# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Bedford-Smith

**Respondent:** SER Staffing Limited

**Heard at:** Manchester **On:** 25-27 September 2023 and 19 October 2023 (in chambers)

**Before:** Employment Judge Slater

**Representation**
Claimant: In person
Respondent: Ms A Jervis, senior litigation consultant

# RESERVED JUDGMENT

The complaint of constructive unfair dismissal is well founded.

# REASONS

## Claims and issues

1. The claimant claims constructive unfair dismissal. He clarified, at the start of the hearing, that he was not making a separate complaint of breach of contract. The list of complaints and issues was amended by the judge agreed with the parties. This is set out in the Annex to this judgment.

## Evidence

2. I heard evidence from the claimant and, for the respondent, from Gary Bentley, Managing Director, and Leah Wilkinson, Accounts and Administration Executive, who acted as notetaker in a meeting on 4 May 2021. There were written witness statements for all the witnesses. There was an electronic bundle of documents of 409 pages. Page references in these reasons are to the typed page numbers on the pages of the bundle rather than to the electronic numbers which, unfortunately, did not correspond to the typed numbers.

3. The hearing was conducted by video conference.

**Facts**

4. The respondent is a recruitment company located Blackburn. It specialises in the following industries: build environment, construction, events, fire and security, lighting, manufacturing and waste. Gary Bentley is the managing director.

5. The claimant began working for the respondent in January 2013. He worked initially as a recruitment consultant and was promoted to team manager in around 2015. Before lockdowns due to the Covid 19 pandemic, the claimant managed a team of three recruitment consultants. He was on a salary of £30,000 per annum with the potential for commission on his own work (paid monthly in arrears) and commission on his team's work (paid annually). The claimant had only received commission on his team's work once, in June 2019 (409), an amount of £2748.12. He was confident that he would receive further commission on his team's work, having a top biller in his team and another one he considered destined to be a top biller. After his promotion to team manager, the claimant's duties included management responsibilities as well as recruitment work.

6. Prior to May 2021, the claimant had a clean disciplinary record.

7. The Covid 19 pandemic had a heavy impact on the respondent's business. In March 2020, before the impact of the pandemic, the respondent had 31 members of staff including four managers. By the end of August 2020, there were 16 members of staff remaining. I accept the respondent's evidence that, in 2020 and 2021, due to the impact of the Covid-19 pandemic, no team commission was paid to anyone.

8. Before the pandemic, there were four team managers: the claimant, John Paul Hollinrake, Joe Reed and Daniel Walton. Daniel Walton had been in the claimant's team before he got promoted to team manager. Joe Reed later became an associate director.

9. Staff were furloughed, using the government scheme, in March 2020. On 29 May 2020 (63), Gary Bentley messaged staff, suggesting they come in in groups to talk about a plan to move out of furlough and back into work. He sent a further message on 3 June 2020 (64), saying that, after speaking to further businesses, he felt it was a little bit too soon and it was likely they would be looking at an end of June return for some and a staggered return for others.

10. Joe Reed and Daniel Walton returned to work in June 2020. The claimant and John Paul Hollinrake remained on furlough. Both the claimant and Mr Hollinrake's partners were key workers in the NHS and both had young children. Joe Reed and Daniel Walton did not have partners who were key workers and did not have young children. The number of recruitment consultants to manage had reduced. Gary Bentley agreed in evidence that, in September 2020, all three members of the claimant's pre-Covid team were still employed by the respondent. There was a dispute as to whether all three members of the team had returned to work by September 2020, but it is agreed that those members of his team who had returned to work were being managed by Daniel Walton.

11. The claimant returned to work in September 2020. When he returned, he did not have any staff to manage. He did not make any complaint about this initially.

12. On 28 September 2020, Gary Bentley told the claimant in a meeting that had not been pre-arranged that, due to a reduction in the workforce, the claimant and the three other team managers were at risk of redundancy. I find, based on the claimant's account in his email of 5 October 2020 (73) and consistency with later events, that Gary Bentley told the claimant that, because Joe Reed and Dan Walton had returned from furlough in June and had now re-established their positions and adapted to the current climate, there was a good chance that the claimant or John Paul Hollinrake would be considered for redundancy.

13. Gary Bentley wrote to the four managers on 29 September 2020 (61), formally informing them that they were entering a period of consultation in regard to redundancies within the management team. He referred to the reason being that they had gone from 26 direct recruitment staff members in January to 16, including the four team managers. The email said that the period of consultation would last from "today 28th October to Thursday 1st October or sooner depending on what happens during the consultation period." I find that there was obviously a mistake in the dates of the proposed consultation period. The reference to "today 28th October" was clearly wrong; it must have been to 28 or 29 September 2020 (depending whether the letter was drafted on 28 September, although the email was not sent until 29 September). I find that the reference was intended to be to 28 or 29 September to 1 October 2020. I consider that the end date was correctly stated. 1 October was a Thursday in 2020. This was the day Gary Bentley planned to meet with at least some of the managers. Gary Bentley wrote that he intended to have individual meetings with the managers during this consultation period to discuss the reasoning and look at the options open. He wrote that the selection process was likely to be based around standard of work, performance, attendance, recent operational changes directly related to Covid and its effect on the business, and disciplinary record. He wrote that it would be his focus during the consultation to look at steps to avoid redundancy. He wrote that he would be asking if they wanted to consider voluntary redundancy but said that if they did volunteer, it would not automatically mean they would be selected for redundancy. He set out the statutory redundancy pay and notice pay that would be paid if they were made redundant.

14. Gary Bentley was thinking at this time that he might have to make up to two of the team managers redundant.

15. On 1 October, Gary Bentley had individual meetings with John Paul Hollinrake and then the claimant.

16. No notes were taken of the meetings with the claimant. The nearest to a contemporary account of the meeting is the claimant's description of the meeting in his letter of 5 October 2020. The claimant further described that meeting in an email of 20 October 2020 (76). I find that Gary Bentley told the claimant in the meeting that Joe Reed and Dan Walton's current positions of managing all remaining consultants between the two of them was currently working well and that Gary Bentley was not prepared to alter this situation. The claimant questioned Gary Bentley as to why those managers had returned from furlough several months

earlier than the claimant and Gary Bentley told him they were "available". I find, based on the account in the letters, that Gary Bentley informed the claimant that it would make Gary Bentley's life easier if the claimant returned to his original role as a consultant. Gary Bentley then told him that the only alternative was redundancy. This is consistent with what John Paul Hollinrake wrote in his email of 5 October about being offered an alternative non-managerial role. I find that Gary Bentley did not, in the meeting, discuss anything concerning the claimant's performance within the company or any of the other criteria set out in Gary Bentley's letter of 29 September. The claimant did not say that he would be interested in voluntary redundancy on the statutory terms set out in Gary Bentley's letter. He suggested that there could be a "managed exit" for him. He explained to Gary Bentley that this meant him leaving with a higher payment than statutory redundancy. I find that Gary Bentley said he would think about what he could offer the claimant.

17. Gary Bentley had not arranged meetings with the other two team managers that day. He said in evidence that this was because they were working in the office and could be called in at any time. However, the claimant was also working in the office and he was just called into a meeting on the morning of 1 October without the time and date having been pre-arranged. Joe Reed and Dan Walton were not called into meetings on 1 October. There is some dispute as to whether John Paul Hollinrake had returned to work in the office at this time, but it is not necessary for me to make a finding of fact on this matter. I find that, whether by pre-arrangement or otherwise, there was a meeting between Gary Bentley and John Paul Hollinrake on 1 October 2020. John Paul Hollinrake said he would be interested in voluntary redundancy, if he could remain on furlough to the end of December. He had hopes of starting another job in January 2021. There are no notes of the meeting with John Paul Hollinrake, but this account is consistent with what Mr Hollinrake wrote on 5 October 2020 to colleagues (69).

18. Gary Bentley decided to take advice on the situation from Peninsula, the respondent's HR advisers, after what Mr Hollinrake and the claimant had said, before meeting with the other managers. Gary Bentley said in evidence that, on 2 or 3 October, Mr Hollinrake confirmed that he would like to take voluntary redundancy. This appears consistent with an email Mr Hollinrake sent on 5 October.

19. On 5 October 2020 at 10.01, John Paul Hollinrake emailed other staff (69), apparently to quash rumours going round about the situation. He wrote that Gary Bentley had to make some positions redundant, they did not have as many consultants as they had previously had and, therefore, there were no managerial roles within the business for him. He wrote that Gary had offered him another role but it was not what he wanted to do so he did not accept it. He wrote that, if things picked up in January, he might stay, but, if not, he would be taking redundancy.

