EMPLOYMENT TRIBUNALS

Claimant: **Mr Adam Marlow**

Respondent: **MyCityDeal Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **11 - 13 November 2020**

Before: **Employment Judge Scott**

Representation

Claimant: In Person

Respondent: Ms G Hicks (Counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was fully Video (all remote) ('V'). A face-to-face hearing was not held because it was not practicable, and no-one requested the same. The documents that I was referred to are in bundle R1 (electronic and hard copy) C1 (hard copy only). There was an additional Bundle (R2) which contains some of what is in the Claimant's Bundle. It was agreed that the Tribunal would rely upon R1 & C1. R2 was not referred to during the Hearing.

JUDGMENT

The judgment of the employment tribunal is that the claimant has not proven that he was constructively dismissed and that therefore the claimant's claim for constructive (unfair) dismissal under Part X of the Employment Rights Act 1996 fails and is dismissed.

REASONS

Introduction

1. The Tribunal convened via Cloud Video Platform to hear the claimant's claim of unfair constructive dismissal.

The issues

2. The claimant had over two years' continuous employment and was an employee. The issues were agreed with the parties at the outset of the hearing and the List of Issues is set out below.

Evidence

3. The Tribunal had two paginated bundles of documents prepared by the Respondent (references [Rx] are references to documents in the main Bundle (R1) (a number of additional documents were added to the bundle during the course of the Hearing (R49A-G; 134A; 179A-F & 180F, 181F, 182F, 183F; 363; 374-378)). The Tribunal also had a Bundle prepared by the claimant (references [Cx] are references to documents in the claimant's Bundle (C67 was added during the course of the Hearing)). R2 was not referred to during the Hearing. I read the claimant's Bundle and documents in the respondent's Bundle that the parties referred me to. Both parties took the opportunity to make closing submissions. The claimant found it 'emotional' to cross-examine Mr. Marritt and switched his camera off, with the Tribunal's permission, to assist him doing so. Ms. Hicks did not object (indeed she helpfully suggested that it might assist).

4. The Tribunal heard evidence from the claimant and from the following witnesses on behalf of the Respondent: Mr. Kasang (HR Business Partner for Sales); Ms. Brown (Assistant General Counsel until beginning of November (when she moved to another employer)) and Mr. Marritt (Country Head). I read the witness statements prepared on behalf of the claimant and the three witnesses for the respondent. I also had a fourth respondent witness statement for CT who did not attend the hearing. I have admitted that witness statement in evidence and I read it but was mindful that the witness did not attend the Hearing. Mr. Kasang amended paragraph 28 of his witness statement to say that this allegation was raised by DH in his grievance [R179A-183F] (the numbering is not quite right). Finally, I also heard evidence from Ms. Dowley (Employment Counsel Groupon). I did not have a witness statement for Ms. Dowley because the respondent had not intended to call Ms. Dowley to give evidence until the claimant disclosed [C65-66]. In the end, I gave very little weight to CTs witness statement because he did not attend the hearing and could not therefore be cross examined about it or C65-67], notwithstanding Ms. Dowley's evidence which I accept. I also make reference to JD and DH below (they were Divisional Sales Managers).

5. I am grateful to the claimant and Ms. Hicks for their assistance.

6. I wish to make it clear that where I do not accept one or other witness' version of events in relation to a particular issue does not mean that I consider that witness to be dishonest or that they lack integrity. I do not doubt that the claimant and Mr Marritt believe that their version is the truth. Robert Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost) [1985] 1 Lloyd's Rep 1*, said 'It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.'

Findings of fact

7. I make the following findings on the balance of probabilities.

Background

8. The claimant began employment with the respondent in September 2014. He worked latterly as a Divisional Sales Manager (DSM), having been promoted in July 2017. The claimant resigned on 17 March 2019 [R278]. In his manager role, the claimant managed between 7-10 sales representatives, although that number would fluctuate when JD was on leave. He was expected to coach and manage them. The claimant completed the relevant training programme in 2018. The claimant reported to CT (Regional Sales Director), who in turn reported to Mr Steven Marritt (then Head of Local Sales for Local, UK and Ireland (as he was until May 2019). Mr John Kasang joined the London office in September 2018 as the HR Business Partner for Sales and in that role he supported Mr Marritt to manage employees. He worked closely with CT and Mr Marritt and also had a number of conversations with the claimant. The claimant's complaints are about Mr Marritt/Ms Brown's grievance investigation/outcome. There are no complaints about CT and the claimant got on well with him, although he thought that CT could have 'stuck up for [him] more'.

9. The claimant accepted in cross examination and I find as a fact that CT had concerns about the claimant's performance in the preceding 6 months because his team were frustrated with the claimant's management style. The claimant considers that his team were frustrated because of what he was being asked to do, namely that he was being encouraged to put members of his team on Performance Improvement Plans ('PIPs') and that this was driven by Mr Marritt and, to some extent, CT and this made him unpopular with his team. Prior to Mr Marritt taking over line management responsibility for the claimant in mid-December 2018, the claimant had not raised any concerns in respect of Mr Marritt with the respondent.

10. CT emailed Mr Marritt on 5 September 2018 setting some goals for the claimant and JD (another DSM) [R55]. In the email he refers to working with the DSMs to '*upskill them to fill some gaps'* (on *difficult conversations* for the claimant). He wrote again on 28 September 2018, to advise Mr Marritt that he has asked the claimant and JD to write a business plan as '*a few things are slipping*' [R70]. CT tells Mr Marritt on 10 October 2018 that he has set targets for the claimant and JD [R76].

Background: 8 November 2018

11. CT spoke to the claimant about his attitude and suggested that he lacked patience on 8 November 2018. The claimant says that this was in part down to the targets that he was being asked to implement for his team. CT and Mr Kasang had an online 'hangout chat' conversation about the meeting on the same day [R79-80] in which CT says that he finds that the claimant '*can be difficult*' and that he doesn't think that the claimant '*believes in doing any of this stuff*' (explained as meaning that the claimant didn't believe in adopting softer management skills to interact with his team). Mr Kasang commented that '*they will get there*' (meaning the claimant and JD). CT comments that he wants to guide the claimant and JD but that they must take full ownership. The claimant alleged in cross examination that he and JD were often

confused for the other. He also said that the comments might have arisen because the claimant pushed back on driving staff hard and that CT often said things to HR and something different to him. There is no other evidence that the claimant and JD were confused for each other by CT. CT knew the claimant (and JD) well. He line managed them. There is a draft PIP dated 5 November 2018 in the bundle at [R77]. It's not clear who drafted it, but it is clear that it was never shared with the claimant.

Background: 19 November 2018

12. CT and Mr Marritt spoke to the claimant (and JD) on 19 November 2018. CT records in a hangout chat that the claimant '*makes the atmosphere darker and bickers more*' he will work on the claimant's '*professionalism and support'*. Mr Marritt comments that they should see how they react, '*I think it will be different*' [R82]. Mr Marritt was reassuring CT about the claimant. The claimant initially said, when asked about the meeting in cross examination, that he did not recall the conversation (his chronology at [C13] does not refer to it). However, upon further questioning, he referred in cross examination to being 'ambushed' at the 19 November meeting. He gave evidence that CT apologised to him after the meeting because Mr Marritt 'went mad' at him and JD in the meeting. CT told Ms Brown in the grievance investigation meeting [R172-178 (177)] that the conversation was quite aggressive and that there was some cursing by Mr Marritt and that Mr Marritt told the claimant that he 'needs to sort himself out or he will be fired'. Mr Marritt said in cross- examination that he would not curse at work. In the grievance meeting with Ms Brown, Mr Marritt said that he couldn't recall cursing; 'it was a firm conversation, no bad language…you're actually struggling managing the current situation' [R188-195 (191)]. His evidence to the Tribunal was that he would not have said this. On balance, I find, given [R177] and that Mr Marritt could not initially recall whether he cursed when asked at the grievance meeting [R192] (I note that he also said, 'no bad language') and the grievance report recommendation (see below) that Mr Marritt should 'take care not to take an aggressive tone in meetings with employees' [R268-77 (276)] that Mr Marritt was 'aggressive', cursed and told the claimant that he needed to sort himself out or he would be fired, in the context of a meeting about performance. The respondent had concerns about the claimant's performance. The claimant does not rely upon this incident as a breach of trust and confidence. He did not raise the meeting in his grievance.

