EMPLOYMENT TRIBUNALS

Claimant: **Mr P Allen**

Respondent: **Bristol Street First Investments Limited**

Heard at: **Leeds (but by CVP on 12 May and 27 September 2023)**

On: **9, 10 and 12 May and 27 September 2023**

Before: **Employment Judge Maidment (sitting alone)**

Representation
Claimant: **Ms R Senior, Counsel**
Respondent: **Ms H Hogben, Counsel**

RESERVED JUDGMENT

The claimant was not dismissed. His claim of unfair dismissal must, therefore, fail and is dismissed.

REASONS

Issues

1. The claimant's complaint is of ordinary unfair dismissal reliant on him having been constructively dismissed. He was employed as a business manager at one of the respondent's car dealerships. The claimant relies on the following actions of the respondent which he maintains singularly and/or cumulatively amounted to a fundamental breach of his employment contract, in particular, a breach of the implied obligation of trust and confidence:

    1.1. being singled out by the general manager and bullied by middle management
    1.2. being held solely accountable for the performance of the dealership with no support including from the general manager or sales manager
    1.3. being accused of having issues working with women
    1.4. being subjected to a disciplinary process

1.5. the general manager and sales manager having lied when the claimant raised a grievance – the sales manager denied knowledge of the claimant's health issues
1.6. being ignored by the general manager
1.7. the respondent showing no consistency in how it dealt with the performance of individuals
1.8. the sales manager undermining both business managers due to an unhealthy relationship with a female sales executive
1.9. lack of support from the general manager (added without objection by the respondent in addition to the foregoing actions identified during the case management process).

2. The claimant relies, in the alternative, on the invitation on 13 September 2022 to attend a disciplinary meeting as a last straw in a course of conduct adopted by the respondent.

Evidence

3. The tribunal had before it an agreed bundle of documents numbering in excess of 304 pages. Both parties provided some additional disclosure of documents on 12 May 2023, which were accepted by the tribunal as additional evidence without objection.

4. Having identified the issues with the parties, the tribunal took some time to privately read into the witness statements exchanged between the parties and relevant documentation. In the afternoon of the first day of hearing, the tribunal heard from the claimant. The claimant had not produced a conventional witness statement. The tribunal allowed him to rely on what he said in his tribunal application, a separate document he had submitted outlining his reasons for leaving in response to the respondent's grounds of resistance and the content of 2 emails sent by the claimant to the respondent's solicitors dated 26 April 2023. Then, on the afternoon of the second day of hearing, the tribunal heard from Mr Paul Anderson, general sales manager and on the third day of the hearing from Mr Andrew Brown, general manager. The hearing could not be completed in the time allocated, such that an adjournment was necessary and the tribunal completed hearing the respondent's evidence on 27 September 2023 when it heard from Mr Ben Harding, sales director, Gary Dreghorn, group financial controller and Mr Steve Gray, divisional aftersales director.

5. Having considered all the relevant evidence, the tribunal makes the factual finding set out below.

Facts

6. The claimant was employed by the respondent from 1 March 2014, initially as a sales executive at its Nissan Halifax dealership. The claimant agreed that he then benefitted from support from Mr Andy Brown, general manager, to undertake a course to progress to the next level of business manager. The claimant passed that course on his third attempt and then remained at Nissan Halifax as a business manager. Whilst working there, Mr Brown had cause to ask the claimant if he had an issue working with female colleagues after issues relating to the working relationship he had with a female sales executive and female assistant accountant.

7. Mr Brown's uncontested evidence was that the claimant struggled in his new role and it was determined that he would benefit from a fresh start in January 2019 as business manager at Nissan Bradford as the pace was slower there. The claimant maintained that the other business manager in place at Nissan Halifax was more experienced than him and controlled the role in a way which did not allow the claimant to learn.

8. The claimant subsequently moved to the role of business manager of the Renault Bradford dealership in September 2021 on the promotion of the incumbent business manager. This move took place on the instigation again of Mr Brown, who was then general manager of that franchise. The claimant accepted in cross-examination that he always got on well with Mr Brown saying that they had "a relationship that works". He agreed that "some of the time" Mr Brown had overlooked previous performance issues and chosen to support the claimant. The claimant had nevertheless previously received letters of concern as had a number of sales executives managed by Mr Brown.

9. The tribunal has been referred to the job description for the business manager role. The purpose was described as leading and managing a controlled sales process, including the regular coaching of sales executives and constant customer interaction - often "second facing" a customer after their initial contact with a sales executive. Job duties included achieving and maximising the opportunity for sales executives to do business and maximising profit, including through the sale of finance and add-on products. Under essential competencies, was included an ability to cope with pressures and setbacks including handling criticism well and learning from it, taking responsibility for actions and persuading and influencing others.

10. The claimant reported to Paul Anderson, general sales manager, who also had direct line management responsibility for 8 sales executive and another business manager who worked alongside the claimant. Mr Anderson focussed on new cars but also helped out on used cars, particularly prior to the appointment of a used cars general sales manager, Mr Matt Young. The business managers had day to day responsibility for driving sales by the sales executives, but no formal line management powers/responsibility for them. Mr Anderson's role was mainly strategic with the claimant more directly involved in second-facing customers and constructing deals, including with finance and insurance add-ons. Mr Anderson set vehicle prices, but the claimant was able to agree discounts and determine levels of profitability. Mr Anderson understood that the Renault Bradford role had been regarded by Andy Brown as a chance for a fresh start for the claimant. He told the tribunal that the claimant started positively. Mr Anderson reported to Mr Brown, who was general manager of both the Renault and Nissan Bradford dealerships, which shared the same forecourt.

11. The claimant accepted before the tribunal, that, if he fell below expected standards, the respondent had the right to take steps to help him to improve. He accepted that if there were complaints about his conduct, the respondent had an obligation to investigate. The claimant was aware that the respondent operated a performance management process.

12. On 16 February 2022 a female customer emailed a sales executive, Sophie Smart, with whom she had been dealing. She said that she had found the claimant to be intimidating and pushy, ignoring what she had said about her

budget for buying a car. She said that the experience had upset her and she felt that, if she hadn't had her parents with her, she would have been pressurised into buying something she couldn't afford.

13. Mr Anderson telephoned the customer, who repeated her concerns to him.

14. Mr Anderson also referred to a female customer on 17 February who had requested to speak to a manager after the claimant had approached her asking: "why are you growling at me". She had felt that the claimant was too pushy and had not listened to her.

15. The sales team had also raised concerns about negative morning meetings led by the claimant. The tribunal cannot conclude on the evidence before it that the claimant made any of the sales executives cry. Mr Brown said he had witnessed Sophie and Olivia crying, but left it for Mr Anderson to deal with any issues. Mr Brown thought that, in any event, the claimant had managed to recover the situation by talking to both of them. He conceded, however, that his memory of Olivia's meeting with Mr Anderson may have been less than perfect when he relayed his recollections to Mr Dreghorn when interviewed by him in respect of a grievance the claimant had raised. He accepted that Mr Anderson had made no finding about the claimant making sales executives cry.

16. On 18 February 2022, Mr Anderson met with the claimant and summarised their discussion in an email to Sam Green of HR. He described discussing the above-mentioned comment made by the customer on 17 February. When this was raised with the claimant by Mr Anderson, the claimant had said that the customer "had the face of a slapped backside" and he was trying to lighten the mood. The claimant did not deny using those words before the tribunal. He said that the customer was abrupt and unsmiling when he had tried to sell her add-on products and he did not intend to offend her. The claimant said that the other customer who had sent the email on 16 February had been fine when they had spoken.

17. Mr Anderson asked the claimant if he had an issue with female sales executives as he had received the aforementioned expressions of concern and some felt pressurised and intimidated by the claimant. The claimant accepted in evidence that Mr Anderson raised this question. The claimant told Mr Anderson that one of the sales executives, Olivia, had been swearing at the recent sales meeting. When asked by Mr Anderson if there was anything he needed to know about that was causing these issues, the claimant said that he was just challenging the sales executives to do their jobs effectively. The claimant referred to being under pressure from the respondent's financial manager, who saw the performance of the dealership as "getting worse". Mr Anderson told the claimant that he would be raising a letter of concern "as we cannot have females feeling uncomfortable and intimidated". The claimant told the tribunal that he understood at the time that this was not any form of disciplinary sanction.

