would be for me to listen to a sample of 20 minutes as selected by him. In fact, he identified a shorter excerpt. The Respondent also requested I listen to a 5 minute excerpt too. Both were from the recording at paragraph 7(a) above.

10. I heard evidence from the Claimant and from two witnesses on his behalf, Peter Hall and Michael Lathwood. They are both former employees of the Respondent. Mr Hall worked for the Respondent between September 2000 and

February 2021. Mr Lathwood worked for the Respondent between January 2019 and December 2020.

11. For the Respondent I heard evidence from David Platton (the line manager of the Claimant for a very substantial part of the time giving rise to the Claimant's allegations) and two members of the Respondent's People Team. They are Meaghan McCrory and Lisa Ramsay.

Fair Participation

12. The Claimant has dyslexia. I discussed with him possible adjustments to the proceedings to ensure his fair participation. The Claimant told me that he needed longer time for processing written words than people without dyslexia might need. Also, that he benefited for explanations being given simply. We agreed (and I enacted) extra time to ensure that he could properly digest documents or passages put to him. He confirmed to me at the outset that the size and font of the written materials (which he had printed) was satisfactory.

13. The Claimant's written style is grammatical and eloquent. An example is his written closing submission. This reflects, I know, considerable time and effort by him. I am certain from that, that he will be able to follow these written reasons fully, in his own time. I still consider it is helpful to provide what I describe as an accessible summary too. This is in the nature of headlines. It does not take the place of the full reasons.

Findings of Fact

14. Suggested findings of fact were advanced by the Respondent in its closing submissions. I am purposefully not adopting these. I do not accept them all. In particular, I reject (as set out in paragraph 3.8 of the suggested findings) that a conversation in December 2020 was simply performance management of the Claimant by his manager, in pursuit of a fundamental feature of that manager's

role. That is to gloss over matters considerably, which tends to charcterise the Respondent's defence of allegations of verbal abuse in these proceedings.

15. From the evidence and submissions, I made the following findings of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the witnesses in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, reflects my application of the overriding objective. This means I deal with a particular matter only to the extent to which I consider that it assisted me in determining the identified issues.

16. The Respondent is a motor retailer with various branches across the UK. The Claimant first commenced employment with the Respondent as a sales executive based at the Manchester Vauxhall dealership on 18 March 2013. The remuneration structure was a basic salary with commission payable monthly in arrears [p.43-44]. Over time the remuneration changed but not the structure.

17. In 2015 the Claimant transferred to the Salford dealership. Originally the Claimant worked under Barry Cosgrove. From around April/May 2017 his line manager became David Platton. From that point, David Platton was the general manager at all material times with which this case is concerned. The manager above him was Ian Cunningham. From the arrival of David Platton, the Claimant had the new title of "product consultant".

18. The Salford Dealership was a Vauxhall dealership which sells to the general public by way of what are referred to as “retail sales”. These includes sales of pre-registered and new cars, as well as pre-used cars to the public. The Salford dealership also sold Motability vehicles. Motability vehicles are available to recipients of a moving around allowance from the Department of Work and Pensions. Accordingly, these transactions require different paperwork and specialist skills.

19. Above their basic salaries, product consultants make their money by achieving (a) a bonus in circumstances where they achieve the required number of sales and, subject to achievement of that target, (b) by selling products, including warranties and services. These cannot be sold in the case of Motability vehicles.

20. I am not persuaded that it is intrinsically easier to complete a Motability sale than a normal retail sale. Mr Platton for the Respondent suggests this is likely to be the case because there is no necessity for the deposit. However, having heard all of the evidence, I am satisfied that Motability sales can have other complexities which cause the deals to collapse or for time to be wasted on a customer who is interested but who is not then able to get the applicable allowance.

21. The distribution of leads which come direct to the dealership – rather than directly to the consultant - is something of a self-fulfilling cycle. The product consultants who have high conversion rates are likely to get the most leads given to them from the managers. There is no written protocol or structure to this which inevitably places managers in positions of significant influence over the performance of their staff, and, correspondingly, their take-home earnings.

22. There was a branch target for the overall performance of the Salford dealership. Mr Platton had responsibility for this. He would himself would be criticised in

heavy and personal terms, if that target was not met. I am satisfied of this from comments he made in a meeting with the Claimant [p.434]. The sales of Motability vehicles did not count as part of this. I am satisfied that to both David Platton and Ian Cunningham the Motability business was of limited interest. Rather, it was a necessary part of running the dealership. Accordingly, provided the necessary specialists were sufficiently in place – and the requirement in Salford was for two, nominally - what happened thereafter in terms of the achievement of Motability sales was of limited real concern. Conversely, retail sales were important to them and it was this aspect of product consultant's performance that was always of foremost concern to them.

23. Until 2018, the Salford branch had a dedicated full-time Motability specialist. She moved on to work at a different branch because she was unable to achieve a satisfactory income having regard to the volume of motability sales.

24. At all times prior to March 2018, the Claimant was not accredited for Motability work. He was not interested in pursuing that work because he appreciated that, when compared to retail sales, it was time-consuming and would disadvantage him therefore in achieving his target overall. This in turn would affect his personal rewards.

25. Nevertheless, prior to the departure of the previous Motability specialist, the Claimant was strongly encouraged and repeatedly requested by David Platton to become Motability trained and to take on that role.

