Case No. 2301755/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS Y BATCHELOR**
MS J FORECAST

BETWEEN:

Mr S Luke
Claimant

AND

Venson Automotive Solutions Ltd
Respondent

ON: **21, 22 and 23 March 2017**
IN CHAMBERS ON: **3 May 2017**
Appearances:
For the Claimant: **Mr M Laing, consultant**
For the Respondent: **Mr C Ludlow, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claim under section 47E of the Employment Rights Act 1996 is dismissed upon withdrawal by the claimant.
2. The claims for constructive unfair dismissal and detriment for taking leave for family reasons fail and are dismissed.

REASONS

1. By a claim form presented on 16 September 2016 the claimant Mr Simon Luke claims constructive unfair dismissal and detriment for taking paternity leave and/or for proposing to make a flexible working request.

2. The claimant worked for the respondent as an account manager. His period of service was from 29 October 2012 to 17 June 2016.

3. The respondent provides vehicle fleet management and related services. It employs about 109 people in Great Britain, with about 60 people at the place where the claimant worked in Thames Ditton, Surrey.

The issues

4. There had been no preliminary hearing in this case and therefore the issues were confirmed with the parties at the outset of this hearing as follows. We were assisted by a draft list of issues from the claimant which guided us in confirming the issues with both parties.

Constructive unfair dismissal

5. This is a claim for constructive unfair dismissal. The term of the contract relied upon is the implied term of trust and confidence. The claimant relies on the same matters as set out below and relied upon as detriments under section 47C Employment Rights Act.

6. The respondent denies fundamental breach. It is therefore an issue for the tribunal as to whether there was a fundamental breach of the contract of employment.

7. Did the claimant resign in response to any proven breach?

8. Did the claimant affirm the breach?

9. If there was a dismissal, was the decision to dismiss a fair sanction and within the range of reasonable responses?

Detriment for taking family or domestic leave – ERA section 47C

10. The claimant relies upon the following detriments:

    a. On 31 July 2015, at a mid-year Performance Management Review , Mr Staton being unjustifiably critical and confrontational. The claimant says his commitment was questioned and he was asked if he wanted to stay in the job.
    b. In about early August 2015 Ms Shaw advising the claimant that he should consider leaving the company because Mr Staton's conduct towards him would not cease. Ms Shaw is said to have told the claimant that he could raise a grievance but given Mr Staton's relationship with the managing director Ms Roff it was unlikely to be a positive outcome.
    c. Mr Staton being unreasonably and unjustifiably critical of and acting in an intimidatory manner towards the claimant after the claimant had attended positive client reviews with clients Connect, Wolseley and The Dogs Trust.
    d. On 25 April 2016 Mr Staton commencing a disciplinary investigation against the claimant in respect of an alleged breach of working instructions.
    e. On 20 May 2016 Mr Staton unreasonably issuing the claimant with a disciplinary warning.
    f. On 8 June 2016 Ms Roff unreasonably refusing to uphold the claimant's

appeal against the written warning.

11. A claim under section 47E of the ERA was withdrawn at the outset of the hearing.

12. It was apparent at the outset of the hearing and we informed the parties that we would not be in a position to deal with remedy, if applicable, at this hearing.

Witnesses and documents

13. The tribunal heard from the claimant and his former colleague Mr James Sherlock who worked as an account manager and left the respondent's employment in November 2016.

14. For the respondent the tribunal heard from (i) Mr Simon Staton, director of client management and the claimant's line manager, (ii) Ms Kellie Shaw, HR manager and (iii) Ms Samantha Roff, managing director. The tribunal had witness statements for (iv) Ms Alison Bell, marketing director and the grievance officer and (v) Mr Mark Gerard, finance director and the grievance appeal officer. These two witnesses were not called. Their evidence was not challenged.

15. There was a bundle of documents of just over 560 pages and a draft list of issues from the claimant.

Findings of fact

16. The claimant worked for the respondent as an account manager. His employment commenced on 29 October 2012. He was one of five account managers. The job involves looking after customers who have a fleet size of 100 to 1,000 vehicles. The claimant's line manager was Mr Simon Staton, the director of client management. The claimant initially had a good working relationship with Mr Staton. They had a shared interest in rugby and got on well.

17. The claimant had his first six-month performance review on 26 April 2013 with Mr Staton, covering the period to 29 March 2013. The scores available within a performance review, in terms of meeting the stated objectives, were 4 – Always, 3 – Almost Always, 2 – Sometimes and 1 – Rarely. The claimant accepts that he had room for improvement as he was new to the job and this was a new industry for him.

18. He had a performance review on 16 January 2014. He scored mainly 3's and 2's with some 4's. His next performance review took place on 27 January 2015. Again this consisted of mainly 3's and 2's with some 4's and with less 2's than the previous review. We saw no overall score for the performance reviews. The concluding comments from Mr Staton were generally positive.

19. It is not in dispute that in January 2015 the claimant received a bonus of 15%, the highest that could be achieved under the bonus scheme (page 95b). Mr Staton's evidence was that just because the claimant received this bonus "*did not mean he was the perfect account manager*". The bonus scheme covers the respondent's financial year which is also the calendar year. Therefore we find that this bonus relates to the claimant's performance in 2014.

20. In his capacity as the claimant's line manger, Mr Staton kept a running record of performance issues that he wished to raise at scheduled performance reviews. This running record was kept by way of an email which Mr Staton sent to himself and which was a document to which he added from time to time. It was to assist him in giving the claimant examples when he wanted to discuss performance. The running record was at pages 158-162.

21. The claimant's case is that Mr Staton's treatment of him changed "dramatically" from February 2015 when the claimant spoke to him about taking shared parental leave when his daughter was born. The claimant's wife was expecting a baby with a due date of 15 July 2015.

22. Mr Staton is also a parent of young children. In early 2015 his two children were aged 2 and 4. Mr Staton has been employed by the respondent since 1998 and has taken paternity leave twice; two weeks on each occasion.

23. It was put to the claimant that when he first informed Mr Staton that he and his wife were expecting a baby, Mr Staton congratulated him. The claimant said he could not remember the conversation but accepted that Mr Staton "*may have done*" and accepted that Mr Staton was pleased for him. We find that Mr Staton was congratulatory and pleased to hear about the claimant's news.

24. In February 2015 the claimant spoke to Mr Staton about taking shared parental leave. Mr Staton referred the claimant to HR. This right was just about to come into effect, as the statutory scheme came into force on 1 December 2014 and applies to those with children born on or after 5 April 2015. It was therefore a new right and not one which the respondent had dealt with previously. Mr Staton understandably referred the claimant to HR. The claimant says it was clear to him that Mr Staton did not want to engage in conversation about it and was "unhappy" that the claimant had raised it. We find that Mr Staton was not in a position to engage in conversation about it as it was a new right and he is not an HR professional. We find nothing untoward about Mr Staton not engaging in conversation on the matter and we also find that he did not express any unhappiness about it; this was purely the claimant's interpretation.

25. The claimant spoke to Ms Kellie Shaw, the HR Manager. Ms Shaw is an experienced HR Manager and has 18 years' service with the respondent. At the material time the HR department consisted of two people; herself and a junior HR Assistant Ms Kirsty Inwood. Ms Shaw said that the

respondent company took a helpful and supportive attitude towards employees needing family leave.