13. The claimant was referred to [R72A] at the meeting, which is the October 2018 anonymous survey results in so far as they relate to the claimant. There is one positive and one negative comment. The claimant considered that his team would comment about him negatively because he had put some of them on PIPs. CT wrote to Ms Brown on 1 March 2019, following a meeting with Ms Brown about the claimant's grievance [R179]. He told Ms Brown that the claimant had '*feedback from Glint from before Christmas but anything since he has not had directly from myself*'. If there is other feedback, I have not seen it. I did not see any survey results other than [R72A & 362]. Mr Kasang thinks that [R72A] was the only report for the relevant period. The claimant accepted that he was provided with survey results to Christmas by CT.

14. Following the 19 November 2018 meeting, Mr Marritt sent an email to CT (copied to Mr Kasang) [R92]. Mr Marritt set out 'areas of discussion' in relation to both the claimant and JD. The areas of discussion section relates to both the claimant and

JD. The 'actions' section refers only to JD (following a 1:1 with Mr Marritt).

15. CT asked Mr Kasang on 5 December 2018 for his assistance to set up 365 feedback for the claimant. CT tells Mr Kasang that the claimant '*winds [his team] up [and is] not very supportive and is very negative'* [R97]. CT went on leave for 6 weeks on 11 December 2018. Mr Marritt took over direct line management of the claimant and JD, in CT's absence. The claimant knew that CT would return to line manage him when he returned from his leave in late February. There is no 365 feedback. Mr Kasang assumes that it was not, in the end, sought.

Background: 19 December 2018

16. Mr Marritt sent the claimant, CT and JD an email dated 19 December 2018 about an incident that had taken place in the office [R104], asking them to support and uphold the values of the respondent and bring his attention to anything flaunting the values of the business going forwards. The claimant was not at work on the day in question. The claimant considers that again that he was confused for JD. The email refers to JD stopping something and I accept Mr Marritt's evidence that it was sent to the claimant and JD (and CT who was by now on leave) as managers as the President had received feedback from that area of the business. Mr Marritt could not recall whether the claimant was there on the day in question or not. That did not matter.

17. In late 2018/early 2019, there were resignations from the claimant's team. Exit interviews were carried out between 7 January & 1 March 2019 with those who had resigned (see further below).

Background: 10 January 2019

18. Mr Marritt met with the claimant and JD on 10 January 2019 and told them that they were being rated 'below the bar'. The claimant says that prior to the meeting on 10 January 2019, he had been told by CT that he would be rated as 'meeting the bar' (he did not receive the paperwork at that stage). The claimant assumed that the measure had already been 'calibrated'. JD told Ms Brown in the grievance meeting that he had been graded as meeting the bar by CT but downgraded by Mr Marritt [R156-162 (158)] and he also told Ms Brown that the claimant was being downgraded to 'below the bar'.

19. Mr Marritt accepts that he downgraded JD. However, his evidence is that CT had graded the claimant at below the bar. CT said at the grievance meeting with Ms Brown that he and Mr Marritt had a 'calibration' meeting during his leave and that he had gone back on forth on where to rate the claimant, '*Adam's soft skills, how he manages people in certain situations, etc we have had conversations about this….*' [R174]. I accept Mr Marritt and Mr Kasang's evidence that the grading is not final until calibrated, which CT confirmed was done whilst he was on leave. Post calibration, the claimant was rated 'below the bar' in his 2018 Annual Appraisal [R104A-C]. Given [R174], I conclude that CT had not advised the claimant that he was rated as 'meeting the bar' before he went on leave. If I am wrong and he did do so, the measure was not finalised because it had not been calibrated. Managers are told not to discuss grades until they have been calibrated.

20. Mr Marritt told the claimant at the meeting that although he was meeting his 'KPIs' that his attitude and behaviours needed to improve. The appraisal refers to 'empathy'. The claimant accepted in evidence that he did lack empathy by now because he was in 'such a bad mental state'. That is consistent with the conversations and discussions that had taken place to date. By this date there had only been one exit interview [R104D-F (EB)]. There are no meeting notes. Given that the appraisal refers to 'Rep feedback', it must, I think, have been written after 10 January but that does not detract from the rating that was given and that there were and had been concerns with the claimant's performance, including team member resignations. The appraisal was available to the claimant on the HR 'workday' system, post calibration.

21. Mr Kasang accepted in evidence that it is not best practice to advise employees of their respective ratings at the same meeting. It is poor industrial relations practice. Ms Brown picks that point up in the 'recommendations' section of her report [R276].

23 January 2019

<u>List of Issues: allegation (a)</u>

22. In his grounds of complaint the claimant alleges that Mr Marritt made fun of a colleague's ethnicity in a meeting on 23 January 2019 by *doing an impression of the colleague, using a mocking Indian accent, only stopping before the colleague came back into the room*. The claimant alleges that the incident made him feel 'extremely uncomfortable'. The claimant did not raise the incident before submitting his grounds of complaint. He did not raise it in his grievance dated 8 February 2019 [R118-121]. Nor did he raise it with Ms Brown in his meetings with her on 18 or 21 February 2019, nor in email correspondence with Ms Brown. The claimant's evidence was that he did not raise it as it had been raised by DH. DH raised a formal grievance on 4 March (but spoke to Mr Kasang earlier on 25 February) [R179A-183F). The claimant gave evidence that he wished that he had raised it and referred to his email to Mr Kasang dated 6 February in which he says that he is ashamed 'that [he] didn't bring [other matters] up at the time' He does not say which matters. [R114-115 (115)].

23. DH (DSM) raised a formal grievance on 4 March 2019 [R179A-183F]. Ms Brown did not ask the claimant to give evidence in respect of DH's grievance because she understood that the claimant and DH were friends and she considered that they would say the same as the other as he, JD and DH were communicating about the incident in hangout chats. JD, DH and the claimant did discuss the comment after the meeting. JD told Ms Brown that Mr Marritt did use a mock Indian accent and that it was a '*poor joke but not malicious*' (R180F). Mr Marritt denied mocking the colleague's Indian accent in the grievance meeting with Ms Brown.

24. Ms Brown concluded that the allegation was 'not … established' [R183F].

25. Mr Marritt's evidence to the Tribunal was consistent with his evidence to Ms Brown at the DH grievance meeting. He said that his comment 'has he gone to get water from another village' could be misconstrued but he denied using a mocking Indian accent.

26. I was referred to [C61] which is part of a redacted document that was sent to the claimant following a subject access request concerning the 23 January allegations. The claimant asked Mr Kasang about the document. It is not clear who the conversations were between. Mr Kasang did not think that he was party to the conversation at [C61]. January 23 is referred to just before the second hole punch and at the end of the page. But it doesn't take matters further.

