



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102826/2023

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Held in Glasgow on 19, 20 and 21 February 2024

Employment Judge R King

10 **Mr Kenneth James Purdon**

**Claimant
Represented by:
Ms A Buchanan -
Solicitor**

15 **Sytner Group Limited**

**Respondent
Represented by:
Mr D James -
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The claimant's amendment application is allowed.
2. The claimant's claim of unfair constructive dismissal is dismissed.
3. The claimant's claim of unlawful deduction of wages is dismissed upon
25 withdrawal.

REASONS

Amendment application

1. During her final submissions, Miss Buchanan sought to advance a case that
the cumulative course of conduct relied upon by the claimant included the
30 following alleged incidents -

- a change in the method of recording demonstrators sold, which the claimant believed created an impression of underperformance.

- An alleged change of attitude towards him by senior management from February 2022 onwards.
 - the respondent having been critical of the claimant's performance in used cars during 2022 and dismissive of his 2021 "Retailer Of The Year" award; and
 - the respondent's failure to acknowledge the claimant's achievement in respect of Bentley Edinburgh's success in the "Retailer of The Year" award.
2. In response Mr James submitted that none of these matters had been mentioned in paragraphs 10 to 15 of the paper apart to the ET1, which according to paragraph 19 contained the details of all of the allegations relied on to show there had been a cumulative course of conduct that had given rise to the alleged breach of mutual trust and confidence. In the circumstances, if the claimant now sought to rely on those incidents as part of that course of conduct an amendment application was necessary. Miss Buchanan accepted that was the case and made such an application.

The claimant's submissions on the amendment

3. In Miss Buchanan's submission the Tribunal should allow the claimant's case to be amended by deleting the number '10' in paragraph 19 of the paper apart to the ET1 and substituting it with '6' so that paragraph 19 read –
- "It was an implied term of the Claimant's contract of employment that the parties act with mutual trust and confidence. The Respondent made unfounded and unjustified criticisms of the Claimant's performance in used car sales in an attempt to undermine the Claimant's performance. It was a material breach of the implied term of trust and confidence to make unjustified criticisms of his performance and vary his role by removing responsibility for used cars, thereby reducing his bonus income. Esto the respondent's conduct in paragraphs 6 to 15 cumulatively was a breach of the implied term of mutual trust and confidence, the last straw being the unilateral decision to*

remove responsibility for used cars sales from the Claimant's role without the Claimant's consent."

4. The issues set out in the proposed amendment had been set out in the ET1 from the outset in paragraphs 6 to 9, even if they had not been initially characterised as part of the alleged cumulative course of conduct resulting in the claimant's resignation. The claimant had given evidence and had been cross examined about those issues. It was open to the Tribunal to conclude that those facts formed part of the course of conduct which, when objectively considered, cumulatively amounted to a breach of trust and confidence.
5. In Miss Buchanan's submission no new complaint was being introduced. The claim remained one of constructive unfair dismissal based on a repudiatory breach of contract. The amendment sought to rectify an error in the paper apart in circumstances where the claim form already included facts from which a claim for constructive dismissal based on cumulative course of conduct could be identified.
6. The respondent had had the opportunity to cross examine the claimant and to lead evidence from its own witnesses about the alleged acts in question, and to make submissions in relation to them as to whether they constituted a breach of trust and confidence. The balance of hardship and injustice favoured the claimant, and the amendment should be allowed.

The respondent's submission on the amendment

7. Mr James referred to ***Chandhok v Tirkey [2015] ICR 527***. In his submission the claim form had set out "the essential case" put forward by the claimant. A claim form was not intended as a loose indication of what the case may be about, that was to be added to or adjusted at a later stage. It was clear at paragraph 19 of the paper apart that the claim was based on an alleged breach of mutual trust and confidence in respect of the cumulative effect of the conduct at paragraphs 10 to 15. Those did not include the allegations that were the subject of the amendment.

8. Referring to the principles in ***Selkent Bus Company Limited v Moore [1996] UKEAT 151/96/0205***, he submitted that the nature of the amendment was such that it widened the scope of the claimant's claim to take account of several additional components that had not been pled as part of the cumulative course of conduct. In addition, the time limit for such an amendment had expired on 30 April 2023 and the delay in making the application was excessive in circumstances where it could have been addressed at an earlier stage in the proceedings.
9. Yet the application had only been made at the conclusion of a three-day hearing once evidence had been heard and even then only in response to the respondent's submissions. In all the circumstances, any prejudice should not be transferred to the respondent by allowing the amendment and widening it beyond the claim set out in the ET1.