26. The claimant enquired about taking some time off for family leave. He enquired about shared parental leave and said he was also thinking about taking off one day per week. As shared parental leave was a new right, Ms Shaw had not dealt with it in practice before. She told the claimant she would look in to the Regulations and get back to him. She also told the claimant that if he was interested in taking one day off per week this was probably not shared parental leave but more likely a request for flexible working.

27. The claimant in his witness statement said that this conversation took place in early March 2015. He told the tribunal in evidence a number of times that he had to prepare his witness evidence significantly from memory because he did not have access to his work emails or computer. The respondent said that the conversation with Ms Shaw took place in May 2015 and the claimant was prepared to accept that this might have been the case. We find that this conversation with Ms Shaw took place in May 2015.

28. The claimant's evidence was that Ms Shaw told him that Mr Staton "would not be pleased" if he took shared parental leave. She said he would worry about how it would affect the client base and customer service. Ms Shaw said this was not true and denied saying this. Having done her research, Ms Shaw sent the claimant a document titled "Shared Parental Leave, the new regulations in a nutshell" prepared by the Institute for Employment Studies (bundle page 64a). We find that Ms Shaw did not say to the claimant that Mr Staton would not be pleased if he took parental leave, for reasons which we set out below under the heading "The claimant's resignation".

29. The claimant's case is that in a conversation with Ms Shaw in May 2015 she asked him about his intentions for taking paternity leave and she told him that Mr Staton would prefer that he took one week following the birth and another week later on in the summer. Ms Shaw denied that she said this. In cross-examination she said she asked him about his intention because other employees had opted to take paternity leave in two separate blocks of a week. We find this was her reason for asking him. The claimant told Ms Shaw that he needed to take the full two weeks in one block. We find that Ms Shaw had an entirely credible reason for asking the claimant about his intentions in this respect. We find that given that Mr Staton had taken his own paternity leave (twice) in a block of two weeks, on a balance of probabilities, he did not tell Ms Shaw that he was not happy for the claimant to take a two-week block.

30. When the claimant next spoke to Ms Shaw on the matter, he said that in the light of the comments from Mr Staton in February 2015 and with Ms Shaw in May 2015, he decided to change his plans and proposed to reduce his working hours to four days per week. Ms Shaw told the claimant he

could do this via a flexible working request. The claimant said he then considered his options. He chose not to pursue a flexible working request and at the start of this hearing, he withdrew his claim in relation to this. In August 2015 the claimant told Ms Shaw that he would not be pursuing flexible working because his mother-in-law would be providing additional child care (bundle page 109).

Events surrounding the birth of the child

31. The respondent was particularly busy in July 2015. The claimant was asked by Mr Staton to prioritise a re-tender bid for one of the claimant's existing clients, Npower. This was one of the respondent's most important clients for whom the claimant was the account manager. It was one of the most important tender bids that the claimant was likely to work on for the respondent. The claimant found out that the tender bid date was Friday 17 July 2015 and this was within a couple of days of his wife's due date. The claimant went to speak to Mr Staton about it. Mr Staton asked the claimant to block out the two weeks running up to the tender date and they would discuss it again nearer the time.

32. In his running record of performance concerns Mr Staton said in relation to the Npower tender presentation: *"...he was expected to attend the presentation as he is the AMgr HOWEVER we would assess the situation closer to the time as "family comes first without exception"."* (page 161). We find that this was a contemporaneous note. The claimant denied that Mr Staton said "*family comes first without exception*" and that he left the meeting feeling anxious. Mr Staton was cross-examined on this thoroughly and was absolutely adamant that said this. He has two young children, aged 2 and 4 at the time and we find that it is entirely plausible that this was his view and we find that he said this. We are supported in this finding by the contemporaneous note. We find that any anxiety related to the claimant's concerns about the Npower tender bid coinciding with his baby's due date.

33. As it turned out the Npower tender date was postponed and the claimant was able to attend it. The tender bid was unsuccessful and the respondent lost the contract.

34. On Wednesday 1 July 2015 Mr Staton contacted the claimant by email at 17:26 hours saying "*Are you able to talk briefly later when the board meeting has finished? I appreciate you're on leave tomorrow and Friday".* Mr Staton had been in an off-site Directors' meeting all day. The claimant had annual leave booked for Thursday 2 and Friday 3 July. The claimant emailed in reply 30 minutes later saying "*Hi Si Am out for dinner shortly Regards Si"* (page 107). Although he did not say so in as many words, the claimant declined the request for a brief conversation with Mr Staton. We find that this was not an unreasonable request from Mr Staton, to email at 17:26 asking for a brief conversation when the claimant was due on holiday for the remainder of the week and Mr Staton had been off-site all day. The claimant was not a junior employee who clocked off at 5pm, he was a

senior manager. The claimant's contract of employment (page 67) said: "*If necessary, you will be expected to work overtime to meet deadlines; to maintain systems or services on behalf of the Company or its clients or to complete outstanding work. You will not be eligible for overtime payment or time off in lieu".* This was a perfectly reasonable request for a conversation which lay fully within the terms of the claimant's contract.

35. The claimant told the tribunal that his daughter's date of birth was 2 July 2015. He was taken to an email (page 566) dated Sunday 5 July 2015 timed at 18:03 in which he emailed Mr Staton and Ms Shaw the news of the birth. The email said "*Just to let you know that Amber went into labour last night and gave birth at 01:06am (in the Volvo at Epsom Hospital), to [name of child]".*

36. This email therefore placed the date of birth as 5 July 2016 in the early hours of the morning. The claimant said that this was a cut and paste email that he had sent to a number of people and amended depending on the person to whom it was sent and he did not correct the date of birth.

37. Mr Staton sent a very pleasant congratulatory email at 08:05 on Monday morning 6 July (also page 566).

38. On 31 July 2015 Ms Shaw wrote to the claimant (page 108) to congratulate him on the birth of his daughter, which she understood had taken place on 5 July and to give him the details of his paternity leave commencing on Monday 6 July for two weeks. Ms Shaw confirmed that the claimant would be taking two weeks in one block of 2 weeks. The claimant said that the respondent had sought to persuade him to take his paternity leave in two separate blocks of one week. He accepted that Mr Staton never told him he could not have a two-week block. We saw no evidence of the respondent seeking to persuade the claimant not to take his paternity leave in a two-week block and we find that they did not.

39. The claimant returned from paternity leave on Monday 20 July 2015.

40. The claimant does not accept that on his return from paternity leave he was not performing to the required standard. The claimant accepts that a conversation took place between himself and Mr Staton about the effects of having a new born baby in the home. The claimant and Mr Staton both acknowledged that the claimant was tired because of the baby's night-time sleeping and feeding routine; the claimant told Mr Staton that he was benefitting from sleeping in the spare room.

41. Mr Staton empathised with the situation because he had been through it himself, twice, but said he had not had the luxury of being able to sleep in a spare room. The claimant thought this conversation "bizarre" and thought that Mr Staton was "being macho" about not benefitting from sleeping in a spare room. We find that Mr Staton was speaking in a friendly and light-hearted manner seeking to be understanding of the claimant's position. The claimant replied to Mr Staton "*would you prefer that I came to work*

with sleep deprivation?". We find that the claimant put a negative interpretation on Mr Staton's comments made in the context of his own experience of having a new born baby in the house. This was an entirely lightweight and friendly conversation between colleagues who had enjoyed a good working relationship.