20. I accept Gary Bentley's evidence that, at some time after 1 October and before 27 October, he had phone calls with the other two managers in which they told him they did not want to take voluntary redundancy.

21. On 5 October 2020, the claimant wrote to Gary Bentley (73) to express his dissatisfaction with the process concerning his proposed redundancy. He set out his account of the meeting on 1 October, explaining why he considered it to be

unfair, after setting out information from published redundancy guidelines. He concluded by saying that, unless the situation was rectified and a proper redundancy procedure put in place within seven days from the date of the email, he would not hesitate to proceed to ACAS and then on to an employment tribunal to claim constructive dismissal on the grounds of unfair redundancy procedures. He wrote that he would not accept invitations to any further official redundancy procedure meetings without an independent HR representative present.

22. Gary Bentley wrote to the claimant on 6 October 2020, writing that the matter was handed over to their HR partner at Peninsula the previous Thursday, once the initial notice meeting was held. The claimant subsequently chased for a further response.

23. On 20 October 2020, Gary Bentley replied to the claimant, apologising for the delay. He wrote that the role of team manager was at risk, therefore the claimant's colleagues were also at risk due to reduction in work. He wrote: "I apologise for any miscommunication and at no point did I say you should return to a full-time recruitment consultant, there will be an offer of a consultant role for any manager who is made redundant as an alternative, as the duties of a consultant are a significant part in a team managers position here at SER Ltd." He wrote that they would be continuing with the redundancy process and the claimant would shortly be invited to a formal consultation meeting where the selection criteria for the team manager role would be discussed. He wrote that they were having to reduce from 4 to 2 team managers, therefore a selection criteria was the fairest way.

24. If there were any letters to the other managers the respondent says were at risk of redundancy at this time about a continuing redundancy process, I was not shown these.

25. The claimant responded to Gary Bentley's letter later on 20 October (76), taking issue with Gary Bentley's letter. He set out his account of meetings on 28 and 29 September and 1 October. He wrote that, it was very clear by the end of the meeting on 1 October, that his choice was to either take a consultant's position or go. He wrote that Gary Bentley had advised him that he would be coming back to him with a redundancy proposal once he had taken some time to think about what he could offer. The claimant asked Gary Bentley to explain himself and wrote of the distress that the situation was causing him and his family.

26. Gary Bentley responded to the claimant's letter that same evening (75). He wrote that the meeting on 1 October was very quickly stopped as the claimant had quickly made the statement of wanting to be "managed out of the business", explaining that this meant payment of a significant sum. Gary Bentley said he had replied that the meeting would stop and he would take advice. He wrote: "at no point then, to now has any decision been made about redundancy, and communication with our HR support company has been pretty continuous since then via telephone and email, so I am hopefully [sic] that the situation can move on quickly. As you know its important to fully explore every option open before making the difficult choice of redundancies, and as stated I have been out of the office significantly over the past three weeks, coupled with the need to assist our appointed solicitor the week prior and the three days at a court hearing for an extremely important matter." He wrote that all that had happened was to inform

every manager of the at risk status and to meet to discuss options in regards to voluntary redundancy and other positions within the business.

27. On 27 October 2020, Gary Bentley wrote to the claimant (83), informing him that his position was no longer at risk of redundancy. He gave three reasons for this: (1) they had received a request for voluntary redundancy which would produce the necessary reduction in the workforce; (2) they had seen an increase in recruitment activity and workload; (3) the government had announced further business support measures on 23 October which would significantly support their business through the difficult times. He wrote that the claimant had asked the company to consider a managed exit but, after giving due consideration to his suggestion, the company believed the claimant's role should no longer be placed at risk.

28. I find, based on Gary Bentley's evidence, which I have no reason to doubt on this point, that Mr Hollinrake was made redundant with a statutory redundancy payment, at around the end of December 2020.

29. Gary Bentley wrote to all staff on 3 November 2020 (86) saying that, as part of their HR support package with Peninsula, they were currently updating and refreshing all of their employment documentation, updating this and bringing it in line with current HR guidance. He wrote that, over the next week or so, staff would be issued with various documents, including updated terms of employment. The claimant was issued with a new job description as a Team Manager on 3 November 2020. This included managerial duties and responsibilities as a recruiter. This reflected his existing role as carried out pre-pandemic.

30. On 6 November 2020, the claimant wrote to Gary Bentley (87), noting that Gary Bentley had not yet come back to him regarding re-establishing his managerial role, despite advising the claimant on 27 October that his position was no longer at risk. He wrote that the issue he had was that nobody from his original team had left the business throughout the Covid crisis but they were now being managed by two other managers. He wrote that, if his position was no longer at risk, there must be capacity to continue his original role as a billing manager. He wrote: "I'm continuing to do the professional thing of coming in and getting on with recruiting every day, but to say I am now feeling excluded and outcast is somewhat of an understatement." He wrote that he had booked most of his remaining annual leave to be taken in the weeks building up to Christmas. He wrote that, despite trying to remain upbeat and professional, it felt awkward even being in the office as other consultants were beginning to ask questions. I accept that this correctly reflected the claimant's feelings about his position at the time. Although a manager in name, he was, in practice, working only as a recruitment consultant because he had no team to manage.

31. The claimant and Gary Bentley had a meeting on 10 November 2020. The meeting was recorded by Gary Bentley on his laptop without the claimant's knowledge or permission. The claimant has, subsequently, been provided with the audio recording and has prepared a transcript of the majority of the meeting (88). The claimant told me that he had transcribed what he considered to be the important part. The transcript does not include the ending of the meeting but Gary Bentley agreed with the claimant's oral evidence as to how this ended: amicably, with the claimant agreeing to go back on furlough. This is the only meeting which

was recorded, since the claimant objected to further meetings being recorded. It is the only meeting, therefore, where I can be sure what was said, the parties being in dispute as to what was said in other, unrecorded, meetings.

32. The claimant and Gary Bentley discussed, on 10 November, the claimant's concern about having lost his original team. Gary Bentley said that re-allocating people did not make business sense at that time. He said that he had got people back in, on nearly full time hours, fairly settled and working hard, and he did not think that moving them at this time, potentially unsettling them, was right. He also said that, if he did split the teams into smaller teams, then, in theory, he had two other managers with less to do, so he had three people in all with less to do, so that did not make business sense.

33. Gary Bentley said that he had brought people back in who would be least disrupted: people who did not have partners who were key workers, who hadn't got family with young children, because we were in lockdown and getting support for children was impossible. He said he went for Dan and Joe because they did not have partners who are key workers and don't have children and could come back on a smaller, flexible sort of working week without disrupting their lives. Gary Bentley spoke of consultants they had lost and that they were not in a position to take anyone on. Gary Bentley said that he had asked the claimant to come back and work as a consultant which is part of the job but he did not have the man management bit to give to the claimant at that time. He said it was just circumstances that had happened beyond his control. He said he thought reallocating people and moving them around in the current market did not make any sense. He said his plan was to review it in January.

34. The claimant asked, when they take people back on, would he get his old team back or would he be starting from scratch. Gary Bentley said he did not know the answer to that. The claimant said effectively his old job had gone. Gary Bentley disagreed. He said that part of that job, managing two or three people was not there at the moment, but other parts were still there. The claimant questioned this. Gary Bentley said there were two parts to the job: one was billing consultant and the other was team manager. The billing consultant role was still there. He said that part of the job was not there at the moment because of outside factors. The claimant asserted that it was not, therefore, a management role. Gary Bentley disagreed.

35. The claimant said they could go down the tribunal route if Gary Bentley wanted but the claimant would rather not and he would rather the respondent be reasonable about things. Gary Bentley questioned what he meant. The claimant said there were probably a number of things such as not following procedure in the redundancy process they went through. He said he was not given the chance to take voluntary redundancy but John Paul Hollinrake was. Gary Bentley said that the claimant was offered voluntary redundancy. The claimant disagreed. Gary Bentley said that voluntary redundancy was not on the table any more.

36. They disagreed again as to whether the claimant had his pre-Covid job. Gary Bentley said that his view was that part of the job was being a billing consultant and the claimant should carry on doing that until they were in a position where he could take on the man management side of it. He thought it would be unreasonable to say give me back my team, all my people, because they are not commodities.

They have views and opinions and they had a duty as an employer for Welfare. The claimant questioned whether Gary Bentley had asked the members of the team. Gary Bentley accepted that he had not asked them how they would feel about going back to work for the claimant. The claimant said: "I know it's difficult times but when I see somebody managing a team who I used to manage, and who I had a large part in helping develop as a manager now taking over a role that I used to do, that's hard to swallow. You seem to struggle to see that. I got nothing against Dan. Not personally. It's more about where we are now and what I'm being asked to do on a daily basis and I'm surprised you can't see that or at least empathise with it. You don't even acknowledge it. It's just "Well that's how it is so suck it up.""