26. The Claimant described that on one occasion he got into David Platton's car believing the reason for the trip with him involved attending the Stretford branch for a work purpose. However, once in the vehicle David Platton told him that he was driving both of them for enrolment on Motability training. During the ensuing car journey I am satisfied that, as the Claimant stated, David Platton indicated he would (a) be registering himself with Motability too, (b) that he would support

the Claimant and (c) that he would ensure the Claimant would be furnished with leads so that the extra workload and time taken meeting the Motability specialist targets, would not affect the Claimant's ability to achieve retail targets.

27. Mr Platton denied this. I prefer the Claimant's evidence about this. Mr Platton did tell me that he went on to the Motability system on the second day of the hearing to look at what needed to be done before attending physical training. This included prior completion of 10 e-learning modules. Inferentially, therefore, what the Claimant suggests could not have happened. In response to my question Mr Platton confirmed that his evidence reflected research done on the second morning of the hearing, namely 8th November 2022. This is some 4.5 years later. It is not of meaningful weight therefore in establishing what happened. I found the Claimant more credible than Mr Platton about this matter, and that, in general, Mr Platton was apt to downplay his unfair conduct towards the Claimant.

28. I am also satisfied that it was a matter of some importance to get the Claimant moved over to being a Motability specialist. Mr Platton was keen to stress in his evidence that as the general manager motabilty was a big tick so it was 100% in his interests to qualify along with the Claimant as two were required for each manufacturer.

29. The fact, as I find, that David Platton offered the Claimant reassurance about giving him leads to allow him to maintain his retail sales, confirms he thought it would be challenging and a move that would potentially prejudice the Claimant in financial terms.

30. All of this said, I do not accept that it was ever part of a plan to set the Claimant up to fail. Nor do I find that it was outside of the Respondent's rights under the employment contract to require diversification in this way. I am much more concerned with the reassurance given to the Claimant which forms the prism

through which his later treatment falls to be assessed. I will return to this in my conclusions below.

31. I turn then to the period after the Claimant's move to Motability and before the move to Winsford i.e. 26 March 2018 to 5 December 2020.

32. I am satisfied that David Platton developed genuine, honestly held concerns about the Claimant's sales performance, especially during 2020 when sales practices were forced to change rapidly in response to the Covid-19 pandemic. As his line manager, he was entitled and required to discuss concerns with the Claimant openly. However, I amply satisfied that this passed over into inappropriate bullying and mistreatment of the Claimant in the form of verbal dressing downs (sometimes in a raised voice) and humiliation by David Platton including:

(a) everything captured in the transcribed recordings of which the following are key examples:

- Telling the Claimant that his conduct was fucking unacceptable and disgraceful [p.416]
- Telling the Claimant he was a dinosaur [p.417]
- Telling the Claimant to "shut the fuck up and listen" [p.419]
- Telling the Claimant that he was stuck because of his "own fucking ignorance and arrogance" [p.422]

(b) aggressive hand-slapping of his desk by Mr Platton to reinforce his point. This was not motivational. I found Mr Lathwood's evidence persuasive about this tendency of managers generally at the branch.

(c) the following, non-recorded insults and slights:

- Asking the Claimant "Have you got a penis?"
- Making the comment to the Claimant in front of the team in the morning sales meeting: "I bet your dick sits on top of your balls" or words of the same effect

- Telling the Claimant "to grow a set" when he asked for help with the Motability work and "you know where the door is".

33. I also find the above was a snapshot over the relevant period and quite typical of how the Claimant would be spoken to by David Platton who freely swore in the presence of, and more importantly, at the Claimant. I am also satisfied that other mangers, including Ian Cunningham and Martyn Whyte freely swore around staff on a frequent basis, including the Claimant. This is demonstrated especially by the transcripts.

34. I find David Platton believed and understood that this was an acceptable way in which to manage staff. It is right to acknowledge too that the Claimant did at times swear too but this was not, I find, directed or weaponised against David Platton. The reverse is not true.

35. For completeness and fairness, I would record that I have not found that David Platton used racist language. The same is true of alleged sexist comments.

36. Either of these *could* be so offensive as to have an effect on the Claimant's work but I found no sufficient evidence to support the factual allegations. The fact that someone has been verbally abusive and bullying is not circumstantially relevant in my view. It does not demonstrate a pre-dispotiion to racism and sexism which are quite different. The racist phrase the Claimant alleges was used also has an opaque meaning. I am also bound to add that there were odd shades of balance and of compassion in the way that David Platton addressed the Claimant within the transcripts. (e.g. "*Your CSI used to be phenomenal, now its not so phenomenal...I'm not saying that is unhappy people"* [p.423] and he referred to the Claimant's *"experience and talent"* [p.427]. Of course, this in no way excuses his other comments and behaviour to the Claimant. I also understand the Claimant considers this is a contrived tactic of building him up and putting him down. However, I consider a fair reading of the evidence as a

whole points to a profoundly poor, unprofessional management style but not any underlying personal malice or vendetta against the Claimant.

37. In addition to these specific findings, I do find the Claimant was made to feel, the low status afforded to Motabilty work by the managers, including David Platton. This was corroborated by his two witnesses. Peter Hall confirmed the Claimant was treated as if he was not fully part of the team. I accepted Mr Hall's evidence. He said the Claimant would be regularly skipped at meetings when the sales team were asked about their day/week. The Claimant, unlike non-Motability consultants, did not have a slot on the sales board on which to note his sales down. This was a reflection of the low status afforded to Motability sales.

38. Moving forward, following the Claimant's move to Winsford the Claimant received emails from David Platton, including when he was on annual leave, concerning Motability vehicles that it was claimed had not been cancelled, despite transactions falling through. The emails were as follows:
    - On 14 December 2020 – evening at 19.55pm [p.81]
    - On 15 December 2020 x 2 within an hour and a half from David Platton [p.79 & 80]. The Claimant also received one from Martyn White [p.79].
    - On 18 December 2020 x 2 (one started getting copied to Martin Whyte) [p. 77 & 78)
    - January 2021 x 4 [pp. 75-77].

