



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Jarvis

Respondent: EEF Limited

Heard at: Liverpool

On: 26 & 27 November 2018

15 January 2019

16 January 2019

(in Chambers)

Before: Employment Judge Hill

REPRESENTATION:

Claimant: Mrs H Barney, Counsel

Respondent: Mr P Wilson, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim for constructive unfair dismissal is well-founded and succeeds.

REASONS

The Evidence

1. The Tribunal was provided with the following:
 - An agreed bundle of documents number 1-261;
 - Witness statement for the claimant, Mrs Michelle Jarvis, and a supplementary witness statement from the claimant;

- Witness statement from Mr Gareth Harrison, who did not attend to give oral evidence;
- Two witness statements for the respondent, Mr A Ward (Commercial Director) and Mr M Corkan (Head of HR).
- The parties also provided an agreed List of Issues and a chronology.

The Issues

2. The claimant complained of constructive unfair dismissal by way of a claim form (ET1 form) presented on 15 June 2018.
3. The respondent resisted the claim by way of a response (ET3 form) presented on 24 July 2018.
4. At the beginning of the hearing the Tribunal confirmed that the List of Issues provided were those issues that the Tribunal was required to determine. For the purposes of this judgment, set out below are the issues in respect of constructive unfair dismissal.
5. In addition, prior to the hearing being listed today, the claimant had written to the Tribunal on 16 November 2018 making an application for specific disclosure under rule 31 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 for documents in respect of total breakdown figures for Mr Chris Hill. The parties confirmed that this issue had been resolved and the relevant documents were now set out in the bundle.

Constructive Unfair Dismissal

- (1) Was the respondent's failure to award a pay increase (as at paragraph 34L Grounds of Complaint) the most recent act or omission on the part of the employer which the employee says caused or triggered her resignation?
- (2) Has the claimant affirmed the contract since that act or omission?
- (3) If not, was that act or omission by itself sufficiently serious as to constitute a repudiatory breach of the implied term of trust and mutual confidence giving rise to an entitlement to treat the contract as terminated with immediate effect?
- (4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions (set out at paragraphs 34A to 34L Grounds of Complaint)? (Applying the approach in the case of **London Borough of Waltham Forest v Omaliju [2004] EWCA Civ 1493**) which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and mutual confidence.
- (5) Did the employee resign in response (or partly in response) to that breach?

- (6) What was the reason for dismissal i.e. does the respondent assert any potential fair reason to dismiss?
- (7) If the dismissal was unfair, should any compensation be reduced/increased to reflect any breaches of the ACAS Code? If so, to what extent?

Relevant Findings of Fact

6. The claimant was employed as a Regional Sales Manager (North) within the respondent's Business Development Team from 15 February 2016 until her resignation on 24 April 2018. Throughout the course of her employment the claimant had a clean disciplinary and sickness record. During her employment the claimant underwent one appraisal for the year 2016-2017 which was signed off in September 2017 by her line manager, Mr Andrew Ward. The claimant's appraisal for the year 2017-2018 was not completed and is referred to later in this Judgment.

7. The claimant was based at the respondent's offices in Warrington and at the commencement of her employment was one of three Regional Sales Managers, all of whom reported directly to Mr Ward. The Tribunal was provided with a copy of the claimant's job description, but in broad terms her role involved developing sales and membership of the respondent's services to new clients. The respondent provides Human Resource and Health and Safety Services and Business Support to organisations typically in the manufacturing sector. The claimant's role was based in the North of England and comprised three regions: Yorkshire and Humber, the North West and the North East.

8. The respondent splits its activities in terms of the Business Development Team into two areas: membership and business support. The claimant was responsible for signing up new members to EEF under membership and required to sell business services which involved training, consultancy and other business services to both existing and new members under Business Support. The claimant was required to visit prospective new clients and existing clients and also was responsible for the supervision of three Business Solution Partners who reported directly to her. When the claimant first commenced her employment, the claimant had two Business Solutions Partners reporting directly to her, Gareth Harrison who was responsible for developing sales in the North East region, and Isobel Graham who was responsible for developing sales in the Yorkshire and Humber region. Daniel Holmes joined her team in September 2017 as a Business Solutions Partner. He covered a region which was mainly in East Midlands. The claimant was responsible for developing sales in the North West region.