18. On the evening of 18 February, the claimant emailed Mr Anderson raising a grievance against Olivia, saying that, at the morning meeting on 16 February, he was repeatedly sworn at by her. He said that he did not feel he should have to accept being verbally abused at work. He listed the people present at the meeting. He also asked to arrange a meeting with Mr Anderson and HR "regarding your comment that I have problems working/dealing with females as

I feel there is no evidence of this and bringing my character into question which I can't and won't accept…."

19. The claimant was issued with a letter of concern dated 21 February 2022. This was said not to be formal disciplinary action. The letter described the complaints from customers and colleagues regarding the claimant's attitude. The claimant was told to ensure that he correctly second faced customers and treated them with respect and professionalism. He needed to allow sales executives to feel they were able to approach him without feeling intimidated. He was urged to ensure that morning meetings ended on a positive note. Mr Anderson said that he was happy to support the claimant with these issues and provide any coaching the claimant believed he may need. He said that it might be worth the claimant occasionally holding the morning meetings when he was present saying he would be happy to "critique for you". The claimant was told that any re-occurrence of the issue could result in the disciplinary process being triggered.

20. Mr Anderson met with the claimant on 22 February to discuss his grievance, despite it relating, at least in part, to Mr Anderson's own behaviour. The claimant gave more detail about the issues he had with sales executives in the team. Mr Anderson accepted in cross-examination that the grievance was not lodged by the claimant as an act of retaliation.

21. As a consequence of the claimant's grievance, Olivia was interviewed on 25 February 2022. She accepted that she had been upset and angry at the morning meeting, that she had sworn at the claimant and reeled off a few things she should have kept to herself. She knew she was in the wrong and said she apologised straightaway to other members of staff - the claimant told the tribunal that she had never apologised directly to him. Mr Anderson spoke to Olivia about appropriate use of language and how she should conduct herself.

22. Mr Anderson wrote to the claimant on 4 March with the grievance outcome. He said that he had concluded that Olivia had sworn while speaking to him and that that situation would be addressed with her and appropriate action taken. The claimant's grievance was upheld on that point. However, Mr Anderson felt he was right to raise the claimant's dealings with females given the number of complaints in quick succession. He said that he had the reasonable belief that there had been some ill-thought comments made by the claimant.

23. A mediation session was recommended between the claimant and Olivia. The claimant was given the right to appeal the outcome. The tribunal notes that Olivia agreed to attend a mediation session, but that the claimant told Mr Anderson he did not believe a mediation would achieve anything.

24. The tribunal notes that a customer complaint was made against Mr Eastwood, the claimant's fellow business manager, albeit newly appointed in May 2022 and in his probation period, on 17 July 2022. This included a reference to pressurising sales techniques. Mr Eastwood had apologised if had come across in the way the customer had described. Mr Anderson said that he considered this "isolated incident" different to him having heard in quick succession about a number of women having concerns about the claimant's treatment of them.

25. The claimant agreed that he approached Mr Anderson and Mr Brown on 28 February requesting to take leave during the first week of March. The claimant said that during their conversation Mr Brown said to him:" We're done". The weight of evidence is that this comment was indeed made. Mr Brown's view was that he was being presented with the holiday request as a fait accompli. The claimant maintains that he said he would be willing to cancel his holiday. Mr Brown did not believe that the claimant had made that offer in circumstances where the claimant was saying it was a surprise holiday arranged by a family member. Mr Brown said that he had "exasperatedly" told the claimant to go on the holiday, feeling he had no other option and having told the claimant that the claimant was aware that this was the busiest period in the business.

26. Mr Anderson said in cross-examination that Mr Brown had shown "some frustration" with the claimant (and that the meeting had been heated) but that his holiday request was allowed. He said that the conversation had been ended by the comment "we're done" – the context was that it concluded their discussion. On balance, the tribunal can not accept that as straightforwardly the nature of the comment, particularly in the light of the claimant subsequently raising this with Mr Brown, his reaction and what he said later to Mr Dreghorn.

27. The respondent maintains that March is the busiest month of the year in the motor trade. The claimant accepts that this ordinarily is the case, but that the business was in a transitional period due to the coronavirus pandemic where all dealers were facing a shortage of available vehicles to sell. He agreed, however, that him taking holiday then put the respondent a difficult position as he was the only business manager in place at the time. He appreciated that booking holidays at this time was against policy which is why, he said he explained that it had been a late/surprise booking made by his wife's aunt.

28. The claimant was referred to an interview of Mr Brown by Mr Dreghorn on 27 September 2022 as a result of a grievance raised by the claimant. Mr Brown referred to this being a last-minute approach and feeling that he couldn't say no. He denied, as is the claimant's case, that he had said to the claimant: "We're done." Mr Brown said that he had actually said that the claimant had had a lot of chances in the past, but now he was going be treated like every other employee. When put to him in cross-examination, the claimant said that that was why he had said to Mr Brown that he would cancel his holidays.

29. The claimant said that Mr Brown said that he should just go on the holiday. Nevertheless, he maintained that the "We're done" comment was made and his understanding from that was that the respondent was out to get him. When put to him that the claimant's performance issues predated this holiday issue and conversation, the claimant accepted that he was already not hitting his targets.

30. The respondent's performance management process provided for triggers where there was a consistent failure to achieve minimum standards or reasonable targets set by a manager. It was noted that there was no absolute requirement to have 3 months of underperformance to begin this process. The policy provided: "So long as the performance is poor enough to warrant concern then the process can begin." The claimant confirmed that the policy was adhered to in his case.

31. All car sales employees had monthly check ins with Mr Anderson. The claimant was assessed against all Renault vehicles sold in the dealership, new, used

and under the motability scheme. In December 2021, the number of new vehicles sold was 46, 7 more than the target. However, with the sale of 16 used vehicles, there was a deficit that month of 39 against target. The claimant accepted that he managed the sales executives, but believed that any criticism against these targets should have been linked to their own individual underperformance.

32. Sales executives had individual targets of 12 monthly sales, either used or new. Their targets and performance against them were on an updated screen in Mr Anderson's office. Their appraisals were not openly viewable, although the claimant could have asked to see them. The performance of sales executives was monitored through monthly reviews. Mr Anderson considered that 2 of them were underperforming in the dealership – JK and CS were placed on PIPs (sometime after May 2022). There is evidence that sales executives throughout the period of the claimant's PIP were not hitting their individual targets – of course, had they all been doing so, then the claimant would have satisfied key targets in his own PIP. There is evidence in March 2022 of Mr Brown admonishing sales executives for not providing him with details of prospective customers after he had asked them to do so. Sales executives were those employees predominantly responsible for providing customers with videos of vehicles and had often failed to meet their targets for doing so.

33. No targets were set for January and February 2022. In February, a key action for the claimant was to increase the closure rate for new Renault vehicles to 35% by the end of March and to achieve used car sales of 61 vehicles. That target was missed by 30 vehicles, though with a deficit only of 2 vehicles against target for new vehicles for the month of March.

34. A performance improvement plan ("PIP") was put in place and signed by the claimant in March 2022, to cover the period from 1 March to 2 May 2022.

35. It was put in cross-examination that, from those figures From December 2021, the claimant was unable to say that a PIP was initiated because of the aforementioned holiday issue in circumstances where that conversation took place at the end of February. The claimant conceded that that was ".. what it comes across like. In that context, yes."

36. The claimant's case was that from December 2021, there were mitigating circumstances for failures to hit targets, including that the 2 most experienced salespeople had retired who used to account for around 50% of sales. Nevertheless, when put to him that the PIP was not to bully him because of the holiday issue or his raising of a grievance, but because his performance was below par, he replied: "Yes, when you see it in black-and-white."

37. The PIP drawn up by Mr Anderson set out a percentage of closed sales from new Renaults of 25% in January and 16% in February against, the claimant accepted, what was a companywide average standard of 35%. For December, it recorded used-car sales of 16 against a target of 40, 41 against a target of 67 for January and 32 against a target of 59 for February 2022. Under the heading of "support required" it was provided that the claimant should ensure that every sales opportunity was discussed with Mr Anderson or Mr Brown before the customer left. The opportunities were to be discussed at the end of each day. The claimant said that he agreed that the targets, particularly as to conversion rates, customer satisfaction and use of vehicle videos amounted to

the company's vision across all dealerships and signed to say that the PIP had been issued, but told the tribunal that he did not necessarily agree the targets. He was told that was what he had to sign. He did not think that the targets were achievable, he told the tribunal.