The mid-year performance review

42. On Monday 31 July 2015, two weeks after the claimant's return from paternity leave he had a mid-year performance review with Mr Staton. The documentary record was at page 564-565 of the bundle. It was a two-hour meeting in the afternoon. There were six bullet points of discussion under the heading "Accountabilities and Conduct" the claimant's performance was identified by Mr Staton as unacceptable. The claimant accepts that four of the bullet points were said in the meeting, one was not and one he could not recall. There were three bullet points under the heading "Conduct", again where performance was considered unacceptable. The claimant admits two of them were said and he cannot remember the third.

43. The claimant's evidence was that this meeting was a case of Mr Staton spending an hour and a half "*pulling apart my performance*" and questioning his commitment to the company. The claimant's case is that at this meeting his commitment was questioned and he was asked if he wanted to stay in the job. The claimant made no notes of this meeting either at the time or shortly afterwards. We find that this was a difficult performance review in which Mr Staton raised legitimate and evidence-based concerns as set out in the bullet points in his notes. He itemised his concerns and raised them with the claimant. The claimant in cross-examination agreed that some of the concerns raised by Mr Staton were legitimate and we find that they were. It is always difficult for employees to hear that their performance is not up to standard but it is necessary for the proper running of the business.

44. Mr Staton's note of the meeting (page 564) confirms that he told the claimant that his performance levels were unacceptable. We find that the claimant interpreted this as a questioning of his commitment to the job, although those precise words were not used.

45. There followed a list of quotes set out by Mr Staton recording the claimant's feedback. There were 11 quotes, seven of which the claimant admits to and four of which he denies. The final quote in the notes is an apology "*for the lack of respect shown in how he responded to the info request on 1 July*". This related to the brief email on 1 July saying he was going out for dinner, when Mr Staton asked for a brief conversation after the board meeting had finished on that day. The claimant admits the apology but said he gave it because he feared for his job. We find that the apology was appropriate and the claimant gave it because he knew this and not because he feared for his job. We repeat our earlier findings in relation to this email exchange and the fact that the claimant was a senior manager who could reasonably be expected to deal with a brief call from a Director in the late

afternoon.

46. The note of the meeting shows that there were a number of performance concerns, the claimant had initially forgotten about the date for this meeting and the claimant had not prepared in detail for the meeting. We find that these issues caused Mr Staton to question the claimant's commitment to the job. It was not expressly put to Mr Staton in cross examination that he asked the claimant if he wanted to stay in the job. There is insufficient evidence for us to find that he said this.

47. In early August 2015 the claimant spoke to Ms Shaw about Mr Staton's behaviour in the 31 July mid-year performance review meeting. The claimant's case is that Ms Shaw advised him "*as a friend*" to leave the company because Mr Staton was "*never going to change*". The claimant's case is that Ms Shaw said he could raise a grievance but that because of the past personal relationship between Mr Staton and managing director Ms Roff, it was unlikely to have a positive outcome.

48. Ms Shaw denies saying this to the claimant. Ms Shaw said she presented the claimant with three options as to how he could deal with the situation with Mr Staton. They are "text book" HR options in such a situation. She said he could (i) raise a grievance against him, (ii) she could arrange a facilitated meeting between the two of them with HR present or (iii) as they had previously got on well, he could try an informal option by going out to lunch together to discuss matters. We unanimously found Ms Shaw to be a credible and straightforward witness. She is an experienced HR professional and we find that it is most unlikely that she would advise an employee to leave the company because of the legal risks such advice might present. We find on a balance of probabilities that she did not advise the claimant to leave because Mr Staton was "*never going to change*".

49. The claimant said he no longer felt wanted at the respondent and that for "*no justifiable reason*" his job was on the line. He was asked why he did not raise a grievance about Mr Staton at that time as he did not do so until the point of termination of his employment. The claimant accepts that he was made aware of the grievance procedure when he joined the respondent. This sets out (page 151) the methods of resolving grievances informally and formally.

50. The claimant said that he did not think of this in 2015 because although he had been made aware of the grievance procedure when he joined, he "*did not have a photographic memory*". We find that he did not need a photographic memory to recall the grievance procedure because it was on the respondent's intranet. We also find that Ms Shaw gave the claimant the option of raising a grievance when they spoke in early August 2015.

51. Ms Shaw did not inform Mr Staton of her conversation with the claimant as, quite properly, she waited to see what the claimant wanted to do about it. Ms Shaw followed up the conversation with the claimant and asked whether for example, he had been out for lunch with Mr Staton to talk about

matters. Ms Shaw says the claimant said "*what's the point, nothing will change*".

52. The claimant accepts that in November 2015 Mr Staton granted his request to leave work early so that he could take his daughter to the doctor. We saw the request at page 115 of the bundle. It was granted within about 45 minutes of the request being made.

53. In early December 2015 the claimant asked Mr Staton if he could take one day's annual leave per week throughout January and February for childcare reasons. Mr Staton was amenable to the request and asked the claimant to have a think about which day of the week would be best so as to least impact the business. The claimant initially suggested Fridays, but Mr Staton did not think this would be the best day. The claimant then suggested Wednesdays. He asserted in his grievance hearing before Ms Bell, referred to below (the notes were at page 231), that Mr Staton told him that also "wouldn't work" and was told to think again. We find Mr Staton did not say this. We saw from the claimant's email of 10 December 2015 at page 125 of the bundle that it was the claimant who changed the request from Wednesdays to Tuesdays because it fitted better with his childcare arrangements. Mr Staton emailed HR with his approval of that arrangement (page 125).

<u>The January 2016 managers' meeting</u>

54. In January 2016 the managing director Ms Samantha Roff held a meeting with managers in an effort to improve the company's performance and standards. Ms Roff presented slides to the managers' meeting and we saw those slides at pages 128 to 157. The headings for the presentation were as follows "2016 objectives/get it right first time; Feedback from customer survey; Department surveys; Structure of the BOM; Review of 2015 performance and 2016 budget".

55. A clear message was given to managers in that meeting (including the claimant) that they must improve service delivery to customers and we find that it was a raising of the bar in terms of standards and expectations of managers. Ms Roff detailed in that meeting what was considered unacceptable in terms of errors and process failures and told managers of her intention to deal with future breaches in a formal manner. Ms Roff was not going to tolerate future breaches of procedure and she said she was "leading the charge" to get it right first time.

<u>The claimant's client review meetings</u>

56. The claimant relies on Mr Staton's reactions to three client meetings that he held in early 2016. There were no notes before us in relation to any of those meetings. The claimant accepts that he made no notes of 2 of the meetings, (Connect and The Dogs Trust) but said that he made a note of the meeting with Wolseley by sending it as an email to himself. The document was not in the hearing bundle. Whilst we accept that after the

termination of his employment the claimant did not have access to his work emails, we were not made aware of any request being made to the respondent for disclosure of this highly relevant email.

57. In March 2016 the claimant held a client review meeting with Mr Mark Earle from his client Connect. The claimant's view of the meeting was that it could not have gone any better. The claimant had a review meeting the next day with Mr Staton who was unable to recall the detail of that meeting.

58. The client review meetings in question were to cover the period 1 April to 30 September 2015 and Mr Staton's evidence was that they should have taken place in November 2015 and not in 2016. The claimant accepted in cross-examination that this is what should have happened but it did not due to the level of his workload.

59. The claimant was affected by the departure of an account executive, Mr Ross Crooks who left in December 2015. The claimant worked with account executive Ms Paula Gunn. Mr Staton met with Ms Gunn in February 2016 to discuss her workload. She told Mr Staton that she had experienced a spike in her workload following the departure of Mr Crooks but she thought it would be temporary and she felt that she and the claimant could work more efficiently on some of their tasks and that some tasks could be delegated to the Account Management Administration team.