37. Gary Bentley said he had never looked at it that way; it was just a circumstance of events that had happened. He apologised if he had offended the claimant in any way. Gary Bentley reiterated that he did not think it was the right time to move people around. The claimant said people had been asking why he was sat down the other end of the office on his own and a couple of people had asked if he was leaving. Some had asked whether he was a manager any more.

38. The claimant said that Gary Bentley could not say someone was a team manager and then give them no one to manage. Gary Bentley said there was no one to manage. Gary Bentley suggested the claimant use the furlough scheme and come back when there were people to manage.

39. They ended the meeting on an amicable basis, the claimant agreeing to go back on furlough.

40. The claimant wrote to Gary Bentley on 11 November (98) proposing that he moved back onto the government furlough scheme from week beginning 16 November then take annual leave from beginning 30 November to 23 December, with the aim of reviewing the situation in January.

41. Whilst on furlough, the claimant received 80% of his normal pay. I find this was by agreement with the claimant, evidenced by the claimant's reference to moving back onto the government furlough scheme, under which, at the time, the government provided 80% of an employee's normal pay to the employer.

42. Gary Bentley wrote to the claimant on 31 December 2020 (99). He wrote that, with the announcement the previous day of further lockdown restrictions, the planned return of everyone back to 9 to 5 was on hold and it was a case of let's see what January looks like and then review at the end of the month. He wrote that, with that in mind, it was probably best if the claimant remained on furlough, certainly for the early part of January unless the claimant wished to return with a focus purely on the recruitment consultant part of his role as the man management part was still not there due to staff numbers and the minimal workload that each consultant currently had.

43. Gary Bentley sent the claimant an update on 14 February 2021 (101). He wrote that they were waiting on the government's roadmap out of lockdown due on 22 February. Until then, the uncertainty linked with the schools being closed was making it extremely difficult to plan anything. He wrote that, due to these factors,

the situation was the same as the previous month. He was happy for the claimant to stay furloughed; however, the recruitment consultant duties which were part of the claimant's role needed picking up at some point. He wrote "with that in mind let's wait for the few days until 22nd and once we have the government's ideas on exiting lockdown and removing furlough support then we can look at getting you back into the office, initially on a reduced hours basis so that you can get cracking on the recruitment side of your position while using the flexible furlough, and seeing how we can build the workforce backup numbers wise."

44. On 26 February, Gary Bentley sent the claimant an email (103), following a voicemail, about returning to work and moving off furlough. He wrote that they were looking at Monday 8 March. Things had really kicked off since the roadmap was released by the government the previous week. He wrote that, although there were no new recruits to the team, they were advertising and interviewing and there was a good chance that there were a lot of jobs to work.

45. On 1 March 2021, the claimant submitted a formal grievance (107). He wrote that this was a last resort, having failed to reach a successful resolution after informal attempts to highlight the issues surrounding his current employment. He wrote that the humiliation of being asked to continue working under people in the company he had previously trained and managed was the last straw in this whole unsavoury saga. He summarised events from 29 September 2020 onwards. The claimant wrote that he and Gary Bentley had mutually agreed that it would be best for him to go back on full furlough from 16 November until at least the turn of the year. The plan was for the respondent to recruit enough new consultants in the meantime that would ensure the claimant could return to the business in a managerial capacity. However, despite Gary Bentley assuring him that he had done everything he could to acquire new personnel, the business had continued to go backwards and the claimant saw no likelihood of returning to any form of managerial duties under his proposed arrangements any time soon. He wrote that he was now being asked to return to the office on 8 March purely to resume the duties of a recruitment consultant whilst his two remaining managerial colleagues continued with business as normal to manage what was left of the company. He set out various questions he wanted answers to. He wrote that, if it was confirmed he was required to attend the office on 8 March solely to resume recruitment duties, it would be under protest.

46. The respondent outsourced the investigation of the grievance to Peninsula. A representative of Peninsula, Kerry Tipple, met with the claimant on 8 March 2021. The claimant had an opportunity to make his points and refer the consultant to relevant material. During the interview, the claimant said that going back to work in any capacity for Gary Bentley had become untenable, the relationship had gone. He said that today was more about finding a suitable exit out of this nightmare. He spoke of the level of humiliation and disrespect he had been shown by Gary Bentley as being unacceptable. Kerry Tipple also spoke with Gary Bentley.

47. Kerry Tipple produced a report dated 15 March 2021 (119). This made recommendations but made it clear that the final decision was that of the respondent. The recommendations were to uphold the grievance in respect of a matter relating to communications, but to reject the rest of the grievances. In relation to the parts of the grievance about the claimant feeling he had been demoted and not being given any managerial duties, the recommendation was to

reject the grievance, writing that the claimant's title and salary had been maintained and that he had been given tasks to carry out that were within his job description and were generating enough work for him whilst a new team was recruited. The consultant did not uphold this part of the grievance "as the employer is working to rectify RBS's current concerns" (128). In relation to the parts of the claimant's grievance where he complained of feeling disrespect and humiliation, the consultant dismissed the grievance, writing that the consultant could not comment on or investigate feelings.

48. Gary Bentley followed the report's recommendations and sent an outcome letter to the claimant on 19 March 2021 (148). The respondent upheld a complaint that there was little to no communication between staff members about his position, which led to speculation and rumours, but did not uphold the other complaints. The letter set out proposals to improve communication.

49. The claimant appealed against the grievance outcome and the hearing of the grievance appeal was outsourced again to Peninsula. A different Peninsula consultant, Paul Baker, conducted the appeal hearing and produced a report on 8 April 2021 (160). Mr Baker met with the claimant and spoke to Gary Bentley before producing his report. One of the grounds of appeal was about the claimant's job role having been changed. The report included noting that in practical terms the claimant's job had changed, until the respondent could recruit more staff, which was not currently feasible, as the claimant no longer directly managed others. Mr Baker noted that the claimant was only currently required to carry out the consultancy element of his role. Mr Baker wrote: "On that basis, PB finds that RBS's perception of becoming a consultant again is understandable and PB does accept this assertion." Mr Baker found that the changes were short term and the respondent's plan was to increase the claimant's role to its full expectations as staff were "onboarded". Mr Baker recommended that the grievance appeal be dismissed in its entirety.

50. Gary Bentley endorsed the recommendation and produced an outcome letter dated 12 April 2021 (177). The appeal was not upheld. The letter included findings that, although the claimant's current practical tasks were different to those he carried out prior to March 2020, this was not due to a change of his job role per se. The reason he was not currently managing staff was due to a low staffing level and not due to the employer having available staff but choosing not to assign them to the claimant. In a covering email (176), Gary Bentley wrote that the next stage was to look to get the claimant back in the office as he was the last staff member on furlough and it appeared that all market sectors they covered were continuing to pick up.

51. On 13 April 2021, Gary Bentley wrote to the claimant (179) informing him that, due to increased demands for their recruitment services, the claimant would be required to resume work on his normal working days and hours from 19 April 2021.

52. On 16 April 2021, the claimant wrote to Gary Bentley (181) enclosing a GP certificate signing him off work for the next two weeks with stress. He wrote that Gary Bentley had only ever indicated to him in the previous six months that he would be returning to a reduced role of responsibility and role which would take him backwards professionally. He wrote that he had concluded that he was being managed away from the business. He wrote that he had taken legal advice and

been instructed that there was a case for breach of contract and constructive dismissal and he intended to take this to arbitration. He said he did not accept the report from Peninsula. He wrote that, at that moment, it felt untenable for him to return to the respondent. He wrote that the only options he saw were (1) arbitration or (2) a planned exit.

53. Gary Bentley replied on 21 April 2021 (182). He wrote that furlough had ended, so the claimant would be paid statutory sick pay from Monday, 19 April. He assured the claimant that he was not being managed away from the business and Gary Bentley was keen to get him back in the office and back working. He wrote that they were aiming to grow the business back to full capacity and were continuing to advertise and interview potential new recruits. He wrote that, at the end of the fit note, they could discuss the claimant's return to work and the best way for getting him back to work at the respondent.