9. There were three Regional Sales Managers across the country within the respondent's Business Development Team, including Jeremy Ball, who was responsible for the Midlands, and Rachel Pavitt, who was responsible for the South of England. Each year membership sales and business services' revenue targets were set. In the year 2016-2017 the claimant's appraisal shows that the North partially achieved its objectives.

10. In December 2017 the respondent carried out a restructuring exercise reducing the three Regional Sales Managers to two. The respondent implemented a

redundancy process and implemented selection criteria, and Jeremy Ball was selected for redundancy in December 2017.

11. It was agreed between the parties that the North West region was a challenging territory to manage. Each region has a Regional Director and a Membership Manager, and there had recently been a change in the Regional Director for the North West, and Mr Ward referred to the North West region as a “struggling region” in an email to the claimant on 2 February 2018, and further described the North West as “an area that needs a lot of focus” in a further email to the claimant.

12. On 9 January 2018 the claimant had a meeting with Andrew Ward and the Business Development Director, Adrian Thompson. At this meeting performance was discussed as was the strategy going forward. During this meeting the team’s performance was discussed and in particular Mr Holmes who had not performed well. Further, Mr Holmes, who started in September 2017, had several periods of sickness and had left the business in early 2018. At this meeting the claimant’s individual business services target was discussed and the claimant had reassured that she had been working on a number of projects towards the end of 2017 which she was confident would “come off in 2018”. At the conclusion of the meeting the claimant was informed that she was doing a good job in an area that was “full of challenges and has no stability”.

Sales Targets

13. The claimant’s individual sales targets for the North region were £130,000 for membership sales and £165,000 for business service revenue. As at 1 February the claimant was currently 156% on target for business services (including the apprenticeship levy sales) and 60% of her membership services target. Sales figures for membership sales are counted at the point of sale. However, the measure for business services revenue is measured once the revenue starts to come into the business. There are several reasons for this, including that whilst the service might be “sold” to a new or existing client, that service might not be implemented immediately, customers may cancel or sales generated in a month may be delivered over a period of several months or even years, and revenue comes in at the point of delivery.

14. The respondent had introduced management apprenticeship courses and this was due to the implementation of the apprentice levy. The claimant had made a significant number of apprentice sales, and this can be seen by her having exceeded her sales target in respect of business service revenue, and during the course of 2017, and particularly towards the end of that year, the respondent was in the position that due to infrastructure issues it was unable to deliver the services to clients who had purchased. As a consequence, this had the impact of affecting the revenue income the claimant was able to generate, because if the service could not be delivered the revenue would not come into the business. This therefore hit the claimant’s target for revenue. The claimant’s revenue figures had reduced to zero in August and September and she also had reduced sales figures during the latter quarter of 2017.

15. Around this time the claimant was also experiencing personal problems specifically related to her daughter who was experiencing difficulties. The specific details are set out by the claimant at paragraph 24 of her witness statement, and it was accepted by the respondent that this was an accurate account. For the purposes of this Judgment, and the fact that this Judgment will be made available online, I see no reason to include the specific details relating to the problems encountered by the claimant's daughter. Suffice to say that the respondent accepted that it was aware of these difficulties and how challenging this was for the claimant. In addition the claimant had also at the same time been covering for an absent colleague, Mr Holmes, and the respondent was also aware of this fact.

Meeting 1 February 2018

16. On 1 February 2018 the claimant was asked to attend an off-site meeting with Mr Ward. Prior to the meeting the claimant had not been given any indication regarding the agenda or the reason the meeting had been called.

17. Essentially this meeting was a performance/capability meeting, and the claimant was asked about her sales targets and told that her performance was not good enough. The claimant explained that her figures had dropped dramatically due to the fact that the apprenticeship levy sales she had made were not now coming to fruition, and that her figures had therefore reduced and this was despite her having made the sales: the fact that the company was not in a position to deliver the revenue from the sales was not being included in her figures. The respondent suggested that in its view it had not been sensible to concentrate on one type of sale and that the claimant had in effect "put all her eggs in one basket". However, the Tribunal finds that the claimant sold products that were made available by the company for her to sell, and that clearly the popularity of the product was evident in the number of the sales. The fact that the respondent was unable to deliver was an issue for the respondent and not for the claimant.