27. On balance, given that the claimant did not raise the alleged incident in his grievance, nor at any stage with Ms Brown or the respondent more generally (I do not think that the DH grievance affected what the claimant raised in his grievance, as it came almost a month later) and that Ms Brown concluded, having heard DH's grievance that the allegation was not upheld (I did not hear from DH), I prefer Mr Marritt's version of events and find that the incident did not take place as described by the claimant. Mr Marritt did not 'make fun of a fellow colleague's ethnicity by mocking his Indian accent'.

29 January 2019

<u>List of Issues: allegation (b)</u>

28. The claimant alleges in his grounds of complaint that Mr Marritt asked the claimant's (and JD's) team whether '*morale was bad because of the claimant and JD. Mr Marritt invited criticism and comments that the claimant was 'too posh', not empathetic enough, and that his personality was a problem*' and that he '*was yelled at by Mr Marritt to just take it*' when he tried to respond. The claimant alleges that the meeting 'was of an aggressive nature' and that Mr Marritt '*invited and encouraged the teams to criticise the personalities of [the claimant and JD]'*.

29. The claimant did not raise allegations that Mr Marritt had yelled at him to 'just take it' or called him 'too posh' and 'not empathetic enough' or that his personality was the problem' in his grievance or at the meetings/email correspondence with Ms Brown. He does say in his grievance that '*when we tried to give our opinion, we were told that we can't answer (in front of the team) further belittling me. I felt publicly humiliated. When challenged our opinions were dismissed as 'getting emotional' which in itself is emotional bullying'* [R119]*. I know this made members of my team uncomfortable.*' The claimant says in the first meeting with Ms Brown that they were told by SM that the '*team not performing well, even though performing better than other teams. When challenged, our opinions were dismissed and called emotional….[team was asked] what was wrong and SM kept pushing them for answers. ES asked why the mood bad in the team, and people started saying because of them two (AM and JD). People criticised us and JD tried to respond and SM shut him down. When SM was criticised, he was able to reply*' [R141].

30. In his grievance meeting with Ms Brown, JD says that the teams were asked for feedback because Mr Marritt felt that morale was low and it '*came across that we weren't doing a great job, and how we can do better. He shut me off when I tried to speak in response to something….a horrible attack on us. Could have been handled better. This is a snowball effect* [R156-162 (160)].

31. In the grievance meeting with Ms Brown, Mr Marrit said that he invited feedback from the team because there had been a number of resignations. Mr Marritt said that the meeting was about performance. '*JD and AM did feel uncomfortable…If I had the opportunity again, I would stop those answers coming back from people. I was happy to take on feedback. It was just a conversation.*' Mr Marritt's evidence is that he invited feedback because morale was low. He denies inviting criticism. He denies raising his voice.

32. I find that Mr Marritt did not say that the claimant was too posh, nor that he was not empathetic enough or that his personality was the problem. I find that Mr Marritt invited feedback from the team because morale was low and team members had resigned and that the claimant (and JD) were subjected to criticism and felt 'attacked' by their teams at the meeting.

<u>List of Issues: allegation (c)</u>

33. The claimant also alleges that Mr Marritt told him after the meeting that he knew that the claimant was struggling. The claimant raised this issue in his grievance. Mr Marritt accepts that he told the claimant that he was struggling [R193]. Mr Marritt's evidence during cross examination was that they (the claimant and JD) were 'struggling with the concept of not doing what we need to be doing'. I accept Mr Marritt's evidence that was the context in which the statement was made. It was made in the context of the perceived performance issues and was a statement of what Mr Marritt perceived.

<u>List of Issues: allegation (d)</u>

34. The claimant's grounds of complaint also allege that Mr Marritt held secret one-to-one meetings with the claimant's team. The claimant raised this issue in his grievance. Mr Marritt did meet with the claimant's team (and others) in what he called 'skip level meetings'. On at least one occasion the meeting was requested by a sales rep. The claimant did not and does not know the purpose of the meetings. His evidence was that when team members returned from such a meeting, that there was a change in atmosphere. The claimant accepted that it was reasonable for Mr Marritt to meet with the sales reps but repeated that the atmosphere was different when they returned and that JD felt the same.

35. I find as a fact that the meetings were not 'secret one to one meetings'. They were 'skip-level' meetings to enable Mr Marritt to build a more 'holistic' picture of the business.

5 February 2019

<u>List of Issues: allegation (e)</u>

36. On 5 February 2019 Mr Marritt held a meeting with the Claimant and JD. He told them that he intended to put them on informal PIPs. The claimant was aware at this date that it would be an informal PIP. By this date, there had been three Exit Interviews (AG; TM and EB) [R104D-F]. The claimant believed that these leavers (and later) commented negatively upon him because of what he was driven to make them do

and/or because he had put them on PIPs and that it was significant that all the resignations came within a couple of months of each other, as he worked for the respondent for 4 years (DSM since July 2017).

37. The claimant alleges in his grounds of complaint that Mr Marritt told him at the 5 February meeting that '*he knows how to bury people*'.

38. In his email to Mr Kasang of 6 February [R114-6], the claimant alleged that he was '*dissuaded from going to HR* '*it's has been made very clear to me that Mr Marritt will retaliate if this happens, in a meeting he said, I'm careful, that's management 101, and I know how to bury people*'. He does not state that the comments were made at a meeting the day before and does not refer to the phrase at page 1 of his email when he mentions the 5 February meeting. The claimant said in the grievance meeting with Ms Brown that the comments were made when Mr Marritt started working for the respondent. He could not recall the context of the comments because *it didn't have any relevance to [him] at the time* [R260]. The claimant does mention the 5 February meeting at the grievance meeting but in the context of Mr Marritt making a reference to the army. In cross examination, the claimant said that Mr Marritt may have made the comment more than once.

39. CT was asked at the grievance investigation meeting whether he had heard Mr Marritt say this. He preferred not to comment. *If* CT did hear Mr Marritt say this, it cannot have been at the 5 February meeting because CT was on leave.

40. JD says in his grievance interview that Mr Marritt made both comments at the PIP meeting on 5 February 2019 in response to him (JD) pulling a face about Mr Marritt alleging '*he's very by the book*' [R161].

41. Mr Marritt's evidence in chief was that he *could not recall* saying 'I know how to bury people…not *think* this is something I would ever say'. He accepts that he may have made the 'management 101' comment. In cross-examination, Mr Marritt said he 'absolutely [would] not' use that phrase (*know how to bury people*).

42. I find, on balance, that Mr Marritt did make the comments at the 5 February meeting, although Mr Marritt does not recall making the 'bury' comment. I also find that the comments were directed at JD in response to JDs reaction (pulling a face (above)). The comment was not directed to the claimant. The claimant was however at the PIP meeting when the remark was made.

43. The claimant emailed Mr Kasang on 6 February [R114-6]. On 8 February, the claimant raised a formal grievance [R118-120]. The claimant states that until that date, he '*felt like [he] was a valued, well performing employee. Granted I have not had the best relationship with Steve Marritt but this has never been from my side. If there are areas that I need to work on I am more than willing to do so, but not with the intention of setting me up to fail….*' He raised the allegations relied upon in his grounds of complaint (and others). He alleged that the 'informal' PIP was designed to manage him out of the business. The claimant had not seen the PIP at this stage. He refers to GN who he alleges was also managed out of the business. GNs exit interview dated 28 February 2019 is at [104D]. GN says that when he was put on a PIP by the claimant, he told the claimant what he needed but that he didn't do what he told him he would do

to help. The claimant considered that he did not know what metric he was failing and that he had not seen Glint surveys referred to (he had seen [R72A] but I find that the claimant was aware that CT and Mr Marritt had concerns about his performance ((above).