39. These emails had a tone of increasing persistence and the extent of the Claimant's apparent errors was being added to progressively as the emails mounted up. The Claimant was on annual leave during some of this period. Mr Platton stated that when he asks a question, he needs an answer. He told the Claimant *"don't ignore me"* [p.81] and later, when he added further allegations about additional vehicles *"I hope you haven't been hiding any more issues Andrew"*.

40. This was greatly alarming to the Claimant. I accept that from a place of relative happiness at his new workplace of Winsford, he started to become deeply anxious and worried as a result.

41. By letter of 10 February 2021 [p.83] the Respondent requested the attendance of the Claimant at a disciplinary hearing on 12 February at 11am at Winsford Vauxhall.

42. The purpose of the interview, was to consider the question of disciplinary action against the Claimant with regards to alleged serious negligence.

43. The letter set out references to four named customers which it was said could lead to a cost of £98,540 for the business

44. The evidence enclosed was described as the basis for the case against him. The purpose of providing it was to consider the evidence, take any advice and to enable the Claimant to prepare his defence.

45. The letter included the disciplinary policy of the Respondent. The policy does not provide that there must be an investigation stage and investigation meeting [p.68] so contractually the Respondent was entitled to proceed in this way.

46. On 8 February 2021 the Claimant conversed with James Barker, his general manager at Winsford, about his situation. A transcript of this has been produced which I accept to be accurate [pp.450-456]. Mr Barker offered the Claimant advice which he described as take it or leave it. He expressed to the Claimant that if he were to try and start going through everything defending himself it would just make his situation worse and that he (David Platton) would not draw

a line. In response to the Claimant's assertion, that he thought he was going to get fired, James Barker said the Claimant was not going to get fired, categorically. He said the Claimant would get a warning and move on. I find it was clearly James Barker's view that substantially the Claimant's position on the cancelled vehicles was non-negotiable.

47. It is right to note that during the conversation with the Claimant, Mr Barker acknowledged that he had spoken that morning with David Platton, who had apparently expressed some sympathy to the Claimant because of the delay in the matter being dealt with but that the Claimant needed to "take the pain". However, having read the transcript in detail I am not satisfied that Mr Barker was in any way conspiring with David Platton to cause the Claimant to accept an unjustified sanction or withhold from criticising David Platton.

48. On the other hand, I am perfectly satisfied that the Claimant was greatly stressed to have received the emails and that, subjectively, he began to have feelings, as he has described of being *"hunted down, not left alone and pushed out of the business"*. I also entirely accept that his description of his extremely poor then mental health, including suicidal thoughts, is genuine. Nevertheless, my task is to determine whether the actions of the Respondent, through these emails and advice were to fundamentally breach the contract with the Claimant.

49. I am critical of the hectoring tone of the emails relating to the cancelled cars. They are in keeping with Mr Platton's management style. However, in his cross-examination of Mr Platton the Claimant has sought to lead evidence to show that the criticism of him within the emails and resulting disciplinary was misplaced, if not knowingly contrived.

50. I have seen the underlying documentation though [pp.85 - 99] and this shows no evidence of having been manufactured for the purpose of implicating the Claimant in wrongdoing. On balance, I am satisfied that David Platton had a

genuine belief on some reasonable grounds that the Claimant's actions had exposed the company to serious loss unavoidably. Mr Platton wanted an explanation. Given that finding, I do not need to adjudicate on the soundness of each of the disciplinary allegations.

51. The disciplinary hearing proceeded on 12 February 2021. In fact, the Claimant did offer a number of explanations about the vehicles. In the meeting the People Team Manager expressed that it was disappointing and that there had been " just little silly mistakes" that the Claimant had made but that had amounted to a lot of money and the branch being in a difficult position to sell cars.

52. Having considered the mitigation and what was described as the Claimant's honesty, the Claimant was issued with a written warning for a period of 12 months and told that any further misconduct would lead to disciplinary action [p.101].

53. The outcome was confirmed, as was the right to appeal, in a letter which followed the same day. The Claimant carried on in his role at Winsford.

54. The Claimant commenced sick leave on 11 May 2021. His illness was one affecting his mental health. I am satisfied his poor emotional state had begun to manifest itself at work – shortly before he left [p.128] - with frequent episodes of crying.

55. He reached out to obtain a call from the People Team when he emailed them on 17 May 2021, asking for a telephone call. People assistant, Monica Pearson, telephoned him twice, subsequently providing signposting to resources relating to health. Her letter of 19 May makes clear the Claimant had advised that his mental health including suicidal thoughts was his significant difficulty.

56. An occupational health report was obtained.

57. On 26 May the Claimant advised the Respondent that his sick note had been extended a further 2 to 3 weeks.

58. A telephone assessment of the Claimant proceeded on 3 June by Occupational Health Axa. The report stated that the Claimant felt it was not the intrinsic natural part of his job that had affected his mental health but the situation at work of which the Respondent was aware. The report expressed that the Claimant would be unfit to return to work in any capacity most likely for 6 to 8 weeks [p.118]. It was also likely that the Claimant would have some ongoing anxiety regarding his workplace concerns, and it was recommended a meeting be arranged to address and resolve those prior to his return to work.

59. Monica Pearson set up a follow up call on 14 June 2021. During that meeting the Claimant made it clear that he wanted to put his work concerns in writing as he felt unable to discuss them at the time.