60. The claimant's review meeting with client Wolseley was scheduled for Monday 29 February 2016. Mr Staton reviewed the claimant's power point presentation for the meeting by way of preparation. Mr Staton considered the power point presentation to have a significant number of errors so he arranged a meeting with the claimant for Thursday 25 February to deal with this. This meeting took 2 hours. Mr Staton asked the claimant for his opinion on some of the metrics and trends that were arising for the client and the claimant replied "*I don't have an opinion, why don't you tell me what it should be".* In cross-examination the claimant admitted that he said this. He explained that he said it was because he was "so worn down" by Mr Staton. We find that the claimant's comment was unhelpful and uncooperative and indicative of his attitude to his line manager.

61. Mr Staton attended the Wolseley client review meeting with the claimant. The claimant again thought the meeting went well. The claimant accepts (statement paragraph 28) that Mr Coles of the client mentioned an area for improvement which was downtime management reporting. The claimant also accepts that Mr Staton pointed out an error in the claimant's slide presentation. The claimant said that the client did not raise it at the meeting. We find that it is entirely appropriate for Mr Staton to raise an error in the presentation even if the client did not mention it. The respondent was aiming, following Ms Roff's managers' presentation in January 2016, to "get it right first time" and to raise standards. The claimant accepts that the client raised an area for improvement and we find that it was appropriate for Mr Staton to raise the error in the slides against the background of getting it right first time. We find that the client review

meeting was not 100% positive and Mr Staton was reasonable and justified in raising the issues. He had been present at the Wolseley meeting and had first-hand knowledge of how it had gone.

62. On 2 March a feedback meeting took place between Mr Staton and the claimant to discuss the Wolseley meeting. The claimant says that Mr Staton proceeded to "grill" him for 45 minutes and questioned "what was going on in his head", which the claimant says he found "bullying and inexplicable". Mr Staton had the benefit of being at the Wolseley meeting so he knew exactly what had taken place. We find that Mr Staton did not "grill" the claimant, he did not bully the claimant and he did not act in an intimidatory manner. This was the claimant's dislike of Mr Staton raising appropriate managerial and performance issues in this business context.

63. The claimant accepts that at the 2 March meeting Mr Staton asked him to provide certain information regarding the promptness of scheduling client review meetings and that this was to be provided the following day. The claimant also accepts that he was late in providing this information which Mr Staton chased on 8 March and which resulted in a further meeting between them on 12 March. The claimant accepted in oral evidence and we find that despite him being late with the information requested, Mr Staton nevertheless agreed on 8 March to the claimant taking some time off to look after his daughter.

64. In about April or May 2016 the claimant had a client review meeting with The Dogs Trust. He said this was a challenging client but that the client gave "excellent feedback". There were no contemporaneous notes to show this. The claimant said that Mr Staton said he could not believe the claimant could do a client review meeting without any negative feedback. Mr Staton did not specifically recall the meeting but denies that he made this comment.

65. In relation to the claimant's workload, the loss of the Npower contract meant that there would be some diminution in his work from 1 January 2016 when the new provider took over. The account was therefore in "run-off". It meant that they were dealing with the practicalities of the return of vehicles from the maintenance engineers in that company. The claimant said this involved hundreds of vehicles and was very time consuming. Call volume from Npower reduced from 753 per month at the end of 2015 to 68 per month for the first three months of 2016. The claimant did not deal with the calls, he was involved in the logistics of the vehicle returns. The claimant had three other run-off accounts to manage. On one of those run-off accounts he had another account executive assigned to assist him, named Jade Cibrowski.

66. The claimant could also call on support from Ms Vickie Newman, the customer services manager and also from the Pricing and Remarketing Department who are also tasked with the return of leased vehicles.

<u>The events leading to the claimant's disciplinary</u>

67. The claimant was very busy at the beginning of the New Year 2016. Despite losing the Npower contract from the beginning of the year, that contract remained in "run-off" status whilst the claimant coordinated the collection of the vehicles driven by that company's employees, mainly engineers and technical staff.

68. The claimant had the other demanding clients including Avonside Group Services. The claimant did not get on well with that client's Finance Director Mr Keith Kershaw whom he described as "hot-headed" (page 389).

69. At page 275 of the bundle we saw a Work Instruction that dealt with the procedure for vehicle ordering for clients. It covered three main topics, converting a quote into an order; raising an order and ordering the vehicle. It states that once an order has been created on the system the next step is the creation of an Order Confirmation Schedule known as an OCS. In that section of the instruction it says "*As per the details on the OCS you will now obtain the required signatures and once that's done you will need to send both the OCS and the driver confirmation sheet to the customer and driver respectively*." (page 276). It goes on to say "*once the customer has posted back the signed OCS you can proceed with the final stage of the ordering process*".

70. This instruction makes it very clear that vehicles are not to be ordered unless and until the customer has signed the OCS. There is a very simple commercial reason for this namely that the respondent does not want to be in a position where it has ordered expensive bespoke vehicles for a client who then no longer wishes to go ahead with the order. It is a straightforward contractual issue.

71. The claimant accepted in evidence that the Work Instruction applied to him as the account manager. He also accepted responsibility for this in an email dated 5 May 2016 at page 523 of the bundle.

72. In mid December 2015 the claimant's client Avonside wished to order two highly bespoke Vauxhall Movano vehicles and a quote was provided. The total price of the two vehicles was about £50,000. The respondent was purchasing from a company named Maxi Low and the two vehicles had very distinct specialisation for the client.

73. There was some email correspondence regarding this at the end of December 2015, at a point when the claimant was on Christmas holidays. The claimant returned to work on Tuesday, 5 January 2016. His direct report Gary Curran, an account executive, emailed him on 5 January with an update on the position with these vehicles saying "*so I should know whether this is a goer (or not) late tomorrow or early Thursday this week*." (page 294). Mr Curran and the claimant were dealing with Mr Mick Ramsden, a Procurement Manager at Avonside.

74. Emails were exchanged on 6 January 2016 as to the delivery address for

the vehicles.

75. On 6 January 2016 at 15:38 hours Mr Curran emailed the claimant with copies to the claimant's other direct report Ms Paula Gunn and Ms Ana-Maria Aloy in accounts. Mr Curran said "*once ordered – vehicles can't be cancelled – would take approx three weeks to build once ordered – plus the blower element*" (page 297).

76. At 16:32 hours on 6 January 2016 the claimant emailed Mr Curran about the cost to Avonside and the client's view that it was being "over-egged" (page 500).

77. On 7 January 2016 at 12:52 the sales director of Maxi Low contacted Mr Curran, with a copy to Mr Ramsden of Avonside, saying that he did not have a confirmed order for the two chassis. He had them on hold for Avonside. He asked if the respondent was able to send over an order as he had had them on hold for three weeks and had an order coming from another customer (page 314). This highlighted the fact that the respondent needed to go ahead with the order if they wanted to be in a position to supply the vehicles to their customer.

78. Mr Curran forwarded this email from Maxi Low on to the claimant. Mr Curran said in a written statement (page 499) "*At this point Simon Luke asked me (verbally) to progress this with MaxiLow urgently and secure the vehicles – making sure we did not lose them."* The claimant denies that he gave Mr Curran a verbal instruction to proceed with ordering the vehicles.

79. At 14:06 the claimant sent an email to Mr Ramsden at Avonside saying that the reason it was taking so long was because MaxiLow were providing incorrect details which meant that Mr Curran was spending a lot of time going backwards and forwards to make sure that the quotes were correct. The claimant said they would have this resolved that afternoon and the vehicles were being held (page 336).