List of Issues: allegation (f)

44. The claimant alleges in his grounds of complaint that Mr Marritt moved his '*team members*' away from him on 11 February, without any consultation when the claimant was on annual leave, and this resulted in him sitting alone and made it more difficult to manage the team.

45. At [R148] the claimant emailed Ms Brown on 19 February following the grievance meeting (below) to say that Mr Marritt had moved 90% of his team away on 29 January and on 11 February that he moved the last team member.

46. Mr Marritt's evidence was that the team was reorganised to separate leavers and joiners. Mr Marritt said at the grievance meeting that it was done to 'create a divide that did not disrupt the team' [R190]. Mr Marritt explained that even if that meant that the claimant was sitting on an empty bank of desks, that there are 7 desks x 4 desks in a row that did not mean that the claimant was separated in 'any meaningful way' and that the claimant could choose to sit where he wished. I accept Mr Marritt's evidence. The claimant accepted that the leavers were moved and that 'it made sense' to move leavers, although he said that he would not have done so and it did not work and created a negative atmosphere.

List of Issues: allegation (g)

47. The claimant alleges in the grounds of complaint that he was placed on a *formal* PIP on 18 February which was *unpassable and designed for [him] to fail*.

48. Mr Marritt met with the claimant on 18 February 2019 to discuss the PIP framework and later that day sent the claimant a written PIP dated 18 February 2019 [R134 & 135 & 144].

49. I make the following findings in respect of the allegation that the claimant was placed on a *formal* PIP on 18 February:

i. The claimant was told and was aware on 5 February 2019 that he was to be placed on an informal PIP. His written grievance referred to an informal' PIP [R118-120 (118)].

ii. The claimant was confused by the formal PIP paperwork issued by Mr Marritt. The claimant had put members of his team on PIPs and had never used the formal template. It was not common to use formal paperwork for informal PIPs. I accept that this *suggested* to the claimant on 18 February 2019 that it was a formal PIP.

iii. Mr Marritt consulted HR for advice before issuing the PIP paperwork because he had not conducted PIPs for a number of years and had never

conducted PIPs for the respondent.

iv. The PIP paperwork stated that if the expected outcomes were not met, more *formal* action may be taken [R144 & R146-7].

v. The claimant emailed Ms Brown on 18 February 2019, following the 18 February meeting to raise his concern that he was being placed on a formal PIP. He was asked to raise it with Mr Marritt and HR [R144].

vi. The claimant told Ms Brown on 21 February that he understood the PIP to be an informal one [R151-154 (152)].

vii. Mr Marritt asks CT (in an email dated 26 February 2019) to re-explain to the claimant that the PIP is informal [R170-1 (171)].

viii. CT emailed the claimant on 6 March 2019, reiterating that the, now revised, PIP was is 'not an official PIP' [R187].

50. The claimant alleges that the PIP was unpassable and designed for him to fail. I make the following findings:

i. Issues concerning the claimant's management skills had been raised with him previously by CT and/or Mr Marritt (above); the claimant was rated as 'below the bar' in his annual appraisal [R104A-C]); team members had resigned and some exit interviews had been conducted [R104D-F].

ii. The claimant raised aspects of the PIP with Ms Brown on 20 February 2019 [[R149 & R151-4].

iii. The claimant had not received any written documents explaining why he was considered to be failing, save that [R104A-C] which was available to the claimant on the HR 'workday' system and he had seen [R72A].

iv. The claimant had not seen a PIP for a DSM before he was issued with his PIP.

v. The PIP drafted by Mr Marritt was not 'SMART'. Mr Marritt had discussed the proposed PIP with HR (Mr Kasang) to check it [R123].The PIP was time limited.

vi. The PIP caused the claimant stress.

vii. CT returned from paternity leave on 25 February 2019 and suggested some amendments to the PIP. The PIP was amended by CT, with Mr Marritt's agreement, because the objectives were not all SMART (objective 2 [R134] deleted, save that the objective 'Team meetings/Morale' is added to the revised objective 2 (measure is now whether there are complaints) [R163]); Objective 3 'Measures & Evidence' [R134B] amended (complaints) [R163]; Objectives 1,4 & 5 were not amended or deleted, save the date was revised). The revised PIP (now containing four objectives) was issued on 26 February 2019 [R63-165] and effective from that date

and due to run to 31 March 2019.

viii. CT resumed line management responsibility for the claimant on 26 February 2019. The claimant was aware of that. Mr Marritt resumed responsibility for line managing CT.

ix. The claimant queried with CT on 26 February why the PIP had been amended and said he had zero confidence in the process and asked whether he could assume that the 'bedding in' period starts again [R168].

x. The claimant met with CT on 6 March 2019 to discuss a support plan and work on the 'hows' in respect of the PIP [R187]. The claimant said in cross-examination that he thinks that [R187] was written to 'cover peoples' backs'. The email was written just over a week after the start of the revised PIP and approximately a month after the claimant's formal grievance. I do not accept that the email was written to cover peoples' backs. [R187] was written by CT to follow up a meeting with the claimant.

xi. CT thought that Mr Marritt had invoked the PIP process a 'bit fast', but agreed that the claimant and JD were not 'improving that fast' [R172-178 (175)].

xii. CT also resumed line management responsibility for JD when he returned from leave. JD passed his informal PIP. He left the respondent to take up a role elsewhere in June 2020.

xiii. There are four formal PIP stages [R49A-G]. Dismissal is a possible outcome at or after stage 3 of the formal process. There is a right of appeal against any formal action taken.

<u>List of Issues: allegation (h)</u>

51. The claimant alleges in his grounds of complaint that the PIP meeting on 18 February was arranged by Mr Marritt to 'rough [him] up'; and dissuade him from going ahead with the grievance, prior to the grievance meeting on the same day with Ms Brown. The claimant believes that Mr Marritt would have been aware of the meeting with Ms Brown because he would have seen Ms Brown's online calendar, although he accepted that Ms Brown did not tell Mr Marritt about the grievance until 5 March. He also gave evidence that Mr Marritt would also have been aware of the grievance because Mr Marritt's line manager (John Wilson) would have told him. Mr Marritt's evidence, which I accept, was that he was not officially aware of the claimant's grievance until 5 March. He was aware of rumours that the claimant had raised a grievance. The reason the informal PIP was invoked by Mr Marritt was because of the claimant's performance and that members of his team had resigned and the need to stem attrition from the business. The PIP was, Mr Marritt said, and I accept, based on the conversations between Mr Marritt and CT previously, designed to highlight what the claimant needed to do. In any event, Mr Marritt had told the claimant (and JD) that he intended to place them on an informal PIP at the 5 February meeting (before the claimant wrote to Mr Kasang on 6 February [114-116] and before he formally raised a grievance on 8 February 2019 [R118-121].

52. The claimant also alleges that the meeting room, which was next to Mr Marritt's desk, was picked by Ms Brown deliberately, to dissuade him from going ahead with the grievance. I find as a fact that Ms Brown booked an available room and did not know that it was next to Mr Marritt's desk (she works in the US office; she had visited the London office earlier in February) and that she had no intention of intimidating the claimant. When the claimant said that he did not feel comfortable with the booked room, Ms Brown found another room on a lower floor in which the meeting took place. The claimant did not refer to the 'roughing up' allegation in either of his meetings or email correspondence with Ms Brown.

<u>List of Issues: allegation (i)</u>

53. The claimant alleges that the failure to uphold the grievance and the fact that Ms Brown told him 'that they were only going to speak to' Mr Marritt about how he treated the claimant and others was the 'final straw'.

54. Ms Brown understood that her role was to investigate whether the claimant's concerns about the basis of the informal PIP (as she understood it to be) were well founded and to consider the claimant's bullying allegations against Mr Marritt. She met the Claimant on 18 February 2019 and again on 21 February 2019 and there was some email traffic.