60. On 16 June 2021 Martin Whyte, operations director, sent the Claimant a message saying he hoped the Claimant was okay. He queried whether he was correct in thinking the Claimant was due to return to work the day following, 17th. He requested a call upon the Claimant's return.

61. The Claimant replied by email to Mr Whyte, attaching the sicknote sent to James Barker who was then off. The Claimant described that he was not okay but thanked Mr Whyte for the enquiry.

62. The Claimant sent a written grievance directed to the People's team/Monica Pearson on 23 June 2021.

63. The grievance letter identified a number of points, and ended with an emphatic request not to be contacted by any management members mentioned in the letter. The Claimant said he wanted to be dealt with exclusively by Monica Pearson.

64. On the 24 June Ms Pearson replied to request the Claimant complete a questionnaire headed grievance questionnaire. The necessity for this was queried by the Claimant on the basis that the points were all contained within his letter. Ms Pearson described that it was part of the grievance procedure process and that adequate paperwork was needed.

65. Ms Pearson was not called as a witness. The evidence of Megan McGrory was that upon receipt of his completed grievance questionnaire Ms Pearson would have sent his paperwork to a manager who then allocated the grievance case to her.

66. Two meetings with Ms McCrory followed. The first was held on 6 July via telephone conference call. The Claimant had been advised ahead of time that he could be accompanied by a work colleague or any accredited trade union representative.

67. The Claimant invited his friend James Goldrick to attend. He was a previous customer of the Respondent. He was also connected to what I shall refer to as the AMEX incident [p.137]. In a nutshell this was an occasion on which the Claimant says he was aggressively rebuked by David Platton and threatened with a wage deduction for accepting a payment by American Express card. Mr Goldrick did not witness the exchange between the Claimant and Mr Platton but saw the Claimant, directly afterwards. I will return to this below in the context of the grievance.

68. Quite apart from this, Mr Goldrick was also somebody who had previously dealt with disciplinary and grievance matters for a major bus company, as he told Ms McCrory.

69. Ms McCrory indicated that, consistent with terms of the invitation, the Claimant would not be allowed to be accompanied by a customer. She explained the process was an internal process and the procedure was for a limited choice of people to accompany him.

70. The Claimant was offered the chance to re-arrange to have a union representative present.

71. The rearranged telephone conference took place on 12 July.

72. In between times on 10 July [p.149], the Claimant received a WhatsApp message from David Platton saying *"give me a ring when you have got a minute mate"* and when he didn't answer "*it isn't to give you grief, promise, I need to speak to you"*.

73. Around a day later David Platton sent another message saying *"I'm surprised you haven't called me, I've something to speak to you about that might help you out..."* [p.149].

74. Returning to the grievance process, at the meeting on the 12 July the Claimant continued to be un-represented. It had not been possible for him to obtain a trade union representative. Ms McCrory indicated that the purpose of the meeting was to discuss the grievance, obtain further information and allow the Claimant to give more specific examples of anyone that he considered it would

be beneficial for her to talk to, in regard to her investigations. She indicated she would have 28 days from 12 July to gather findings and come back with a response.

75. The minutes reflect that Ms McGrory was seeking details of witnesses to the verbal abuse from Mr Platton which took place other than on a one-to-one. The Claimant's response was that other employees had been present but he did not think it was fair to bring other people into this. Ms McGrory indicated that enquiries would be conducted on a private and confidential basis but in essence that the allegations required some corroboration. The Claimant indicated he had used James Goldrick because he was separate. Ms McGrory disputed that this was appropriate because of the internal process. Rather, the Respondent asked if there were colleagues or someone in the branch who had witnessed matters. The Claimant said that all the staff members who were relevant had actually left precisely because of Mr Platton's conduct in doing the same things to them that he had done to him. He specifically urged Ms McGrory to look at their grievances saying he did not think he was the first nor second.

76. Ms McGrory commented that she could not confirm or deny other grievances and had not looked into seeing if there's anything else been raised previously at this time. That would be part of her investigations and she would then take the appropriate action. However, she said, it was not the usual procedure of the Respondent to discuss matters with people who had left the company.

77. The Claimant made the point that there is natural reluctance for current employees which would cause them not to want to be a witness even though they may have witnessed relevant things. He offered former employee, Mike Lathwood. The Claimant reiterated he simply did not believe anybody who actually worked with Mr Platton still was going to say anything adverse about him or indeed start defending the Claimant. The Claimant later mentioned Adam Penman. This was closed down by Ms McCrory who again said that it would not be discussed with people who have left the business. She expressed

strongly the reason was because those grievances would have been dealt with at the time and belonged to that individual. The Claimant made the point that Mr Platton was still getting away with it and part of his grievance was that nothing had been done and if she was not prepared to take into account people that have left then Mr Platton would be able to do what he wants.

78. Ms McGrory persisted in seeking names of current employees. She did, however, repeatedly reassure the Claimant that witnesses would simply be told that they had been cited for a certain issue and then asked not to discuss anything outside of the investigation with that person. The Claimant expressed reluctance to put someone in this position. In that respect he also relied on the fact that he had received communication from Mr Platton despite the contents of his grievance letter. I will return to this.

79. In the event, the Claimant was only able to give the names of Jason Smith, Tracey Mayall, Scott Campbell and Martin Whyte as current employee witnesses [p.173] with the rider in the case of Jason that he did not expect him to take part.

80. In regard to James Goldrick –the response was that they could raise the AMEX incident as a customer complaint but that in terms of investigating the grievance, it would need to be employees. [p.184].

