



EMPLOYMENT TRIBUNALS

Claimant: Mrs Nosheen Iqbal

Respondent Owen Mumford Limited

Heard at: Reading Employment Tribunal **On:** 21 September 2018

Before: Employment Judge George

Representation

Claimant: In person

Respondent: Mr J Mitchell, counsel

RESERVED JUDGMENT

1. The claimant was not dismissed by the respondent.
2. The claim of unfair dismissal is not well founded and is dismissed.

REASONS

1. These are the reasons for my decision to dismiss the claimant's complaints of constructive dismissal arising out of her employment by the respondent as a regional account executive.

Procedural history

2. The claimant's continuous employment started on 11 December 2011 - see the offer letter at page 25 of the bundle. She resigned with immediate effect on 18 August 2017 (see page 98). She alleges that she resigned as a result of acts of the respondent that amounted to a breach of the implied term of mutual trust and confidence that entitled her to resign and count herself to be dismissed.

3. Following early conciliation which took place between 4 November 2017 and 4 December 2017 the claimant presented her claim form on 3 January 2018 by which she alleged constructive unfair dismissal, intimidation and bullying. The respondent contests the claim and entered a response on 26 February 2018 which is at page 16 of the bundle.
4. At this hearing I had a joint bundle of documents which ran to 219 pages and page numbers in these reasons refer to that bundle. The parties have exchanged witness statements setting out the evidence of the witnesses upon which they wished to rely. The respondent called David Paul Ramsay - the international sales manager and Emma Willoughby - a human resources manager. On behalf of the claimant there was a witness statement setting out her own evidence but also statements that had been prepared for or on behalf of Karen Lodge - formerly a senior regional account executive with the respondent, Ayasha Rahman - formerly a regional account executive with the respondent, Debbie George - formerly a nurse adviser with the respondent, and Marie Feeney - formerly a regional account executive with the respondent.
5. Shortly before the hearing the claimant applied for her supporting witnesses to give evidence by video link and was told that that application would be decided at the hearing. She had not brought with her to the tribunal any equipment via which she proposed that those witnesses could give their evidence apart from her iPad. The application was made on the basis that it was inconvenient to them to travel to Reading to give evidence: the witnesses were in Scotland, Yorkshire, Portugal and London. She argued that they were very important to her case because they contradicted things that had come out in the investigation and provided a snapshot of what the team felt at the time. She said that her witnesses had assumed that the hearing was to take place in Manchester but also that one of her key witnesses, Ms Rahman, had subsequently booked a holiday - perhaps mistaking the date.
6. The application was opposed by Mr Mitchell on behalf of the respondent. He argued that there was insufficient time to ensure that the circumstances in which the witnesses gave evidence was as similar to that of a tribunal hearing as possible. For example, they needed to have an unmarked copy of the bundle, they needed to have available any relevant holy books and they needed to have a room where they would not be disturbed. He pointed out that much of the evidence set out in the witness statements was hearsay.
7. I had reference to the Administrative Guide to Employment Tribunal Procedures and, in particular, the section about videoconferencing. I noted that the kinds of situations which the Guide envisages that videolinks would be allowed were where the witness was abroad or prevented from attendance by disability. I considered that the fact that the request had been made about week before the hearing and that it seemed to have been necessitated by a failure of effective communication between the claimant and her witnesses as to the date and location of that hearing. I was unable to satisfy myself that suitable arrangements could be made to satisfy the requirements of a public hearing. In particular it was not possible to ensure

that the evidence could be both seen and heard by myself, the claimant and also the respondent and its representatives. This meant that the parties would not be on an equal footing in relation to the hearing of evidence and the norms of a fair public hearing would not be observed. I was also not satisfied that the circumstances in which the witness was situated would sufficiently replicate the formality of the tribunal room. I therefore refuse the application for evidence to be heard by video link.

8. The claimant did not wish to apply for a postponement in order for the case to be relisted at her witnesses' convenience and accepted that there was an alternative way forward. This was for me to read and take into account the statements that had been provided. I did make clear that I would give them such weight as I thought fit but that it was likely that less weight would be given to statements made by witnesses who had not attended tribunal and been cross-examined upon them where they conflict with the evidence of those who have been cross-examined. Unfortunately, the statements disclosed by the claimant had not been signed. During the course of the morning the claimant sought to obtain signed copies of the statements. In the end the tribunal had available in relation to each of the four supporting witnesses either an email confirmation that the witness approved the statement in question or photographs of signatures on witness statements. On that basis I agreed to admit the statements into evidence and give them such weight as I thought fit. The respondent did not object to the statements going into evidence on this basis but made submissions to the effect that minimal weight should be given to them because the witnesses had not attended and because much of the content was hearsay.
9. I also had the benefit of a list of issues provided by the respondent together with a cast list, chronology and skeleton argument.