80. There was an issue from the client's point of view regarding the region or cost centre to which this order was to be charged. This was an internal matter for Avonside as their relevant cost centre is not a concern for the respondent so long as the order is placed. Mr Staton's evidence, which we accept and find, was that an order can be put against any cost centre and then moved at a later date and this often happens.

81. At 14:05 hours on 7 January 2016 Mr Curran emailed Maxilow with a copy to Mr Ramsden at Avonside and a copy to the claimant asking if Maxilow were happy with the content and "*if so I'll complete with associated Venson detail and send over as confirmation of the order of both vehicles this afternoon."* (Page 344). Mr Curran sent a signed and completed order to Maxi Low at 15:54 hours on 7 January, copied to the claimant.

82. At 14:36 hours there was a further email from Mr Curran to the claimant and the respondent's purchase admin team (page 500). It said that these

were the "FINAL" quotes for the Avonside converted vehicles. At 15:48 Mr Curran emailed accounts (page 519) with a copy to the claimant with pro forma invoices for the 2 vehicles saying that he did not think that the orders were yet on FW, which is the respondent's software system known as Fleetware. At 15:54 he ordered the vehicles.

83. It was not until 17 February when MaxiLow chased payment, that Mr Curran became aware that the orders were still not on Fleetware because the claimant and his colleague Ms Gunn had not been given a relevant cost centre by Avonside against which to place the charge and there was no signed OCS.

84. It is not in dispute that no OCS was completed before the two vehicles were ordered and that this was a breach of the Work Instruction.

85. Mr Staton and Ms Roff's evidence was that it is only the account manager who has the authority to place an order and this must be with an OCS and that Mr Curran of his own volition, as an account executive did not have that authority. There are exceptional cases when orders are placed without a signed OCS, when it is authorised at Director level such as by Mr Staton or Ms Roff. We find that in those circumstances it is the Director who is taking the commercial risk.

86. The claimant agreed that Director authority could be obtained to place an order without an OCS and he also accepted that he did not seek such authority.

87. On 29 January 2016 the claimant sent an email to Mr Staton as his line manager raising his difficulties with Mr Kershaw the finance director of Avonside (page 389) and saying "*I think your previous decision to remove me from this account would be the right move. Therefore I would really appreciate it if you could review and revert your decision*".

<u>The claimant's working relationship with Mr Staton from 2015</u>

88. Mr Staton candidly admits that he has a direct management style. He has had no formal grievances lodged against him during his 19 years' service with the respondent in various different roles. Ms Shaw from HR said that there were sometimes verbal complaints made to her as there were concerning other managers. Ms Shaw said it was not unusual for staff to come upstairs to the HR department and sound off about their manager. Sometimes, if she felt the situation warranted it, she would follow up with the "complainant" who normally said "it's all fine" and they did not want to take matters any further. Ms Shaw said, and we accept and find, that this is all in the normal course of her HR work. We find that there were no more complaints about Mr Staton than any other Director or senior manager and that there were no formal complaints made about him until the claimant made his complaints.

89. It was also not in dispute that many years ago, ending in 2004, Ms Roff and

Mr Staton were in a relationship. Both are now married to other partners and have children with those partners. Ms Roff took maternity leave from the respondent and Mr Staton took paternity leave from the respondent, on two occasions in two-week blocks each time. By way of example Ms Roff said that her sales director, Ms Danielle Tilly, had just returned to work from maternity leave and she is taking every Friday off for the first 5 or 6 weeks to ease her back in to the working environment.

90. We heard from the claimant's witness Mr James Sherlock. He left the respondent's employment in November 2016. He had some sensitive personal issues arising during his employment (the detail of which it was not necessary for us to hear about) and he said that Mr Staton was understanding and considerate about these issues. Mr Sherlock agreed that Mr Staton was direct and challenging in his management style and he also agreed that Mr Staton wanted things to be as good as they could be. Ms Roff said that as a company they are understanding about the personal challenges that employees face, and in Mr Sherlock's case she approved a change of his working hours to help him accommodate taking his children to school in the morning.

91. Mr Sherlock had some performance issues and underwent formal performance management with Mr Staton in early 2016. We saw a note of a performance consultation meeting between them at page 560-563. At no time was the claimant formally performance managed by Mr Staton.

92. The respondent has had many employees come back to work after maternity leave, sometimes on a part-time basis to reflect changed family responsibilities. Directors have taken their own maternity and paternity leave. We find that this is a company that is understanding about its employees' family commitments and that it seeks to honour its statutory obligations in this regards. We are supported in this finding by the evidence of the claimant's own witness Mr Sherlock.

93. The claimant said that when he complained to Ms Shaw about Mr Staton's behaviour towards him and she mentioned the possibility of raising a grievance, the claimant says that Ms Shaw said it would do no good because Mr Staton and Ms Roff had been in a relationship together. Ms Shaw says it was the claimant who said, there was no point raising a grievance because of their past relationship. We find that Ms Shaw did not say this and we set out our reasons for this finding below under the heading "The claimant's resignation".

94. Ms Roff said that she and Mr Staton sometimes have professional differences and robust debates. She is the managing director and she sometimes has to make professional decisions with which Mr Staton does not agree. She has no hesitation in doing so and it does not stop her from being objective. We found this evidence entirely convincing. We found Ms Roff to be an independently minded managing director commensurate with her status and managerial role above Mr Staton. The personal relationship between Ms Roff and Mr Staton ended over a decade before the events in

question in these proceedings and long before the claimant joined the company. We find that any past relationship between Mr Staton and Ms Roff had no bearing on their treatment of the claimant.

The disciplinary process

95. The issue regarding the order of the 2 vehicles from Maxi Low with no OCS did not come to Mr Staton's attention until 19 February 2016. This was with a threat of legal action having been received from Maxilow (email of that date from Ms Sara Theobald, an account administrator to the claimant, Mr Curran and Ms Gunn, page 439). Maxilow had been on the phone to the respondent saying that if they did not sort out payment they would be disposing of the vehicles, retaining the deposit and taking legal action. They also complained about the storage costs for the vehicles and started to charge the respondent for this.

96. It is not in dispute that Mr Staton did not initiate disciplinary action until 24 April 2016 some two months later. Mr Staton said that the reason for this was staff absences and the need to catch up once those members of staff returned. Ms Newman was absent in February 2016 but was back by Monday 29 February. Mr Nuno Ferera, the client experience improvement manager, was also absent at this time due to a diagnosis of a serious illness and Ms Newman was deputising for him. Ms Roff's evidence was that they were hit by a number of unplanned absences which put strain on the business so that managers were having to cover for someone else at management level. Ms Roff accepted that it was not ideal to delay the disciplinary hearing by a couple of months and it was not what she wanted.

97. We find that despite the delay, the facts and matters in issue were substantially documented in a series of emails mainly between December 2015 and January 2016. The only matter that was undocumented related to a verbal instruction said to have been given by the claimant to Mr Curran, which the claimant denied. We find that the delay was satisfactorily explained by the respondent. It was not ideal but we find that staff absences can put a strain on a business even after those members of staff return when catching up is needed. This delay was not, on our finding, likely to undermine the relationship of trust and confidence between the parties.

98. The claimant was informed about the disciplinary matter in a one to one meeting with Mr Staton on 25 April 2016 (page 163).