18. At this meeting in addition to the effect the apprenticeship levy sales had had on the claimant's figures, the claimant also explained further about the issues she was currently experiencing with her daughter, the fact that she had had to manage another member of staff who had then taken long-term sickness, and she had therefore had to provide cover, all during the latter part of 2017. These factors had all impacted on her ability to achieve target.

19. The claimant was told that she had to turn around the North West (her territory) and show an upward trajectory of sales, and that she had until the end of April 2018 to achieve this. She was also told that if she did not meet this objective she would be put on a three month probation review. The claimant was informed that her appraisal would be deferred until the end of April and that during this period her direct reports and the management responsibility for the North would be removed from her. She was informed that the Regional Manager from the South, Rachel Pavitt, would assume responsibility for her direct reports. The claimant was told to inform her team that she would no longer be managing them but that she would retain her title and basic salary, but as she was no longer acting as a Regional Manager she would not be eligible for the annual team bonus.

20. The claimant felt that she had been set an impossible task and that she had in effect been demoted. The claimant was asked to come up with a plan and to provide this to Mr Ward, setting out her objectives, by 6 February 2018.

After 1 February 2018

21. No minutes were taken at this meeting. The respondent stated that it was not a capability meeting so no procedure had been followed, as was set out in the respondent's policy. However, Mr Ward confirmed via email (set out at page 83B of the bundle) his outcome of this meeting. Of note Mr Ward confirms that the claimant will no longer manage her team and that they would report to Rachel Pavitt, that she would talk to the team herself, that her appraisal had been deferred until the end of April, that her objectives were to get on target by the end of April, that the management of her team would be reviewed then, that she required to learn from other regions, for example Yorkshire and Humber and South West, and that she should get a plan together for him by 6 February 2018. In this email Mr Ward also seems to have acknowledged that the removal of her Regional Manager responsibilities would be embarrassing for the claimant, and says that the message to the team and everyone else is that the company needed her full focus on a struggling North West region and that he had personally asked for her full assistance on this. Mr Ward also accepted during evidence that the removal of these responsibilities, and particularly the removal of her direct reports, would have been embarrassing and difficult for the claimant.

22. In addition Mr Ward also followed up this meeting with an email to HR confirming that he had had a meeting with the claimant regarding her performance, and that as a result her direct reports would now report to Rachel Pavitt, but he would not be entering a formal appraisal but that her objectives to the end of April were clear, and that she would not be getting a pay rise. This had not been mentioned to the claimant at their meeting or in the subsequent email confirming the discussions at this meeting.

23. The claimant informed her team by way of a telephone conference the following day, and the claimant stated that she found this an extremely tough thing to do and felt that Mr Ward should have managed this. The claimant stated that she felt embarrassed and that the removal of her team had made her look incompetent. The Tribunal accepted that the removal of her line management responsibilities amounted to a demotion albeit that it was intended as a temporary measure.

24. On 6 February 2018 the claimant set out her plan and forwarded this to Mr Ward. In this email the claimant laid out her ideas and actions and asked for support, and in particular that she received quality leads. The Tribunal heard a significant amount of evidence on how leads were generated and followed up. In a nutshell, leads were generated from various sources including the Telesales Team, Health and Safety Administrators, Learning and Development Administrators, Solicitors and the Membership Team. The claimant had raised concerns over not getting sufficient and/or quality leads in the past, and it was clear to the Tribunal that the respondent knew that this had been an issue in the past for the claimant. For the purposes of this Judgment the Tribunal accepts that there was an issue with leads being passed to the claimant, and in particular the respondent conceded that it was aware that the claimant had not been passed leads and this was evidenced in an email by Mr Ward

at page 89 of the bundle where Mr Ward acknowledges that in particular the claimant was not being passed leads by Michelle Roberts, and referring to the fact that he had raised this issue previously and that leads should be passed to the claimant.