The Tribunal's decision on the amendment

10. The Tribunal had regard to the principles set out in ***Selkent Bus Company Limited v Moore [1996] UKEAT 151/96/0205***. It was clear to the Tribunal that the nature of the amendment was the relabelling of facts already pled and about which evidence had been led during the course of the hearing by both the claimant and the respondent. The respondent plainly had fair notice of the allegations and indeed had presented its case in such a way that those allegations were answered in its own evidence and its approach to the cross examination of the claimant. The respondent had evidently approached the hearing in the knowledge that the issues set out in the amendment were relevant to the claimant's case.
11. In all the circumstances, the Tribunal finds that the balance of prejudice favours the amendment being allowed. The claimant would suffer greater prejudice if the amendment was refused than the respondent would suffer if it was allowed. The amendment was therefore allowed.

Introduction

12. The claimant claims that he was unfairly constructively dismissed when he resigned from his employment following management action taken by the respondent to address his alleged poor performance. He maintains that the respondent acted in breach of the implied term of mutual trust and confidence and that he was entitled to accept the breach and resign. The respondent denies that it acted in breach of the implied term of mutual trust and confidence, and it asserts that the claimant resigned for different reasons.
13. During the hearing the claimant gave evidence on his own behalf as did Natasha Richardson, a former employee of the respondent. On behalf of the respondent, evidence was given by Dominic Bell (Head of Business), Sarah Burnett (Divisional Head of HR) and Robert Berry (Franchise Director for Scotland).
14. Where there was a dispute, the Tribunal reached its conclusion on the balance of probabilities. It is not the Tribunal's intention to recite or make findings in fact on every piece of evidence that it heard, since that would include facts that were ultimately irrelevant to its conclusions on the disputed issues to be determined.

Unlawful deduction from wages

15. At the outset, Ms Buchanan confirmed that the claimant's unlawful deduction from wages claim had been resolved and was therefore withdrawn.

Relevant law

16. The relevant law is contained in the Employments Rights Act 1996. Section 94 (1) of this Act provides for an employee not to be unfairly dismissed by his employer.
17. Section 95 1 (c) provides that an employee should be regarded as dismissed if *“the employee terminates the contract under which he was employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employee's conduct.”*

18. The leading case relating to constructive unfair dismissal is **Western Excavating (ECC) Limited v Sharpe [1978] ICR 221** in which Lord Denning held that:

5 *“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, 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.”*

10 19. Unlike the statutory test for unfair dismissal, there is no band of reasonable responses test. It is an objective test for the Tribunal to assess whether, from the perspective of a reasonable person in the position of the innocent party, the contract breaker is clearly showing an intention to abandon and to refuse to perform the contract **Tullett Prebon Plc & Ors v BGC Brokers LP & Ors [2011] IRLR 420**.

15 20. In **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978**, the Court of Appeal stated that 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:

20 (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?

25 (3) If not, was that act (or admission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju v Waltham Forest LBC [2004] EWCA Civ 1493**) of a course of conduct comprising several acts and admissions which, viewed cumulatively, amount to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate

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consideration of a 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?

5 21. In the present case, the claimant relies on an alleged breach of the implied term of trust and confidence. As established in **Malik v BCCI [1997] ICR 606**, this is a requirement that an employer must not -

10 *“without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between an employer and employee”.*

22. There is no rule of law that constructive dismissal is necessarily unfair. If it finds that there has been a constructive dismissal, a Tribunal must also consider whether that dismissal was fair or unfair having regard to section 98 (4) of the Employment Rights Act 1996, which provides:

15 *“(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reasons shown by the employer) –*

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

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

25 23. The Tribunal must therefore consider whether the respondent had a potentially fair reason for the breach (**Berriman v Delabole Slate [1985] ICR 546**) and whether it was within the range of reasonable responses for an employer to breach the contract for that reason in the circumstances. When making this assessment, the Tribunal must not substitute its own view of what it would have done but consider whether a reasonable employer would have

done so, recognising that in many cases, there is more than one reasonable response).

24. The issues for the Tribunal were therefore as follows:

- 5 • Did the respondent breach the implied duty of mutual trust and confidence in the claimant's contract by behaving in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent without reasonable and proper cause for doing so?
 - If so, was such breach (or breaches) sufficiently important to justify the claimant resigning?
- 10 • Has the claimant resigned in response to such breach (or breaches if the claimant is relying on a "last straw" event)?
- Has the claimant waived or affirmed any such breach (or breaches)?
- If a compensatory award is made, how much should it be? The Tribunal will therefore decide:
 - 15 • what financial loss has the dismissal caused the claimant?
 - has the claimant taken reasonable steps to replace the lost earnings, for example by looking for another job.
 - if not, for what period should the claimant be compensated?
 - is there a chance that the claimant would have been fairly dismissed anyway had a fair procedure been followed, or for some other reason?
 - 20 • should the claimant's compensation be reduced and by how much?
 - did the ACAS Code of Practice on disciplinary and grievance procedures apply?
 - 25 • did the claimant unreasonably fail to comply with it by failing to raise the issues with the respondent by way of grievance?

