EMPLOYMENT TRIBUNALS

Claimant: **Mr S Sealey**

Respondent: **TJ Smith & Nephew Limited**

Heard at: **Cardiff** **On: 15 October 2019**

Before: **Employment Judge Harfield (sitting alone)**

Representation:
Claimant: In person
Respondent: Mr Boyd (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant's claim of constructive unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

1. By way of a claim form presented on 1 June 2018 the claimant brings a claim of constructive unfair dismissal. The claimant resigned with notice on 23 January 2018. He had a 3 month notice period. Acas conciliation took place between 13 March 2018 and 10 April 2018. By way of a response form presented on 13 July 2018 the respondent disputes the claim. The claim was originally dealt with by the Watford region and was listed for

hearing on 13 December 2018. That hearing was postponed to allow the case to be transferred to Wales. The case was then listed for 4 April 2019 but was postponed, on the direction of Judge Frazer, as the respondent's witness, Mr Maloney was out the country on holiday. A further hearing listed for 13 August 2019 was postponed on the direction of Judge Brace for medical reasons relating to a witness.

2. I received written witness statements from the claimant and Mr Maloney for the respondent and both witnesses gave oral evidence. I had a bundle of documents extending to 217 pages and the claimant also handed in better copies of some photographs found at [171-172]. Towards the end of the hearing the claimant also provided my clerk with a "Personnel Today" article on the Acas Code of Practice for disciplinary hearings. We were not able to access the article during the hearing itself but Mr Boyd did not object to my taking that into account before reaching my decision. I received oral submissions from Mr Boyd and from the claimant. Judgment was reserved.

3. The claimant's claim form in box 9 mentions an unpaid bonus of £2500. The claimant clarified in evidence that there was no separate claim brought in relation to that bonus, but that it was part of the losses that he was seeking to recover in his constructive unfair dismissal claim.

Findings of fact

4. Applying the balance of probabilities, and to the extent necessary to decide the issues in the case, I make the following findings of fact.

5. The respondent is a medical devices company. The claimant started working for the respondent in November 2015 as a sales representative/ Territory Manager. At the material time the claimant's line manager was Matthew Maloney, Regional Sales Manager.

Restructuring

6. In late 2017 there was a restructuring of the respondent's business with the introduction of 8 new County Managers. Mr Maloney explained in evidence that his region did not receive one of the new 8 County Managers and that someone from within his team was moved to the role and other roles then restructured. It is not in dispute that as part of the restructuring the claimant's territory changed on, 15 November 2017, from South Wales to East Wales and Gloucestershire. The claimant explained in evidence that the changing of his territory was not an alleged breach of contract that he was relying upon but that it was important background. The claimant explained that the sales team as a whole were fearful that the new appointments would lead to others being let go from the business elsewhere

and he says that being moved to a new smaller territory started alarm bells ringing for him. I accept it would have been an unsettling time.

Phone call from RJ

7. On 22 December 2017 Mr Maloney received a phone call from RJ, another Territory Manager. RJ told Mr Maloney that he had visited Cardiff Spire Hospital and had told them that due to the structural changes he would no longer be the Territory Manager and the claimant would be the main point of contact going forward. RJ told Mr Maloney that TW, Sterile Services Manager, at the hospital had said "If that's the case S&N will lose a lot of business." Mr Maloney states he received the phone call from RJ in his car and it was a short call such that he did not make a note anywhere. The claimant submits that there is no evidence that the call happened as it has not been documented. I agree that it would have been wise for Mr Maloney to have documented the call in some way at the time. However, having heard from him in evidence I accept that the call with RJ did happen and the gist of that conversation was as Mr Maloney sets out.

8. Mr Maloney states, and I accept, that he was concerned about the message that RJ was passing on and that he arranged to meet up with TW after the Christmas break. Mr Maloney also made arrangements to follow up with another customer, Hereford County Hospital. He made arrangements to visit both, on the same day, 5 January 2018.

9. Mr Maloney had met with Hereford County Hospital previously on 5 September 2017 where a surgeon, CP, had expressed frustrations with the level of service and organisation provided by the respondent for hip arthroscopy procedures. The concerns had not been levelled at the claimant personally albeit it was a customer within his responsibility. Mr Maloney discussed it with the claimant at the time.

5 January 2018

10. On 5 January 2018 Mr Maloney met first with RC, Theatre Manager at Hereford County Hospital. The typed notes that Mr Maloney prepared are at [65 – 66]. The claimant disputes that there is any evidence of any concerns being raised by RC as the meeting notes are not signed and there is no witness statement signed by RC or indeed, for example, any written complaint by RC such as an email. Having heard from Mr Maloney, I am satisfied that the meeting with RC did take place and that the gist of the conversation is reflected in the notes at [65-66]. Mr Maloney stated, and I accept, that he prepared handwritten notes at the time of the meeting and typed up the typed account afterwards from those notes. To be clear, that is not a finding that the concerns expressed by RC are true. It is a finding that it is a summary of what she communicated to Mr Maloney.