54. On 1 May 2021, Gary Bentley confirmed he would meet the claimant at the office at 9 a.m. on Monday 4 May.

55. The claimant and Gary Bentley met on 4 May 2021 at 9 a.m. Initially, they met alone and Gary Bentley intended to record the meeting on his laptop. The claimant objected to this and Leah Wilkinson was brought in to the meeting to take notes. The meeting was short. There are some minutes of the meeting (191). Leah Wilkinson took handwritten notes during the meeting and subsequently typed up a version of these notes. Unfortunately, it appears that the handwritten notes were not retained. The minutes were never agreed with the claimant and he disputes that he spoke in the way recorded. He accepts that he may have used the odd swearword, but not directed at Gary Bentley.

56. In the absence of the contemporaneous handwritten notes and in view of inconsistencies in the accounts given about the meeting in the interviews, Gary Bentley's witness statement provided to the Peninsula consultant, and Leah Wilkinson's witness statement and evidence to this Tribunal, I find that the typed notes are not a reliable account of all parts of the meeting.

57. Leah Wilkinson, in giving evidence to the Tribunal, understandably, given the passage of time, recalled little of the meeting. I do not consider any real weight can be placed on her recollection so long after the event. She could not recall how she had prepared her witness statement and what she had referred to. She did not think she had the typed notes of the meeting in front of her when she wrote her statement, given the differences between her statement and the typed notes. Her witness statement does not include an allegation that the claimant told Gary Bentley to "fuck off". The statement is more consistent with the notes of the meeting with Joe Reed held on 4 May 2021 than the typed notes of the meeting between the claimant and Gary Bentley.

58. All parties agree that the substantive part of the meeting started with Gary Bentley asking the claimant his intentions. The claimant was unhappy with this way of approaching the meeting. This finding is supported by the claimant's email following the meeting. The tone of the claimant's email following that meeting indicates that the claimant was very angry.

59. In the meeting, Gary Bentley said the claimant was being aggressive and difficult. The notes are supported in this respect by what the claimant said in the disciplinary hearing.

60. I find that the claimant did swear during the meeting. I consider it more likely than not that the claimant swore more than would be usual for him, given his anger and frustration. However, the respondent has not satisfied me that the claimant told Gary Bentley to "fuck off" as written in the typed notes. I do not consider that the instances of swearing recorded in the notes of the interview with Leah Wilkinson on 4 May indicate that the claimant was swearing **at** Gary Bentley, rather than using swear words in an emphatic way. I deal with the various interview notes which I consider support my findings in following paragraphs.

61. I accept that Gary Bentley perceived the claimant as aggressive. This is supported by Gary Bentley's email of 4 May (188). The respondent has not satisfied me, however, that Gary Bentley was genuinely in fear that the claimant would become physically aggressive. The witness evidence, notes of the meeting and statements taken after the meeting do not identify what the claimant is alleged to have done which could have led Gary Bentley to believe the claimant was likely to become physically aggressive. I consider it more likely that the aggression perceived by Gary Bentley was verbal aggression.

62. The meeting ended after a short time. I find, based on the claimant's and Gary Bentley's subsequent emails, that Gary Bentley asked the claimant to leave.

63. I find that swearing was not uncommon in this workplace. I accept the claimant's oral evidence, during cross examination, that swear words were used freely in the business. I do not have sufficient evidence, however, to find that it was common for Gary Bentley and others to swear **at** other employees, rather than using swearing in an emphatic or adjectival way, although I note that the claimant made allegations to this effect during the disciplinary investigation.

64. The claimant wrote to Gary Bentley by email on 4 May sent at 14.55 (189). He wrote that he had gone into the office, ready to push on with whatever was asked of him, only to find that Gary Bentley had no actual plan "but the temerity to then ask me what my intentions were." He wrote that Gary Bentley appeared oblivious to the fact that there were still issues to resolve. He wrote that Gary Bentley had a great opportunity to try and resolve their differences that morning but, "instead of asking the right questions, listening and attempting to understand what's gone wrong, your own conversational agenda didn't go according to plan so you threw your toys out of the pram, which after watching you do this sort of thing for 8 years has now become boring, and asked me to leave. Not great leadership in my view." The claimant set out a number of issues including:

64.1. That the respondent had conducted a redundancy programme without using any sort of credible or proper process then when questioned, Gary Bentley lied his way out of trouble.

64.2. That, to get out of the mess he had created, Gary Bentley came up with the idea of removing him from being at risk of redundancy and

informed the claimant that his job was no longer at risk but then failed to give him his managerial duties back.

64.3. That Gary Bentley informed him at a meeting in November that the claimant would not be returning to his managerial duties until after the company had recruited enough new consultants and informed him that it was highly unlikely that he would be getting any of his original team members back, including two he had trained to be consistent billers and one who had improved under his management to become one of the top billers in 2019.

64.4. That when his managerial duties were returned, he would be expected to start again from scratch, building up a team of "newbies", whilst someone else he used to train and manage [Dan] would inherit a bigger team of consistent billers, including consultants trained by the claimant and they would likely "benefit from bonuses off the back of consultants I'd had taken off me through no fault of my own."

64.5. That Gary Bentley was unable to justify that he had given the claimant his original pre-Covid role back, so suggested the claimant should go back on furlough until he could come back in a managerial capacity but, having failed to grow the business, contacted the claimant in February, insisting that he should come back into the business, for all intents and purposes, as a consultant.

65. This was the first mention, in writing, of the possible loss to the claimant of bonus based on work done by consultants he had managed.

66. The claimant concluded, writing that he still did not know what Gary Bentley's plans were for his return. He wrote "I've had some crappy jobs in my time, but never have I been treated with such contempt." He wrote that he did not think he had any choice but to consult with ACAS and he expected to be on full pay until either things moved forward with arbitration or the respondent came up with "some sort of credible solution out of this mess."

67. Gary Bentley replied by email on 4 May at 16.51 (188). He wrote that he did not believe the claimant's email to be a true and accurate reflection of the events that happened. He wrote that the claimant's grievance and appeal had been dealt with by an impartial third party and was dismissed in it entirety based on the information available. He wrote that it was important for them to build back a working relationship in order to move forward from the grievance and build a good working relationship and environment. He wrote that the claimant had been asked to leave that day due to the claimant's swearing and aggressive behaviour towards him in the meeting.

68. He wrote that the claimant was expected to return to work and he would arrange for Joe to discuss the claimant's return to work with him as Gary Bentley's attempt had been met with what he would call aggressive and intimidating behaviour. He wrote that Joe could discuss the plan for the claimant's training on the new systems and his role over the coming weeks, until the team started to grow and he would start to have a team back.

69. Although Gary Bentley referred in that letter to swearing and aggressive behaviour by the claimant in the meeting on 4 May, he did not, at that time, threaten disciplinary action.

70. On 5 May 2021, Gary Bentley wrote to the claimant with a return to work plan (194). This included reference to building a team back for the claimant.

71. Gary Bentley wrote to the claimant at 10.25 a.m. on 5 May 2021 (196), following a phone call, asking the claimant to attend a meeting with him and Joe to discuss a plan for the coming weeks. He wrote that he had asked Peninsula to investigate the previous day's incident, which they were going to start the next day, via Zoom meetings, with Gary Bentley, the claimant and Leah. In a further email sent at 12.20 p.m., he wrote that the claimant was required to attend work the next day and failure to do so would be considered as unauthorized absence and could result in disciplinary action.

72. By a separate letter sent on the same day (200), following a further telephone call, Gary Bentley wrote to the claimant requiring him to attend an investigation meeting on 6 May with a consultant from Peninsula "to discuss some concerns we have about your conduct". Contrary to what is written in the consultant's report, the letter did not state that it was to discuss "swearing and aggressive behaviour towards the Director in a meeting on 04/05/2021". Gary Bentley wrote that possible outcomes from the meeting were that they might decide it was necessary to pursue a formal disciplinary procedure with him or alternatively decide that there were no grounds for this. Gary Bentley wrote this this was deemed to be a reasonable management instruction. If the claimant failed to attend without notification or good reason, they would treat the non-attendance as a separate issue of misconduct.

73. In a further letter sent on 5 May (204), Gary Bentley refused a request from the claimant for details about what he was accused of. Gary Bentley wrote that, as the investigation meeting would be an informal investigation meeting, there was no requirement to outline the exact details.

74. In an email exchange, Gary Bentley agreed, on 6 May 2021, that the claimant could continue working from home until he heard otherwise (205).

75. The claimant attended an investigation meeting on 6 May 2021 with a consultant from Peninsula. The consultant had a copy of typed notes they understood to have been taken by Leah Wilkinson. It does not appear that the claimant had a copy of these notes at the time. The consultant asked the claimant why he felt it was relevant to swear and be quite aggressive towards Gary Bentley. The claimant said he did not remember swearing at Gary Bentley. He said he did not deny being frustrated. He said he did not remember using bad language. He asserted that there was a culture of swearing at the respondent. The consultant did not put a specific allegation to the claimant that he told Gary Bentley to "fuck off", although she put some other allegations of swearing to the claimant.