99. Mr Staton was concerned to learn that the two vehicles had been ordered without an OCS as this put the respondent in an exposed financial position. These were particularly bespoke vehicles and although the respondent would have been able to realise some sale value if Avonside had not gone ahead, it was not as easy as reselling a straightforward Audi A4 or VW Golf. The financial exposure was around £50,000 subject to resale value plus the time and inconvenience of this.

100. Ultimately the client paid for the vehicles and from the claimant's perspective there was no financial loss of any significance. However, Mr Staton was concerned that the claimant put the respondent in an exposed position and wanted to deal with this via a disciplinary process. We find that this is unsurprising following Ms Roff's briefing to managers in January 2016 on the need to raise standards and the clear message that standards would be enforced. As we found above, the bar had been raised and we find that Mr Staton was responding to this. Even if there was no actual financial loss to the respondent we find that nevertheless the exposure was created by the lack of the signed OCS.

101. Mr Staton appointed Ms Vickie Newman, customer services manager, as investigating officer. He then informed the claimant of the matter at a one to one meeting on 25 April 2016. A note of that meeting was at page 163 of the bundle. Ms Roff accepted that there were other managers who could have carried out the role of investigating officer but she considered Ms Newman to be suitable. She said she understood that Ms Newman and the claimant had a good working relationship and that Ms Newman was part of the Account Management team so was possibly more inclined to take a view in favour of an account manager such as the claimant rather than Mr Curran. Ms Newman had a full understanding of the process under consideration, possibly better than many others, she had been with the business for many years and is a well-respected member of the team. This evidence was not challenged. We find nothing untoward or unfair about the appointment of Ms Newman as the investigating officer. She was a suitable manager for the task.

102. Ms Newman produced an investigation report (starting at page 169). Although she did not interview the claimant in person as part of her investigation, he provided a statement on 27 April 2016 (page 277). The claimant's statement said as follows:

> *"On 7th January, orders were placed with Maxilow for two vehicles. The orders were signed, returned and the deposit authorised by the remarketing department before the OCSs been obtained.*
> *The period during which the OCSs were not in place was prolonged by the fact that Avonside failed to tell anyone at Venson that the order was for a previously unknown region. Upon discovery of the issue, they delayed sending bank details through which meant that the orders could not be put on Fleetware and the necessary OCSs could not be generated. They eventually instructed us to put the orders through their Head Office instead. I ensured that within 24 hours of confirmation of the outstanding details, the signed OCSs were generated, sent out and returned signed.*
> *I have attached a timeline of the relevant events around this date. During this time, I was under extreme pressure, caused in part by the volume of work from my assigned customers and in part by a very difficult and often unreasonable key stakeholder at Avonside.*
> *In any event, I would not authorise such a departure from protocol."*

103. We find from this statement that the claimant clearly knew that the order had been placed in early January 2016 without the OCS. He did nothing to flag this with his Directors and he did not proactively manage the situation or the financial exposure.

104. Ms Newman followed up in early May with questions by email which the claimant answered (pages 522-526).

105. In his email answers, the claimant accepted (page 523) as he did in oral evidence, that it was his responsibility to obtain the signed OCS before an order is placed for a client. He said "*Whilst it is my responsibility to obtain the signed OCS, it is unreasonable to expect me to be able to control the unprompted actions of others for whom I am not responsible".* The claimant was referring to his account executive Gary Curran, a person for whom he had managerial responsibility. We find that the claimant was fully aware of the Work Instruction including the OCS procedure.

106. Following the completion of Ms Newman's investigation report, on or about 9 May 2016 the claimant was sent an invitation to a disciplinary hearing to take place on 16 May 2016 (page 178).

107. The disciplinary charges were set out under the heading "Allegation" as "*Following an investigation undertaken into the alleged failure to comply with company policies and procedures which relates to: two Vauxhall Movano's vehicles ordered in January 2016 for Avonside prior to obtaining the correct signed documentation (OCS) from the client as per the Working Instruction – Raising a New Order. The above actions could have resulted in financial implications for Venson and impacted on Venson's reputation with the supplier and the client*".

108. On 12 May 2016 the claimant sent to HR Advisor Ms Kirsty Inwood a schedule of 18 questions that he wanted to raise at the disciplinary hearing. The hearing was to be chaired by Mr Stanton as the line manager and this was in accordance with the disciplinary process (page 44) which provides that save where dismissal is contemplated, the disciplinary hearing is taken by the employee's line manager. At no stage during this disciplinary process was the claimant told that dismissal was an option under consideration. We find that this is because it was not considered gross misconduct, the respondent was not considering the termination of the claimant's employment and they did not tell the claimant that termination was a possibility.

109. Mr Staton acknowledged the questions and decided that the best way to deal with matters was to use Monday 16 May 2016 as a meeting to deal with the questions and postpone the disciplinary hearing for a couple of days. His reasoning was to ensure that all the claimant's questions were dealt with in a fair and reasonable manner (email page 181). He reviewed the questions over the weekend of 14/15 May. The claimant was not happy that the disciplinary hearing was not to proceed on 16 May and he objected to the delay. He wanted the questions dealing with at the disciplinary hearing itself.

110. We find that the respondent was seeking to give due weight to the claimant's questions and that there was no material prejudice by delaying the disciplinary the two days in order that those questions could be properly addressed. One of the claimant's questions (number 10) was why his colleague Paula Gunn's interview was not documented as part of the investigation report and this gave time for a witness statement to be obtained from Ms Gunn and put before the disciplinary hearing. In any event Ms Gunn was due to (and did) attend the disciplinary hearing as the claimant's chosen work colleague.

111. The claimant raised questions related to his disciplinary. They were answered by the respondent, albeit not in the meeting that he preferred. There was no prejudice to the claimant at all.

112. The claimant also accepts that at the meeting on 16 May 2016 Ms Inwood handed him a copy of the grievance procedure (notes of the meeting page 183). Again we find that the claimant was fully aware during the course of his employment of the grievance procedure and his right to raise a grievance which he chose not to do.

The disciplinary hearing

113. The disciplinary hearing went ahead on Wednesday 18 May 2016. It was chaired by Mr Staton. The claimant was accompanied by Ms Gunn and Ms Inwood attended as note taker.

114. Mr Staton considered the claimant's argument that he was busy due to Mr Crooks' recent departure and this put pressure upon the claimant and Ms Gunn. From Mr Staton's point of view the evidence strongly supported the fact that the claimant was aware of the error, that the vehicles had been ordered without the signed OCS and this resulted in a threat of legal action from MaxiLow.

115. It was put to Mr Staton in cross-examination that he should have checked to see that the claimant received the relevant email correspondence between Mr Curran and Maxi-Low in early January. Mr Staton said that he had noted that the claimant was copied in to the emails and he believed the claimant had seen them. We find it entirely reasonable for Mr Staton to form the view that when actually at work (and not on leave) and in relation to a matter in which he was involved, it was reasonable to conclude that the claimant had seen emails into which he was copied and which related to a difficult client for whom he was responsible. Dealing with difficult clients is part of the job.

116. Mr Staton found that the claimant had not taken any steps to avoid or resolve the situation or escalate his concerns to a Director if he was unable to resolve it himself. Mr Staton considered this an act of misconduct. Mr Staton acknowledged that mistakes like this do happen and they may be unintentional, but ultimately the responsibility for the error lay with the claimant as the account manager. The claimant does not deny that the

responsibility for obtaining the OCS lay with him.