The Issues

10. the parties agreed that the issues for me to decide were as follows:
 - a. Did the respondent behave in the following ways towards the claimant?
 - i. David Ramsay (hereafter referred to as DR) taking credit for the claimant's initiative in using ICS with one of the practices in her region;
 - ii. DR criticizing the claimant at a business review meeting (see paragraph 5 of the claimant's statement);
 - iii. DR telling the claimant to stop working with ICS;
 - iv. unfairly blaming the Claimant for the loss of an administration day;
 - v. failing to acknowledge the claimant's work at a team meeting in May 2017;

- vi. DR unreasonably criticising the claimant in a meeting on 8 June 2017 and saying “you need to go”;
 - vii. refusing the claimant leave to be accompanied to a meeting;
 - viii. carrying out an inadequate investigation of the grievance.
 - ix. The claimant also alleges that she had been affected by DR preferring the account of a former colleague with whom he had had a relationship over MF.
- b. Did any of the acts which the respondent is proved to have carried out amount to a repudiatory breach of the implied term of mutual trust and confidence? In other words, by that conduct did the respondent conduct itself without reasonable and proper cause in a way which was calculated to or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?
 - c. If so then did the claimant resign in response to that breach?
 - d. Alternatively, had the claimant affirmed the contract?
11. The allegations of intimidation and bullying relied upon as amounting to a repudiatory breach of contract were set out in paragraph 10.a above.
12. The claimant, in her claim form, stated in relation to one of the incidents relied upon as contributing to the breach of the implied term of mutual trust and confidence that DR had met with her in a public restaurant for a meeting on 8 June (which fell during Ramadan) despite knowing that the claimant, a practicing Muslim, was fasting and then ordered food and ate. I asked her how she relied upon this in relation to her claim and she replied that could not say that his conduct related to the fact that she was fasting but that it provided the context in which his actions should be judged. Her argument was that he should have taken account of the fact that she was fasting when making the judgments that he did about her behaviour on that day. The claimant confirmed that she did not, by this factual allegation, intend to raise an allegation of religious related harassment. As she put it “Ramadan played a part in why my response was not that jovial”.

Findings of Fact

13. The standard of proof that I apply when making my findings of fact is that of the balance of probabilities. I took into account all of the evidence presented to me, both documentary and oral. I do not record all of the evidence in these reasons but only my principle findings of fact, those necessary to enable me to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgment about the credibility or otherwise of the witnesses I have heard based upon

their overall consistency and the consistency of accounts given on different occasions compared with contemporaneous documents, where they exist.

14. The claimant was, at the time of her resignation, a Regional Account Executive responsible for selling the respondent's products into a sales territory in the north-west of England. The respondent is a global industry leader in medical device design and manufacture. One of the products which the respondent sells is the Unistik 3 single use safety lancet. The claimant's statement of terms and conditions of employment are at page 28 following. She reported to DR, the National Sales Manager.
15. His responsibilities meant that he was solely responsible for managing the entire UK sales team of 9 Regional Account Executives (including the claimant). He had previously been a Senior Sales Executive and prior to that a Sales Executive for the northern Home Counties. He gave evidence in his statement (which was accepted by the claimant) that the performance of all Regional Account Executives is measured against certain key performance indicators (or KPIs). The key responsibilities of the role are at page 42 and include making weekly written reports on the status of the accounts and maintaining records of progress and activity for each customer which needs to be updated including through monthly reports to the National Field Sales Manager.
16. DR also stated (paragraph 7 of his statement) that the Regional Account Executives are responsible for managing relationships with primary care organisations (such as GP surgeries) and secondary care (such as Hospitals) and have a high degree of autonomy. This was not disputed by the claimant although she did dispute that the KPIs were agreed annually – from her perspective she was told what they were to be. She did agree that the Account Executives had a degree of autonomy within their territory about what to do with their role.
17. The claimant and DR have very different perspectives about key events. It seems clear that matters came to a head between following a meeting of 8 June 2017. After that meeting DR invited the claimant to a disciplinary hearing which was postponed when the claimant raised a grievance against him in which she complained of the same matters which now form the basis of her claim (see pages 69-70). Her allegation was that, at the meeting of 8 June 2017 there was threatening and intimidating behaviour by DR. His version of events was that it was at that meeting that he discovered that the claimant had lost a key account two months previously and had not told him.
18. The claimant's evidence was that the meeting came against the background of numerous incidents (see her statement paragraphs 3 to 13) where DR had behaved inconsistently in relation to the claimant's initiative in using ICS to supply one of the pharmacies on her patch: she complained that he had tried to take credit for her work and criticized her in public for using it despite her successful implementation of that method of working. According to her paragraph 9 he then privately told her to stop using it while publicly encouraging it. She also complained that an email which he sent (page 129) caused colleagues unreasonably to think that she was responsible for them

losing an administration day and that he had written the email because he wanted her to be blamed and to be alienated from her team. In short, she accuses DR of having an agenda to remove her and of having acted to undermine her over a period of time prior to the 8 June meeting.