38. The claimant accepted that at the time he had not raised a complaint that the targets were unfair. Nor did he raise a grievance saying that he thought the decision to put a PIP in place by Mr Brown was motivated by animosity. The claimant said that he signed the plan because he had been given it the day before he went on his holiday. When pressed regarding the lack of complaint given that connection in point of time, he said that it was always going to happen. He did believe that Mr Brown's animosity towards him had resulted in the plan.

39. The PIP was then reviewed on 4 April with Mr Anderson. On new cars, a closure rate of 31% for March against the company standard of 35% was achieved. Used car sales were 27 units against a target of 61. Mr Anderson emailed the claimant on 7 April attaching the updated PIP. The claimant accepted that he included within the email a number of pointers to help him. The claimant was to meet customers at the point of the order to thank them for their business. As regards the claimant's concern that he was not getting a serious response to requests of the sales team to carry out their duties, he was recommended to ask them once, ask then a second time and then also send them an email requesting that they carried out their duties copied into Mr Anderson. Mr Anderson said that he would then take over. It was noted that Mr Anderson requested that if a member of the team came to the claimant with a customer concern, then they should be pointed in Mr Anderson's direction to handle the concern, but that that the claimant should follow this up by asking the sales executive if Mr Anderson had been informed. They had also discussed the sending of videos to prospective customers who had enquired about a car online or by phone. The claimant needed to drive the completion of those vehicle videos and was told to chase the sales executives to ensure that they had sent them out. He was told that he could monitor this on his 'electronic enquiry manager'. Finally, under no circumstances were any of the sales executives to be involved in locating a used car from outside the dealership – the claimant was told that the team were fully aware that they needed to come to a manager in this regard.

40. The monthly check-in with the claimant for April 2022 recorded a deficit of 29 new vehicles sold against a target of 80 and a deficit of 30 used vehicles against a target of 64. Mr Anderson said that the dealership had achieved those sort of targeted figures historically. This was not challenged.

41. The claimant signed off a further review after a meeting with Mr Anderson on 6 May 2022. This recorded a drop in closure rates for new vehicles of 14% in April and 34 used vehicles sold against a target for the month of 64. The claimant in cross-examination accepted that he had signed the review in circumstances where he thought that he could achieve the targets. Clearly, his evidence on the attainability of the targets has not been consistent.

42. Mr Anderson emailed the claimant on 8 May following up on the PIP review. The claimant was given examples of the tools he had when constructing a deal and second facing a customer. This included spreading out the payment of deposits. Mr Anderson recorded that this was the second review and there had

been no progress "so I will have to pass this on". The claimant said that he understood that there could, therefore, then be a formal disciplinary process.

43. Mr Anderson wrote to the claimant on 10 May 2022 inviting him to a formal disciplinary hearing which ultimately took place on 23 May conducted by Mr Brown. The meeting lasted almost 2 hours.

44. When discussing new car sales, the claimant said that customers looking for Renault vehicles were flipping to Dacia vehicles due to their cheaper price – Dacia are in the same group of companies as Renault. The claimant accepted in cross-examination that he did not say that the target had been set too high. He accepted that the PIP provided targets for Renault car sales and, when put to him that he was ignoring those targets and selling Dacia vehicles instead, he said that, if Renault vehicles were out of the customer's budget, he would sell them a Dacia.

45. When discussing used car sales, the claimant referred to customers finding cars cheaper elsewhere. He agreed in cross-examination that he was not raising at this point that the shortfall was due to the failings of the sales executives.

46. Poor internet lead conversion rates were discussed and the percentage of vehicle videos sent by the sales executives. The claimant was encouraged to embarrass sales executives regarding their failings.

47. Mr Brown raised with the claimant a question as to how the dealership was performing for that month of May. The claimant was unable to tell him and agreed before the tribunal that he was not fully prepared for the meeting.

48. The claimant agreed that at the meeting he did then seek to deflect his responsibility onto others and asked why sales executives were not on PIPs. He agreed in cross-examination, however, that, ultimately, he was accountable for the dealership's performance.

49. The claimant raised that the sales executives, Olivia and Sophie, had had "an upper hand on me" ever since he had raised his grievance and there had been the issue of female staff/customers complaining. He said that they got assistance from Mr Anderson when they required it – the suggestion being that he was treated differently. The claimant raised that there had been a change in the treatment of him since he had requested the aforementioned short notice holiday. Whilst the notes of the meeting are difficult to follow - the claimant said that he did not understand some aspects himself - the claimant referred to the "you done" alleged comment, saying to Mr Brown: "don't you remember?". Mr Brown was recorded as responding: "No. Prove it".

50. By letter of 27 May, Mr Brown issued the claimant with a written warning. He recorded that the claimant had declined to be represented at the meeting. He recorded that he had referred to the investigation summary report undertaken by Mr Anderson and had asked the claimant provide any mitigation to support the reasons for his failure to meet the targets outlined in the PIP. The tribunal had not seen any investigation report until its late disclosure – Mr Brown's evidence was contradictory as to whether or not he had one before him. A brief report was forwarded to Mr Brown on 10 May, with Mr Anderson asking Mr

Brown whether it looked okay. HR had prepared part of this, leaving Mr Anderson to fill in some gaps.

51. Mr Brown summarised what the claimant had said. This included the claimant (surprisingly) not recalling seeing the covering emails from Mr Anderson following the PIP meetings dated 7 April and 9 May, such that he had not actioned any of the points raised in those emails. He noted that the claimant could not explain why the sales executives were not doing as asked, despite it being part of his role to manage them. Mr Brown noted that the claimant had said that he had asked to sit in on the sales executives' appraisals since February, but this had not happened. Mr Anderson conducted their appraisals on his own – he said that the claimant had the opportunity to ask him to raise anything with a sales executive, but that he never had. The claimant also said that he had not seen their individual targets – their sales and targets were in fact no secret. The claimant said that he did not believe that it was down to him to resolve a lack of performance by a sales executive. Mr Brown also noted the claimant's belief that, since he had raised a grievance about a colleague, there had been a change in the dealership, the sales executives had an upper hand on him and every time he had asked Mr Anderson for assistance, he had not received it. The sales executives, it had been said, did not do what he asked of them and were not held accountable. It was recorded that the claimant had said that the target for his PIP was not realistic and he believed he did not have the right number of sales executives.

52. Mr Brown stated that, having considered this information, he believed that the claimant had lost control over the sales executives whose performance he was expected to drive. He did not appear to understand that his role as a business manager was in great part to manage colleagues and to motivate and mentor them in their roles. To do so he must know what both their targets were as well as his own and ultimately that of the dealership. He, therefore, decided to issue a first written warning for failure to achieve objectives set out in the PIP. The claimant's performance was to remain under review for a further 3 months and a failure to attain a satisfactory level of performance during this period might result in further disciplinary action up to and including dismissal. The claimant was given the right to appeal the warning.

53. The claimant submitted an appeal on 20 June. The claimant referred to his meeting with Mr Brown as the first conversation he had had with him in over 2 months after comments Mr Brown had made after the claimant had raised a personal family issue and after the claimant going on the short notice holiday. There are no examples before the tribunal, however, of Mr Brown ignoring the claimant. He referred to a lack of sales executives being held accountable for their performance over a sustained period of 4 months. The claimant said that he had asked to see sales executives' appraisals, but had not seen what was in place and had asked to sit in on their appraisals, but this had never been allowed. Sales executives, he said, had gone a full quarter without selling a used car yet this was rewarded by them being put on an evolution development plan – a reference to Sophie being given an opportunity to develop into a business manager. The sales executives were said to come in late to work and had been vocal about what they were not prepared to do. He referred to them not sending videos of vehicles to customers. The claimant felt that these points showed there was an underlying culture that had been allowed to take hold and impacted on the dealership's performance.