117. There was no disciplinary outcome letter. Instead, the outcome was sent to the claimant on a proforma document filled out by Mr Staton and dated Friday 20 May 2016. It set out the disciplinary charge which Mr Staton found proven. The decision was a written warning. The document stated "*This warning will be placed on your HR file but will be disregarded for disciplinary purposes after a period of 12 months, provided there is no further and/or similar occurrence"* (page 199).

118. The claimant set great store on the wording of the disciplinary charge which said "*two Vauxhall Movano's vehicles ordered in January 2016 for Avonside prior to obtaining the correct signed documentation".* The claimant's position is that he did not do the ordering, it was Mr Curran and therefore it was not him who should have been disciplined. We find that the claimant took an over literal approach to the disciplinary charge in terms of who actually placed the order. In the 7 January email at 14:36 Mr Curran said in response to an email from the claimant: "*I will provisionally order vehicles today based on the attached".* It was the claimant's responsibility to ensure that the OCS was in place and we find that Mr Staton formed a reasonable conclusion on facts before him on this disciplinary issue.

119. The claimant went off sick on Monday 23 May after receiving the disciplinary warning. He was initially signed off with work-related stress until 4 June 2016. He did not subsequently return to work.

The disciplinary appeal and grievance

120. The claimant was given a right of appeal which he exercised via his solicitors on 27 May 2016 (pages 205-207). He raised 7 points of appeal. His first point of appeal was that the fault lay with Mr Curran who authorised the ordering of the vehicles and not himself. The claimant was unhappy that Mr Curran did not face disciplinary action. He also said that he believed that the situation was engineered by Mr Staton to victimise him for making requests for family leave in 2015. Although he was off sick, the claimant said that he wanted the appeal heard as soon as possible.

121. With the claimant's consent the appeal hearing took place in his absence. Ms Roff sent the claimant an appeal outcome letter on 8 June 2016 (page 220-221). The claimant accepted in evidence that Ms Roff dealt with all his points of appeal. In relation to Mr Curran's role she said as follows:

> *"It is my reasonable belief that Gary would not have placed an order without direction from you. Furthermore at 15:54 on 7 January 2016 Gary confirmed to you by email that the two vehicles had been ordered and therefore it would have been clear that it was your responsibility to have obtained the signed OCSs, sought approval to proceed without signed OCSs or cancel the orders.*
>
> *…*
>
> *I agree that Gary Curran was aware that the OCSs may not been signed*

by either side at the point of ordering the two vehicles, however it is not his responsibility to obtained the signed OCSs. In these circumstances, I would have expected Gary to confirm that you had sought the appropriate approval for these vehicles to be ordered. However, the responsibility for ensuring that an OCSs is signed lies with you and therefore it is not appropriate to take formal action against Gary for this process failure."

122. In relation to the decision to take disciplinary action Ms Roff said as follows:

"Furthermore you were in attendance at the Manager's presentation in January 2016 during which I detailed the unacceptable level of errors and process failure during 2015 and my intention to deal with future breaches in a formal manner."

123. We find that Ms Roff drew reasonable conclusions based on her knowledge of the business and the information before her as set out in her outcome letter.

The claimant's resignation

124. The claimant responded to the appeal outcome by letter dated 17 June 2016 (page 222). In that letter he resigned stating that the rejection of his appeal was regarded as a final straw in a series of events that made his continued employment untenable. The claimant said he considered that his line manager Mr Staton had a problem with him ever since he requested family leave in July 2015 and the claimant considered that he was behind the disciplinary process that culminated in the written warning.

125. The claimant said he considered there was no justification for the warning and that his treatment amounted to a fundamental breach of his contract of employment. He said "*I am therefore resigning from my employment with immediate effect on the basis that I have been constructively dismissed by the company*." He reserved his rights to pursue a claim for constructive dismissal and detriment for exercising family leave rights. He said he wished to pursue point 7 of his appeal as a grievance, namely his view that he had been victimised by his line manager.

126. Even though the claimant's employment had terminated, the respondent agreed to proceed with a grievance hearing which was held off-site at a hotel in Surbiton. It took place on 14 July 2016 in front of marketing director Alison Bell. The claimant attended. The notes of the grievance hearing were at pages 229-232.

127. At the grievance hearing Ms Bell asked the claimant whether he felt he could raise a grievance at the time of the matters he complained of in April 2016. He said "*SS and SR have been in a relationship before for 7 years so what's the point?".* The claimant accepted in cross-examination that these notes were an accurate reflection of what was said at the meeting. We find that this was the claimant's wording and he did not say in the grievance meeting that Ms Shaw told him that there would be no point because of this past relationship. This would have been a material fact to mention, if correct,

particularly as by July 2016 he was in receipt of legal advice. We find on a balance of probabilities that it was the claimant and not Ms Shaw who raised the matter of this historic past relationship when Ms Shaw suggested to the claimant that he could raise a grievance.

128. For similar reasons we find that Ms Shaw did not say to the claimant in May 2015 that Mr Staton would not be pleased if he took shared parental leave. We rely on our findings at to the respondent's attitude towards employees' needs for family leave and their compliance with their legal obligations.

129. Ms Bell sent a grievance outcome letter on 3 August 2016 (page 234). The grievance was not upheld because Ms Bell considered there was insufficient evidence to support the allegations. To reassure the claimant she said that so far as his written warning was concerned, it was the respondent's policy not to disclose active disciplinary sanctions and that it was the respondent's policy to respond to all reference requests. She sent a sample written reference for his information.

130. The claimant appealed against the grievance outcome by email dated 16 August 2016 (page 237).

131. Ms Bell responded by letter dated 18 August 2016 (page 240) saying that although it was post termination of employment as a gesture of goodwill the respondent would proceed to hear his grievance appeal and finance director Mr Mark Gerard was appointed to hear it. The claimant chose not to attend the grievance appeal hearing and Mr Gerard heard it in the claimant's absence. He sent a lengthy appeal outcome letter on 14 September 2016 (page 260 to 263).

132. The appeal was not upheld. Mr Gerard commented in the letter that although not directly relevant to the facts of the claimant's case, he would no doubt be aware of two employees, Ms Laura Murray and Ms Hazel Gray, who had successfully returned to work in Mr Staton's department within the last year following maternity leave, one of whom had requested and received flexible working hours. He saw no evidence to support the claimant's contention that the disciplinary proceedings were linked to his request for shared parental leave in 2015.

133. By the date of disciplinary hearing, the claimant had not raised any issues concerning family leave since his request for annual leave one day per week in January and February 2016, which had been granted. The only prior issue he had raised concerning family leave was for his paternity leave in July 2015. He was given, as he requested, two weeks off in one block.

The relevant law

134. The applicable law in relation to constructive dismissal is found in section 95(1)(c) of the Employment Rights Act 1996 which provides that "*for the purpose of this Part an employee is dismissed by his employer if …….the employee terminates the contract under which he is employed (with or*

without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"

135. The leading case on constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221***, CA. The employer's conduct must give rise to a repudiatory breach of contract. In that case Lord Denning said "If the employer is guilty of conduct which is a significant breach going to the root of the contract, then the employee is entitled to treat himself as discharged from further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

136. In ***Malik v Bank of Credit and Commerce International SA 1997 IRLR 462*** the House of Lords affirmed the implied term of trust and confidence as follows: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

137. In ***Baldwin v Brighton and Hove City Council 2007 IRLR 232*** the EAT had to consider whether for there to be a breach, the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view of the EAT was that the use of the word "and" by Lord Steyn in the passage quoted above, was an error of transcription and that the relevant test is satisfied if either of the requirements is met, so that it should be "calculated or likely". In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.