Support

25. The respondent stated that it provided the claimant with support during this period. The claimant stated that she did not receive support and that she was essentially left to achieve the objectives set for her in a very short space of time without adequate input or support from the company. The respondent certainly acknowledged that this was a significant task for the claimant, and an email from Mr Ward sent to senior staff states, "she can't do this on her own" and as referred to above reiterated that leads should be passed to the claimant. Mr Ward's evidence was that he considered the plan that had been prepared by the claimant was positive and sensible and that he was happy with it.

26. The Tribunal finds that the claimant had raised at least twice with Mr Ward her personal difficulties. The respondent argued that she had not specifically asked for any support, but it was clear that when questioned in the meeting on 1 February 2018 about why she had not reached her sales target the claimant had raised this as an issue. It was also clear that the respondent did not offer any support or make any adjustments to the claimant's targets to reflect these personal circumstances. Mr Ward's evidence was that he referred to having monthly meetings with the claimant, but no evidence was provided regarding these meetings and the claimant's version was that they did not happen. The Tribunal accepts the Claimant's evidence in respect of this issue.

27. The claimant was provided with updated leads information and Mr Ward did email regarding passing leads to the claimant, and he also spoke to Dan Shipway, Head of Telesales, to ensure that leads were prioritised and passed to the claimant. The evidence shows that there were email catch-ups between Mr Ward and the claimant, and there were also a couple of telephone chats during this period. Mr Ward's evidence to this Tribunal was that the claimant's progress was great and that everything was being done that needed to be done by the claimant. The claimant's view was that she did not get support and that she had a couple of one-to-calls with Mr Ward where he had told her that she was doing everything right, but that there were no formal reviews.

28. In addition, the claimant was concerned that she was still required to attend sales meetings and that despite being asked to be excused so that she could concentrate on the job and objectives set for her, and also because she felt embarrassed in front of her colleagues, but this was refused. The claimant also referred to one of these meetings where all team members were assigned an area of responsibility in respect of troubleshooting except the claimant, and once again this made her feel embarrassed and humiliated. On another occasion the claimant suggested some new ideas to be implemented during a North West team meeting but the directors were dismissive of her ideas and told staff to stick with the existing methodology and not to do anything else without asking. The claimant felt that this was unsupportive and demoralising.

29. The Tribunal finds that whilst the claimant was supplied with leads, and it would appear that there were some email and telephone communications specifically between the claimant and Mr Ward, that no additional support had been put in place for the claimant and no formal reviews were carried out during this period.

Events leading to termination

30. During this period it was the claimant's view that the respondent was engineering her exit from the business and that her demotion would be permanent. The claimant relied on the fact that the other Regional Manager, Rachel Pavitt, had told her during a private conversation that it would be best if she "moved on" and that she sounded "down and disheartened". At around the same time on 9 April 2018 Rachel Pavitt was given a new job title as Head of Solution Sales, and that the position had not been advertised internally across the company and the claimant had not been made aware of this vacancy. The claimant said that she would have been interested in applying for this role. However, the respondent's version of events was that this was merely a re-labelling of the claimant's role and that it had been changed to more accurately reflect the role that Rachel Pavitt was already performing. This would indicate that Rachel Pavitt was not merely acting as a Regional Manager as was the claimant's understanding, and the Tribunal was also provided with evidence that Rachel Pavitt had deputised for Mr Ward on several occasions and would send emails out on his behalf, and was involved with meetings with involved both the claimant and Mr Ward.

31. The Tribunal finds that on the respondent's own evidence Rachel Pavitt was not performing the role of the Regional Manager and whilst she may have been performing duties that were different to the claimant and concentrating on key accounts, that this was a change in focus and the status of the new role suggested a promotion. The Tribunal also finds that the respondent failed to communicate that Rachel Pavitt's role was different to that of the claimant i.e. not that of a Regional Manager, and that the claimant would not have been aware that Rachel Pavitt's role was seen by the respondent as being different and that it was reasonable for her to assume that this had been a promotion that had not been communicated to the claimant.

32. Further, the claimant's direct reports had been removed from her and were now reporting directly to Rachel Pavitt. Coupled with the fact that the only other Regional Manager had been made redundant in November/December 2017, it was not unreasonable for the claimant to have assumed that the respondent was undergoing a restructuring and that her demotion was either permanent or that she would be exited from the business.