81. Ms McGrory requested that the Claimant on the day of the meeting to send snapshots of the text messages he had received.

82. The Respondent's position on this point is that Ms McGrory did not ask David Platton not to make contact with the Claimant until she met with him on 22 July. I accept the minutes of that meeting are accurate. They are consistent with that being the first occasion [p.200].

83. It does follow from this that the Claimant's prior request had been not actioned from receipt on or around 23 June until 22 July 2022. David Platton was front and centre of the grievance and indeed the questionnaire, and that is very disappointing given the serious points the Claimant was confiding about his mental health and its relationship to the actions' of David Platton in particular.

84. David Platton gave evidence that, in essence, he messaged the Claimant, quite unprompted, on 10 July 2022 because he knew a manager who the Claimant did not like, had recently taken over at Winsford. Mr Platton says when he learned of this he reached out to the Claimant to see if he wanted to return to Salford, with the benefit of the time spent away.

85. I find this grossly implausible and inconsistent with the previous history between the Claimant and Mr Platton. I am satisfied that Mr Platton had begun to realise from some information imparted to him that it would be good to atone to the Claimant. I do not find Mr Platton knowingly breached the Claimant's request of him not to make contact with him, though. I accept Ms McGrory only passed that on later.

86. Ms McGrory proceeded with her investigation. As part of that she interviewed all of those people identified at the conclusion of the grievance process together with four others and Ian Cunningham.

87. The transcripts of these interviews were not provided to the Claimant.

88. On 22 July 2021 Ms McCrory, after speaking with Martin Whyte, related to the Claimant that he could be transferred to Altrincham Kia if he wanted to. This was conveyed the Claimant who did not give an answer at that time saying he would need to think about it.

89. The response to the chief aspects of the grievance [pp.239 - 245], so far as relevant to this claim, can be summarised in this way:
    - It partly upheld that David Platton had sought to address issues with the Claimant's "listening" in an inappropriate way. It did not otherwise uphold the rest of this grievance point. That was in part because David Platton had not agreed that he (David Platton) refered directly to the Claimant as a dinosaur.
    - It found that sufficient training has been provided to the Claimant in order to carry out the motability role.
    - It found that there had been no failure to provide promised leads. This was based on David Platton and Ian Cunningham whose word Ms McGrory preferred.
    - It found that as there were no other witnesses and David Platton refuted the suggestion that he had made up customer complaints underpinning the disciplinary action against the Claimant.
    - It found that, based on Tracey Mayall's testimony, prior authorisation had not been given to the customer to pay using AMEX and that David Platton had expressed only appropriate concern to the Claimant about his actions. The Claimant had also not suffered a deduction and the matter was therefore closed.
    - It found the transfer to Winsford was not the product of bad intention.
    - It found that there had been no inappropriate comments by reference to race or sex. This was based on the denial of Mr Platton and also of subordinate staff members. One of these described that the Mr Platton's management style was perhaps "old school".
    - The grievance found that James Barker had considered the situation of the Claimant's disciplinary was black-and-white and that nobody had told him to speak with the Claimant

90. The Claimant lodged an appeal to his grievance on 10 August 2021. This was managed by Lisa Ramsay.

91. She got partial recordings from the Claimant. This was because of practical reasons relating to file size. She declined the Claimant's offer to drive to Glasgow with them all. I will return to this.

92. In her outcome of 15 September [p.297] Ms Ramsay upheld only one allegation in respect of Mr Platton calling the Claimant a dinosaur directly – she also found that the language and the tone used by Mr Platton was not appropriate and would be addressed through the internal procedures [pp.297 - 302].

93. The Claimant tendered his resignation with notice on 23 September [p.310] which took effect on 23 October 2021. He expressed disappointment with the grievance process and that the one option presented, of moving to another branch of the Respondent was unsatisfactory because of David Platton's influence inside the business and the bullying culture that exists. He indicated that he would be seeking redress before the Employment Tribunal.

The Law

94. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

95. As to what gives rise to the right to resign and claim to be constructively dismissed, the employer must have committed a fundamental breach of the contract of employment (**Western Excavating Limited v Sharp [1978] QB 761)**. It must be a significant breach, going to the root of the contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The term relied upon may be an individual express term but is very commonly the implied term of trust and confidence.

96. In the case of the latter, case law also establishes the following principles:

- Whether there has been a repudiatory breach of contract should be objectively assessed and the employer's subjective intention is not relevant (**Leeds Dental Team Limited v Rose UKEAT/0016/13/DM**).

- In general, there is well established distinction between cases where the fundamental breach is comprised of a course of conduct taken together and cases where a one-off, single act by the employer is relied upon as fundamentally breaching the contract.

- The act precipitating the resignation in a last straw case need not itself be a breach of contract (**Lewis v Motorwold Garages Ltd 1986 ICR 157 AC**).

- The last straw, if an incident which is part of a course of conduct that together constitutes a breach of the implied term of trust and confidence, will revive the employee's right to resign. In that situation it does not matter that they worked and affirmed the contract after earlier incidents forming part of the course of conduct (**Kaur v Leeds Teaching Hospitals NHS Trust 2019 1 ICR 1, CA)**

- The last straw does not need to be proximate in time or of the same character to the previous act of the employer (**Logan v Celyn House Limited EAT 0069/12** and **Omilaju v Waltham Forest London Borough Council 2005 ICR 481**). It need not be blameworthy or unreasonable but must contribute to the breach of the implied term.

- An act which is entirely innocuous cannot be a final straw, even where it is interpreted by the employee as hurtful and destructive of his trust and confidence. (**Omilaju**).