- if so, is it just and equitable to increase or decrease any award payable to the claimant and if so by what proportion of up to 25%?
- if the claimant was unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct?
- 5 • if so, would it be just and equitable to reduce the claimant's compensatory award and if so by what proportion?

Findings in fact

25. Having heard evidence, the Tribunal makes the following findings in fact.
26. The respondent is a luxury car company, specialising in selling luxury and
10 high-performance cars to customers throughout the United Kingdom. The
claimant was formerly employed at its Bentley dealership at 8 Whitehall Road,
Fort Kinnaird, Edinburgh between 3 January 2018 and 3 January 2023.
27. Although the claimant began as a sales executive, he became sales manager
at the start of 2020. In that role his responsibilities included purchasing cars,
15 negotiating car exchanges, and selling cars. The claimant's job was split
roughly 50/50 between responsibility for selling new cars and used cars but
that split could vary throughout the year. His role also involved managing a
team of five, comprising two sales executives, a business manager, a
marketing executive, and the showroom receptionist. On a day-to-day basis
20 the claimant reported to Dominic Bell, the respondent's head of business.
28. In his role as sales manager, he had a target to achieve Bentley Edinburgh's
annual sales budgets each year for new and used cars. The claimant well
understood the importance of those targets and he saw his role as creating
profit for the business in a budget target related environment.
- 25 29. The claimant's basic salary was £32,500 plus benefits including a company
vehicle. He also participated in various bonus schemes including an objective
bonus, a quarterly bonus, an annual bonus, and a stretch performance bonus.
All the bonus schemes he participated in, apart from the stretch bonus
scheme, were directly related to his own personal performance. The stretch

bonus scheme was based on net profits across all the respondent's dealerships at Edinburgh, which included Bentley, Ferrari, Maserati, and Lamborghini, all of whom were located at the same site.

Award

5 30. In 2021 Bentley Edinburgh performed well and received an award from the manufacturer, Bentley, for "Retailer of the Year 2021 Pre Owned". That award recognised the claimant's performance as the best performing used car sales manager and the Edinburgh dealership as the best performing dealership in terms of numbers of sales made. As sales manager of the
10 successful dealership, the claimant was invited to the national "Bentley Awards" to collect his award, although he was unable to attend because he had COVID-19.

15 31. Although the manufacturer invited the claimant to the awards ceremony his perception was that his own and the Bentley Edinburgh's success was not properly recognised by his senior management team because they did not make an internal announcement to all of the Edinburgh dealerships about the award. He believed that was in stark contrast to senior management's actions when the respondent's Ferrari dealership at Edinburgh won a similar award, which was openly celebrated by management.

20 32. The claimant also felt that the respondent's franchise director, Mr Berry, had been dismissive of the award when he described it as having been 'market led'. Mr Bell had however congratulated the claimant personally about the award, which he considered commendable, although not exceptional as he recognised that it was based on the number of units sold and not profitability.

25 Quarterly performance review – 5 November 2021

30 33. In common with the respondent's general practice, during his employment the claimant was subject to routine quarterly performance reviews, which were carried out by Mr Bell. Those quarterly performance reviews covered performance against targets for both new and used car sales and other objectives in line with departmental and overall business needs.

34. Such reviews were always recorded in writing and the record retained on the respondent's system, which included a section for the claimant's comments in response to various feedback questions.

35. In the record of his one to one on 5 November 2021, the claimant's written
5 response to the feedback question -

"Which areas of your role do you feel you could have performed better?"

was

"Used car stock – disposing of issue cars. Conversion rates of sales team need raised to above Div Av. Plan agreed."

10 36. 'Issue cars' are cars that remain in stock unsold for too long, Pre-owned cars are usually bought with a view to being sold within 30 to 60 days. If a used car is unsold within 90 days it becomes an issue car.

Sales of demonstrators

15 37. At a meeting with the claimant on 3 January 2022, Mr Bell informed the claimant that from then on, the method of recording profits from sales of ex demonstrator cars on the respondent's Electronic Daily Operating Control ('EDOC') system, which records sales profits on all sales transactions, would be changed. Typically, the total profit paid by Bentley ('the manufacturer') to the dealer on a sale of an ex-demonstrator is 14% of the car value. That is
20 made up of a 'front end' profit of 9% paid at the time of the sale and a 'back end' profit of 5% which the manufacturer retains until after a guarantee period has elapsed during which the dealer must adhere to the manufacturer's after sales terms. Prior to 3 January 2022 the dealership would immediately record all profits from such a sale, including 'back end' profits even though they were
25 subject to retention.

38. On 3 January 2022 Mr Bell told the claimant that in future, 'back end' profits retained by the manufacturer would not initially be recorded as profit and would only be recorded as profit when released by the manufacturer. He explained that to do otherwise would risk misrepresenting the profit on the

sale of a demonstrator if, for example the manufacturer ultimately decided to refuse to pay an element of the back-end profit. A refusal to release all retained profits could also result in claw back of bonuses paid on the full 14% at the time of the sale.