54. When put to the claimant that he had not raised that he was being bullied by either Mr Brown or Mr Anderson in his appeal, the claimant agreed. When asked why not, he said that he was just getting on with the job.

55. The claimant's appeal was heard on 21 June by Ben Harding, sales director. The claimant was asked to explain the reference to the personal family issue and going on holiday. The claimant said that he had told Mr Brown about his daughter's health issues during a car park chat and Mr Brown hadn't asked about her since. When asked by Mr Harding if he felt isolated, the claimant said that he did.

56. To digress from the appeal hearing, Mr Brown's position was that he was first aware about the claimant's daughter in May 2022 and that he had a conversation with the claimant about her in June. The claimant said that this was not the first time Mr Brown had been made aware. He did recall Mr Brown popping in one evening to speak to him as he was leaving, but the claimant couldn't recall the date.

57. The tribunal notes that the claimant emailed Mr Anderson on 11 May 2022 referring to his daughter's illness. In a further email of 13 May, he referred to needing a day off due to a family matter and him and his wife having to deal with issues relating to his daughter over the previous 12 months. An email subsequently from Mr Brown of 13 May referred to freeing up time being important for family matters and not being a problem, but that it was respectful to give a decent amount of notice.

58. Reverting to the appeal hearing, the claimant explained the circumstances of the March holiday being arranged and that he had told the respondent that he would be prepared to cancel it.

59. There was discussion regarding the claimant's desire to sit in on sales executive appraisals. The claimant accepted that Mr Anderson was their line manager. However, he had told Mr Harding that others had suggested that he sit in on the appraisals. The claimant agreed that, whilst he had not seen the appraisal records, he did have access to the targets and sales performance of the sales executives.

60. The claimant raised that Olivia was often late for work. He said that he was not aware that Mr Anderson recorded the absences in his own diary. The claimant denied in cross-examination that he was often late himself. The claimant was referred then to some texts from the claimant to Mr Anderson regarding him running late. The claimant said that on one of these occasions he had been stuck in traffic.

61. Mr Harding took the claimant through Mr Brown's outcome letter and the points of potential mitigation recorded. Mr Harding referred to the comment that the claimant couldn't tell Mr Brown where he was up to against the PIP and had not actioned points made to him in follow-up emails. The claimant said that he had probably seen the emails, but "flicked over it and hadn't got back to it".

62. Having raised with Mr Harding issues relating to his grievance and the suggestion that he had problems with women, the claimant referred to an uncomfortable environment and Mr Anderson not wanting to help him. When asked why this would be, he said that he didn't know, but that it was "bordering

on bullied". He said that he enjoyed his job and felt like he was left out of what was going on.

63. When asked by Mr Harding if he felt responsible for the dealership's results, the claimant said that of course he did. Mr Harding summarised that the claimant did feel partly responsible, but considered that there were mitigating factors. He referred to the claimant feeling isolated, the team not being held accountable and Mr Anderson not listening to his requests. Mr Brown was described as "aggrieved" and it not being a happy place.

64. Mr Harding did not conduct interviews with Mr Anderson or Mr Brown. He did not consider that to be necessary in the light of the documentation he had before him.

65. Mr Harding wrote to the claimant on 27 June with the appeal outcome. He went through the claimant's points of appeal. He said that he was sorry to hear that the claimant did not believe that Mr Brown had fully supported him, however, on the claimant's own admission, he had not believed that this had contributed towards his performance. He did not believe that the claimant had been put on the PIP due to him going on holiday in March. He recorded again that by the claimant's own admission the PIP was factually correct and the claimant had been underperforming for 3 months prior to being placed on it. Mr Harding noted that the claimant said that he was now able to view sales executives' appraisals. In addition, he was able to see their targets. It was not common practice for a business manager to sit in on appraisals. Mr Harding did not believe that if the claimant had had any visibility of the appraisals, this would have affected his individual performance. The point about a sales executive, who the claimant believed was not performing, being put on an evolution development programme was not regarded as relevant.

66. Mr Harding referred to the claimant saying that Mr Brown had not received requested information from sales executives about levels of prospects. The claimant had been saying that if the general manager was unable to get updates from the sales team, how could he. Mr Harding appreciated the point, but said that this was not the sole downfall in the claimant's performance and he believed it was the claimant's responsibility to meet the targets set, which he had not done. Again, whilst appreciating the claimant's criticism of the performance of sales executives, the purpose of the meeting was to discuss the claimant's written warning and the claimant had admitted that he had not met his targets. As regards sales executives not being held accountable themselves, he recommended that a meeting between the claimant, Mr Brown and Mr Anderson take place so he could have an opportunity to discuss his concerns. The claimant told the tribunal that he did not regard this as supportive. In conclusion, Mr Harding upheld the decision to give the claimant the first written warning.

67. Mr Harding accepted in cross-examination that Mr Brown's listed items in the disciplinary outcome letter said to be points of mitigation included fresh aspects of criticism of the claimant not in the original invitation. He considered that these points were properly included as they had been discussed with the claimant. He considered that prior to the initiation of the PIP, there had been discussion with the claimant on an ongoing basis of the performance of the dealership. It was inconceivable in the business not to be aware of how you were performing. From his own conversation with the claimant, there was

nothing to suggest to him that any targets set were unrealistic. That was not the focus of the claimant's own appeal. There was evidence he had seen of poor performance, rather than of the process having been followed as a reaction to the claimant's holiday request. The performance of sales executives was an issue on which the claimant focused.

68. The meeting suggested by Mr Harding between the claimant, Mr Brown and Mr Anderson to resolve these issues took place on 8 July. Mr Brown suggested they use this meeting positively. He reinforced with the claimant positive aspects of his previous performance and asked him to remember how he got to the position of business manager, saying that he had got there because of his performance as a sales executive. The claimant took an opportunity to raises concerns about the sales executives. Mr Brown referred to some of the steps he had taken himself when he had previously been in control of the sales floor. The claimant was told that he had to change and the claimant said that he knew that. The claimant told the tribunal that he agreed that he was going to have to work differently.

69. In fact, the PIP (or more accurately any formal steps under it) was paused from June 2022 by Mr Brown, following the claimant informing him of his daughter's health issues on 13 May and after a subsequent discussion between them. Mr Brown told the tribunal that he did not feel it right for the PIP process to continue with those issues in the claimant's personal life. However, monthly check-ins with the claimant continued. The pause simply meant that there were not monthly reviews of the claimant's performance against targets in his PIP. When the PIP was restarted the interim months were still considered when assessing the claimant's performance because, as Mr Brown told the tribunal, the claimant was still working in the business.

70. At a check-in on 10 June 2022 with Mr Anderson, it was noted that the dealership was behind on new and used sales and overall customer satisfaction. The claimant was advised that if he was unsure about any deals, he should speak to Mr Anderson. The claimant told the tribunal that he had done so all that month.

71. At a check-in on 9 July 2022, an improvement in new car sales was recorded, but also a more significant deficit on used car sales. At a check-in on 13 August in respect of the month of July, there was a significant shortfall in the sale of new and used cars. It was noted on 9 September that whilst 25 new cars had been sold against a target of 15 for the month of August, used car sales were 25 below the target of 67.

72. Mr Anderson emailed the claimant on 10 September 2022 attaching the updated PIP. The claimant was given some advice regarding approaching customers when they were with a sales executive. Prospecting was described as one of the claimant's strengths and an area in which he could coach the sales executives. The claimant was said also to be very good at sending out the service prospects for the day ahead. Mr Anderson recommended that the claimant speak to the sales executives during the day to ask for updates on where they were with each prospect. The claimant accepted in cross-examination that this was a supportive email, where his strengths were recognised. He accepted the point that it was being given to help him improve his performance.

73. Mr Anderson also referred to the claimant feeling it unfair that he had been the sole person to be judged on the dealership's performance, where Mr Eastwood was also in place as a business manager. Mr Anderson pointed out that Mr Eastwood was still in his period of probation and, if there was no improvement at the end of this, the respondent would look also at his performance. The claimant's own performance issues started prior to Mr Eastwood joining the business. Mr Anderson said that they were now six months into the claimant's PIP without any tangible improvements and that the next stage was now out of his hands. The claimant accepted that he knew that it was then inevitable that he would be invited to a further disciplinary hearing. That was not an admission by the claimant that he considered such decision to be justified or fair. He indeed raised a grievance shortly thereafter.