19. DR's evidence was that after he had been promoted to UK Sales Manager he had identified the claimant as someone who could do with coaching in order to enable her to work more effectively to develop her business (DR paragraph 13) and that he had put in place a performance improvement process which she had responded positively to. This had been in about 2013. No documentation has been provided to evidence this and the claimant denies that she was put on a formal performance improvement plan. As she put it "No way would I not know if I'd been put on a performance improvement plan because there would be meetings and signed documents and it would have been signed off at the end". In this I accept the point made by the claimant and conclude that, whether or not DR was supporting her more intensively than any other Account Executive, there was no formal performance improvement process and nothing was said to her to make clear that her performance was regarded as of concern. Whatever steps taken by DR at this point must have been done in a positive, supporting way such that the claimant did not realise that her performance had been identified as being of concern.
20. DR went on to say that, so far as he was concerned, the claimant responded well to coaching and thereafter got on with her job and had no problems with his management style. Her take on this period was that it was DR who was not so experienced and she hadn't minded him coming out with her while he was learning.
21. Part of the claimant's case is that she was, uniquely, aware of a former relationship between DR and a co-worker which she alleges meant that he gave the co-worker preferential treatment. She accepts that the relationship was short and ended in 2012 and that the co-worker left the respondent's employment in 2015 or 2016. Her allegation is that her knowledge about these past events motivated DR's criticisms of her in June 2017. I return to this point below.
22. Another particular complaint of the claimant is that her work on STPs had not been properly acknowledged. This is said to have been linked to something mentioned by KL in her paragraph 2. In an email from January 2017 at pages 146 and 147 KL had made some suggestions for a template letter which the claimant has agreed to. DR replied to both the claimant and KL saying that they made valid points and he would share it at a meeting the following week. All emails were circulated to the whole team so they would have seen DR saying that he thought that the claimant made some valid observations. It makes no sense, in the light of his email, for him then to penalise the claimant in some way. The allegation is that the claimant was prevented from making a presentation. I accept DR's evidence that there were 9 people and only time for 2 to make their presentations. The claimant was one of those who did not present but was not treated differently to a

number of her colleagues and I accept DR's denial that he had not chosen her in order to make her appear lazy and workshy.

23. On DR's account, he had held a quarterly business review on 19 January 2017 when he had asked the claimant how to tell him if any of her accounts were at risk so that they could intervene (see email of 13 February 2017 at page 148 which refers to identifying threats). I accept his evidence on this point because it is consistent with the contemporaneous email which the claimant accepts was sent. The claimant had sent him monthly reports and all of the Account Executives are, in their turn, sent a monthly sales report which DR compiles (see his paragraph 24) from which to gauge how the performance of sales to the accounts in their area compares with their target.
24. In the email of 13 February 2017 DR congratulated the claimant for the Quarter 1 results. He then counselled her that her Quarter 2 targets increased (I infer he meant compared with Qu1) which meant that her Unistik 3 target might be a challenge. He asked the claimant to contact each of her major hospital trusts on a quarterly basis and said "where a threat is identified report this to me and make an appointment for you and I to visit the supplies team." It was accepted by the claimant that she had not responded to this email complaining of a lack of support from DR which is something she now says was a problem in this period. For that reason I conclude that that complaint of lack of support is not made out.
25. DR's evidence was that, after receiving the claimant's report for May 2017, he had written to express concern about the sales to some of her accounts (see his paragraph 25 and page 54). That was the reason, according to DR, why he wanted to meet her on 8 June – to discuss the situation which he had identified from her sales figures and he denies having an agenda or ulterior motive to force her to resign.
26. It is useful to compare the claimant's monthly business report for April 2017 (page 157) with that for May 2017 (page 175). The claimant's evidence was that these monthly reports were an opportunity for her to record what had happened in that month with particular accounts. She was not expected to record everything that she herself had done. The particular account that was lost was Blackpool Hospital DSNS. In the April 2017 report the claimant's information about Blackpool is at page 159. She accepted in evidence that in that report she did not record anything to the effect that Blackpool were reducing the amount of the products which they purchased from the respondent.
27. The next report was sent to the end of May. The report on Blackpool at page 178 is word for word the same as that of the April report at page 159. In addition, in the May report (page 175) she provided information that had been fed back by the Blackpool diabetes paediatric team. The claimant accepted that when submitting the May report the text from page 176 to the end of the report was identical to the equivalent pages in the April report. The only exception was the information about Alderhey hospital. She also accepted that in the May report she did not inform DR that Blackpool had been lost, that the sales figures for Unistik 3 showed a decline in sales to Blackpool or that there

was any cause for concern. Her explanation for that was that she had not visited Blackpool and therefore did not have anything new to say. However, given that on 8 June – on any view – she told DR face to face that she was concerned that Blackpool may have been lost this is something that either she was aware of at the time of the May report or should have been aware of had she analysed the declining sales figures. She also accepted that the priorities she set June were the same as the priorities she had said for May although her explanation was that the issues did not go away. In my view, when you compare the April and May monthly reports, the claimant did not provide information from which DR could reasonably understand what the picture of the respondent's business was in her region or how it had changed over the month.