5 39. The claimant was concerned that this change in method of reporting these profits meant that Bentley Edinburgh's profits were shown as being less than they truly were. He was also concerned that he was being asked to present figures differently from the respondent's other UK Bentley dealerships in Manchester, Birmingham, and Leicester and that the perception in the group would be that Edinburgh was under performing in relation to used cars.

10 40. Although he voiced these concerns to Mr Bell on several occasions, Mr Bell assured him that this same method was being employed by the respondent's other UK Bentley dealerships in relation to sales of demonstrator cars and that 'back end' profits would still ultimately be reflected in the dealership's performance once paid after the retention period.

15 **Used car sales**

41. During 2022, the performance of Bentley Edinburgh was poor in relation to the acquisition and sale of used cars, albeit sales of new cars continued to perform well. Throughout that year Mr Bell and Mr Berry spoke to the claimant on a regular basis about their concerns about his performance in sales of used cars and how he could improve. Mr Bell saw the key to successful used car sales as buying the correct stock, preparing it in a timely manner, marketing it well and dealing with customer inquiries thoroughly. He told the claimant that he was concerned that he was not carrying out that process well, particularly in relation to 'issue cars' which had also been an area of concern, recognised by the claimant, during the latter part of 2021.

25 42. Mr Bell was especially critical of the claimant having bought cars that were unsuitable for the dealership as they were unlikely to have a high following in terms of customer inquiries – for example, a bright yellow Bentley and a bright orange Bentley Bentayga, the latter of which was in stock for 6 months and resulted in a loss to the dealership of £13,500.

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43. He also spoke to the claimant of his concerns that he had failed to market vehicles to an appropriate standard on the respondent's website because vehicles were often photographed poorly or against inappropriate and messy backgrounds. He pointed out that on one occasion a vehicle on the website was seen to have a stone chip.
44. The respondent was also concerned about the claimant selling ex demonstrator cars to 'prop up' sales of used cars. In June 2022 the dealership relied on sales of two ex-demonstrator and pre-registered cars to boost its profits in relation to used cars. Without those sales the dealership's performance for used car that month was very poor. Of the two genuine used cars sold, one made a profit of £9,663 and the other a loss of £7,507.
45. The respondent was also concerned that the claimant was paying what it considered to be excessive fees to brokers who acted for purchasers in the sale of used cars. It was concerned that the claimant had paid brokers fees of £8,000 at a time when the used car market was buoyant, and it considered the payment of such a level of fees unnecessary.

The claimant's own feedback about used car sales performance

46. The claimant had in his review feedback throughout 2022 acknowledged that used car sales performance was an issue of concern. On 13 January 2022, following his quarterly performance review with Mr Bell, his written response to the feedback question -

"Which areas of your role do you feel you could have performed better?"

was

"Used car stock management and enquiry management".

47. As at the date of the claimant's May 2022 performance review meeting with Mr Bell the Bentley Edinburgh year to date performance on sales of used cars was £104,000 behind its budgeted target for the year to date. On 11 May 2022, following his quarterly performance review, his written response to the feedback question -

“Which areas of your role do you feel you could have performed better?”

was

“Used car performance has been a struggle with the YTD performance (£104k) to budget. This has largely been due to poor first quarter sales rate and over-age stock. Tighter enquiry management with the sales team and consistency of approach.”

Meeting on 9 August 2022

48. On 9 August 2022, the claimant met with Dominic Bell and with Robbie Berry. During that meeting Mr Berry criticised the claimant’s performance in relation to the marketing of used cars. He highlighted to the claimant several instances in which he believed cars had been marketed poorly, including one occasion where a Bentley vehicle shown on the respondent’s website had an obvious stone chip. He pointed out that there were photographs of cars on the respondent’s website that had been taken with unsuitable and untidy backgrounds or in poor light that made it difficult to discern a car’s true colour, where stone chips could be seen in paintwork and where vehicle interiors were dirty or dusty. He spoke to him of his concerns that vehicles had been poorly prepared for sale. He reminded him that Jeremy Mallett, a board member, had also visited Bentley Edinburgh on two occasions and had criticised the cleanliness and preparation of the used cars on display.

49. In response, the claimant pointed to the manufacturer’s “Performance Management Scorecard – KPIs – UK” for August 2022. This showed that sales of used cars at Bentley Edinburgh were 120.6% against target whereas the national average across the UK for other dealerships was 97.7% against target.

50. However, Mr Berry told the claimant that his performance was no longer acceptable and that if he did not improve, he would have to consider taking him down a formal performance management route. The claimant’s reaction was to smirk at him. This annoyed Mr Berry, who asked the claimant if he realised how serious the situation was and whether he appreciated the level

of support and coaching he had been given. Mr Berry was stern and to the point during this meeting, which became heated, and voices were raised. He reminded the claimant that as far as he was concerned, the respondent could have started performance management some time ago but had not. Instead, it had chosen to provide the claimant with coaching and support.