74. By letter of 13 September 2022 the claimant was invited to a second disciplinary meeting on 20 September to discuss his performance. The claimant was told that there were a number of different potential outcomes, but it was important that he was aware that one could be a first or final written warning. Following further performance review periods dismissal was a possibility if the claimant's performance did not reach a satisfactory level. This meeting did not take place.

75. The claimant raised on 14 September a grievance against Mr Anderson and Mr Brown, who he said had been "complicit in a 6 month period of bullying and victimisation with the aim of making my position of Business Manager untenable with the end goal of making me either resign or using the disciplinary procedure to dismiss me." The claimant described the events of September as the tipping point. In cross-examination he denied that he was seeking to deflect attention from the invitation to a second disciplinary. Within the grievance, the claimant referred to the accusation that Mr Brown had said in the previous March that he was done with the claimant. The claimant accepted that this was the first time such complaint had been raised.

76. On 18 September, Mr Brown emailed the claimant, copying in Mr Anderson and Mr Eastwood. This related to the claimant not having checked deliveries. Mr Brown recorded the business selling "zero retail vehicles" on the Friday and that there were too few appointments arranged into the weekend. He stated: "You and Wayne are equally responsible for this BUT surely as the Senior of the two BMs we have, this is one of the very first things you look at – certainly after a day off??" Paul Anderson has far greater things to worry about that neither you or Wayne can control or affect so to say that Paul should be looking when he has two BMs is borderline insulting. Do you check to see if every single Renault and Dacia is ordered correctly?… No – Paul does – which incidentally takes more time/skill/knowledge than looking after basic requirements like delivery dates for deliveries. Just the once, take this on board – take full responsibility for YOUR actions. Admit when you're in the wrong. Learn from it and do not let it happen again. It is really that simple but despite numerous occasions like this we find ourselves in the same position. If we were running that fast, selling that many cars and everyone's heads were spinning I'd understand. We are nowhere near as busy as we should be – there are no excuses for not getting the absolute basics done at any time but especially when we're well off the pace with a fully resourced team. I will discuss this and other points with you on Tuesday in our meeting." Mr Brown accepted in cross-examination that some elements of the communication were not supportive.

77. The claimant met with Mr Dreghorn, divisional finance director, appointed to investigate the grievance, on 27 September 2022. At that meeting the claimant described a tipping point as the taking of a day's pay away from him, saying that he knew it was at the discretion of the general manager, but it was "ridiculous". This related to payment during sickness. The claimant accepted in cross-examination that company sick pay did not apply until after 3 days of absence and his terms and conditions provided that company sick pay was at the general manager's discretion. The claimant's issue was said to be the length of time he had been at the respondent and what he was going through. He raised the matter with one of the respondent's accountant's, Dominic, but had not spoken to Mr Brown or Mr Anderson about it.

78. The claimant accepted that Mr Eastwood as a probationer would be treated according to a different procedure than he would. He was indeed taken to documentation that showed that Mr Eastwood's probation period had, in fact, been extended on 26 October 2022.

79. The claimant accepted in cross-examination that he was not saying in his grievance that he had been treated unfairly because of the previous issue of treatment of female employees. The claimant said that that already been dealt with.

80. Mr Brown was interviewed by Mr Dreghorn also on 27 September 2022. There was discussion of the claimant's holiday request in the March and Mr Brown said that it was typical of the claimant to do things at the last minute. He said that the raising of the "we are done" comment was misconstrued by the claimant in their previous disciplinary meeting. The claimant said that what he said was that he was going to treat the claimant as he should every employee, whereas before he had let the claimant get away with a lot of things. He was now going to manage him properly. He described the claimant as showing his true colours after this comment and taking it as "me and him done". Mr Brown said that he had been present at the meeting with the claimant and Mr Anderson on 8 July and gave him the usual amount of advice and support. He thought this was a constructive meeting. The claimant was going to do things, but then did nothing, which Mr Brown described as frustrating for anyone. He said that he did show his feelings on his face a lot of the time. He said that he would say that communication had broken down since March.

81. In answer to a question, he said that the claimant had mentioned one night about his daughter's issues. Mr Brown said he had told the claimant that he should have told him about such things and if he needed time, help and support. He accepted that he couls have handled the issue of the claimant's sickness better.

82. Mr Dreghorn also spoke to Mr Anderson on 27 September and Mr Matt Young, used car sales manager, in particular to ascertain if the claimant had been treated differently from Mr Eastwood.

83. The claimant wrote to the respondent on 6 October giving 4 weeks' notice of his resignation. He thanked the respondent for his time working with them.

84. Mr Dreghorn then met the claimant further on 26 October. At this meeting the commencement of the performance reviews was discussed and that they had started before Mr Eastwood's commencement of employment in circumstances

where Mr Eastwood's performance had to be treated differently because of his probationary period. There was a proposal made by Mr Deghorn that the claimant remain with the respondent, but that there would be a review of the PIP which would be reset from 1 November so that from that point both the claimant and Mr Eastwood were treated equally. The claimant in cross-examination accepted that this was a reasonable solution. The solution proposed would involve specific consideration of each business manager's individual performance.

85. As regards the claimant's relationship with Mr Brown, Mr Dreghorn said that there were elements he could see on both sides. He said it was difficult to propose anything as, by this point, Mr Brown had moved on to a different role at another dealership, but it seemed that the PIP had put pressure on the relationship and having to manage the claimant in a different way had broken the relationship. The claimant disagreed and informed Mr Dreghorn that the holiday issue had broken the relationship in the March. Mr Dreghorn concluded that if there had been no underperformance by the claimant, there would have been no PIP. He believed that there had been within the dealership a daily focus on performance prior to the PIP. Any senior manager could see from the figures, including in the claimant's check-ins, a performance issue regarding the dealership.

86. Mr Dreghorn raised with the claimant the possibility of him moving to the Halifax dealership and said that this could still be offered, regardless of Mr Brown's departure. That would have taken the claimant away from Mr Anderson's management. Mr Dreghorn told the tribunal that he recognised that the claimant had been with the respondent for a long time and he wanted to continue his employment.

87. Mr Dreghorn said that he couldn't influence the claimant's decision to resign, as that was clearly within his power, but asked him to take some time and reflect on the options presented.

88. There was a discussion regarding the claimant believing himself to have been treated differently to the sales executives. Mr Dreghorn said that he was not going to carry on discussions about other people. The claimant had been measured against his own PIP and this had been done correctly and fairly. The claimant was keen to raise the performance of Sophie who had been put on a development programme despite being, he said, in the bottom 25% of sales executives. The claimant was pointed in cross-examination to some figures for such individual which showed her to be meeting the key performance indicators. The claimant said that he was in no position to challenge those figures. He accepted, however, that, if they were correct, there was no reason to put Sophie on a PIP. Mr Dreghorn was satisfied that the sales executives within the business were being managed in terms of their own individual performance.

89. The claimant told the tribunal that he had no problem with how Mr Dreghorn had investigated the grievance. The claimant said that he thought that Mr Dreghorn had done a very good job.

90. Mr Dreghorn met the claimant again on 31 October, when his notice period expired. The claimant told Mr Dreghorn that his decision was still to resign, referring to a warning staying on his file as a "big thing" and that this didn't sit

right with him. The claimant said that there were a couple of things that he couldn't get over. Again, sales executives not coming close to their individual targets' Mr Dreghorn said he was disappointed that was his decision and thought that they had given the claimant some good options. He asked if the claimant had a job to go to and, in response, the claimant said that he had and was working his notice anyway.

91. Again, in cross-examination, the claimant was asked if he accepted partial responsibility for being on a PIP. He said that he did. He was asked whether the plan was justified on his performance. The claimant agreed that it was. It was put that the claimant had no issue with the PIP provided it was reset on 1 November and if it then remained in place. The claimant said he had not. He accepted that if he had gone to Halifax or even stayed, the PIP would not have been managed by Mr Brown. He accepted that it would not have been managed by Mr Anderson, if he had moved. Nevertheless, the claimant said that he did not believe he was unreasonable in rejecting the proposal.