- If the claimant's resignation *can* be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides

  "…. 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".

Discussions and conclusions

(a) Mistreatment and bullying from David Platton

97. I have made detailed factual findings about the specific acts alleged. I accept that there was inappropriate verbal abuse of the Claimant by Mr Platton. In my firm view, the way in which he spoke to the Claimant surpassed anything that could reasonably be described as robust management. The Respondent's disciplinary process makes clear, as I would expect, that only minor shortcomings in meeting the job requirements would be brought to the employee's attention informally [p.68, clause 1.1]. Instead, there was sustained mistreatment, in the form of inappropriate verbal abuse, primarily by David Platton.

(b) Inappropriate pressure to take Motability and lack of support

98. I do think the manner in which it was done – as a complete fait accompli by taking the Claimant to training - was unacceptable and unreasonable. However, it was somewhat fleeting and the Claimant was brought around.

99. Regrettably, the Respondent did not then offer the promised support by way of retail leads. That was a breach of a clear promise that was made. The suggestion that he got the third highest number of leads was never evidenced in the course of the disciplinary but in some respect is not to the point –he was supposed to have a form of compensatory treatment.

100. In terms of that obligation to the Claimant, it does not have to be rehearsed in the contract expressly. I find the Claimant was left to his own devices, not given the promised leads and that Mr Platton did not himself try and do any Motability work to lighten the load on the Claimant. I also find that he did tell the Claimant to *"grow a pair"* and *"fuck off out of his office and get him a real lead"* when he tried to complain about his workload.

Were allegations (a) and (b) breaches of the implied term of trust and confidence?

101. The conduct under these two subheadings where I have found for the Claimant (i.e., in paragraphs 97 to 100 above) clearly elapsed over a period of time. I consider that cumulatively they constituted a repudiatory breach of contract. The Respondent's actions via Mr Platton did go fundamentally to the core of trust and confidence. However, I find this bullying conduct ended with the Claimant's move to Winsford in early December 2020 which was not itself a breach of contract but an act within the Respondent's rights. I will explain why.

Move to Winsford – 5 December 2020

102. The contract provides that:

> *"You may, however, be required to move your base to any other branch or place of business of the Company (or elsewhere) in the mainland UK on either a permanent or a temporary basis as the Company* ***may reasonably specify.*** *Where possible notice will be given of such a move although circumstances may prevail where this is not possible."* [p.47]

103. This provision does not depend expressly on either business need in the other base or reduced need in the current base/branch but in common with all provisions, it needs to be exercised in good faith. It is conceivable that invoking the provision for the purpose of deliberately prejudicing the Claimant might consistiute a breach.

104. The ET3 says that it arose because in or around late 2020, Mr Platton had concerns regarding the Claimant's attitude towards his role and felt that the best way to move forward was for the Claimant to have a fresh start at another branch. The Respondent's Winsford branch was short staffed at the time and on 5 December 2020 the Claimant was transferred to work from the Winsford branch.

105. The transcript shows that:

DAVID PLATTON: What did I just say, I'll tell you what right, let's just make this simple right, I think we need to ***agree you can't work at Salford.*** *Because I can't even speak to you, and motivations a two-way street, I'm massively disheartened by f****** you as well when we speak because we can't talk to you, your un talk, you just don't talk, you talk over people and it gets infuriating. I tried to even give you a deal yesterday, I thought you know what this can't possibly go wrong. Look at the notes on it, spoke to the guy, no one has even asked him to put a deposit on it and now she's not a deal. An that an, we're talking about thousand-pound deposit when she wants to pay two forties because she wants products in and stuff, when you didn't even have the right to ask for the business until she looked at the right car properly, this is what I'm trying to get to.* ***So, we obviously can't work together Andy****, that, that, that's obvious. So, we try, I, it was me that approached Martyn to try and actually help you because you were always going to hand your notice in or I was going to manage you out of the business those where the two things that where going to happen. So now I'm trying to be positive and I'm trying to give you a new start because you're a nice guy, you deserve it. We've had a few chats about this with Winsford and we've both actually looked at the positives of it for you...*

106. The move was essentially characterised by David Platton as an alternative to what he openly identified at that stage was the Claimant's predictable exit from the business, either by the Claimant's resignation or David Platton managing him from the business because in his words *"they could not work together".* I understand why the Claimant has drawn attention to this aspect which has the appearance of a premeditated plan should the Claimant resist the move. However, giving an effective and meaningful choice to the employee in a move is not a key part in exercising the power in good faith. The power was reserved to the Respondent.

107. The important question for me is whether these circumstances mean that Respondent was not operating within the power conferred under the contract. Was the Respondent reasonably, and in good faith, specifying the move? Overall, I am satisfied that the Respondent was still specifying the move reasonably and in good faith. There is a later very revealing part of that same conversation [p.434] in which Martyn Whyte was involved in which he stresses the importance of a solution to the impasse, of which an alternative was *"fixing things at Salford"* to get *"working dynamics"* that worked for both Mr Platton and the Claimant.

108. So I find, in all, that the move was reasonably specified as a means of obviating the poor working relationship, which regardless of the cause, had certainly been reached. I also take into account that the Claimant was not at this stage raising a grievance against David Platton. That is an important factor. The move was not a breach of contract, nor a last straw.

Last straw after Winsford move?

109. I therefore turn to the remaining events in the period *before* the Claimant resigned. That's because the earlier breach could only be relied on to justify a

constructive dismissal in October 2021, if (in addition to the causation question), it can be shown there was an intervening last straw.