51. Although sales of new cars at Bentley Edinburgh remained positive the respondent's used car sales for the year to 30 September 2022 were £128,412 against a budget target of £195,978, meaning a deficit of £67,566. That deficit compared unfavourably with the other Bentley dealerships throughout the UK.

52. On 13 September 2022, following his quarterly performance review, the claimant's written response to the feedback question -

"Which areas of your role do you feel you could have performed better?"

was

"Used cars continue to be very challenging. Ageing stock with several cars over 100 days have meant that profitability is low and in cases have taken heavy financial hits on cars".

Used car sales for the year to 31 December 2022

53. In the year to 31 December 2022 for sales of genuinely pre-owned cars (excluding ex demo and pre-registered) Bentley Edinburgh sold 24 cars against a target of 24 and made a profit of £60,715 against a budgeted target of £208,000, meaning a deficit of £147,285. For older vehicles it sold 24 cars against a target of 27 and made a profit of £44,558 against a budgeted target of £175,500, meaning a deficit of £130,942. It had used cars in stock for an average of 117 days and it had sold 16 cars at a loss.

54. For each quarter in 2022, Bentley Edinburgh's used car sales profits were lower than they had been for the corresponding quarter of 2021. Its performance against budget for 2022 was also significantly worse than the respondent's dealerships in Manchester, Birmingham, and Leicester. Its

profit per car sold was also the lowest out of all the Bentley dealerships throughout the UK that year.

55. For the financial year to 31 December 2022 Bentley Edinburgh had achieved 44% of its budgeted target for sales of used cars whereas Manchester had achieved 157%, Birmingham had achieved 106% and Leicester had achieved 109%. That deficit had largely been caused by the Edinburgh dealership having stock that it had struggled to sell and on some occasions stock that had to be sold at a loss.
56. For the majority of 2022 the claimant was responsible for Bentley Edinburgh's sales performance.

Appointment of Andy Canning as general sales manager

57. As a result of the respondent's concerns about sales of used cars, Mr Berry concluded that the appropriate measure to assist the claimant to improve sales performance at Bentley Edinburgh was to appoint Andy Canning as general sales manager to oversee Bentley Edinburgh, including used cars. Prior to his appointment Mr Canning had worked for the respondent for 20 years and had a wealth of experience, with particular success in the sales of pre-owned cars. Prior to his appointment as general sales manager he had been the sales manager at the respondent's Lamborghini dealership and his performance was considered exemplary. He took on the role of general sales manager on or around 11 October 2022. While his role was seen as an 'umbrella position' his key focus was to help improve sales of used cars during a year in which post the Covid lockdown the used car market in the UK had been buoyant and in general car sales and profitability had increased..
58. When considering its options to improve used car sales performance the respondent also considered formal performance management and concluded that this was a reasonable option available to it. However, it believed that performance management could have negative connotations for the claimant and that a more practical and pragmatic solution was to provide him with Mr Canning's support, which it felt had more chance of achieving a successful improvement in his performance.

59. The respondent's decision to appoint Mr Canning was communicated to the claimant by Mr Bell in a meeting on 22 September. Mr Bell explained that the business had concluded there was a need to appoint a general manager at the Edinburgh dealership to restore its used car performance and that appointing a general manager was in line with other Bentley dealerships throughout the UK.

60. Although Mr Canning was to be appointed as general sales manager, Mr Bell assured the claimant that he was to remain in his role as sales manager and his responsibilities continued to include the buying and selling of used cars. Mr Bell explained that Mr Canning was being appointed to provide support and oversight for the claimant in an area that was underperforming. Daily responsibility for used car sales would be shared between them, with Mr Canning having overall ultimate responsibility.

61. In particular, Mr Canning was to be a "*second pair of eyes*" over any used car transactions that the claimant conducted – to sense check the price he was paying for used cars – a practice that is standard across the industry. As part of the new arrangement the claimant continued to have authority to buy cars for the dealership. To have removed that authority would have been wholly impractical, as part exchanges are part and parcel of both new and used car sales.

62. Mr Canning's appointment did not affect the claimant's basic salary or alter the bonus rules that applied to him. While the claimant was concerned that in future his earning potential would be influenced by someone with no experience of the Bentley brand or product the respondent's genuine belief was that, if anything, the additional support would improve the claimant's ability to earn sales bonuses.

The claimant's resignation

63. Following a meeting with Mr Canning and Mr Bell on 28 September 2022 to discuss the operation of the new structure previously outlined by Mr Bell the claimant decided to resign from his employment.