55. The grievance procedure is at [R76A-C]. Ms Brown conducted her investigation throughout February and March [R136-43; 151-4; 156-62; 172-8; 188-95]. Ms Brown met with JD; CT and Mr Marritt, in addition to the claimant. There are typed notes of the meetings.

56. Ms Brown concluded, having reviewed the evidence before her, that the claimant's allegations had not been established. She concluded that the bullying allegations were not established, but rather that Mr Marritt had had 'firm and direct' conversations with the claimant. She found that the underperformance of the claimant justified the PIP put in place to support the claimant [268-277].

57. The claimant was asked in cross-examination whether he was satisfied with how the grievance was handled. The claimant said that he did not know how it should be handled but that Ms Brown had not interviewed DH and that she did not do anything to follow up his allegations. The claimant said that if DH had been asked to be a witness in respect of his grievance, that he would have considered Ms Brown to be independent. Ms Brown did not speak to DH as part of the investigation into the claimant's grievance because she understood that the claimant and DH were friends and because he also raised a grievance against Mr Marritt on 4 March 2019 [R179A-183F] and because she did not consider that he would add anything to the investigation as he was not present at the meetings on 29 January; 5 February or 18 February and would only have known about the incidents from the claimant (the claimant did not raise the 23 January allegation (above) in his grievance. DH was present at the 23 January meeting).

58. Ms Brown met with the claimant (online) on 15 March to discuss the outcome of his grievance. Ms Brown did not uphold the grievance. The meeting lasted about an hour. She told the claimant that the respondent wanted to support him and that nobody

wanted to push him out. Ms Brown considered that the meeting went well and that she was shocked that the claimant resigned on 17 March. She also emailed the claimant on 15 March 2019 [R206], attaching the grievance report [R268-77] and supporting documentation [R207-267]. Ms Brown recommended that Mr Marritt 'take care not to take an aggressive tone in meetings with employees and refrain from providing feedback or commentary to anyone outside the relevant individual for whom the feedback is meant'. She did not recommend mediation between Mr Marritt and the claimant because CT had returned from leave and was line managing the claimant again and she thought that the claimant was 'happy'. Mr Marritt was spoken to by Mr Kasang and advised to be mindful of the environment.

59. The claimant was aware that he had a right of appeal. He did not exercise it. I accept that the claimant felt that 'mentally [he] could not do it' but that is very different to not knowing that he could appeal. The claimant considers that he was not supported by HR and that although Mr Kasang offered support, anything he said to Mr Kasang went straight to Mr Marritt. Mr Kasang accepted in evidence that the claimant was in a 'tough spot' during February-March and said that he tried to support him. They met on several occasions in informal meetings. He was of the view that the claimant was 'panicked/paranoid'. Mr Kasang mentioned the Employee Assistance programme to the claimant [R200].

60. CT discussed the exit interviews [R104D-F/187] conducted by Mr Kasang with the claimant on 6 March 2019. The claimant alleges that CT did no not do so (save in respect of the EH interview) but given that there is documentary evidence supporting that he did [R187] and that Mr Kasang's evidence was that CT told him that he would speak to the claimant about the exit interviews and that the claimant accepted that CT had discussed the EH interview (R104F) with him, I find as a fact that CT did so as part of the PIP support process. A number of the interviewees record concerns about the claimant's management. The claimant alleges that the comments were made because he was forced to put his team on PIPs and/or because at least four of the leavers went to work for the same company. One of the exit interviews refers to a PIP, although it doesn't say the PIP itself was the issue; another [EH at R104F] does say she left because of a 'PIP, worked to get off it but couldn't and management'. The claimant says that SL [104D] was also on a PIP and that he doesn't recall him raising a concern with him about his friend. The claimant said that AG [R104D] was not on a PIP but that targets were higher than ever and that CT drove 'us' so hard and it was stressful and therefore that staff would not understand the difference between what they were being asking to do and the claimant. I do not repeat all the leavers' comments here. Most make reference to the claimant.

61. The claimant resigned on 17 March 2019 [R278-81].

62. The claimant sent his cv/applied for jobs beginning on 1 February 2019 [R363]. The claimant received acknowledgment of an application to his current employer on 12 March 2019 [R370] and written confirmation of an interview with his current employer on 19 March 2019 [R372]. The claimant started a new job on 8 April 2019, having received the written offer on 26 March 2020 [R373].

Submissions

63. Both parties had the opportunity, which they took, to make oral submissions at the end of the evidence. I do not repeat them here. Ms Hicks also provided written submissions. The claimant had a copy of those written submissions. The Claimant, though not a lawyer, made creditably concise submissions; Ms Hicks, though a lawyer, also made concise submissions, which were directed to the relevant issues.

The Law

64. Section 95 Employment Rights Act 1996 sets out the circumstances amounting to a constructive dismissal:

> *"(1) For the purposes of this part an employee is dismissed by his employer if (and subject to subsection (2)…, only if)-*
>
> …
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

65. I considered *Western Excavating v Sharpe* [1977] EWCA Civ 165. The burden of proof is on the Claimant to prove the following:

a. That there was a breach of contract. The breach of contract must be sufficiently serious, or repudiatory - going to the root of the contract of employment, so as to justify an employee's resignation. The implied duty of trust and confidence has been defined as a duty that the 'employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and/or (see *Baldwin v Brighton & Hove City Council* [2007] IRLR 232) likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee'. It is irrelevant that the employer does not intend to damage his relationship provided the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot reasonably be expected to put up with it (Leeds Dental Team Ltd v Rose [2014] IRLR 8). The conduct of the parties must be looked at as a whole and its cumulative impact assessed. It is the impact of the employer's behaviour on the employee that matters, not the intention of the employer, but the impact on the employee must be judged objectively (*Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84/*Malik v Bank of Credit and Commerce International* [1997] IRLR 462 affirmed by the Court of Appeal in *Bournemouth University Higher Education Corporation v Buckland* [2010] IRLR 445). In *Parsons v Bristol Street Fourth Investments Ltd trading as Bristol Street Motors* UK EAT/0581/07 HHJ Peter Clark reminds me that whilst the employee's subjective reaction to his employer's conduct is not determinative of the breach it is a factor which the tribunal is entitled to take into account in deciding objectively whether the conduct is likely to destroy trust and confidence and in assessing whether there has been a breach what is significant is the impact of the employer's behaviour on the employee. A breach of the

implied term of trust and confidence is necessarily a fundamental breach of contract (see Safeway v Morrow [2002] IRLR 9).

b. The Claimant must show that he resigned in response to this breach, not for some other reason. But the breach need only be *an* effective cause, not the sole or primary cause, of the resignation.

c. That he did not, by his conduct, lose the right to resign in consequence of the breach, sometimes called affirming or waiving the breach.

66. Guidance was given in the case of *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 as to what amounts to a “final straw”. The Court of Appeal affirmed these principles in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978. A relatively minor act (or omission) may be sufficient if it Is the last straw in a series of incidents. The last straw need not be unreasonable or blameworthy conduct. All it must do is contribute, however slightly to the breach of the implied term. At paragraph 22, Lord Dyson states: ‘*Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test… [i]s objective*.’

67. HHJ Auerbach HHJ applied *Omilaju* and *Kaur* in *Williams v The Governing Body of Alderman Davies Church in Wales Primary School* (UKEAT/0108/19). I raised the point (not the case) briefly with Ms Hicks during submissions:

28. …The starting point is that there will be a constructive dismissal, that is to say a dismissal within the meaning of Section 95(1)(c) of the Employment Rights Act 1996 where (a) there has been a fundamental breach of contract by the employer, (b) which the employee is entitled to treat as terminating the contract of employment and (c) which has materially contributed to the employee’s decision to resign.