33. Shortly after the claimant's resignation Mr Ward was indeed promoted and Rachel Pavitt took over the duties previously undertaken by Mr Ward. No new Regional Managers were appointed, and indeed at the date of this Tribunal no Regional Managers were in place. It was the claimant's belief that her position was being removed and this was further reported by the fact that Rachel Pavitt was involved in the telephone meetings between the claimant and Mr Ward in respect of her performance and was involved in taking minutes. The claimant considers that this was evidence that Rachel Pavitt was in effect being trained up to take over Mr Ward's role, which in fact did occur after the claimant's resignation.

34. A further sales meeting had been scheduled for 16 April 2018 and Rachel Pavitt had contacted the claimant directly to ensure that she would be attending. This was not usual and was not consistent behaviour with, at the time, her purporting to be the claimant's peer. The claimant had requested that she not attend that meeting because she still felt embarrassed and was still being asked questions from colleagues regarding her change in position, and in addition she wanted to concentrate on the objectives that had been set. This text further confirmed to the claimant her suspicions that Rachel Pavitt had indeed been promoted, and the stress of this situation caused the claimant to call in sick because she could not face her colleagues at this meeting. The following day the claimant received a letter from the respondent stating that she would not be receiving the annual 2% pay increase. The letter stated that this had been discussed with her by Mr Ward. The claimant stated that no discussion had ever taken place with Mr Ward in respect of her pay rise, and the Tribunal accepts this. It is not referred to in the email sent by Mr Ward following their meeting on 1 February 2018. The Tribunal finds that something significant as not making a pay award would have been referenced in that email if that conversation had taken place.

35. As a result of this letter the claimant was extremely upset and contacted her colleague, Gareth Harrison, who she knew had also performed poorly during the previous year. It was agreed by the parties that Mr Harrison's performance was worse than the claimant's but that Mr Harrison had received the 2% pay rise. At that point the claimant felt that she had no choice but to resign.

36. The Tribunal heard evidence that pay awards were awarded on the back of appraisals and that a box on the appraisal form had to be ticked by the relevant line manager to confirm a pay award would be made. It would also appear that there was a discretion on the part of the line manager to tick the box indicating a pay award would be given even if a person had not hit their targets/objectives for the year. However, no evidence was provided to the Tribunal on what procedure or guidelines or how that discretion could be exercised by individual managers. It would appear that an individual manager could award a pay rise without any explanation as to how they applied their discretion.

37. The respondent accepted that Gareth Harrison had been awarded a pay rise despite very poor results but were unable to offer but were unable to offer an explanation as to why it was so and how discretion had been exercised in his case. It showed that the claimant herself had been involved in the first part of Mr Harrison's appraisal although it would appear that was just merely starting to complete the form, but the final appraisal was completed and confirmed by Rachel Pavitt.

38. The respondent argued that the claimant was fully aware that pay rises were linked to the completion of the appraisal, and that as her appraisal had been deferred she should have known that any decision on her pay rise would also have been deferred. The claimant accepted that while she knew her appraisal had been deferred she had not been informed that this would result in her not receiving a pay rise.

39. It is clear from the evidence before the Tribunal that Mr Ward had made a decision on 2 February 2018 not to award the claimant a pay rise. This was set out clearly in his email to the HR Department and no caveat was added to his statement

that the claimant was not to receive a pay increase such as pending the outcome of her appraisal. It was a clear straightforward statement that the claimant would not receive a pay rise.

40. The Tribunal accepts that the decision not to award the pay rise was arbitrarily taken by Mr Ward with no explanation to the claimant in contrast to other poor performing staff who did receive a pay rise. The Tribunal accepted the claimant's evidence that this was a total surprise to her. In addition, at the point of resignation no appraisal date had been set up, no review meeting, no indication of whether her direct reports would return to her. The respondent's evidence was that they likely to have extended this period despite the upward trajectory of the claimant's performance.