64. He decided to resign from his employment because he felt that all he had built up at Bentley Edinburgh had been taken from him as a result of Mr Canning's appointment and he had lost trust and confidence in the respondent's management team as a result.
- 5 65. The claimant's resignation was tendered in an e-mail to Dominic Bell dated 3 October 2022, the material part of that stating –
- “After further consideration and much thought to the discussion that took place at 6pm on Thursday the 22nd September 2022, This along with a culmination of incidents this year has resulted in myself being forced into a decision I do not wish to take and that is to resign from Sytner Group without*
- 10 *having employment to go to, this is due to a lack of trust and confidence.*
- I acknowledge I legally have to give three months' notice as per my contract of employment with employment ending on the 03rd January 2023.”*
66. Following the claimant's resignation, Mr Bell spoke to the claimant on several occasions and sought to persuade him to withdraw his resignation. Prior to
- 15 his resignation, the claimant had made no secret of the challenge of his lengthy daily commute between work and home and his desire to work closer to home. He had also spoken to colleagues on occasion about his desire to set up his own business.
- 20 67. The claimant's employment terminated on the expiry of his notice on 3 January 2023.

The claimant's written grievance

68. Following his resignation, the claimant raised a written grievance about his treatment in a series of e-mails dated 23 January, 30 January and 31 January.
- 25 69. This grievance was in due course investigated and rejected by Sarah Burnett, divisional head of HR. Her decision was sent to the claimant with reasons by letter dated 21 February 2023.

The claimant's employment post dismissal

70. Since the claimant's resignation, he has not found employed work and has lived mainly on savings. He has been in receipt of Universal Credit since the beginning of January 2024. He has also set up several businesses, none of which are yet trading profitably.

Submissions*The claimant's submission*

71. The claimant relies on the following acts in support of his claim that he was unfairly constructively dismissed:

1. *Dominic Bell failing to adequately explain the instructions to record demo bonuses differently on the internal EDOC system.*
2. *The alleged belittling of his and branch's used cars sales award from the manufacturer 2021.*
3. *Mr Berry shouting aggressively at him on 9 August 2022, unjustly criticising him and threatening to performance manage him out of the door.*
4. *Putting Andy Canning in charge of used car sales in 2022.*
5. *The instruction that he was to have nothing to do with used cars sales and everything was to go through Andy Canning."*

72. The claimant submits that his ability to manage buying and selling used cars was a significant part of his job and his bonus payment was dependent on the performance of used cars sales. It was wrong for the respondent to say that the change did not matter because that change removed his opportunity to influence used cars sales. That change was made without consultation and without his consent. It was unilaterally imposed. It was by itself a repudiatory breach of contract. The claimant did not delay too long before accepting the breach and resigning and he did not affirm the contract because he resigned

for that reason. Even if there were other factors at play, such as his wish to work closer to home, that did not matter so long as the repudiatory breach was one of the principal reasons for his resignation.

5 73. The claimant relied on the following authorities in support of his arguments namely ***Coleman v Baldwin [1977] WL 59218; James McBride v Falkirk Football & Athletic Club [2011] WL 2649444; Nigel Gibbs v Leeds United Football Club Limited [2016] EWHC 960.***

10 74. The claimant submits that if the respondent's actions on 28 September by removing his responsibility for used cars was not repudiatory by itself, then it was a last straw and it re-ignited earlier breaches of trust and confidence when the respondent had failed to adequately answer and explain changes recording profit margins and demo bonuses on EDOC, failed to recognise his achievements and his award in 2021, threatening to performance manage him out of the business, imposing a buying ban on him, imposing a new structure described as support and oversight but in fact materially altering his role and responsibilities, creating a checking system and removing his autonomy and status including removing responsibility for overall sales performance of the branch.

15 75. If the Tribunal accepts that the claimant was constructively dismissed, his dismissal was for poor performance and was unfair in circumstances where no formal performance management process had been put in place, no support had been offered and the claimant had not been warned of the consequences of not showing improvement. In all the circumstances, the respondent had failed to act reasonably in treating the reason of poor performance as a sufficient reason to dismiss the claimant.

The respondent's submission

20 76. In Mr James's submission the claimant's contract of employment did not provide him expressly with "*sole, untrammelled responsibility*" for all new and used cars sales in the showroom without any potential for oversight. Yet that was nonetheless the express term which he asserted to exist. In the
30 circumstances, even *if* it were true that the claimant's entire responsibility for

the sale of used cars was removed, it would not be a breach of an express term of his contract.