The unjustified pursuit of disciplinary proceedings against the Claimant between December 2020 and February 2021 / wrongful pressuring to accept misconduct and an inadequate disciplinary process

110. The way in which the Motability cancellations were first approached by Mr Platton was wrong. There was an inappropriately hectoring tone to his January 2021 emails. His pointed enquiries about the different customers happened in a piecemeal fashion when it would have been fairer for him to sit down in one go, work through them and then send a single email to the Claimant dealing with them all.

111. The series of emails was undermining and unpleasant. I do not find they were in the nature of a freestanding breach of contract. Given the proximity to the previous bullying, they do have the potential to add something to the previous breach. However, the Claimant did not then resign. The matter instead progressed to a disciplinary. He remained at work.

112. In terms of James Barker's role, his actions did not breach the obligation of trust and confidence. I believe he was giving honest and well-intentioned advice. A manager is not precluded from doing this. I accept it could constitute a breach if it could be shown that he was acting in concert with Mr Platton to cause the Claimant to be found guilty of misconduct, where, to his knowledge there had been no such misconduct. But the evidence nowhere near attains the high threshold to prove such a concerted campaign against the Claimant.

113. The transcript I have indicates James Barker had some prior knowledge about the outcome [p.451]. I find at most this was to the effect that the

Claimant's job was not on the line. It's clear from the transcript however that Martin Whyte had already given the same reassurance to the Claimant in any case [p.452, paragraph 13]. My finding is that James Barker was forcefully and positively urging upon the Claimant the inherent wisdom, against that backdrop, of accepting his failures.

114. I am also far from convinced that the charges were wholly or even substantially unjustified against the Claimant, on the material the Respondent had. I reject that there was any bad faith. I do follow and understand that the Claimant considered that the outcome was not right but the question for me is whether it was arrived at following a fair process. He has not demonstrated to me that any part of it – barring David Platton's initial approach via email – was not conducted reasonably or the conclusions were somehow perverse or outside the range of reasonable responses, on the facts. He was given notice of the allegations, and an opportunity to comment on the evidence and to provide a response. He was given the opportunity to appeal. In terms of the sanction, there is nothing manifestly excessive in the warning taking account of the Respondent's findings and the value placed on the stock.

115. No aspect of the disciplinary constituted a breach therefore. Nor did it add to what went before so as to be a last straw.

Inadequate conduct of a grievance process in relation to his allegations of bullying

116. The grievance appeal upheld only the Claimant's point about being called a dinosaur and David Platton's language and tone in a single December meeting and not the other points.

117. Ms Moretti, for the Respondent, correctly makes the point that the role of the Tribunal is not to re-run the grievance or appeal from it– that is

unassailably right. That said, there may be circumstances where the conduct of a grievance is such that when looked at objectively, it is capable of contributing to a past breach of implied trust and confidence.

118. Hence I have looked at this aspect closely. Given the chronology and my findings, it can be the only basis on which the right for the Claimant to treat himself as dismissed, could conceivably revive.

119. I have paid close attention to these particular complaints of the Claimant:

- That the Respondent did not consider other grievances of previous employees and look at "the bigger picture"
- That the Respondent did not consider the whole of the recordings which the Claimant had offered to make available
- That the Respondent did not take into account a customer's testimony in respect of the AMEX incident
- That the Respondent failed to investigate other possible work within the Respondent as a resolution. He relies on what is said in the AXA report.

120. By this stage, Ms Ramsay had received from the Claimant a recording which demonstrated objectively (as she found and told David Platton in her appeal investigation meeting with him [p.303]) - that contrary to the information provided by David Platton previously, he had called the Claimant a dinosaur personally and directly. Moreover, the tone is aggressive. Was it a breach in these circumstances not to open the investigation much wider, in essence into a practice of long-term, institutionalised bullying? Ms Ramsay had not volunteered to receive or facilitate hearing the rest of the recordings which the Claimant had. Did she need to do so? Was it necessary for the Respondent to go back through the files and look for Mike Lathwood's grievance, for example, who had been named by the Claimant? These points are at the heart of why the Claimant considers the grievance was flawed and compounded the earlier breaches.

121. I do not find these are gaps that objectively did revive the earlier breaches. I have kept closely in mind what was said in **Omilaju** at paragraph 26, namely that it will be an unusual case where conduct which is reasonable and justifiable satisfies the final straw test.

122. There are a number of relevant points here. The foremost one is that a further detailed investigation had been conducted at the appeal stage. This built upon the first grievance stage which included the confidential interviewing of witnesses identified by the Claimant. They had not supported the Claimant's assertions of widespread inappropriate bullying. The parts of the recordings that Ms Ramsay did hear, though they exposed David Platton's inaccurate response in first interview, did not dictate that the Respondent needed to consider all recordings minutely for wider evidence of a cultural problem. Acting to keep trust and confidence did not require an exercise on that scale. Second, the Claimant was told that David Platton would be addressed through the company's procedures. Correspondingly, the substantial object of his grievance was going to be dealt with. The Claimant did not have the right to know the nature of any disciplinary outcome at that stage. It would be premature and in potential breach of the obligations of the Respondent to David Platton.

123. Those two matters, together with: (a) no bad faith or bullying having (correctly) been found against James Barker and (b) the fact the Claimant *was not* complaining about the new manager at Winsford, Mike Crossthwaite, mean the grievance outcome was reasonable and justified. It was a proportionate and fair response.