138. The EAT in ***Leeds Dental Team Ltd v Rose 2014 IRLR 4 EAT*** said of the above test:

> *"That test does not require a tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that its conduct is likely to destroy or seriously damage the relationship of trust and confidence, then it is taken to have the objective intention spoken of;"*

139. Procedural defects in a disciplinary process can be corrected on appeal. What matters is whether the disciplinary process as a whole was fair - ***Taylor v OCS Group Ltd 2006 IRLR 613 CA***.

140. The claimant relied upon the decision of the EAT in ***Working Men's Club and Institute Union Ltd v Balls EAT/0119/11*** (Underhill P) in which the EAT found that the initiation and conduct of disciplinary proceedings against a claimant was so unreasonable as to constitute a fundamental breach of contract entitling the claimant to resign and claim constructive dismissal. The question of reasonableness is one of fact (Underhill P (as he then was) at paragraph 29). This was a case in which allegations of gross misconduct

for serious dishonesty (including an unspecified allegation of falsification of records) were put to the employee and which the tribunal found were made without any sufficient basis.

141. The EAT in the above case confirmed that it is well-established that the unreasonable bringing of disciplinary proceedings is capable of constituting a breach of the implied term of trust and confidence. Underhill P went on to say "*Of course tribunals should be slow to treat the investigation as itself a repudiatory breach; very often an employer may act reasonably in investigating allegations of misconduct which turn out in the end to be groundless."*

142. Section 48C of the Employment Rights Act 1996 (ERA) in relation to leave for family and domestic reasons provides as follows:

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

143. A prescribed reason under section 48C(1) includes paternity leave, parental leave and shared parental leave.

144. Under section 48(2) of the ERA, "*it is for the employer to show the ground on which any act, or deliberate failure to act, was done*". As in ***Fecitt v NHS Manchester 2012 IRLR 64 CA*** the statutory burden is on the employer to show on the balance of probabilities that the act complained of was not on the grounds that the employee had done the protected act. In this case the grounds are the prescribed reasons set out in section 47C(2) which includes shared parental leave. The tribunal has to consider whether the request for shared parental leave materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the employee.

145. In relation to time limits on a detriment case the Court of Appeal in ***Arthur v London Eastern Railway 2007 IRLR 58*** said that there should be some link between the acts which makes it just and reasonable for them to be treated as in time and for the claimant to be able to rely on them. In order for the acts in the three-month period and those outside to be connected, the CA went back to the statutory wording (section 48(3) ERA) that they must be part of a 'series' and acts which are 'similar' to one another. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged.

Conclusions

Unfair dismissal

146. We deal with the detriments relied upon for taking family leave which are also relied upon as causative, on the claimant's case, of his constructive

dismissal.

147. We have found above that Mr Staton was not unjustifiably critical and confrontational at the 31 July 2015 performance review meeting. He was critical but he had justification for those criticisms and as line manager it was incumbent upon him to raise these issues. His role was to performance manage the claimant, although this was not formal performance management under a poor performance procedure. It was appropriate in the context of a mid-year performance review.

148. We have found above that Ms Shaw did not advise the claimant that he should consider leaving the company because Mr Staton's conduct towards him would not cease. We have also found that Ms Shaw did not discourage the claimant from raising a grievance, because of Ms Roff and Mr Staton's past personal relationship or otherwise. On the contrary, our finding is that Ms Shaw suggested a range of options to the claimant which included the raising of a grievance.

149. We have found that Mr Staton raised legitimate issues around the claimant's client meetings. We have found that these were not unreasonable or unjustified. We have found above that Mr Staton did not act in an intimidatory manner towards the claimant.

150. Mr Staton did commence a disciplinary investigation into the breach of the working instruction in relation to the OCS. The claimant relied upon an "alleged breach" of the working instruction. However, during the evidence it did not appear to be in dispute that the working instruction to obtain an OCS had been breached. It was breached. It was the claimant's responsibility.

151. We have considered the ***Balls*** case (above) and Underhill P's observations that tribunals should be slow to find that commencing an investigation is a breach of contract. In the ***Balls*** case there was an allegation of gross misconduct for a serious allegation of dishonesty that was not specific and we find it is not directly on point with this case. In the current case, there was never any prospect of the disciplinary process resulting in dismissal and the claimant was fully aware of the allegations against him. There were no unspecified allegations of dishonesty or otherwise.

152. We find that the disciplinary warning was not unreasonable. It resulted in a first written warning, with actions required. There was no prospect of dismissal. The claimant had been assured that it would not be referred to in any reference and the respondent's procedure confirmed that it would be removed after 1 year. We found above that Mr Staton had a reasonable belief that the claimant had committed a serious disciplinary offence but it was not sufficient to justify a final written warning or dismissal.

153. We find that Ms Roff formed a reasonable view on the appeal outcome. She set out a well-reasoned and considered decision in the appeal outcome letter. To the extent that there were any procedural defects in Mr Staton's disciplinary process (which we find there were not) they were corrected on

appeal through Ms Roff's appeal process.

154. Factually the claimant has not proven his case on the first three detriments relied upon. On the final three detriments, relating to the disciplinary process, we have found that the respondent acted reasonably and not in breach of the claimant's contract of employment. It was entirely within the contract for the respondent to initiate and pursue a disciplinary process. This was not conduct which on our finding was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. We find that Mr Staton was following a proper line management process in terms of managing the claimant, as a senior manager, to ensure that he complied with the expectations of his role.

155. We find that the claimant had difficulty with the role and accepting his own shortcomings. He was not amenable to constructive criticism and guidance. There was no repudiatory breach of contract. We find that the claimant was not constructively dismissed and the claim for unfair dismissal fails.

Detriment for taking family or domestic leave

156. On the family leave detriment claim, the claimant does not succeed on the facts of the first three detriments and we have found the second three detriments to be reasonable actions on the part of the respondent. We find no causative link between the claimant's requests for family leave and his disciplinary process some months later. There was a significant supervening event, of the managing director's meeting with managers in January 2016 at which a more stringent line was drawn in terms of adherence to standards and accuracy. It was made clear at that meeting that future breaches would be dealt with in a formal manner. This is exactly what happened to the claimant.

157. We find that this is a respondent which takes a positive and flexible approach to family leave issues, such as in the case of James Sherlock; giving the claimant time off to look after his daughter on 8 March 2016 even though he was behind in terms of providing information requested by Mr Staton; letting the claimant leave work early in November 2015 to take his daughter to the doctor; Ms Murray and Ms Gray returning to work in Mr Staton's department following maternity leave (one of whom was granted flexible working) and sales director Ms Tilly recently returning to work from maternity leave and taking every Friday off for the first five or six weeks.

158. Senior directors have taken their own maternity and paternity leave. There was no refusal of the claimant's request to take his two weeks off in one block for paternity leave. We found that Mr Staton's comment, family comes first without exception, to be true for this company and he had no issue with the claimant seeking or taking family leave. He acted reasonably in asking the claimant to block off the time for the Npower tender, but made it clear that this would be reassessed closer to the time.

159. The claim for detriment for taking family or domestic leave fails and is

dismissed.

Listing a provisional remedies hearing

160. The parties having had an opportunity to check their availability, we listed a provisional remedies hearing for 20 June 2017. We made orders by consent for an updated bundle and remedies witness statements on or before 13 June 2017.

161. In the light of our findings above the remedies hearing and these orders are vacated.

Employment Judge Elliott
Date: 3 May 2017