76. Gary Bentley had previously written to the claimant that the Peninsula consultant would interview Gary Bentley and Leah Wilkinson. Although the report states at paragraph 14 that the consultant spoke with Gary Bentley and Leah Wilkinson, the consultant does not appear to have carried out investigatory interviews with them. The consultant relied on notes from interviews they were told

had been carried out by Joe Reed. The consultant writes at paragraph 40 that she spoke to Leah Wilkinson but this appears to have been a very limited conversation, not asking Leah Wilkinson specifically what she heard, and there are no notes of this conversation other than what is recorded in paragraph 40. If the consultant did speak to Gary Bentley, there is no record in the report as to what was said. There is no record of the consultant questioning Leah Wilkinson and Gary Bentley about differences between the typed notes of the meeting and the accounts given to Joe Reed.

77. According to the investigation report, Gary Bentley was interviewed by Joe Reed at 1 p.m. on 4 May. Gary Bentley alleged that the claimant was aggressive and swearing directly at him. He said that when Gary Bentley ended the meeting and said he would come back to the claimant, the claimant replied with "you fucking best do" or words to that effect. Gary Bentley was asked if he felt threatened by the claimant. Gary Bentley said he felt he could [come] across the table at him at any point. Gary Bentley did not say in this interview that the claimant told him to "fuck off".

78. The investigation report records that Gary Bentley submitted a witness statement after that interview. This was in brief terms but included that the claimant swore directly at him and that Gary Bentley thought the claimant's aggression could boil over and become physical. The witness statement (193) does not state that the claimant told Gary Bentley to "fuck off". It alleges that the claimant swore directly at him. He wrote that the claimant said "have you not read my fucking emails" or words to that effect.

79. According to the investigation report, Leah Wilkinson was interviewed by Joe Reed on 4 May at 1.30 p.m. She was asked to outline what had happened. She said that he said fucking this and you fucking know what I want and at the end you best fucking call me. The last part does not correspond with the typed notes of the meeting. She said she thought the claimant was being aggressive and that the language was aimed at Gary. She did not say, in this interview, that the claimant told Gary Bentley to "fuck off".

80. The investigation report was produced on 18 May 2021 (211). At paragraph 83, this recommended that there was a case to answer at a disciplinary hearing for the following allegation: "that on Tuesday 4 May at 9.00 am, you were invited to a return to work meeting with your Director, Gary Bentley, the behaviour that you displayed directly to Gary Bentley was confrontational, aggressive and that you were swearing at him."

81. Under the heading "Consultant Recommendations", the allegations the consultant recommended the claimant was invited to attend a disciplinary hearing to answer expanded to three points. There is no explanation as to why the one allegation at paragraph 83 expanded to the three bullet points at paragraph 85. The third point is about there being an irrevocable breakdown of the working relationship between the claimant and Gary Bentley rather than being an allegation about the conduct of the claimant. The report recommended that the claimant be warned that these allegations, if upheld, may be considered as serious misconduct.

82. By a letter dated 21 May 2021 (246), the claimant was required to attend a disciplinary hearing on 26 May with Joe Reed, associate director. The allegations the claimant was to meet were set out as follows:

> "It is alleged that you have taken part in activities that cause the Organisation to lose faith in your integrity namely, on Tuesday 4 May at 9 a.m. you were invited to a return to work meeting with your director, GB, the behaviour that you displayed directly to GP was confrontational, aggressive and you were swearing at him.
>
> "It is further alleged that you have knowingly and deliberately been obstructive to your director when being asked about how you are going to move forward in your job role on your return to work.
>
> "It is alleged that there is an irrevocable breakdown of the working relationship between yourself and GB which is unresolvable by other means. Further particulars being that your relationship with GB has deteriorated to a level meaning you can no longer work together for the benefit and interests of the company due to your aggressive conduct and behaviour."

83. These allegations were based on the recommendations in the consultant's report except that words were added to the third allegation i.e. "due to your aggressive conduct and behaviour". In terms of an allegation about the claimant's conduct, this would seem to be the same in effect as the first allegation.

84. Gary Bentley wrote that, if the allegations were substantiated, they would regard them as serious misconduct. He wrote that the claimant could be given a warning or final written warning, if deemed appropriate in accordance with their disciplinary procedure.

85. Various documents were included, including minutes of the meeting of 4 May 2021 and Peninsula's report.

86. The claimant attended the disciplinary hearing on 26 May with Joe Reed. The hearing was recorded and a transcript has been produced (250). The claimant said he did not really remember swearing. He said he probably swore at least once but not in an aggressive manner, more out of frustration. He said to Joe that Joe would know he did not talk in the way recorded in the minutes, swearing all the time, using the f word. Joe Reed asked what he said when he swore and the claimant said he could not remember. The claimant pointed out the inconsistency between the notes and what Leah Wilkinson and Gary Bentley said in their interviews, suggesting this brought the rest of the notes into serious doubt. The claimant denied being aggressive, saying he did not know what basis Gary Bentley had to believe that the claimant would ever get physical. In answer to a specific question about this from Joe Reed, the claimant denied telling Gary Bentley to "fuck off". The claimant made accusations about occasions when Gary Bentley had shouted and sworn at the claimant in the office and thrown car keys across the office at the claimant. The claimant said he had text messages from Gary Bentley apologizing for his conduct towards him "yet he's got the nerve to bring me into a formal disciplinary for a few things that he didn't like the sound of."

87. Joe Reed asked the claimant what he wanted. The claimant said that he had told Gary Bentley for months that an amicable exit from the business was the only outcome or it was arbitration. The claimant said that the only way forward was for him and Gary Bentley to sort out their differences. He said he had had his managerial duties taken away from him 10 months ago and Gary Bentley still didn't know what his job was going to look like when he did come back. Gary Bentley knew he was not coming back in and recruiting but none of this had been considered in his grievance. The claimant said it was seemingly OK to take over half of someone's job away and ask them to carry on regardless. The only way forward was for him to leave the business in an amicable way, otherwise it was arbitration. The claimant warned Joe Reed in the hearing that he could take Tribunal proceedings.

88. The claimant clarified in evidence that, by arbitration, he meant entering into the early conciliation procedure with ACAS.

89. The claimant obtained a fit note on 17 May 2021 for 3 months absence due to symptoms of depression. He provided this to the respondent on 14 June, after he had been issued with a final written warning.

90. The claimant accepted that he did not go off work sick until 14 June 2021 and that he received SSP when on sick leave. He received normal pay prior to his sickness absence.

91. By letter dated 11 June 2021 (260), Joe Reed informed the claimant that all three allegations made against him were substantiated. In relation to the first allegation, Joe Reed wrote that "the behavior [sic] that you displayed directly to GB was confrontational, aggressive and you were swearing at him." He did not specify what it was he had concluded that the claimant had said to Gary Bentley and, in particular, whether or not he had found that the claimant had told Gary Bentley to "fuck off". In relation to the second allegation, he wrote: "You have knowingly and deliberately been obstructive to your Director when being asked about how you are going to move forward in your job role on your return to work." In relation to the third allegation, he concluded there was an irrevocable breakdown of the working relationship, writing that there was a deterioration in the relationship with Gary Bentley to a level meaning they could no longer work together for the benefit and interest of the Company "due to your aggressive conduct and behavior [sic]." He wrote: "At the hearing your explanation of the events were very different to those of both Gary Bentley and Leah Wilkinson. You seemed to remember everything very clearly apart from the bits where Gary Bentley and Leah have said both said you were aggressive and swearing. I consider your explanation to be unsatisfactory because of this."

92. Joe Reed wrote that he had decided a first and final written warning was the appropriate sanction. He wrote that improvements in the claimant's conduct were required by returning to work and beginning working with Joe Reed and Gary Bentley in rebuilding the working relationship, working to the very best of his ability in a polite, professional and non-confrontational manner. The warning was to have effect for 12 months.

93. On 14 June 2021, the claimant wrote to Joe Reed (258). He wrote that he was appealing on the simple grounds that he refuted all accusations; at no point did he swear at Gary or towards him. He enclosed his fit note. He described the process against him as "farcical". He wrote that Gary's letter of 21 May confirmed that their working relationship had become simply irrevocable and wrote that he was curious how he thought that fabricating a disciplinary hearing against him would have improved this situation. He wrote that either the relationship was irrevocable or it wasn't and they needed to make their minds up. He said he was contacting former employees to gather statements about Gary's behaviour and aggressive manner throughout his time at the company. He wrote that he did not accept any of the accusations, nor the results of the nonsense of a disciplinary hearing and would contest them in court.