The meeting of 8 June 2017

28. One of the complaints made by the claimant is that she had been criticised in the meeting of 8 June 2017 for not having forewarned D are the respondent might be losing Blackpool to a sole supplier when she had sent him two months of reports with the figures showing declining volume in Blackpool (see her statement paragraph 17a) and had received no feedback from those reports. Those statements were confirmed on oath but are not borne out by the reports in the bundle. The raw sales figures may well have been available to Mr Ramsay but find that he reasonably expected the reports to contain analysis of the figures, account by account. You could not reasonably say that the claimant had communicated the threat to that account by arguing that he should have noticed the situation from the sales data when her reports omit that analysis. This is particularly so when he had previously communicated to her the need for the reports to contain analysis (page 114). I reject her evidence that she had warned Mr Ramsay in the April and May 2017 reports that there were declining figures on the Blackpool hospital account.
29. Arrangements for the 8 June meeting were made by email (page 54) in which DR drew the claimant's attention to the sales target sheet for May which included figures from the sales department. He described them saying "we are really starting fall behind on the numbers across all of the core lines". The claimant agreed that "it is looking pretty bad" when she accepted his invitation to meet at the Premier Inn at about 12.30. She accepted in her evidence that she usually arranged to meet DR in a hotel.
30. It was suggested that the claimant that DR had arrived early and had already ordered food by the time she arrived. She denied this and said that after she arrived he said to her that he was about order and would she like any thing to which she had replied that she was fasting. On the claimant's account he had then asked permission to order and she had said that he could. On DR's account, he had already been eating when she arrived had asked her if she wanted anything. When she said that she was fasting he asked if he could continue and she had consented.
31. It does not seem to me to be material to the decision that I have to make whether DR ordered his food after the claimant arrived (having previously asked her if he might do so) or continued eating after finding out that she was

- fasting, having first asked for and received her consent to that course of action. Others might have handled that differently, but DR's actions do not seem to me to have been unreasonable in circumstances where the claimant had agreed that he eat. I remind myself that the complaint against DR here is that he chose a public place to criticise the claimant's performance and it is that which she refers to as a public humiliation.
32. On DR's account (see paragraph 31 to 34) he had wanted to talk about the declining figures and the claimant had started to talk over him that a different element of the business before saying that she knew why her numbers were declining that that was because of Blackpool hospital. She then told him "we've lost it to a competitor" and said that that had happened two months previously. This contrasts with her evidence that she said that she was investigating *whether or not* the respondent had lost the account because they were using less than before (see claimant's statement paragraph 15).
 33. When the claimant was asked about this meeting in her grievance meeting (see page 72C) she said that she had told him "that Blackpool looks like it is going elsewhere" but said she had not received formal confirmation of that. She also accepted in the grievance meeting that she had not flagged the declining Blackpool numbers in her monthly reports. In DR's comments on her grievance allegations he does not specifically deny that he then said that the claimant was destroying the territory or that he said "you know what you need to do. You need to go" (see page 73). However, when he gave his account of the meeting of 8 June to the investigatory meeting on 6 July 2017 (see page 84) he says that the Blackpool contract was a complete shock and there had been no indication of the decline in the monthly reports (which I find to be true). He denied saying "you are destroying the territory" but accepted that he had said that the territory was in a the worst state that it had been in since he had taken over his role.
 34. It comes across clearly that he had been taken aback by the claimant's body language when discussing this problem. He regarded her as showing a lack of dynamism in the claimant when telling him about the prospect of having lost such a big contract. It seems to me that there is some merit in the argument put forward by the claimant that he did not take sufficient account of the impact on her of fasting when he judged that her body language showed a lack of interest in the seriousness of the information she was disclosing: she was likely to be sleep deprived at the time and struggling with the physical demands of fasting in summer. Nonetheless the loss of the client was clearly an extremely important matter to the claimant's region and to the respondent's business as a whole and DR would quite reasonably have expected the claimant to have planned a strategy for remedying the situation which she was able to discuss with him then and there.
 35. DR's account in the grievance investigation meeting of 6 July 2017 is consistent with the email he wrote to JT (Regional General Manager-Northern Europe) on 8 June 2017 (page 58). In that he said that he had questioned the claimant when she told him about the decline in orders from Blackpool and she had said that the trust had started declining in April and she had taken the decision not to raise it with him but to deal with it herself because

“she was concerned I would see her in a bad light she revealed trust declining”.