77. In any event, Andy Canning's appointment was intended to provide the claimant with a second opinion from someone who could be relied upon to ensure that his performance would improve. Mr Canning was appointed as general sales manager in order to provide a layer of oversight and support. That appointment was reflected elsewhere in the respondent's UK business in the structure in place for other sales managers in the respondent's business.
78. The claimant's fundamental issue with the respondent was that he was managed *at all*. Yet his opinion of his performance and his capabilities was not borne out by the objective evidence which showed that Bentley Edinburgh was underperforming in relation to the sale of used cars. The claimant had made several mistakes. He had bought in part exchange a number of cars which he should have known would be difficult to sell and that the respondent had indeed struggled to sell. He had failed to market cars properly on the respondent's website. He had made mistakes in managing stock and preparing it to be sold. That was the context in which the decision to appoint Mr Canning as general sales manager had been made.
79. Far from the respondent making unjustified criticisms of the claimant's performance, the criticisms were wholly justified. The used car side of the business was performing poorly. The claimant's insistence that any criticism was unjustified was in direct contradiction to the objective evidence. The appointment of a general sales manager was consistent with its practice across its business and demonstrated the type of checks and balances on the ability of individuals to provide used cars for onwards sale, which reflected the respondent's dealing in high value inventory in which a mistake could have substantial financial consequences. In the circumstances, it was reasonable that Mr Canning was introduced to provide a "*sense check*" to ensure that the claimant was not buying what would turn out to be "*issue cars*".

80. That appointment did not affect the claimant's earning potential. In fact, his bonus scheme was dependent on the performance of the dealership rather than himself as an individual. If Mr Canning helped the dealership perform better, the claimant's bonus would be increased accordingly. In all the circumstances, the respondent's conduct was not so serious as to be likely to destroy or seriously damage the relationship of trust and confidence. The claimant might well feel aggrieved but viewed in the context of the dealership's underperformance, the respondent acted as many businesses would do. The respondent had reasonable and proper cause for its actions in order to address the poor performance of the Edinburgh dealership.
81. In respect of the claimant's claim that he resigned because of a purported cumulative breach and a last straw on 28 September 2022, his resignation letter had made no mention of that alleged incident and therefore that claim should fall away.
82. In the respondent's submission, the claimant resigned because he found the commute too long and he wanted to start his own business instead of working for the respondent. In late 2022, his wife was having health problems, and he was about to incorporate a new business. In the circumstances, the evidence showed that the claimant did not resign because of the pled last straw or indeed any breach of contract.
83. In any event, the purported last straw was not in fact a last straw because it did not add anything to the breach. The appointment of Andy Canning in an oversight and coaching role, in the context of the Edinburgh dealership underperforming and the claimant's experience was entirely innocuous. Nothing about the meeting of 28 September 2022 was problematic. Even if the purported last straw was capable of being a last straw eventually relied upon by the claimant it did not, taken together with earlier events, amount to conduct which went any way to establishing a breach of the *Malik* term.
84. In Mr James' submission, Mr Berry's account of the meeting of his discussion with the claimant at their meeting on 9 August 2022 ought to be preferred. This discussion came in the context of the claimant having had performance

issues highlighted with him throughout 2022, which was evident from review documents. It came in the context of the claimant smirking at Mr Berry, which he accepted he had done. As a result, Mr Berry reprimanded the claimant and highlighted the alternative approach which could have followed, which was formal performance management. Given Mr Berry's role and his concerns, such comments in the face of the claimant's insubordinate behaviour was entirely reasonable.

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85. In relation to the alleged ban on buying used car sales stock, it would not have been sensible for a car dealership to put a ban on buying cars and in fact that did not happen. In the respondent's submission, the meetings of 20 and 28 September were explained fully by Dominic Bell and Robert Berry. They had been unproblematic. The claimant's principal issue seems to have been self-inflicted due to his own abilities and his insistence that he knew better. Nothing about either of those meetings were serious enough to amount to a breach of the Malik term.

86. In respect of remedy, the respondent submitted that even if the claimant had been unfairly dismissed, he had contributed to his own dismissal by his poor performance and he had failed to mitigate his loss.

Discussion and decision

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87. The Tribunal considered its findings in relation to each allegation and whether the respondent's conduct had amounted to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent.

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88. Simply acting unreasonably is not sufficient to establish a breach of the implied duty of trust and confidence. The conduct must be likely to destroy the relationship of trust and confidence or cause it 'serious' damage. A balance has to be struck between an employer's interests in managing its business and an employee's interest in not being unfairly or improperly exploited. The conduct must be such that an employee cannot be expected to put up with it. The employer must demonstrate by its behaviour that it is abandoning the contract.