41. The claimant considered that this was the final straw and that she could no longer continue to work for the respondent because she believed that all trust and confidence had broken down between them. The claimant felt unable to raise any grievance procedure prior to her employment, or indeed after termination. Upon receipt of the claimant's termination letter and a letter from her solicitors seeking a potential resolution to the problem the claimant was offered the opportunity to go through the grievance procedure, which she declined. The Tribunal accepts the claimant's evidence that once she had resigned that she had lost all trust and confidence in the respondent and that the relationship was so badly destroyed that she had no confidence that the grievance procedure would be meaningful and therefore she was unable to engage in the process.

The Law

Constructive Dismissal

42. Section 95 (1)(c) of the Employment Rights Act provides:

95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if.....

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

43. The leading case in respect of constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp [1978] QB 761**. The Tribunal should ask itself the following questions (agreed between the parties)

- a. Did the Claimants resign in circumstances in which they were entitled to resign without notice by reason of the respondent's conduct?
- b. If so, what was the repudiatory breach that entitled the Claimants to resign?

- c. Was there a series of breaches which entitled the Claimants to resign and, if so, what was the last straw in such a series?
- d. Did the Claimant's resign in response to this breach?
- e. Did the Claimants delay in resigning and reaffirm the contract?

44. In order to be successful in a claim for constructive unfair dismissal, the Claimant must show that there has been a repudiatory or fundamental breach of contract going to the root of the contract and it is not enough to show that an employer has merely acted unreasonably. Further in cases where an employee is relying upon the implied term of mutual trust and confidence the Tribunal must consider the House of Lords decision **Mahmud v BCCI SA, Malik BCCI SA (In Liquidation) [1998] AC 20, [1997] 3 All ER 1**, where it sets out that an employer shall not 'without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'.

45. A course of conduct may have the effect of undermining mutual trust and confidence and consequently amount to a fundamental breach following a last straw incident. Guidance is provided to the Tribunal in the Court of Appeal case of **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** as set out para 55:

- a) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- b) Has he or she affirmed the contract since that act?
- c) If not, was that act (or omission) by itself a repudiatory breach of contract?
- d) If not, was it nevertheless a part of a course of conduct comprising of several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?
- e) Did the employee resign in response (or partly in response) to that breach?

46. Therefore an employee claiming constructive dismissal on the basis of a "last straw" is entitled to rely on the totality of the employer's acts as a continuing cumulative breach of the implied duty of trust and confidence notwithstanding a prior affirmation of the contract, provided that the last straw formed part of the series. Thus, a "last straw" can revive the right to terminate the contract.

47. The Tribunal is further assisted by the case of **Wood v WM Car Services (PETERBOROUGH) LTD: EAT 1981**, where it states that the function of the Tribunal is to look at the employers conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly is such that an employee cannot be expected to put up with it.

48. The Tribunal, when considering whether an employer's conduct has destroyed the relationship of trust and confidence is an objective test and the burden of proof rests with the Claimant.

Conclusions

49. The Tribunal has adopted the approach taken in the Court of Appeal case of **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**. The Tribunal has considered whether the final act of failure to award the claimant a pay increase was the most recent act or omission on the part of the respondent which caused the claimant to resign. The Tribunal accepts the claimant's evidence and finds that that act was the act that triggered the claimant's decision to tender her resignation. The Tribunal finds that the claimant's resignation was submitted in a timely manner and it cannot be said that the delay between 18 April 2018 and 24 April 2018 amounts to an affirmation of the contract.

50. The Tribunal considered whether the act of failing to award the claimant a pay rise in itself was sufficiently serious to constitute a repudiatory breach of the implied term of trust and confidence, and the Tribunal accepts the claimant's argument that it was. The Tribunal considered the events leading up to the receipt of the letter by the claimant and that she had complied with the requests of the respondent: she had had her direct reports removed, she had set out an action plan from which to recover her position, and that throughout this period she had not received any additional support to support that had been previously been offered other than a couple of emails from Mr Ward ensuring that leads were forwarded to her. There had been no meetings on a formal level to discuss the claimant's performance with Mr Ward, and in those conversations she had had, she had been told that she was doing a good job and going in the right direction.