36. The details put forward in DR's email of 8 June 2017 include that the account was worth £400,000 per annum, that the claimant had not had a named contact in the hospital and have been trying to establish contact for two months. Mr Ramsay also details in the email to JT of the 8 June 2017 particular ways in which she says the claimant has failed she the territory objectives set in the January review meeting. However, I note that Mr Ramsay also said that he had initially wanted to go for suspension pending further investigation. This contrasts with his witness statement at paragraph 44 where he says that his immediate reaction was to go for performance management. This suggests that he has sought within these proceedings to downplay the strength of his reaction to the discovery that the claimant had not kept him properly informed about the threat to this important account despite being asked to do so in February 2017.
37. The claimant emailed DR shortly after the meeting (page 182) and said “I know I said that I lost Blackpool hospital and I was working on securing it back or saving it”. It therefore seems to me to be likely that despite her denials in cross-examination those were the words or very similar to the words used by the claimant in her meeting with Mr Ramsay. My conclusion is that she said words to the effect that she had lost Blackpool hospital and that was certainly what he reasonably understood her to mean. That email strikes me as having been defensive and it provides no detail about particular steps taken to try to prevent the loss of the Blackpool account or to try to get the business back. In oral evidence she said that she hadn't been able to remember the name of her contact at the time of the meeting however, when writing that email sometime later she was similarly vague on detail despite having had time to check her records.
38. The claimant criticises DR for not having realised that Blackpool had been lost and points to a previous occasion when he had been mistaken about his recollection of information that she had provided to him (page 115). That dates from March 2016 and Mr Ramsay readily accepted his error. This does not seem to me to be a comparable situation at all. The claimant's assertion that her manager should have known from the report about the threat to Blackpool is completely inconsistent with the contents of it. There is no evidence (whether email or otherwise) that the claimant communicated the information in any other way. She accepted in her grievance interview that she did not flag it up. In my view that means that the claimant had failed to take on board the direction in the email 13 February 2017 (see page 149) that she ensure her activity is documented in detail within the monthly report. She clearly should have contacted her major accounts as requested and detailed the activity she had carried out. This particular criticism is completely irrelevant to the issues which I have to decide
39. My conclusions are that Mr Ramsay was reasonably ignorant about the threat to the Blackpool account prior to the meeting 8 June 2017. In that meeting he was told for the first time that this very valuable account had been lost to the respondent and that this was a significant contributing factor to the decline in

sales for the region. The region was likely to fail to meet its targets for Quarter 2 as a result. I prefer his evidence that the claimant because it is more consistent with the contemporaneous documents and because the claimant's recollection was, as she herself admitted, imperfect.

40. The claimant's statement evidence is that Mr Ramsay became angry and "began to insinuate that I have hid this from". If he did say words to that effect then they seem to me to have been justified by the claimant's telling him that she had not told him previously about the state of affairs because she did not want him to think badly of her. DR denies becoming aggressive and says that he was talking calmly and was not shouting or raising his voice. However, taking into account that his immediate reaction was that the claimant should be suspended, and the importance of the revelation, I conclude that while calm, DR probably did raise his voice to some extent in reaction to the shock.
41. In cross-examination the claimant described DR as getting "quite heated" but said that she didn't know that he had actually shouted but she was sure that he had raised his voice. She said that he had started saying that he could take her to HR for the figures alone and that she had felt humiliated.
42. I conclude that the news about the Blackpool hospital was an unwelcome shock to him. Even in cross-examination the claimant continued to argue that Mr Ramsay had not known about the loss or threat to the account because he had read her reports but that is plainly untrue. She also seemed to me to struggle to accept any responsibility for the loss of the account and for DR's lack of knowledge about it. Since that is the position she takes now, my conclusion is that while the fact that she was fasting probably did contribute to the claimant's demeanour on 8 June, it did not fundamentally alter her position which was essentially one of resignation to a situation for which she was not responsible.
43. There was one specific point put to the claimant about an instruction to her in the February 2017 email (page 149) where she had been asked to contact SC and arrange for non-formulary mailers to go out to a list of specified CCG's. When DR asked SC she had told him that the claimant had not made that request. The claimant's view was that those products were not that important to her clients. She accepted she had not done what she had been asked to do. That is a small point of detail in the overall picture but contributes to the impression that, rather than the claimant suffering months of DR picking on her the background was of him reasonably trying to manage her in her role and her not responding positively to it.
44. The claimant accepted that if Mr Ramsay had genuinely believed that she had failed to do what she was asked in the details to JT (see page 58) then he was justified in taking disciplinary action against her. The claimant also relied upon evidence from her supporting witnesses about conversations that they had had with her following the 8 June meeting. See for example KL paragraph 4 and DG paragraph 7. I have no reason to doubt that they accurately record the way the claimant described the meeting to them but I prefer the account she gave the under cross-examination. I accept that Mr Ramsay may have raised his voice, I accept that he may have said that he could take her to HR. He

accepts that he told her he would need to speak to his manager because it was clear that she had not carried out any of the objectives that had been set for her (see DR paragraph 38). No doubt this was very uncomfortable for the claimant to hear. It would have been far better had the meeting been held in private but I accept that Mr Ramsay was not expecting it to take the turn that it did. As a manager, DR should not have raised his voice but in circumstances where it had just been brought home to him how unreliable the claimant's reports were and that she had lost a major account he can be forgiven for departing from best practice. His statement to the effect that he was contemplating taking her to HR or instigating disciplinary proceedings against her (which seems to me to be the necessary implication of that) was justified by the facts in front of him.