92. In terms of why the claimant did not want to return, he said that the company was no longer the company he started working for and that the way he had been treated in the last 6 months made him no longer want to stay. Although he had been offered another job, that was not the reason for him leaving and the new job was on lower pay.

93. Mr Dreghorn issued a written grievance outcome by letter to the claimant of 14 November 2022. He sent to the claimant the investigation meeting interviews notes at the same time.

94. The claimant appealed Mr Dreghorn's grievance outcome. Given the claimant's comments about Mr Dreghorn, it was asked why he appealed. Before the tribunal, he said he did so as it was open to him to appeal.

95. In an email of 22 November he said that he would like to appeal on the grounds that he had proof that the majority of information taken from Mr Brown and Mr Anderson in their grievance interviews were "blatant lies and another example of their behaviour towards me". He said the worst point was when Mr Brown referred to him as being supportive when the claimant's wife was ill. He described this as being "very low". He referred to Mr Brown calling him when he was with his wife at the hospital asking how long he was going to be.

96. The claimant had complained that in February 2021 he was on the rota to work 2 weeks without a day off. Mr Dreghorn had accepted that to be the case. He said that whilst this was not common practice, he had observed that this was during the coronavirus pandemic and there were 8 people off at the time. He understood it was an exceptional circumstance due to the pressures of the pandemic. The claimant was dissatisfied, because it became clear that there was nothing in place to give him the additional days back. When put to him, in cross-examination, that this was not part of the reason for him resigning, he said it was part of the whole package. The claimant agreed that he was not saying that he had been asked to work that period by Mr Brown because Mr Brown did not like him and he accepted it was not part of any separate grievance.

97. The claimant was still dissatisfied that Mr Eastwood had not also been placed on a PIP. He agreed nevertheless that a different policy applied to Mr Eastwood because of his probationary period.

98. The claimant still took issue that he was not paid for his sickness on 25 July 2022. Whilst the issue of Sophie not being on a PIP had been addressed, the claimant felt that his grievance related to the whole team of sales executives.

99. The claimant attended an appeal meeting before Mr Steve Gray, divisional aftersales director, on 12 January 2023.

100. In his appeal, the claimant referred to Mr Anderson saying he had not been aware of any health issue regarding the claimant, whereas the claimant said he was aware that he had been going to the doctors. The claimant agreed that Mr Anderson just knew he was at the doctors, not what he might be there for. Nevertheless, the claimant maintained that Mr Anderson was aware of him suffering from high blood pressure. He said he had gone to the doctor and been given a log to record his blood pressure and he had photocopied this at the respondent and showed it to Mr Anderson. He had also shown him his prescription and the tablets he had been put on. The claimant accepted that he had not given Mr Anderson a list of his doctor appointments. It was put that, if he had given Mr Anderson a log, this would be mentioned to Mr Gray and it wasn't. The claimant then said that he gave Mr Gray a log of appointments with his doctor. He agreed then that he hadn't shown this record of appointments to Mr Anderson. He had only shown Mr Anderson the log of blood pressure readings. There is no corroborative evidence of what we claimant had shown Mr Anderson. Mr Anderson was adamant that the claimant had not shown him a document on which he logged his blood pressure or the tablets he was taking. He only knew about the claimant's blood pressure from a conversation he had with the claimant in the car park in September 2022. The tribunal accepts Mr Anderson's evidence in preference to an account of the claimant lacking in consistency and coherence.

101. The claimant then accepted, in a question from the tribunal, that this issue of knowledge of any medical condition did not really influence the decision to resign. He had already decided to resign and saw the investigation interview notes after he had decided to leave.

102. The claimant did not respond when Mr Gray asked what his desired outcome was from the appeal. Mr Gray asked the claimant that, if the claimant's contentions were accepted, how it would affect the outcome. There was no direct response. The claimant confirmed to the tribunal that nothing determined at this stage would have affected the issue of his continued employment.

103. Mr Gray did ask that, now Mr Brown had moved on, whether the right resolution was to reinstate the claimant. The claimant said that he wouldn't go to Renault Bradford.

104. The claimant subsequently raised a number of issues that dated back to 2016. This included a letter of concern issued on 21 November 2016 which the claimant said was unfair and evidence that Mr Brown was vindictive towards him. It was put then in cross-examination that Mr Brown later promoted him to the position of business manager after that letter of concern. The claimant agreed.

Applicable law

105. In order to bring a claim of unfair dismissal an employee must have been dismissed. In this regard the claimant relies on Section 95(1)(c) of the Employment Rights Act 1996 which provides that an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which she is entitled to terminate without notice by reason of the employer's conduct. The burden is on the claimant to show that he was dismissed.

106. The classic test for such a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".*

107. The claimant asserts there to have been a breach of the implied duty of trust and confidence. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract.

108. In terms of the duty of trust and confidence, the case of **Mahmud v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that he "will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee". The effect of the employer's conduct must be looked at objectively.

109. The Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju 2004 EWCA Civ 1493** considered the situation where an employee resigns after a series of acts by the employer. The claimant brings his case, in the alternative, on such basis.

110. Essentially, it was held by the Court of Appeal that in an unfair constructive dismissal case, an employee is entitled to rely on a series of acts by the

employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation of the contract by the employer, it should be an act in a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to be of the same character as the earlier acts, but it has to be capable of contributing something to the series of earlier acts. There is, however, no requirement for the last straw to be unreasonable or blameworthy conduct of the employer, but it will be an unusual case where perfectly reasonable and justifiable conduct gives rise to a constructive dismissal.

111. Underhill LJ in **Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978** cited Dyson LJ in **Omilaju** approvingly on the question of the 'last straw' as follows:

> *"39. Against the background of that summary Dyson LJ addressed the last straw doctrine specifically in paras. 15-16 of his judgment (pp. 487-8), which read:*
>
> *"15. The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1986] ICR 157 . Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:*
>
> *'(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See Woods v W. M. Car Services (Peterborough) Ltd. [1981] ICR 666 .) This is the "last straw" situation.'*
>
> *16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim ' de minimis non curat lex ') is of general application…" …….*
>
> *46. the "last straw" image may in some cases not be wholly apt. At the risk of labouring the obvious, the point made by the proverb is that the additional weight that renders the load too heavy may be quite small in itself. Although that point is valuable in the legal context, and is the particular point discussed in Omilaju , it will not arise in every cumulative breach case. There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)…..*

> *55. I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> > *What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation ?*
> > *Has he or she affirmed the contract since that act ?*
> > *If not, was that act (or omission) by itself a repudiatory breach of contract?*
> > *If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
> > *Did the employee resign in response (or partly in response) to that breach?"*

112. If an employee was constructively dismissed, it remains open to an employer still to seek to advance a potentially fair reason for dismissal.

113. Applying the legal principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

114. Prior to the final hearing, the claimant had not at times pointed to specific and detailed incidents of alleged mistreatment. He had not prepared a detailed witness statement with reference to the acts of alleged mistreatment which had been identified during the case management process as forming the basis for his complaint and the reason for his resignation.

115. Inevitably the claimant's case has developed from the point the cross-examination of him commenced. Ms Senior has done a very thorough job of exposing anomalies and potential criticisms of the way the respondent carried out various processes, including how it dealt with the claimant's grievances and appeals. Not all of these points of criticism were, however, in the claimant's mind at the time the events occurred and certainly did not, regardless of how his case has been pleaded, feed into his decision to resign from the respondent's employment.

116. It is important for the tribunal to remind itself that the test in the case of constructive dismissal is not whether the respondent behaved reasonably, although unreasonable behaviour might, on the facts, be illustrative of a breach of trust and confidence. The assessment is also quite different to that undertaken where, for instance, there has been an actual dismissal on the grounds of capability. Further, actions of the respondent after the claimant's resignation can obviously not have formed a basis for that earlier resignation

decision, they might merely cast light on the appropriateness or otherwise of the respondent's behaviour prior to resignation. The claimant resigned after he had been invited on 13 September 2022 to attend a second disciplinary hearing. That disciplinary hearing did not go ahead. After his resignation he raised a grievance and the claimant expressed himself, before the tribunal, to accept that Mr Dreghorn did a good job of hearing that grievance. Despite the position now taken by the claimant, he did, at the time, appeal Mr Dreghorn's outcome and Mr Gray's appeal and outcome letter obviously further postdates the resignation decision.