51. The evidence before the Tribunal was very clear: Mr Ward had made a decision on 2 February 2018 that there would not be a salary increase. The claimant had not been informed of this decision, and whilst the Tribunal has some sympathy with the respondent's argument that the claimant knew her appraisal was being deferred therefore any decision on her salary would be deferred, this is not what the letter of 16 April 2018 said: it informed her that she would not be receiving a pay rise and that this had been discussed with her by Mr Ward. This was not the case, and it is clear that Mr Ward had made a decision not to award a pay rise (without any caveat) as far back as 2 February 2018.

52. Under cross examination Mr Ward confirmed that the letter sent to the claimant would have been a surprise to her and accepted that the situation concerning the pay rise should not have happened like that.

53. Although the respondent's argument was that they would have reviewed the claimant's performance and given a pay award in May, it was clear on the evidence that no such review meeting had been diarised or planned and the claimant had never been informed with regard to a date for her appraisal and/or a pay award review. Indeed the Claimant had not been informed at all that her pay rise was at risk as a result of the review of her performance.

54. In addition the Tribunal accepts the claimant's argument that whilst her appraisal may have been deferred pay awards had been given to other poor performing employees, and in particular Gareth Harrison, and the respondent was unable to satisfy this Tribunal of how discretion had been exercised in the case of Mr Harrison to explain the difference in treatment between the two. The respondent

sought to argue that the letter of the 16th was a relatively innocuous act by the HR Department and that the HR Department would merely look at whether the box had been ticked and put through those pay rises. However, the Tribunal does not accept this evidence based on the fact that Mr Ward had emailed the HR Department directly saying that in the claimant's case a pay award would not be made. In addition the respondent never communicated to the claimant that her pay award would not be considered at the same time as everybody else, or indeed that she may receive an automatic letter but to ignore it or a letter that was bespoke to her particular situation.

55. The Tribunal therefore finds that the failure to award a pay rise or indeed provide any clear indication to the claimant of how her pay award was to be treated was conduct that was likely to destroy or seriously undermine the relationship of trust and confidence between the claimant and the respondent. The Tribunal therefore finds that this act alone amounted to a repudiatory breach of contract entitling the claimant to resign and claim constructive dismissal.

56. However, the Tribunal has considered further this last act was also a part of a course of conduct comprising several acts and omissions which if viewed cumulatively would amount to a repudiatory breach of the implied term of trust and confidence. The Tribunal considers that the first act capable of being relied on by the claimant is the meeting on 1 February 2018 with Mr Ward where out of the blue the claimant was informed that she was not performing effectively to such an extent that the respondent considered it appropriate to remove her direct reports from her, and remove her focus from the North as a whole to her own North West territory. This meeting was following a meeting in January where no concerns had been raised with the claimant, and indeed she had been told that she was doing a good job despite the fact that the respondent would have known of the claimant's results at that meeting in January.

57. In addition the respondent appeared to have taken little account of the fact that the claimant had been experiencing quite severe personal difficulties at the time, had taken over management of another employee and was also covering for that employee's absence. Significantly, the claimant had also had success and had exceeded her business revenue target by selling the apprenticeship levy. As a result of the respondent's failure to be able to deliver on those sales the claimant's sales figures were adjusted to take into account that these sales were unlikely to come to fruition, which had had a significantly detrimental effect on the claimant's targets.

58. Running alongside this there had also been a restructure of the respondent's business, and one Regional Sales Manager had been removed and the other had had a change in job title to accurately reflect that the role that she was performing was not that of a Regional Manager. Rachel Pavitt had been taking a much more prominent lead role within the organisation at a time when the claimant had had her responsibilities removed from her and was being performance managed by the respondent. The respondent did not provide any evidence of performance management of any other staff; including Gareth Harrison.

59. The Claimant resigned in response to the final act in a timely manner and it cannot be said that there was a delay in her resignation. The Tribunal is satisfied that the Claimant has proved facts that viewed objectively amount to a repudiatory

breach of contract in particular a breach of the implied term of trust and confidence and that the Respondent's actions cumulating in the failure to award a pay rise without any explanation amount to conduct that was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

Employment Judge Hill

Date 19 February 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 February 2019

FOR THE TRIBUNAL OFFICE

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