45. I reject the claimant's assertion that, in criticizing her performance and commencing disciplinary proceedings, DR was motivated by the claimant knowing about his previous relationship with the former colleague and incidents which the claimant regards as having been favouritism of the colleague. It seems inherently unlikely that her would have been motivated by the claimant's knowledge of the relationship so long after the colleague left and some 5 years after the (very brief) relationship. Furthermore, there is ample evidence that there were reasonable grounds for the commencement of the disciplinary action for poor performance in circumstances where the claimant had failed to highlight the threat to the Unistik 3 business with Blackpool hospital. The claimant has alleged difference of treatment compared with other Sales Executives but has provided no evidence of that.

Conclusions on the background to 8 June 2017 meeting

46. In reaching the conclusions that I have about what happened on 8 June I have rejected the claimant's account in a number of respects: any exasperation expressed by DR seems to me to be justified by her failure to warn him that the account was at risk in time for them to attempt to prevent it; I reject her suggestion that he came into the meeting with an agenda to undermine her; his statement to her to the effect that this needed to be taken to HR was justified by her failure to carry out a number of key responsibilities of a sales executive. Taking that into account I consider what the claimant says in her paragraphs 3 to 13 and reject her assertion that her manager set out to alienate her from her team or undermine her. I also reject the claimant's assertion that he said words to the effect that "you've got to go" in the sense that she needed to leave the business. I do take into account the fact that it is clear from page 59 that Mr Ramsay thought it was so serious that he wanted to suspend the claimant but was effectively talked out of this by HR and he has, as I found, sought to downplay the strength of his initial reaction. However I accept that he had good reason for his provisional view that the loss of the accounts and the failure to flag it up in advance was negligent and that that would justify disciplinary action being commenced.
47. In reaching that conclusion I also take into account one particular email of which the claimant complains which is at page 129. By that email dated 26 October 2016 Mr Ramsay announced that the respondent was reducing the amount of administration time from 4 days a month to 2 days a month. This

may well have been an unpopular decision. He explained the reasoning as being that the respondent regarded it as necessary for the sales executives to spend as much time as possible in the field face-to-face with customers and quoted something which had apparently been said by the claimant "You have to be in the mix to win". He attributed that to her and she says that by doing so he attempted to cause her colleagues to blame her for the loss of their administration days. At worst this is somewhat tongue in cheek. It seems to me that he was struck by the phrase but it is only one part of several paragraphs used to justify his decision. My view is that the claimant is unreasonable when she relies on it as an attempt to shift the blame onto her and alienate her from team. I therefore reject her allegation that he unfairly blamed her for the loss of an administration day.

48. On the other hand, the deficiencies in the claimant's monthly reports are far more consistent with Mr Ramsay's account of someone who had needed help and support in the past and for those reasons I prefer his account of the background meeting 8 June.
49. A specific complaint that she makes about the disciplinary process is that the respondent refused to allow her to be accompanied to the hearing. It was originally arranged for 15 June 2017 and on 14 June the claimant wrote to DR asking for it to be postponed to 22 June because she considered that she did not have sufficient time to prepare and she needed to seek legal advice. This was also interpreted by the respondent as a statement that her representative was unavailable for 15 June (page 60A) and the hearing was rearranged as requested. DR said in his reply that the claimant could be accompanied by a trade union representative or colleague but not by legal representation. The allegation that she was not permitted to be accompanied to a meeting is not made out.

The grievance

50. Following 8 June meeting the claimant was invited to a disciplinary hearing (see page 60) but that was suspended when she raised a grievance against Mr Ramsay (see page 71). By the grievance she complained about his behaviour on 8 June and said that she had sent him the relevant information in advance and had received no feedback. In support of that allegation she argued that when, at an earlier time, a customer account had been lost he had not addressed it at the time and that justified her attempts to go ahead and try to win the account back on her own. This is an inconsistent position to take: both to say that she had told DR and to say that it was right that she didn't tell him but try to win it back on her own because previously he had not reacted when an account was lost. She said that she was treated differently to her colleagues in relation to lost hospital business and was publicly humiliated in the restaurant on 8 June. She also complained that on 9 June she had asked DR to come with her to a meeting to discuss the respondent's product the following week facilitated with the unable to attend. Essentially, she accused him of not taking reasonable steps to assist her because he wished her to fail and that his actions following 8 June were consistent with that.