124. I fully understand that the Claimant was deeply hurt and had very poor mental health. Also, that he was seeking considerably more vindication and wanted a wider enquiry and admonishment. However, I do not find in all the circumstances that was a justified or reasonable expectation under his

employment contract or that “the failure” went to the heart of the relationship he had with the Respondent. Nor did it attain the necessary level to be a last straw that added something to earlier breaches.

125. The remaining question is whether it broke trust and confidence not to speak to the customer who was the supposed AMEX incident witness, as part of the grievance.

126. Ms Ramsay had also received from the Claimant with his grievance appeal, a letter from James Goldrick who from the earlier grievance meeting minutes, it would have been apparent had attended the meeting with the Claimant. In factual terms this letter stated that there had been a telephone call with a female Arnold Clark employee called Tracey who had told her that payment in full within American Express card *would* be acceptable. The letter said there were phone records to support the call and also a WhatsApp message [p.253]. Returning to the first grievance meeting [p.146] James Goldrick had confirmed to Megan McCrory that he had purchased 4 or 5 vehicles via the Claimant from the Respondent. And that an incident had taken place and the Claimant had returned distraught. It did not talk about witnessing any actions by David Platton which brought this about.

127. Given the denial that had been made in clear terms by Tracey Mayall (who the Respondent had bothered to ask directly - p.242 - and who denied she would personally authorise a payment), I do **not** find objectively that it was a breach of the obligation of trust and confidence, for the Respondent not to speak to Mr Goldrick. Of particular importance is that Mr Goldrick did not ever press that he had directly witnessed unprofessional humiliating treatment from David Platton. This matter did not therefore add something to the breach that went before. It was reasonable for the Respondent to proceed in the way that it did.

128. So far as investigating other possible work as resolution, the Claimant was candid that he had alighted upon this [p.20] only after his dismissal and from a reading of the AXA Occupational Health form which referred to possible relocation. A clear consequence of that is that it could not have been a breach which in anyway contributed to his resignation. More generally, I am satisfied that the Claimant was offered employment in Altrincham Kia (via Ms McGrory) and also back at the Stretford branch (by Ms Pearson). I appreciate the Claimant had, by this stage, formed a dim and enduring view as to the management culture at the Respondent. He had related misgivings about both of these offers. However, the offers themselves tend to speak of meaningful engagement with his grievance. They were not self-evidently unappealing or unworkable, having regard to the investigation and findings.

129. For all of the reasons I have given, the Claimant has demonstrated past fundamental breach of contract. However, he waived his right to rely on it by continuing in his employment, affirming his contract and not resigning until around 10 months later. In the words of **Omilaju,** he soldiered on. There was no last straw event after January 2021 (i.e., after the last email of David Platton about the cancelled Motability cars) which allowed him to revive his earlier right to resign. His claim for constructive dismissal does not therefore succeed.

Tribunal Judge Miller-Varey
acting as a Judge of the Employment Tribunal
Date: 13 March 2023

JUDGMENT SENT TO THE PARTIES ON
20 March 2023
FOR THE TRIBUNAL OFFICE

Notes

1. Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

ANNEX A

ACCESSIBLE SUMMARY

What the law says must be proved

(A) To win his case, Mr Souter needs to show that Arnold Clark behaved in a way that tends to kill trust or that does not fit at all with the Arnold Clark acting like it was still his employer. The actions towards him must be serious. Being unreasonable is not enough.

(B) Mr Souter could do that by proving quite a lot of connected activities over time which, when you add them up, are that serious. That seems to be the way he puts his case.

(C) But, even if he can show these things, that does not mean that the Arnold Clark is automatically liable. Being treated badly in the past is not sufficient.

(D) If, after a series of acts that breach his contract, Mr Souter carried on behaving as if there *was* an employment relationship, he will lose his right to claim constructive dismissal unless there was a later event which was “a last straw". And he then resigned in response to that last straw.

What I have found

(E) I have found that Mr Souter was an entirely honest witness. I find that up until he moved to Winsford in December 2020 Arnold Clarke had, through a combination of actions by his manager, Mr Platton, committed a serious breach of his employment contract. However, Mr Souter then worked for Arnold Clarke from that time until he resigned effective on 23 October 2021.

(F) Between around 5 December 2020 and 11 May 2021 Mr Souter worked at the Winsford branch. From 11 May 2021 until his resignation became effective, he was off sick, away from the premises. This was because of ill health which he related to the way he had been treated.

(G) Even so, the latest possible last straw is some badgering emails from Mr Platton about cancelled vehicles in January 2021. Nothing else Mr Souter has pointed to after that, contributed to the earlier breach of contract. The actions in relation to the disciplinary and later grievance were, overall, reasonable and justified. I accept that was not Mr Souter’s interpretation. He personally found the actions

hurtful. That does not satisfy the legal test though. Because of that, Mr Souter's right to treat himself as dismissed was lost and could not be brought back to life when he resigned with notice on 23 September 2021. This means that in law he resigned. The Respondent did not dismiss him.

ANNEX B

List of Issues Sent to the Parties on 7 November 2022

1. Was the claimant dismissed?

2 . Did the respondent do the things set out in the Claimant's witness statement (which as per para 2.2 of the Case Management Order sets out the breaches of contract alleged)

3. Did those things, on their own, or taken together, breach the implied term of trust and confidence? The Tribunal will need to decide:

    3.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

    3.2 whether it had reasonable and proper cause for doing so.

4. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

5. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

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

7. Was it a potentially fair reason?

8. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

9. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

10. If so, should the claimant's compensation be reduced? By how much?

11. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

12. Did the respondent or the claimant unreasonably fail to comply with it by [each side will need to specify alleged breach]?

13. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

14. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

15. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?