94. On 24 June 2021, the claimant wrote to Joe Reed that he thought leaving his appeal until the end of his period of sickness would be best (270). He wrote that this was currently due to expire on 13 August.

95. On 6 August 2021, Gary Bentley wrote to the claimant at 10.57 a.m. to confirm his return to work day would be Monday 9 August (277).

96. In the evening of 6 August 2021, the claimant replied to Gary Bentley's email (276). He referred to the unfinished disciplinary procedure and wrote that Gary Bentley's "cavalier expectation of having me just waltz back into the office on Monday, ready to resume my diminished role as a recruiter, is merely a continuation of the delusion you have been suffering from in recent months." He wrote that he was left with no alternative than to "begin the arbitration process for breach of contract/constructive dismissal." He wrote that he would be tendering his resignation over the coming days.

97. Gary Bentley replied on 9 August 2021 (280). He asked whether this was really what the claimant wanted to do. He requested that, if the claimant wanted to raise a formal grievance, he do this by 13 August. He asked the claimant to let him know if he wanted to reconsider his decision to resign. He wrote that, if the claimant did decide to retract his resignation, the claimant would continue to be subject to their formal processes and it would still be their intention to address the outstanding disciplinary matters which existed prior to the claimant's resignation. The appeal against the disciplinary warning was the only outstanding disciplinary matter.

98. Gary Bentley wrote in his witness statement (paragraph 20) that, if the claimant had not resigned, he would potentially have been subject to disciplinary action to address the outstanding disciplinary matters which existed prior to his resignation and would potentially have been dismissed. This part of his statement is inaccurate, in that there were no outstanding disciplinary matters which could have led to the claimant's dismissal. In oral evidence, when asked about this, Gary Bentley said he was referring to the appeal against the warning and that the claimant could potentially have been dismissed as a result of the appeal. When asked whether the disciplinary procedure allowed for this, he replied "good question". Since the letter inviting the claimant to the disciplinary hearing warned the claimant that the outcome could be a warning or a final written warning (but not dismissal), I find that there was no outstanding disciplinary matter that could have led to the claimant's dismissal.

99. The claimant wrote again on 10 August (285). He wrote that he would be confirming his resignation as this was the only way he could take the respondent to an employment tribunal. He wrote:

> "Please do not pretend that you now want to resolve issues or satisfy my concerns when you have deliberately made it your business to go out of your way to do precisely the opposite for a period of almost one year. Why would I have any desire to put in another grievance? I tried that 5 months ago and you failed to take it seriously. You have paid a HR consultancy to carry out a series of pointless exercises which involved no actual investigation and led them to confirm only what you wanted them to confirm in accordance with your agenda.
>
> "The pinnacle of this was the nonsensical disciplinary hearing you fabricated in May which I do not accept."

100. He wrote that they would shortly receive a letter of resignation. He wrote that, if they wished to avoid a tribunal, he suggested that they come up with a solution, for which he would wait until 13 August.

101. On 17 August 2021 (288), the claimant sent a letter of resignation with immediate effect. He wrote:

> "Your actions over the past year, which have been well documented, have made it simply untenable to continue working for the company and I will now begin the arbitration process."

102. He wrote that Gary Bentley had treated him with "utter contempt" over the previous 12 months.

103. The claimant began early conciliation on 17 August 2021 and the early conciliation certificate was issued on 28 September 2021. The claimant presented his claim to the Tribunal on 28 September 2021.

**Submissions**

104. The respondent made written and oral submissions. The claimant made oral submissions, reading from a prepared script, a copy of which he sent to the Tribunal subsequently. I do not seek to summarise the parties' submissions.

105. I do record, however, that, after discussion and consideration of the EAT decision in **Welch v The Taxi Owners Association (Grangemouth) Ltd** [2012] UKEATS/0001/12, Ms Jervis agreed that the **Welch** case was not on all fours with the situation in this case. In the **Welch** case, the Tribunal found that the claimant was constructively dismissed, but the respondent had pleaded, and the Tribunal found, that there was a potentially fair reason for the constructive dismissal. The respondent had not pleaded, in this case, that, if the claimant was constructively dismissed, this was a fair dismissal. If I found that the claimant was constructively dismissed, that dismissal was unfair, since the respondent had not advanced a potentially fair reason for dismissal.

**Law**

106. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

107. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not waived the breach or affirmed the contract by their conduct.

108. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Limited** 1981 ICR 666, said that the tribunal must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

109. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" is not, by itself, a breach of contract: **Lewis v Motorworld Garages Limited** 1986 ICR 157 CA. The last straw does not have to constitute unreasonable or blameworthy conduct, but it must contribute, however slightly, to the breach of the implied term of trust and confidence: **Omilaju v Waltham Forest London Borough Council** 2005 ICR 481 CA.

110. In **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978, the Court of Appeal reasserted the orthodox approach to affirmation of the contract

and the last straw doctrine i.e. that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation. The Court of Appeal set out the questions the tribunal must ask itself in a case where an employee claims to have been constructively dismissed:

> (1) 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?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) 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 because the effect of the final act is to revive the right to resign.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?

**Conclusions**

111. I will deal in turn with each of the matters relied upon by the claimant as together constituting a breach of the implied duty of mutual trust and confidence. In considering whether each of the matters relied upon breached, or contributed to a breach, of the implied term, I will consider whether the respondent had reasonable and proper cause for their acts or omissions and whether the respondent behaved in a way that, when viewed objectively, was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

112. The first matter relied upon is that, in early October 2020, did the Respondent accept JPH's request for voluntary redundancy and deny the Claimant's request? I have found that the respondent did accept Mr Hollinrake's request for voluntary redundancy. The respondent did not agree to offer the claimant a "managed exit" on terms better than statutory redundancy, as requested by the claimant. I do not consider this to be a matter which can constitute a breach of the implied term or contribute to such a breach. Mr Hollinrake volunteered to take redundancy and agreed to this on statutory terms. The claimant did not volunteer to take redundancy on statutory terms but suggested a "managed exit" on better terms. The respondent was under no obligation to offer the claimant a departure on such terms. The respondent's conduct was not calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

113. The second is that, on 27 October 2020, did the Respondent downgrade the Claimant whilst appointing/retaining Daniel Walton as team manager? 27 October 2020 is the date on which Gary Bentley wrote to the claimant (83), informing him that his position was no longer at risk of redundancy. From the evidence given by

the claimant, it does not appear that the claimant is arguing that downgrading took place specifically on this date and Ms Jervis, in her submissions, fairly has not taken such a limited approach to the allegation. I consider the situation in the period from the claimant's return to work from furlough in September 2020, ending with the meeting on 10 November 2020 where it was made clear to the claimant that, if he remained at work, he would not be carrying out the managerial part of his role. From his return to work in September 2020, he had been carrying out only the consultant part of his role, the team he had managed having been reallocated to Daniel Walton, who had returned to work from furlough earlier. This was not a formal downgrading, since the claimant retained his previous job title and pay (with the exception of ability to earn bonus based on a team's efforts, which was, I conclude, of little real significance at this time). However, it was a reduction in status and removal of the ability to exercise his managerial responsibilities. I conclude that the respondent had reasonable and proper cause to allocate the team members to the management of Daniel Walton whilst the claimant was on furlough and Mr Walton had returned to work. I note the concerns expressed by Gary Bentley about potentially unsettling the teams who were working well by reallocating team members to the claimant (see paragraph 32). However, I conclude that the other part of the explanation he gave to the claimant on 10 November, that, if he did split the teams into smaller teams, then, in theory, he had two other managers with less to do, so he had three people in all with less to do and that not making business sense, is not a reasonable and proper cause for the respondent's decision not to reallocate some team members to the claimant. If the respondent did not have enough work for three managers, they could have undertaken a redundancy selection exercise (as originally anticipated) and reduced the number of managers. If they decided not to do that, then dividing the management responsibilities between the three remaining managers, with the result that each had less management work to do until the number of consultants increased, is not obviously contrary to business sense. Instead of the claimant only being left without management responsibilities and carrying out the consultancy part of the role only, all three managers would be in the same position. I consider that the respondent's actions in removing the claimant's managerial responsibilities, albeit with the intention of this being temporary, was a breach of the implied duty of mutual trust and confidence.