29. As to the first element, the fundamental breach may be a breach of the Malik term. That may come about either by a single instance of conduct, or by conduct which, viewed as a whole, cumulatively crosses the Malik threshold. As to the third element, the conduct amounting to a repudiatory breach does not have to be the only reason for resignation, or even the main reason, so long as it materially contributed to, or influenced, the decision to resign. Some authorities use different language to express the same idea, such as whether the employee resigned at least partly in response to the breach, but the underlying point is the same. These two points are long established in the authorities and generally, I think, well understood.

30. As to the second element, in recent years, the following question has been explored in the authorities. If there has been conduct which crosses the Malik threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of contributing to a breach of the Malik term, can the employee then treat that conduct, taken with the earlier conduct, as terminating the contract of employment?

31. That question appeared to have received different answers from the EAT, but was tackled head on by the Court of Appeal in Kaur v Leeds Teaching Hospital NHS Trust. Their decision confirms that the answer is "yes". In Kaur, Underhill LJ, which whose speech Singh LJ concurred, gave the following guidance: "I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions: (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, for the reason given at the end of para. 45 above.) (5) Did the employee resign in response (or partly in response) to that breach? None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy".

32. This helpful guidance assists Tribunals to navigate through one particular possible permutation of the branchings of the decision tree. Some other possible permutations are relatively straightforward. If the answer to Underhill's LJ question two is "yes", then the claim of constructive dismissal must fail. If the answer to question three is "yes" then the Tribunal should proceed to question five.

33. As I understand it the parenthetical "if it was" following question four, conveys that it is an affirmative answer to that question that will also take the Tribunal to question five. However, what if the answer to question four is "no"? That is the scenario with which this ground of appeal in the present case is concerned. The answer is, that if the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign.

34. In my judgment this is the correct analysis as a matter of principle, and indeed is in line with what has been said by the Court of Appeal in previous authorities. It is the correct answer in principle because, so long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it has not been lost, and the employee does resign at least partly in response to it, constructive dismissal is made out. That is so, even if other, more recent, conduct has also contributed to the decision to resign. It would be true in such a case that in point of time, it will be the later conduct that has "tipped" the employee into resigning; but as a matter of causation, it is the combination of both the earlier and the later conduct that has together caused the employee to resign.

35. In Kaur, Underhill LJ observed that the last straw metaphor may, in some instances, mislead, but we are, he concludes, probably stuck with it. See paragraphs 45 and 46. In particular he pointed out there, that the label may be applied both to cases where the last conduct in point of time was not innocuous, and the previous conduct was not enough by itself to cross the Malik threshold, and in cases where the most recent conduct in point of time was not innocuous, and the previous conduct was enough to cross that threshold, but was affirmed.

36. The expression "soldiers on" indeed, borrowed from Dyson LJ's speech in Omilaju, conveys the notion of affirmation. In many such cases, indeed, the employee will, after the previous conduct of the employer, be taken by some conduct on the employee's own part, to have affirmed the initial breach. In those cases, the further conduct of the employer will only put the employee in a position to treat the employment as terminated by the employer's conduct if that further conduct could, itself, contribute something to such a breach. However, it will not be in all such cases that the employee, even though they did not, prior to the further conduct of the employer, resign, will be treated as having affirmed the prior breach. It is always a fact sensitive question as to whether the employee's conduct, whether by act or omission or some combination thereof, amounts to affirmation.

37. In cases where there has been previous conduct in breach, which has not been affirmed, and then a further innocuous act which tips the employee into resignation, the employee may still, colloquially, think of the most recent conduct as the "last straw", because it is the most temporally proximate element of the overall conduct which contributed to the resignation and in fact tipped them into taking that step. However, I venture, it is not a last straw in the legal sense at all.

38. This analysis is also, I consider, not in conflict with the prior authorities. In paragraph 21 of Omilaju, cited by the ET at paragraph 75 of its Decision, and relied upon by Ms Wynn Morgan in her submissions, Dyson LJ referred to a situation in which the employee "soldiers on and affirms the contract" (my emphasis). It is in that situation – where the employee has not only not yet resigned, but has affirmed following the prior conduct – that he is dependent on the later act at least being more than entirely innocuous, to order to be in a position to treat the contract as terminated by the employer's overall conduct. However, that analysis does not apply in a case where he has not previously affirmed the contract; and Omilaju does not say that it does.

39. The analysis in Kaur, as Underhill LJ explained, involves no departure from the analysis in Omilaju. As I have explained, the general guidance given by Underhill LJ focusses on the type of scenario at hand in that case, which Tribunals might perhaps most typically encounter; but it does not purport to cover all the possible paths through the decision tree.

68. Section 95(1)(c) provides that the employee must terminate the contract by reason of the employer's conduct. The question is whether the repudiatory breach(es) played a part in the dismissal. It need not be the sole factor but can be one of the factors relied on. If, however, there is an underlying or ulterior reason for the employee's resignation, such that he would have left anyway irrespective of the

employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives the tribunal must decide whether any breach was *an* effective cause of the resignation. At paragraph 20 of Wright v North Ayrshire Council [2014] IRLR 4, Langstaff P said, '*where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause*.'

69. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract *W E Cox Turner (International)Limited v Crook* [1981] IRLR

Unfair dismissal

70. Where dismissal is proven by the employee, the employer has to prove that the reason for the dismissal falls within one of the potentially fair categories listed in section 98(2) ERA 1996.

71. An employer has to prove the reason for the dismissal falls within one of the potentially fair categories listed in section 98(2) ERA 1996. The respondent relies upon capability.

72. Section 98 provides:

> "98(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee is redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."

73. It was said by Cairns LJ Abernethy v Mott, Hay & Anderson [1974] IRLR 213 at 215, that:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be a set of beliefs held by him, which caused him to dismiss the employee."

That formulation has been approved by the House of Lords in Devis v Atkins [1977] ICR 662. It is not for the Employment Tribunal to consider the substance of the employer's reason at the section 98(1)(b) stage (provided they are more than "whimsical or capricious".

Unfairness

74. Where there is a potentially fair reason for dismissal, a tribunal must decide whether the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissal. Section 98 (4) Employment Rights Act 1996 which so far as relevant provides:

> "(4) … where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

The burden of proof in establishing the reasonableness of the dismissal is neutral and the test is an objective one – *Boys and Girls Welfare Society v Macdonald* [1996] IRLR 129.

75. In addition, case law makes clear that "a decision to dismiss must be within the band of reasonable responses which a reasonable employer might have adopted" - *Iceland Frozen Foods v Jones [1982 IRLR 439*. Tribunals should not, when considering these matters, look at what they would have done but should judge, on the basis of the range of reasonable responses test, what the employers actually did. The appropriate test is whether the dismissal of the Claimant lay within the range of conduct that a reasonable employer could have adopted.

76. If the Claimant's dismissal was unfair, I must consider what the percentage chance was, if any, that a fair dismissal would have occurred in any event ('Polkey' argument)?

77. If the Claimant's dismissal was unfair I must also consider whether there had been any unreasonable failure to comply with the ACAS Code of Practice and whether, as a result, there should be any adjustment to compensation under s207A Trade Union & Labour Relations (Consolidation) Act 1992?

78. Finally, if the dismissal of the Claimant was unfair, I must consider whether the Claimant contributed to the dismissal and, if so, what proportion the Tribunal

considered just and equitable as a reduction to the basic and/or compensatory awards?