117. In terms of chronology, the claimant's first specific complaint is of being accused of having issues working with women. The claimant maintains effectively that the suggestion by Mr Anderson had no foundation. The tribunal concludes, however, that Mr Anderson was raising a genuine issue of concern about the claimant's behaviour. In February 2022 there were a number of specific issues of concern, which included how some sales executives felt they were being treated and genuine customer concerns regarding the attitude the claimant had displayed towards them. It is clear that Mr Anderson wished to explore these matters with the claimant and in context it was entirely justifiable and understandable for him to question whether the claimant did have an issue working women.

118. The tribunal notes that this was not the first occasion in the claimant's employment that his working relationship with a female staff had been questioned - Mr Brown had raised a similar issue with the claimant in the past.

119. It is clear that Mr Anderson's reaction to the concerns raised was proportionate, resulting simply in a letter of concern after he had had a full discussion with the claimant, which was not the first such letter the claimant had ever received and where formal disciplinary action had not been in Mr Anderson's contemplation.

120. The claimant went on to raise a grievance about how a female sales executive had spoken to him at a sales meeting. Mr Anderson took this seriously and after interviewing the sales executive concerned, upheld this aspect of the claimant's grievance and issued advice to the sales executive as to how she ought appropriately to behave. He further made an offer to the claimant of mediation between him and the sales executive.

121. There was a complaint by a female customer in respect of Mr Eastwood on 17 July, but the lack of him being issued with a letter of concern does not represent an example of inconsistency of treatment with the claimant in circumstances where the complaint was made on 17 July 2022, Mr Eastwood had been in his role only from May, this was a single isolated incident and Mr Eastwood quickly apologised for it.

122. In none of this is any breach of trust and confidence by the resondent evident. Again, the respondent acted appropriately and proportionately in response to legitimate concerns it had. It had reasonable and proper cause to raise the issue it did with the claimant.

123. It has been separately alleged by the claimant that Mr Anderson undermined both business managers due to an unhealthy relationship with a female sales executive. The tribunal has not made any finding of any unhealthy

relationship - the claimant has not sought to positively advance any factual basis which might allow such conclusion. There has been reference to a sales executive, Sophie, allegedly not meeting her targets and yet being put through an evolution development programme which might lead to her promotion to a business manager role. There is no basis upon which, however, the tribunal could conclude that there was any irregularity in that sales executive's professional development, an individual who has now achieved that promotion. No adverse inference can be drawn from an email to Sophie asking her to carry out what Mr Anderson described, and it is accepted, was a very menial task of valeting and videoing vehicles. This did not undermine the claimant, who was on leave at the time. The sales executive who swore during a morning meeting was admonished. The tribunal is not in a position to understand what type of unhealthy relationship is being alleged and how this undermined the claimant and, as is the claimant's case, Mr Eastwood.

124. The claimant complains of being singled out by the general manager and bullied by middle management. No examples have been given by the claimant of aspects of such treatment separate from the criticisms of his performance and the performance management process then adopted by the respondent. The claimant does complain that he was being held solely accountable for the performance of the dealership with no support, including from the general manager or sales manager.

125. The claimant was the only individual, as at March 2022, who was subject to formal performance management within the dealership, although subsequently some sales executives were held to account for a lack of performance against their individual targets.

126. The role of business manager was one separate from that of, for instance, sales executives and general sales managers. The latter role was more strategic. The claimant's role was still very much one where he was required to drive individual sales on the ground on a day-to-day basis. Whilst his ability to influence the performance of sales executives might not have been assisted by his lack of line management responsibility for them and, for instance, involvement in their individual appraisals, his role was effectively one of a higher level sales executive responsible for motivating and mentoring the sales executives, but also for becoming actively involved in their sales, "second facing" customers and giving sales executives the tools in terms of flexibility, discounting and added value products to enable them to close their deals. In one sense he was in an invidious position, in that his performance did to a significant extent depend upon that of the sales executives beneath him. Nevertheless, he was in a position to influence sales and profitability and assessed against the performance of the dealership as a whole. The claimant understood that to be the case during his employment. He understood that he was accountable for the overall sales performance and that, if levels of attainment against that sales performance fell below what was expected, performance improvement procedures might be justified.

127. Sales executives had a narrower role/responsibility at a more junior level to the claimant. There is evidence that if sales executives were regarded as being deficient in their performance, they would be taken to task. However, it was not unjustifiable for scrutiny to fall on a business manager, rather than individual sales executives, if sales executives' individual or overall performance fell below target. Again, a business manager was responsible for driving their

performance and his actions could impact sales achieved. The respondent genuinely believed that the claimant bore a responsibility for the failure of the dealership to hit specific targets.

128. When the PIP process began, the claimant was not the only business manager and indeed he cannot have been assisted in the dealership by the other business manager being new to both the business and the role. Nevertheless, the respondent did still have reasonable and proper cause to call into question the claimant's individual performance.

129. The tribunal cannot conclude there to have been a breach of trust and confidence arising out of the respondent's failure to subject Mr Eastwood to similar performance management procedures. Again, Mr Eastwood was new to the business and the role. Furthermore, he was subject to management separately under and in accordance with his probationary period. It is noted that Mr Dreghorn gave consideration to the resetting of the PIP on the basis that the claimant's performance ought to be distinguished and separated out from that of Mr Eastwood. This is a point which might of course have been raised by the claimant at the disciplinary hearing he was invited to on 13 September or in any appeal in respect of any disciplinary decision reached that stage. The process did not proceed further, however. This does not prevent the respondent from having had reasonable and proper cause to consider the claimant's performance at a further stage of the PIP process or create a situation where trust and confidence was likely to be seriously damaged or destroyed.

130. The claimant's complaint of being subjected to a disciplinary process, centres on there being no legitimate basis for such a process to be commenced from the initiation of the first PIP. The claimant maintains that there were no performance concerns or certainly none which would or should have been taken forward more formally until he made his holiday request in late February.

131. Clearly, the claimant's holiday request did not justify the initiation of a performance management process with a predetermined view, because of that holiday request, to manage the claimant out of business. The tribunal does not consider that the holiday request resulted in the respondent taking those steps or with that mindset.

132. The claimant did fail to appreciate how the respondent would, with justification, react to his request to take a short notice holiday in March in circumstances where this was the busiest period of the year in the car sales industry and where the respondent's policy was against allowing holidays to be taken at such time. The claimant seeking such leave and without plenty of notice would be (with justification against the background of the dealership's performance)) frustrating to the respondent, particularly with the claimant being the sole business manager in place at the time.

133. Mr Brown did say the words "we're done" as a reaction of frustration and exasperation arising out of the claimant's request. The tribunal can conclude that there was a change in attitude towards the claimant. Mr Brown's evidence was that he told the claimant that he would manage him going forward in the same way as he would manage anyone else – a recognition of a change in how the claimant would be managed. Nevertheless, the tribunal cannot conclude that the words used, when viewed objectively in context, signified the likely

ending of the claimant's employment. That is certainly not how the claimant took the comment at the time and, whilst he was concerned by it sufficiently to raise it with Mr Brown, he did not raise a complaint until a significant time thereafter when he saw, following the invitation to the second disciplinary hearing that, in his eyes, the writing may be on the wall. By then, Mr Brown had certainly shown a willingness to engage with the claimant's issues in an effort to assist him, for instance, at their 8 July meeting. Mr Anderson's follow up email of 10 September 2022 was accepted by the claimant as recognising positive aspects of his performance and providing support.

134. The nature of the respondent's business was such that the claimant was at all times clear as to performance against targets and how a deficit was likely to be viewed. The monthly check-in meeting in December 2021 had highlighted that the dealership and claimant had not hit targets and in particular had a significant deficit in terms of used cars sold. The claimant fully understood that he was being held accountable for overall sales across the dealership. He knew that he was accountable for those sales. In February 2022 he had been given a key action point to increase the closure rate for new cars and again to meet a target for used car sales which had just been missed by 30 units. The claimant himself accepted before the tribunal that against that background it "came across" that the holiday issue was not the reason for the initiation of the PIP. When taken to the figures he accepted that the performance issues being raised were not to bully him because of his holiday when he saw the figures "in black and white". Indeed, the claimant had in February 2022 expressed that he felt under pressure from the financial controller regarding the performance of the dealership, quite separate from the management by him of Mr Anderson and Mr Brown. The concerns raised which led to the letter of concern in February included a lack of constructive interaction with sales executives who felt reluctant to approach the claimant for help. Mr Anderson had already offered to critique the claimant's handling of morning sales meetings.