114. The third matter is putting the claimant on furlough when he protested at the downgrading. The claimant returned to furlough by agreement at the end of the meeting on 10 November 2020. I conclude that, since the claimant agreed to this, the respondent had reasonable and proper cause for this, and this cannot contribute to a breach of the implied duty.

115. The fourth matter is paying only 80% of the downgraded salary and denying the claimant commission whilst on furlough. I found that the payment of 80% of normal salary during furlough was by agreement. The claimant's normal salary had not been reduced from the salary to which he had been entitled pre furlough as a team manager. No commission was payable since the claimant was not carrying out recruitment. I conclude that the respondent had reasonable and proper cause for not paying commission, since no recruitment was being undertaken by the claimant. Since team bonus was paid annually (in June) and had only been paid once to the claimant in June 2019, I conclude that no team bonus would have been payable, had the claimant not been on furlough. I conclude that this matter cannot contribute to a breach of the implied duty.

116. The fifth matter is instructing the claimant to stay at home in February 2021 after the claimant protested at having to return from furlough to the downgraded role. The claimant was not instructed to stay at home in February 2021; Gary Bentley provided the claimant with an update and said he was happy for him to remain on furlough (see paragraph 43). The claimant did not protest. I find this matter not proved so it cannot contribute to a breach of the implied term.

117. The sixth matter is whether the respondent failed to investigate the claimant's grievance properly or at all before deciding it was denied. The claimant outsourced the investigation to a consultant from Peninsula. The consultant then made recommendations, upholding one part about communication but rejecting the majority of the grievance. Gary Bentley then followed the recommendations in rejecting the majority of the grievance. It appears to me that the claimant's complaint in relation to the grievance is, in reality, about the outcome, rather than the investigation itself. The claimant has not pointed me to any particular deficiencies in the grievance investigation. I conclude that this complaint is not proved and this matter cannot contribute to a breach of the implied term.

118. The seventh matter is that the respondent appointed an external legal representative to hear his grievance. The name of the consultant is incorrectly identified in the list of issues as Mr Tickle. As can be seen from the report, the consultant's name was Kerry Tipple. The consultant is also incorrectly described as a legal representative. I conclude that appointing an external consultant to carry out the investigation and make recommendations is not something which can contribute to a breach of the implied term. The respondent, with limited resources and no in-house HR expertise, had reasonable and proper cause for taking this step.

119. The eight matter is the respondent denying the claimant his grievance outcome on 19 March 2021. As noted above, the respondent did reject the majority of the claimant's grievance, on the recommendations of the HR consultant. The respondent submits that the conclusions were reached, based on the evidence available and presented, and were reasonable and supported with logical rationales. I conclude, in relation to the part of the grievance about perceived demotion and removal of managerial responsibilities, (see paragraph 46) that the recommendations, which were then endorsed and followed by Gary Bentley, did not take proper account of the effect on the claimant of removal of his managerial responsibilities, including the feeling of humiliation resulting from this, which was dismissed by the consultant as being something the consultant could not investigate. I conclude the reasoning was flawed in this way. Dismissing this part of the grievance, based on inadequate reasoning was, I conclude, capable of contributing to a breach of the implied duty of mutual trust and confidence. I conclude that there was no reasonable and proper cause for the respondent to reject this part of the grievance on the basis of the reasoning in the report. The respondent cannot separate itself from the reasoning on the basis that it was the reasoning of a third party (and Ms Jervis did not seek to do so in her submissions); the respondent decided to outsource the making of recommendations and endorsed these without independent consideration.

120. The ninth matter is whether the respondent failed to investigate the claimant's grievance appeal properly or at all before deciding it was denied. The claimant has not pointed me to any particular deficiencies in the investigation of the grievance appeal. I conclude that this complaint is not proved and this matter cannot contribute to a breach of the implied term.

121. The tenth matter is whether the respondent appointed an external legal representative, Mr Dacre, to hear the claimant's grievance appeal. There is an error in the consultant's name in the list of issues; this should be Mr Baker. The allegation also incorrectly describes Mr Baker as a legal representative. It is correct that the respondent outsourced the grievance appeal hearing to a third party; a consultant from Peninsula. I conclude that appointing an external consultant to carry out the investigation of the grievance appeal and make recommendations is not something which can contribute to a breach of the implied term. The respondent, with limited resources and no in-house HR expertise, had reasonable and proper cause for taking this step.

122. The eleventh matter is the denial of the grievance appeal on 12 April 2021. The appeal was rejected. I conclude that there was no reasonable and proper cause for the respondent to reject the part of the grievance appeal relating to the change in the claimant's job role. The consultant, Mr Baker, acknowledged that the claimant was currently doing a consultant's role only and his job had, in practice, changed, because the claimant had no managerial responsibilities. Mr Baker said, in effect, that this was temporary, until the respondent recruited more staff who the claimant could manage, but noted that the recruitment of new staff was not currently feasible. (See paragraph 49). No time scale was established for when the claimant was likely to resume his managerial duties. This had been the situation, by now, for about 7 months. Given these circumstances, I conclude that there was no reasonable and proper cause for the respondent to reject the part of the grievance appeal relating to the change in the claimant's job role. I conclude that this is something which could contribute to a breach of the implied term of trust and confidence.

123. The twelfth matter is Gary Bentley instructing the claimant to go home on 4 May 2021. This was during the meeting in which the claimant is alleged to have sworn at Gary Bentley and acted aggressively. Gary Bentley did ask the claimant to leave. Although I have not been satisfied that the claimant swore at Gary Bentley or acted in a way likely to cause Gary Bentley to believe the claimant was likely to be physically aggressive, I have found that the claimant swore in the meeting and Gary Bentley perceived him to be verbally aggressive (see paragraph 61). I found that the claimant became angry when Gary Bentley began the meeting by asking the claimant his intentions. I conclude that the respondent had reasonable and proper cause to ask the claimant to leave, in these circumstances, and doing so was not something which could contribute to a breach of the implied term.

124. I will deal with the thirteenth to the seventeenth, and the nineteenth matters together, since they all relate to the disciplinary investigation and proceedings and outcome, in relation to allegations about the claimant's conduct at the meeting on 4 May 2021. These matters are: that the respondent classified swearing and the content of the altercation on 4 May 2021 as misconduct when it was commonplace

for language of this kind and raised voices to be used by colleagues including Mr Bentley (2.13); that the respondent sent the claimant a disciplinary letter on 5 May 2021 (2.14); that the respondent required the claimant to attend a disciplinary investigation interview on 6 May 2021 (2.15); that the respondent appointed an external legal person to conduct the disciplinary investigation (2.16); that the respondent failed to conduct a disciplinary investigation hearing (2.17); and that the respondent stated in a letter of 11 June 2021 that the relationship with the claimant was irreparable (2.19).

125. Most of these complaints can be summarized as relating to the decision to start a disciplinary investigation, to take disciplinary proceedings and to categorise the claimant's conduct as misconduct (leading to the issue of a final written warning).

126. The respondent has not satisfied me that the reason for starting a disciplinary process was genuinely because of a belief that the claimant's conduct at the meeting on 4 May 2021 was sufficiently serious potentially to warrant a disciplinary penalty. Gary Bentley was at the meeting on 4 May so knew what had happened. He was the person who decided that the claimant should attend an investigatory interview and then a disciplinary hearing. The respondent did not satisfy me that the claimant had sworn at Gary Bentley in the meeting (as opposed to swearing in an emphatic way) or that he had behaved in a way which caused Gary Bentley to fear that the claimant would become physically aggressive. I have found that swearing was commonplace in this workplace. The claimant had just completed a period of sickness absence due to stress. Gary Bentley had started the meeting, on the claimant's return to work, by asking the claimant's intentions, rather than, as the claimant had expected from Gary Bentley's email of 21 April 2021, discussing the claimant's return to work and the best way for getting him back to work at the respondent (see paragraph 53). I infer from this that Gary Bentley was not intending to make proposals for the claimant to resume his managerial role, rather than just the consultancy part of his role, at least in the short term. The claimant was objecting to working without his managerial responsibilities. Gary Bentley did not want to make a team manager redundant and did not want to distribute the existing managerial responsibilities between the three team managers. He wanted the claimant to continue working as a consultant only, until, at some point in the future, the respondent recruited more consultants so the claimant could be given a team to manage. I consider it likely that Gary Bentley acted opportunistically, when the claimant reacted as he did in the meeting, deciding to treat the claimant's conduct at the meeting as a disciplinary matter, as a tool for dealing with the difficult situation, when the type of conduct displayed by the claimant would not normally have led to disciplinary proceedings. I did not hear evidence from Joe Reed who made the decision to issue the disciplinary warning, but he had been tasked with the decision making by his superior at work, who was the witness of the conduct with which the claimant was charged. I did not have the opportunity, therefore, of clarification from Joe Reed as to what exactly he concluded the claimant had said and done which merited a final written warning. In particular, as I noted, the outcome letter does not state whether or not Joe Reed conclude that the claimant had told Gary Bentley to "fuck off" (see paragraph 91). The issue of a final written warning, when the claimant had no previous disciplinary offences, appears disproportionate and supports my conclusion that the

categorization of the claimant's conduct as misconduct was not due to a genuine view that this was conduct which merited disciplinary action.