51. Another matter she refers to is that set out at paragraph 10.8.i-iii above. See also page 70 – the claimant’s grievance. When the grievance investigatory meeting took place on 22 June 2017 (see page 72C), the claimant explained that her complaint was that she had GP practices that were ready to switch to this scheme and DR had discouraged her despite her successes in this new scheme. When this was put to DR in the grievance he denied it and said he had been encouraging her to do the switches (see email at page 125 where he praises her efforts in this regard and copies his praise to JT). My conclusion on the ICS matter is that since, overall, I have found the claimant to be a less reliable witness than Mr Ramsey when describing their working relationship and his management of her, I reject her allegation that he had behaved inconsistently about ICS, that he had taken credit for her initiatives in this regard - something which is also contradicted by page 125 - or that he had criticized her unreasonably in a business review meeting. His evidence, which I accept, was that there was a 6 months’ pilot scheme after which it was decided that the scheme wasn’t bringing in the expected results and it went no further.
52. The grievance outcome letter is at page 91 and by it JT rejected the grievance. The claimant appealed on 19 July 2017 (page 93) and on 20 July 2017 was told that that appeal would be heard by JC on 26 July 2017. The appeal was rejected, and the claimant was notified of that by a letter dated 9 August 2017 (page 95).
53. On 9 June 2017 the claimant asked DR to accompany her to Wigan and Leigh hospital to discuss Unistik 3 lancets for the whole hospital (page 190). His response was that he would not have a car on 16 June because his own was in for a service. This was raised within the claimant’s grievance (page 69) but was not one of the 5 bullet points in that grievance. JT did not cover it in her outcome letter but it was picked up by JC (page 95).
54. I accept that the appeal against the grievance was upheld on this point (see point 2 on page 96). JC said that DR had accepted that he should have made himself available for that meeting but did not consider his attendance to be essential. She stated that DR would make himself more available in future for such meetings, subject to his diary commitments. In his oral evidence to the tribunal DR said that he accepted this and had apologized for it. JC also upheld the complaint that the meeting of 8 June should have taken place in a private meeting room (point 3 on page 96) JC also reviewed the leaver analysis to satisfy herself that there had been no grievances or concerns with regards to DR’s management of his team and otherwise rejected the allegations that DR had been threatening on 8 June or of victimization. One consequence of the grievance was that the disciplinary was no longer to go ahead and JC concluded that the respondent would like to “work together to mediate between you and DR and rebuild a working relationship” which would be facilitated by JT (see page 97). According to EW, the claimant declined the offer of mediation (see her paragraph 17).
55. Taking the grievance investigation and appeal as a whole, it does not seem to me that the respondent’s investigation was inadequate. JT does appear to have overlooked the point about DR’s failure to make himself available for the

meeting on 16 June but that was picked up on appeal. That suggests an appeal process which is working as it should. The positive nature of the appeal outcome letter, in particular where JC upholds the grievance on two points, praises the claimant for having won new work and decides to implement mediation between DR and the claimant I conclude were a genuine attempt by the respondent (against the backdrop of the “expectation that [the potential loss of the Blackpool account] would have been brought to David Ramsey’s attention and if support had not been forthcoming from him this should have been escalated to Jo Thompson”). This conclusion by JC that the claimant had fallen short of the respondent’s expectations in her handling of the threat to the Blackpool account was, in my opinion, a reasonable one to reach.

The claimant’s resignation

56. The claimant resigned on 18 August 2017 (page 98) and went to work for a company called Vygon Ltd from which she resigned in February 2018 (page 199). Her present employment started on 6 March 2018. The new contract of employment with Vygon had been entered into on 13 July 2017 (page 90) and was for the claimant to start work on 21 August 2017 as a Sales Executive. I conclude that, prior to the determination of the grievance, the claimant had applied for a job with Vygon (page 82) and she had signed a new contract of employment also prior to the first stage grievance outcome. The respondent argues that this undermines the claimant’s case that she resigned because of any act of theirs. She resigned 9 days after the grievance appeal outcome on the last working day before she started work with Vygon.
57. In her letter of resignation (page 98) the claimant said that she considered herself to have no choice but to resign because of bullying and intimidation which she highlighted through her grievance and appeal but that she considered those to have been a “white wash” leaving her with no other option but to resign and consider herself constructively dismissed. In oral evidence she denied that she had resigned solely because she had an alternative job offer and pointed out that the travelling required by the role with Vygon meant that it was disadvantageous to her because it took her further away from her family. Her evidence was that she would have withdrawn from the Vygon job – despite having firmly accepted it – had the grievance appeal outcome been different.
58. Prior to the grievance appeal being concluded, on 2 August 2018, the claimant had to go on an assessment training day with Vygon about the prospective job with them. Her evidence was that in the industry colleagues were always receiving approaches from headhunter. Essentially she was saying that it could not be inferred from the simple fact that she had agreed terms with Vygon prior to leaving that the reason why she left was to get another job. She said that it would have been rude to fail to respond to the recruitment agent once she had expressed interest in the role. She thought it likely that she had agreed to take the job on the 12th or 13th and then signed on the 13th. The respondent had been unaware of the job offer from Vygon until she resigned.

Law applicable to the issues paragraph 10 point

59. Section 95(1)(c) of the Employment Rights Act 1996 makes it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned, then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.
60. In the present case the claimant argues that she was unfairly dismissed because she resigned in response to a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
61. One question for me is whether, viewed objectively, the facts found by me amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether an employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.
62. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning then he or she was constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).
63. Once he or she has notice of the breach, the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied. Mere delay in resigning is unlikely to amount to affirmation by itself but delay can be taken as evidence that the employee

has affirmed the contract and decided to carry on working under it notwithstanding the breach.