89. The first alleged breach relates to the respondent's decision to change its method of recording ex demonstrator sales profits on EDOC and its alleged failure to adequately explain that change to the claimant. The Tribunal could not accept that the respondent's decision to show its profits on EDOC only when they were received from the manufacturer was anything but reasonable and rational. It accepts Mr Bell's rationale that in this way profits would never be misrepresented, and bonuses paid on 'back end' profits would never need to be clawed back. It also accepts Mr Bell's evidence that this was common practice within the respondent's business and that he explained all of this to the claimant. In the circumstances there was no conduct on the respondent's part that breached the duty of trust and confidence.
90. The claimant complains that the respondent failed to recognise his and the dealership's achievements and his award in 2021. He complains that there was a change of attitude towards him by management after Mr Berry's appointment in February 2022. The Tribunal found no evidence of any failure on the respondent's part to recognise the Retailer of the Year 2021 award for used car sales or of any change of attitude other than its justified response to his underperformance in used car sales. The claimant complains that Mr Berry dismissed the award as 'market led' and was annoyed that there was no announcement within the Edinburgh dealership group to celebrate it. The Tribunal finds that it was open to Mr Berry to make such a comment having regard to the upturn in used car sales generally after the initial Covid lockdown.
91. The Tribunal also accepted the respondent's evidence that Mr Bell congratulated the claimant personally and that the award had to be viewed in the context of it having been in relation to sales made and not profitability, which was in the respondent's view a far greater measure of success. While the claimant may have expected an announcement to be made about the award it was not incumbent on the respondent to do so, particularly as it did not see the award as a genuine cause for celebration when seen in that context. In the circumstances, once again there was no conduct on the respondent's part in this respect that breached the duty of trust and confidence.

92. The claimant complains that Mr Berry unjustly criticised him and threatened to performance manage him out of the business. The Tribunal finds that there was ample objective evidence of the claimant's underperformance in used car sales throughout 2022. There was also clear evidence from the claimant's own comments in his performance reviews that he accepted that used car sales were problematic that year as well as evidence that this had been discussed with him regularly before the 9 August meeting. Any criticism of the claimant's used car sales performance was therefore entirely justified.
93. Further, the Tribunal accepted Mr Berry's undisputed evidence that while discussing his performance with him on 9 August 2022 the claimant smirked at him and that he therefore spoke robustly to the claimant, which in all the circumstances he was entitled to do. The Tribunal does not accept that Mr Berry threatened to performance manage the claimant out the door, although it is likely that both their voices were raised. Such a threat as is alleged is directly contradicted by the action that the respondent subsequently actually took, even though performance management was a reasonable option available to it. While the Tribunal accepts this would have been a difficult meeting for the claimant, once again there was no conduct on the respondent's part that breached the duty of trust and confidence.
94. The act relied on by the claimant as either a repudiatory act by itself or, alternatively, a last straw that reignited earlier breaches was that the respondent had stripped him of all responsibility for used car sales and replaced him with Andy Canning through whom all used car sales had to be done.
95. It was clear from the evidence that Bentley Edinburgh had been significantly underperforming throughout 2022 in used car sales, for which the claimant was responsible. It had failed to meet its own budgets and targets on used car sales, it was performing poorly relative to its previous year's performance, and it was underperforming relative to the respondent's other UK Bentley dealerships. Despite his evidence to the contrary, there was clear objective that the claimant's performance in relation to used car sales throughout 2022 was unacceptably poor in material respects. He had made poor buying

5 decisions on cars that had become 'issue cars' and had been sold at a loss. He had made mistakes when marketing cars. He had overspent on commission payments to brokers. Those failures in his performance had materially affected the dealership's performance on used car sales. The respondent was entitled to take steps to manage the decline in his and the dealership's performance.

10 96. While a formal performance management route was an available option it considered that this might impact negatively on the claimant. Its decision to instead appoint a general sales manager above him, a position replicated elsewhere within the respondent's business, in order to provide a "sense check" and an avenue of support was a reasonable and pragmatic one in the circumstances.

15 97. The Tribunal accepts the respondent's evidence that the claimant was not stripped of all responsibility for used cars but that he would need to consult Mr Canning when purchasing a vehicle. In all the circumstances that was an entirely reasonable measure when it had identified that the claimant had made poor decisions on purchases of cars, and these had contributed to the dealership's underperformance. The Tribunal does not accept that the claimant was subject to any buying ban. It accepts the respondent's evidence
20 that such a measure would have been impractical and would also have impeded the claimant's ability to sell used cars, which he was successful in doing, as such sales also involve an element of part exchange.

25 98. The claimant was naturally disappointed by Mr Canning's appointment, as he had hitherto been ultimately responsible for the sales of used and new cars. However, it cannot be said that Mr Canning's appointment in order to provide him with additional support in circumstances where used car sales were badly underperforming amounted to conduct that breached the duty of trust and confidence.

30 99. For all the reasons set out above, the respondent's conduct cannot be objectively viewed as conduct that was calculated or likely to destroy or

seriously damage the trust and confidence between the claimant and the respondent without reasonable and proper cause for doing so.

100. For those reasons, the Tribunal finds that the respondent's conduct was not in breach of the implied term of trust and confidence entitling him to resign.
5 Being satisfied that there was no fundamental breach the Tribunal did not require to determine whether the claimant resigned in response to the breach asserted or to consider any issue in relation to delay or waiver. It also did not require to consider remedy.

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Employment Judge:	R King
Date of Judgment:	30 April 2024
Entered in register:	3 May 2024
and copied to parties	