127. For these reasons, I conclude that the respondent did not have reasonable and proper cause for taking disciplinary proceedings against the claimant for his conduct on 4 May 2021, and classifying his swearing at that meeting as misconduct, leading to the issue of a final written warning. I conclude that the respondent's actions in starting disciplinary proceedings and categorizing the claimant's conduct as misconduct, leading to a final written warning, was capable of contributing to a breach of the implied term.

128. I do not consider that the appointment of an external consultant to carry out the disciplinary investigation was something capable of contributing to the breach of the implied term although, in fact, for reasons which have not been explained, they did not do all the investigation. I do not consider the allegation at 2.17 is made out on the facts. If it is intended to refer to a disciplinary hearing, one was held. Similarly, an investigation meeting was held with the claimant.

129. The allegation in 2.19, that the respondent stated in the letter of 11 June 2021 (the disciplinary outcome letter) that the relationship was irreparable, is true as a matter of fact. It appears inconsistent with the respondent issuing a warning and continuing with the employment relationship and is not, without the addition of matters which were duplicated in the first charge against the claimant, a disciplinary offence. However, despite the peculiarity of this part of the letter, I do not consider that the statement by itself is capable of contributing to a breach of the implied term. The claimant had made similar statements himself about the impossibility of continuing to work with Gary Bentley.

130. The allegation at 2.18 is that the respondent failed to pay the claimant on expiry of sick pay after 17 May 2021. This was not made out on the facts (see paragraph 90) so cannot contribute to a breach of the implied term.

131. The allegation at 2.20 is that the respondent failed to address the claimant's appeal against the disciplinary outcome letter at all. On 24 June 2021, the claimant wrote to Joe Reed that he thought leaving his appeal until the end of his period of sickness would be best (see paragraph 94). I conclude that the respondent had reasonable and proper cause, in the light of this letter, for not dealing with it prior to the claimant's resignation, so this cannot contribute to a breach of the implied term.

132. The final matter, at 2.21, is that the respondent, on 6 August 2021, required the claimant to attend work in the downgraded role. Gary Bentley wrote to the claimant on 6 August 2021, towards the end of the claimant's sick leave, confirming that his return to work date would be Monday 9 August. Gary Bentley made no reference to the issue about the claimant's managerial duties. The claimant was given no assurance that he would regain these duties on his return to work. I conclude that this was, therefore, a requirement to attend work in the diminished role, without managerial responsibilities. I concluded that the respondent's original actions in removing the claimant's managerial responsibilities, albeit with the

intention that this should be temporary, was capable of contributing to a breach of the implied duty of mutual trust and confidence (see paragraph 113). For the same reasons, as in relation to the original removal of managerial responsibilities, I conclude that this continued requirement to work in the downgraded role was without reasonable and proper cause and can contribute to a breach of the implied duty of mutual trust and confidence.

133. I conclude that the matters I have identified as capable of contributing to a breach of the implied duty of mutual trust and confidence, taken together, constitute a breach of the implied duty. They were without reasonable and proper cause and together calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

134. The claimant also relies on an alleged express term that he was employed as a manager entitled to a basic salary of £30,000 per annum plus team and individual commission, each worth around £8000 per annum. The claimant was employed as a manager but not with the team commission alleged. The claimant continued to be employed in name as a manager, on the same pay and conditions. In these circumstances, I do not conclude that there was a breach of the express contract term about his employment.

135. I conclude that the breach of the implied duty of mutual trust and confidence was a fundamental breach of contract. It was sufficiently serious to entitle the claimant to treat the contract as at an end.

136. I conclude that the claimant resigned because of this breach. It was because of the initial breach (see paragraph 113) that the claimant sought, as an alternative route, a “managed exit”. I reject the respondent’s submission that it was only ever the claimant’s intention to achieve a significant sum by way of a pay off. I have no reason to believe that, had the respondent not removed the claimant’s managerial responsibilities and then told him he was likely to be chosen for redundancy, the claimant would not have carried on working as a successful manager.

137. I conclude that there was no affirmation of the contract before resigning. The claimant was consistent in his objection to the removal of his managerial responsibilities. He brought a grievance and appealed against the outcome. He defended the disciplinary proceedings which I have concluded were brought opportunistically rather than through genuine belief in misconduct warranting disciplinary action. He finally resigned on 17 August 2021, after the respondent was requiring, by letter of 6 August 2021, that he return to work without the managerial duties issue having been resolved. I do not consider that the delay between 6 and 17 August 2021 indicates affirmation, given the continued expressed objections in the claimant’s emails prior to his resignation.

138. Since the respondent did not plead a potentially fair reason for a constructive dismissal, I conclude that the complaint of constructive unfair dismissal succeeds.

Employment Judge Slater

Date: 28 October 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

3 November 2023

FOR EMPLOYMENT TRIBUNALS

# ANNEX
# List of complaints and issues

## Unfair dismissal

Dismissal

1. Can the claimant prove that there was a dismissal?

Alleged breach of the implied duty of mutual trust and confidence

2. Did the respondent do the following things:

    2.1 In early October 2020, did the Respondent accept JPH's request for voluntary redundancy and deny the Claimant's request?

    2.2 On 27th October 2020, did the Respondent downgrade the Claimant whilst appointing/retaining Daniel Walton as team manager?

    2.3 Did the Respondent put the Claimant on furlough when he protested at the downgrading?

    2.4 Did the Respondent pay only 80% of the downgraded salary and deny the Claimant commission whilst on furlough?

    2.5 Did the Respondent instruct the claimant to stay at home in February 2021 after the Claimant protested at having to return from furlough to the downgraded role?

    2.6 Did the Respondent fail to investigate the Claimant's grievance properly or at all before deciding it was denied?

    2.7 Did the Respondent appoint an external legal representative, Mr Tickle, to hear his grievance?

    2.8 Did the Respondent deny the Claimant his grievance outcome on 19 March 2021?

    2.9 Did the Respondent fail to investigate the Claimant's grievance appeal properly or at all before deciding it was denied?

    2.10 Did the Respondent appoint an external legal representative Mr Dacre to hear the Claimant's grievance appeal?

    2.11 Did the Respondent deny the Claimant's appeal by grievance appeal outcome on 12 April 2021?

2.12 Did the Respondent's Managing Director Gary Bentley instruct the Claimant to go home on 4 May 2021?

2.13 Did the Respondent classify swearing and the content of the altercation 4 May 2021 as misconduct, when it was commonplace for language of this kind and raised voices to be used by colleagues including Mr Bentley?

2.14 Did the Respondent send the Claimant a disciplinary letter on 5 May 2021?

2.15 Did the Respondent require the Claimant to attend a disciplinary investigation interview on 6 May 2021?

2.16 Did the Respondent appoint an external legal person to conduct the disciplinary investigation?

2.17 Did the Respondent fail to conduct a disciplinary investigation hearing?

2.18 Did the Respondent fail to pay the Claimant on expiry of sick pay after 17 May 2021?

2.19 Did the Respondent state in a letter of 11 June 2021 that the relationship with the Claimant was irreparable?

2.20 Did the Respondent fail to address the Claimant's appeal against the disciplinary outcome letter at all?

2.21 On 6 August 2021, did the Respondent require the Claimant to attend work in the downgraded role?

3. Did that breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:

3.1 whether the respondent had reasonable and proper cause for those actions or omissions, and if not

3.2 whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

<u>Alleged breach of an express contractual term</u>

4. Were there express terms in the Claimant's contract that he was employed as a manager and entitled to a basic salary of £30000 plus team (circa £8000) and individual (circa £8000) commission?

5. Did the Respondent breach the above express terms on 27 October 2020 by giving to Daniel Walton the claimant's team manager role and the claimant was downgraded to a consultant?

Issues relevant to both terms (if there was a breach of contract)

6. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

7. Was the fundamental breach of contract a reason for the claimant's resignation?

8. Did the claimant affirm the contract before resigning, by delay or otherwise? 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.

Reason

9. The respondent does not assert that, if the claimant was constructively dismissed, it was for a potentially fair reason.