135. The claimant's career as a business manager had not been straightforward and he had previously struggled in the role in other dealerships to the point where he was moved to allow him fresh starts. He had previously received letters of concern. There is no basis for concluding that dealing with the claimant through a PIP in March was anomalous or a departure from general previous practice. As at March 2022, there were concerns about the claimant's performance which had endured for some time and the respondent's procedures anticipated the option of instituting a PIP in such cases.

136. A number of the metrics against which the claimant was assessed were groupwide expectations. Whilst the claimant's evidence was not consistent before the tribunal, he did at times accept that the objectives set in the PIP were reasonable. In respect of the May PIP, he agreed that there had been an underachievement and that he had signed the May review of the PIP to confirm that the objectives were attainable. He accepted partial responsibility

137. The respondent did not include Dacia vehicles within the targets set – at times an easier vehicle to sell on the basis of price. The respondent's position was clearly that the sale of Dacias was not to be viewed as an easy solution when faced with a customer on a tighter budget. That is when the respondent expected a more imaginative approach to the structuring of a deal to make a more expensive vehicle affordable. The tribunal cannot characterise that approach as unreasonable. The claimant was assessed separately on the

basis of new and used car sales in contrast to sales executives who had a combined target. Again, the tribunal has no basis for impugning the targets set by the respondent. The claimant would have been assisted if the 2 most experienced sales executives had not recently left the dealership, but again the tribunal cannot still deem the targets as unreasonably set. The facts indicate that the targets were at times missed by a significant margin. The respondent did not ignore the claimant's protestations regarding the failings of some of his sales executives – the claimant was given advice as to how to enhance their performance and compliance with company protocols.

138. The period of the first PIP was a short one, before the invitation to the first disciplinary hearing, but not of such length that the claimant would be unable to demonstrate an improvement. He was not straightforwardly being expected to turn around performance from one month to the next, but rather show that he could attain targets specifically set for each month in question with regard to inevitable differences in what could be achieved in car sales depending on the time of year, not least in respect of new registration plates. There was a short gap between some specific advice given on how to improve on 8 May and the invitation to a hearing, but that does not undermine the respondent's assessment that the claimant had already failed to show an improvement, which the respondent reasonably regarded as sufficient to avoid an escalation of the process. Whilst the claimant might reasonably have been given a longer period to demonstrate an improvement, the pace at which the respondent chose to move cannot be characterised as a breach of trust and confidence given the sales performance of the dealership and the assistance which had been provided to the claimant. Again, the test is not whether the respondent did all that it reasonably could to support an improvement in performance. If the metrics against which the claimant was assessed had materially improved, the tribunal has no basis for concluding that the respondent would have continued to follow a process leading to an inevitable end to the claimant's employment.

139. The claimant was unaware in a discussion in May of how the dealership was currently performing – a surprising admission which was likely to and did cause the respondent further concern. The claimant agreed in cross-examination that he had tried to deflect criticism, whilst still understanding that he was held ultimately responsible for the dealership's performance.

140. Criticism is made of Mr Brown's outcome letter of the first disciplinary, which, under the heading of mitigating factors, does list issues of further concern and criticism of the claimant. Those matters had arisen, however, in discussion with the claimant. The process involved a consideration of the claimant's overall performance and what needed or could be done to improve it. The situation was not analogous to an employee accused of misconduct and ambushed by or having been found to have acted inappropriately in respect of new allegations.

141. Although no formal action was taken further forward in June, July and August in recognition of the claimant's personal issues, the claimant was still attending work during that period and in fact showed an improvement in some areas. Nevertheless, his performance was still behind target during a period when he did attend work as normal. Against that background and the respondent's genuine and justified assessment that there had not been an improvement in the dealership's performance, the claimant was invited to a

further formal disciplinary meeting. Whilst the claimant might have articulated an understanding of why the respondent was taking that step during his cross-examination, this was certainly not a welcome move and might have constituted an act sufficient to represent a last straw allowing the claimant to revive reliance on previous acts in stages of the performance management process. However, within that invitation itself and then separately and when viewed together with the earlier actions of the respondent, there was no breach of the obligation of trust and confidence.

142. The claimant believes there to have been a lack of support from Mr Brown and Mr Anderson. This was against a background where the claimant accepted that Mr Brown had previously been supportive and he had enjoyed a good working relationship with him.

143. Whilst it might be said that the respondent could have done more to support the claimant during the performance process, support was given throughout with practical suggestions made. When the initial PIP was put in place, the claimant was told that he should discuss sales opportunities with his managers each day. The claimant has not suggested that this assistance was not available. Emails were sent after reviews with pointers to seek to help the claimant, including suggestions about how he might be able to get sales executives to improve their own performance. He was given advice about tools available to construct and enhance a deal and techniques involved in "second facing" customers. The first PIP disciplinary meeting was very full in its nature lasting around 2 hours. A meeting was held on 8 July 2022, at Mr Harding's suggestion, as an attempt at reconciliation between the claimant and Mr Brown. There were certainly constructive elements in that discussion aimed at assisting the claimant improve his performance. The claimant recognised that he needed to change.

144. Mr Harding's appeal might reasonably have involved his interviewing Mr Anderson and Mr Brown. He might reasonably be criticised for not looking into the claimant's assertions about the culture in the dealership. He did, however, genuinely give consideration to the appropriateness of the claimant's first written warning and in a manner which, even if flawed, cannot constitute a breach of trust and confidence or an approach contributing to that. The claimant did not view the appeal outcome and how the appeal had been conducted in that way at the time.

145. Mr Harding considered a reference to the electronic "showroom" system as being a minor matter in terms of aiding potential improvement – he did not, however, conclude that all the levels of support given to the claimant ought to be similarly categorised.

146. The claimant was an experienced manager in what is a traditionally demanding and quite unforgiving industry in terms of attitude towards lapses in performance. In this industry often you are only regarded as being as good as your last month and the culture tends not to allow anyone to rest of their laurels. Challenging comments might be expected, the tribunal noting the bluntness and annoyance expressed by Mr Brown in his email of 18 September 2022 – a communication which the claimant placed no reliance on as contributing to his decision to resign, but also an example of a genuine belief in the respondent that the claimant was reluctant to accept personal responsibility. Again, any deficiency in support given to the claimant cannot in all the circumstances

amount to conduct intended or, when viewed objectively, likely to destroy or seriously damage trust and confidence.

147. The tribunal has already dealt with the claimant's assertion that the respondent showing no consistency in how it dealt with the performance of individuals.

148. The claimant says that the general manager and sales manager had lied when the claimant raised a grievance – the sales manager denied knowledge of the claimant's health issues. The claimant's assertions are not borne out by the evidence. The respondent did not have the level of knowledge about the claimant's health issues as he now suggests. The claimant's issue arose only after his resignation and on him becoming aware of what Mr Brown and Mr Anderson said to Mr Dreghorn during his investigations into the claimant's grievance, raised by the claimant following receipt of the invitation to the second disciplinary hearing.

149. The claimant complains of being ignored by the general manager, but no specifics are provided of this allegation. Mr Brown was fully involved in giving the claimant his first level disciplinary warning and was willing to take on board Mr Harding's suggestion that he sit down with the claimant to try to resolve the differences between them.

150. The invitation of 13 September 2022 to a disciplinary meeting was the most recent act which caused the claimant's resignation. The tribunal does not consider that he affirmed the contract since that act. His resignation followed shortly afterwards and it cannot be inferred that the claimant had determined to let bygones be bygones in the meantime. The invitation was not, however, by itself a repudiatory breach of contract. Nor was it part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a breach of trust and confidence. No treatment relied on singularly or when taken cumulatively amounted to a breach of trust and confidence entitling the claimant to resign with immediate effect. The claimant was not dismissed and his complaint of unfair dismissal must therefore fail.

Employment Judge Maidment

Date 9 October 2023