64. Once the tribunal has decided that there was a dismissal they must consider whether it was fair or unfair in accordance with s.98 ERA 1996.
65. If the tribunal finds that the dismissal was unfair and has to go on to consider whether there should be deductions from compensation then, on the authority of Polkey v A E Dayton Services Limited [1987] IRLR 503, compensation may be reduced on the basis that had the employer taken the appropriate procedural steps which they did not take then that would not have affected the outcome.
66. The provisions of s.122(2) and 123(6) of the Employment Rights Act 1996 set out the powers of the tribunal to reduce any basic and compensatory awards because of conduct or contributory fault respectively which we are asked to use in the event that we conclude that the dismissal was unfair.

Conclusions on the issues

67. I now set out my conclusions on the issues, applying the law as set out above to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but I have them all in mind in reaching these conclusions.
68. My conclusions on the specific allegations of behaviour amounting to a breach of the implied term of trust and confidence can be summarized as follows:
 - a. I rejected the claimant's allegation that DR had taken credit for her initiative in using ICS with one of the practices in her region, unreasonably criticized her at a business review meeting or behaved inconsistently in alternately encouraging and then discouraging her from promoting the switch to ICS. (see in particular paragraph 51 above)
 - b. I reject the claimant's underlying allegation that DR had an agenda to manage her out of the business and acted prior to and at the meeting of 8 June 2017 in pursuit of that agenda. (see in particular paragraph 46 above)
 - c. I reject the claimant's specific allegation that he unfairly blamed her for the removal of two administration days a month with the aim of undermining her with her team. (see paragraph 47 above)
 - d. I reject the claimant's specific allegation that DR singled the claimant out by not inviting her to share her STP slides or acknowledging her work on this at a team meeting in May 2017 because she had

seconded a comment made by KL about an appropriate draft of a template letter. (see paragraph 22 above)

- e. At the meeting of 8 June 2017 the claimant revealed to DR that the Blackpool Hospital account which was worth £400,000 a year to the respondent had been lost or was likely to have been lost, that she had about the threat for about two months and had not referred to it in her monthly reports. (see the conclusions about that meeting at paragraphs 28 to 45 above)
- f. DR's reaction was one of shock and included that he could send her to HR for the figures alone. He commenced disciplinary action against her for poor performance for reasons which he detailed in his email to JT of 8 June 2017 and not for any reason to do with the claimant's knowledge of his historical relationship with a former colleague. His reaction was justified by the information disclosed to him at the meeting of 8 June 2017.
- g. The respondent did not refuse the claimant leave to be accompanied to a meeting. (see paragraph 49 above)
- h. Taking the grievance procedure as a whole, there was an adequate investigation and the conclusions were born out by the evidence before the grievance officers. They engaged with the issues, the appeal officer – JC – upheld the claimant on two matters and a sensible and even-handed solution of mediation was suggested. (see, in particular, paragraph 55 above)

69. It follows from those conclusions that I reject the allegation that the respondent conducted itself without reasonable and proper cause in a way which was calculated to or likely to destroy or seriously damage the relationship of trust and confidence. For the most part the claimant's allegations are not made out on the facts. To the extent that I have accepted that DR raised his voice in the meeting of 8 June and can be criticized for conducting the conversation in the restaurant rather than in private I am of the view first, that his conduct did not reach the levels of conduct that can be said to be likely to destroy or seriously damage the relationship of trust and confidence. I accept that he did not act in a calculated way. I also accept that his reaction was completely reasonable, given the unwelcome and shocking news that he had just received about the loss of an important account.

70. I do nonetheless consider the question of whether the claimant resigned in response to the acts of the respondent or whether she resigned in order to start a new job. I have considered this question carefully. The claimant has not been a reliable witness in a number of respects and she seems to have been somewhat calculated in her decision to resign at the eleventh hour having gone through the recruitment process prior to receiving the first stage grievance process. However I accept her evidence that the job with Vygon was in an inconvenient location and was in other ways not suitable for her. The timing of her resignation may have been affected by the availability of another job but I accept that an effective reason why she left was the

relationship with DR, her perception of it and the fact that she had not been upheld in her grievance. None of these acts were breaches of contract by the respondent but they did effectively contribute to her decision to resign.

- 71. One of the arguments raised by the respondent is that the similarity of the terms of the grievance and the claim form mean that, as a matter of fact, the claimant’s claim is based upon acts which predate the grievance outcome on 14 July 2017. Given my findings on the underlying facts I do not need to go on to consider this argument in detail however the claimant did resign within a relatively short period after the rejection of her grievance appeal and given that she was still going through the grievance process until about 9 days before her resignation I would not have been minded to conclude that she had affirmed the contract.
- 72. My overall conclusion is that the respondent did not behave in a way which entitled the claimant to resign and consider herself to be dismissed within the meaning of s.95(1)(c) of the Employment Rights Act 1996. She was not dismissed by the respondent and therefore her claim of unfair dismissal fails.

Employment Judge George

16 December 2018

Date 18 December 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
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FOR EMPLOYMENT TRIBUNALS