79. The claimant does not seek reinstatement.

Conclusion (application of the law to the facts)

<u>Did the respondent breach the implied term of mutual trust and confidence?</u>

80. I have set out the law in some detail above. The legal test requires the claimant to prove evidence from which the Tribunal can find that the respondent's conduct was 'calculated or likely to destroy or seriously damage' the relationship between the parties, without reasonable and proper cause. An employer's actions can damage the employment relationship, without reaching the threshold of destruction or serious damage.

81. I appreciate that the claimant feels very strongly that he was treated unjustly by the respondent and, in particular, by Mr Marritt in the period ending with his resignation. Mr Marritt's management style was different to the claimant's line manager, who was on leave for much of the period in question. But the legal test requires me to take an objective view of the employer's conduct. I take each of the incidents that the claimant says individually and/or cumulatively amounted to a breach of trust and confidence:

a. I found as a fact that the 23 January incident did not occur as described by the claimant. The incident happened as described by Mr Marritt and on that basis, there was no breach of trust and confidence. Whilst the comment made by Mr Marritt was inappropriate and liable to be misconstrued, I do not consider that objectively it was likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent.

b. I found as a fact that Mr Marritt did not say that the claimant was too posh, nor that he was not empathetic enough and that his personality was the problem on 29 January 2019. There was therefore no breach of trust and confidence in that respect. I also found as a fact that Mr Marritt invited feedback from the team because morale was low and there had been resignations. Mr Marritt had not invited criticism (although that is what happened). My conclusion is that inviting feedback from a team in a team meeting does not amount to a breach of trust and confidence. Mr Marritt wanted to address the concerns that he had about the team's performance and he felt the way to do this was to have a team meeting to gather feedback. This may not have been the best way of achieving the desired outcome and, given the criticism that was directed at the claimant and JD, I agree with Mr Marritt that stopping the meeting sooner would have been better, but I cannot say that inviting feedback was done without reasonable and proper cause. It was, I conclude, within a range of reasonable management techniques. A manager is entitled to manage a team and seek feedback. There were concerns about the claimant's performance and Mr Marritt was seeking to find out what the problem was

by asking for feedback from the team. I therefore conclude that there was no breach of trust and confidence in respect of the 29 January incident.

c. The claimant also alleges that Mr Marritt breached the implied term by telling him that he was struggling. I conclude that there was no breach of trust and confidence in Mr Marritt telling the claimant that he was struggling, given the context of the meeting that had just happened and the concerns about the claimant's performance. It was statement of how Mr Marritt felt about the claimant's performance. A manager must be able to have honest conversations with employees. There was reasonable and proper cause for the statement in the context it was made.

d. The claimant alleges that the implied duty was breached because Mr Marritt held one-to-one secret meetings with the claimant's team. I found that Mr Marritt did meet with the claimant's team (and others) in what he called 'skip level meetings' to enable Mr Marritt to build a more 'holistic' picture of the business. They were not 'secret' meetings. There was no breach of the implied duty of trust and confidence in holding skip-level meetings with team members. There was reasonable and proper cause for Mr Marritt meeting with the team.

e. I found that Mr Marritt did say to JD in response to JD pulling a face 'I'm careful that's management 101, and I know how to bury people' at the 5 February PIP meeting, in the claimant's presence. Whilst the comment was not directed to the claimant, it was said in a meeting where the claimant was advised that Mr Marritt intended to put him and JD on an informal PIP. On balance, I have concluded that, in making the 'bury' comment in the context of a meeting about performance, the respondent conducted itself in a manner which was likely to destroy or seriously damage the relationship of trust and confidence between itself and the claimant without reasonable and proper cause. Whether or not behaviour is calculated or likely to destroy trust and confidence is to be objectively assessed and does not turn on the subjective view of the employee. I consider that for Mr Marritt to suggest to JD in the claimant's presence in the context of a meeting about performance management of both employees that he could 'bury' them was sufficiently serious to amount to a breach of the implied term. It was, in my opinion (in this context) likely to seriously damage the relationship of trust and confidence.

f. The claimant alleges in his grounds of complaint that Mr Marritt moved his team away from him on 11 February, without any consultation when the claimant was on annual leave, and this resulted in him sitting alone and made it more difficult to manage the team. I accepted Mr Marritt's explanation for the move. There was reasonable and proper cause for the action that he took. There is no breach of the implied duty.

g. In respect of the allegation that the respondent breached the implied duty of trust and confidence in that the claimant was placed on a *formal* PIP on 18 February which was *unpassable and designed for the claimant to fail*. My finding of fact and my conclusion is that the claimant was placed on an

informal PIP, albeit he was initially confused by the paperwork. In respect of the allegation that the PIP was unpassable and designed for the claimant to fail, I found as a fact that Mr Marritt took HR advice before sending the PIP paperwork to the claimant because he had not previously set up PIPs in the respondent organisation. Whilst the objectives may not have been SMART, Mr Marritt had asked HR for their help to set up the PIP. Mr Marritt was happy for the PIP to be amended by CT when he returned on 25 February 2019, it was amended, and a support plan was put in place by CT when he returned from leave. I do not therefore accept that the PIP *was unpassable and designed for the claimant to fail* (and the fact that JD passed his PIP reinforces my conclusion). I accept it was distressing for the claimant but there was no breach of trust and confidence in my judgment. There was reasonable and proper cause for the informal (and subsequently amended) PIP.

h. The claimant alleges in his grounds of complaint that the PIP meeting on 18 February was arranged by Mr Marritt to 'rough [him] up'; and dissuade him from going ahead with the grievance, prior to the grievance meeting on the same day with Ms Brown. I found as a fact that the reason the informal PIP was invoked by Mr Marritt was because of the claimant's performance and that members of his team had resigned. The PIP was based on the conversations between Mr Marritt and CT; the feedback from team members and was designed to highlight what the claimant needed to do to improve and, furthermore, Mr Marritt had told the claimant (and JD) that he intended to place them on an informal PIP at the 5 February meeting (before the claimant wrote to Mr Kasang on 6 February and before the claimant formally raised a grievance on 8 February 2019. I conclude that the meeting was not designed to 'rough up' the claimant and dissuade him from his grievance. There was no breach of trust and confidence. Whilst not alleged as a breach of trust and confidence, I also find that there was no breach in Ms Brown inadvertently booking the room next to Mr Marritt's desk.

i. The claimant alleges that the failure to uphold the grievance and the fact that Ms Brown told him 'that they were only going to speak to' Mr Marritt about how he treated the claimant and others was the final straw and that he 'lost his final faith in HR'. I have asked myself whether proper enquiries were made by Ms Brown and whether the relevant evidence was fairly and objectively considered, and whether a reasonable conclusion was reached. I conclude that it was. I accept that Ms Brown could have interviewed DH, but I also accept that she had objective grounds for concluding that it would not be appropriate to do so. She reached a different conclusion to my conclusion on the 'bury' allegation. I do not think it was unfair for her to have done so, nor repudiatory (sufficiently serious, going to the root of the contract). Ms Brown assessed the evidence and in my judgment the conclusion that was reached was one that was reasonably and rationally open to her on the evidence. There was in my conclusion no diminution of the trust and confidence between the claimant and the respondent by its handling of the grievance or the outcome. Inevitably perhaps, the claimant did not agree with the outcome. The issue

is whether the grievance was handled properly. I conclude that it was. I conclude that there was no breach of trust and confidence in the manner of investigation, the conclusions reached, and the recommendation.

Kaur/Williams

82. Having considered the complaints individually and determined whether there were individual breaches of the implied term, I will now address the guidance in *Kaur / Williams*, by answering the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his resignation?
(2) Has he affirmed the contract since that act?
 (a) If yes, the claim must fail (*Williams*).
(3) If not, was that act (or omission) on the part of the employer by itself a repudiatory breach?
(a) If yes, Q5 (*Williams*)
(4) If not, was it nevertheless a part (applying the approach in Omilaju) of a course of conduct comprising several acts and/or 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).
 (a) If yes, proceed to Q5 (*Williams*).
 (b) If not (i.e if the most recent conduct was not capable of contributing something to a breach of the implied term), consider whether the earlier conduct itself entailed a breach of the implied term, has not since been affirmed, and contributed to the decision to resign (*Williams*)).
(5) Did the employee resign in response (or partly in response) to that breach?

83. Taking those questions in turn and applying them to the facts:

(1) The most recent act relied upon by the claimant is the grievance investigation/outcome.
(2) The claimant has not affirmed the contract since that act. He resigned shortly after the outcome was communicated to him.
(3) The grievance outcome was not, in my opinion, a repudiatory breach for the reasons I state above.
(b) I now step back to consider whether the cumulative effect of the treatment of the claimant can be said to amount to a breach of the implied duty of trust and confidence under the last straw doctrine (in the sense of the last event in a point of time). The last straw relied upon was the grievance investigation/outcome. I remind myself that whilst the last straw may be relatively insignificant, it must contribute something to the breach of trust and confidence. I do not, in the end, think it did. It was, in my judgment, an innocuous act. The claimant does not agree that it was right for Ms Brown not to call DH as a witness nor does he agree with the outcome of the grievance. But it did not, viewed objectively, contribute to the breach,

even though the claimant considers the acts as destructive of his trust and confidence in the employer. The grievance investigation/outcome was of a completely different nature to the previous allegations. There was, in my conclusion, no series of incidents which cumulatively amounted to a repudiation of the contract by the respondent. I must now ask whether the earlier conduct (the '*bury*' comment) amount to a breach of the implied term? The answer is, as stated above, yes. Did the claimant affirm/waive the breach? I conclude not. He raised a grievance shortly after the comment was made; that grievance was ongoing until its conclusion on 15 March 2019; the claimant resigned on 17 March 2019. The final question I must ask then is whether that earlier conduct contributed to the claimant's decision to resign? The claimant relies upon the issue (and the others) in his grounds of complaint as contributing to his decision to resign. He raised the allegation in his grievance. He did not, however, say in his email of 6 February (or in his grievance of 8 February) that the comment was made at a meeting just the day before (or, in the case of the formal grievance) three days earlier). He does not refer to the comments at page 1 of his email to Mr Kasang where he mentions the 5 February meeting. Moreover, the claimant told Ms Brown that the comments were made when Mr Marritt began his employment with the respondent. He could not recall the context of the comments because '*it didn't have any relevance to [him] at the time'*. The claimant does mention the 5 February meeting at the grievance meeting but in a different context, namely Mr Marritt making a reference to the army. I think that if the comment had been an effective cause of the claimant's resignation that he would, at the very least, have told Ms Brown that the comment had been made by Mr Marritt during the 5 February PIP meeting. He did not. For that reason, I conclude that the 5 February comment was not *an* effective cause of the claimant's resignation. In my judgment, he resigned because his grievance had not been upheld.

84. The claimant's claim of unfair constructive dismissal therefore fails. The claimant was not constructively dismissed. The remaining issues do not require determination. The claim is dismissed.

Employment Judge Scott
Dated: 21 December 2020

APPENDIX

AGREED LIST OF ISSUES

Constructive Dismissal

1. Did the Claimant terminate the contract in circumstances in which he was entitled to terminate it by reason of the employer's conduct (s.95(1)(c) Employment Rights Act ("**ERA**") 1996)?

2. Did the Respondent conduct itself in a manner calculated or likely to destroy or seriously damage the implied term of trust and confidence between itself and the Claimant, without proper cause? The Claimant relies on the following acts:

<u>January 2019</u>

a. On 23 January 2019 Mr Steven Marritt made fun of a fellow colleague's ethnicity by mocking his Indian accent;[1]

b. On 29 January 2019 Mr Steven Marritt asked the Claimant's junior team members whether morale was low because of the Claimant and Jonathan Douglas, the other Divisional Sales Manager. It is alleged that he: (i) invited junior team members to criticise the Claimant and Mr Douglas; (ii) yelled at them to "just take it"; and (iii) criticised the Claimant for being "too posh" and "not empathetic enough";[2]

c. At the conclusion of the meeting on 29 January 2019, Mr Steven Marritt told the Claimant that he was struggling and he knew it;[3]

<u>February 2019</u>

d. Mr Marritt subsequently had secret one-to-ones with the Claimant's team;[4]

e. On 5 February 2019, Mr Marritt told the Claimant, at an unscheduled meeting, that he knew how to bury people;[5]

f. On 11 February 2019 Mr Marritt moved the Claimant's team members to different desks without consultation and whilst he was away on holiday;[6]

---

[1] Grounds of Claim, para 3 [**18**].
[2] Grounds of Claim, paras 4-5 [**19**].
[3] Grounds of Claim, para 6 [**19**].
[4] Grounds of Claim, para 7 [**19**].
[5] Grounds of Claim, para 8 [**19**].
[6] Grounds of Claim, para 10 [**19**].

PIP

g. On 18 February 2019 the Claimant was placed on a formal Performance Improvement Plan ("**PIP**"), which was unpassable and designed for the Claimant to fail;[7]

h. The meeting on 18 February 2019 was deliberately arranged so as to "rough up" the Claimant before his grievance meeting;[8]

Grievance

i. On 15 March 2019 Ms Elisabeth Brown delivered the Claimant's grievance outcome: it was not upheld.[9]

3. Did the Respondent commit these acts?

4. Did any proven conduct on the Respondent's part amount to a series of unreasonable acts, such that, cumulatively, they amounted to a fundamental breach of the employment contract?

5. If so, were the breaches an effective cause of the Claimant's resignation?

6. Had the Claimant waived any breaches by the time of his resignation on 17 March 2019?

Fairness of Dismissal

7. If the Claimant is found to have been constructively dismissed, what was the reason for this dismissal?

8. Was it a potentially fair reason? The Respondent relies on capability, which is a potentially fair reason under s.98(2)(a) ERA 1996.

9. Was dismissal fair in all the circumstances (s.98(4)-(6) ERA 1996)? Specifically, was the dismissal fair as a matter of (a) substance, (b) process and (c) was dismissal a fair sanction to impose?

Remedies

10. To what remedies, if any, is the Claimant entitled? The Claimant seeks:

    a. A basic award for unfair dismissal;

---

[7] Grounds of Claim, paras 11, 13 [**19-20**].
[8] Grounds of Claim, para 12 [**20**].
[9] Grounds of Claim, para 15 [**20**].

b. A compensatory award for unfair dismissal.

11. If the Claimant is found to have been unfairly dismissed:

    a. Should the basic award within the meaning of s.119 ERA 1996 and/or compensatory award be reduced to any extent because of any conduct of the Claimant, applying s.122 ERA 1996?

    b. Should the compensatory award be reduced to reflect the fact that he would have been dismissed in the near future in any event (*Polkey v A E Dayton Services Ltd* [1987] IRLR 503, [1988] ICR 142)?

    c. Has the Claimant unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (s.207A(3) of the Trade Union and Labour Relations (Consolidation) Act 1992)? If so, what percentage reduction to the compensatory award would be just and equitable in all the circumstances?

    d. Has the Claimant proven that he has made reasonable attempts to mitigate his loss (s.123(1) and s.123(4) ERA 1996)?