11. I will not repeat the content of [65-66] here but it included concerns expressed to Mr Maloney:

- That, in RC's view, the claimant was "dishonest and unreliable";
- That the claimant had not consistently attended procedures to provide case support – giving an example of a hip arthroscopy where she alleged the claimant had canceled a couple of days before the case such that she had asked a competitor to attend;
- That the claimant had agreed products for shoulder arthroscopy but that he had then used with the surgeon, and invoiced for, different products outside of the agreement (the allegation of dishonesty);
- That £70k of business had been lost to a competitor because they felt that the claimant's support was not good enough (whereas Mr Maloney had understood it was because the competitor offered a better deal);
- That she had nothing personal against the claimant but that the lack of support was specific to the claimant and that her view of the respondent had changed.

12. Mr Maloney's typed notes of his meeting with TW and JD, the Theatre Manager, from Spire Cardiff are at [67]. Again I accept Mr Maloney's evidence that these notes reflect the gist of the conversation that he had, and that they were prepared from his handwritten notes taken at the time. I therefore find that the concerns set out within [67] were expressed to Mr Maloney. Again this is not a finding that the concerns are true, simply that is what Mr Maloney was told. They include:

- That TW had nothing personal against the claimant;
- That general support and service was not what they had come to expect when the claimant had previously been in the role;
- There were pre-existing problems with stack systems that she felt the claimant had not handled well;
- That he was difficult to get in touch with and arrange visits;
- That she had to chase for a quote for an ACL tibial aimer and when received it was incomplete as the quote the claimant had provided was incorrect. She accepted that mistakes happen but her complaint was that the claimant, in her view, had been unhelpful in correcting the situation. They bought the instruments from another supplier.

13. Mr Maloney was concerned about the feedback he had received and spoke with EH in the respondent's HR team. Mr Maloney states, and I accept, that they discussed whether the situation needed a formal or an informal approach and that they took the view a more formal approach was needed given the language used, particularly the allegation of dishonest behaviour.

I accept that Mr Maloney was also concerned by the suggestions that the respondent may be losing business. Mr Maloney states, and I accept, that they also discussed whether it should be treated as performance concerns or a potential disciplinary issue and that they decided to proceed down the disciplinary route, particularly due to the allegation of dishonesty. He states that they discussed and agreed that the complaints, if well founded, could amount to bringing the company into disrepute within the potential list of acts of gross misconduct under the disciplinary policy.

Mini Lab

14. The claimant was unaware of the above events at the time they occurred. The claimant alleges that during the same period Mr Maloney was deliberately excluding him from important emails/meetings/ business information and a teaching lab with the claimant's new customers.

15. The NHS account Cheltenham & Gloucester was an important element of the claimant's new territory. The respondent runs training labs/mini labs at its Head Office for customers. It is a way to show key stakeholders, such as surgeons, their equipment and an important way to build relationships with those key stakeholders. The previous Territory Manager, OS, was already arranging a mini lab. Mr Maloney explained, and I accept, that the visit had initially been organised for a different hospital falling under OS (RUH Bath) and that one of the surgeons from Cheltenham & Gloucester had been added to it at a later date. Despite the territory change the mini lab went ahead without the claimant being invited and he missed the opportunity to spend time with the Cheltenham & Gloucester surgeon. Mr Maloney's evidence, which I accept, is that he had "dropped the ball" and had not thought to ensure that the claimant was invited but that it was an error rather than intentional side lining of the claimant. The exact date of the mini lab is unclear but it was on a date before the 11 January 2018 as on that date the claimant sent the surgeon in question a follow up email [180].

Genmed Contract

16. The claimant also alleges that Mr Maloney did not tell him about a large contract in his territory or its progress. Mr Maloney explained in his oral evidence, which I accept, that the Genmed contract related to a decision by Cheltenham & Gloucester to use a third party agency for their procurement. The email publicising the implementation of the change, dated 8 January 2018, is at [69]. It was sent to a central orders team at the respondent where it was passed on several times as shown at [68]. OS received it on 11 January 2018 who forwarded it on. The chain at [68] is not entirely clear but it tends to suggest that OS forwarded it to the claimant and to Mr Maloney at the same time. Mr Maloney's evidence was that was what

indeed happened. The claimant at [68] emails Mr Maloney in response to state he would give him a call to plan moving forward.

17. Mr Maloney stated in evidence that it was not a substantial change to the claimant's working conditions as the key stakeholder relationships remained the same. He said was the invoicing that changed which was dealt with by a different part of the respondent's business in any event. I accept his evidence. I therefore do not find that the claimant was deliberately kept out of the loop about a substantial contract in his region. Ultimately, the on the balance of probabilities the final detail of the procurement change was sent by OS to the claimant and Mr Maloney at the same time due to the way that global correspondence email had been cascaded.

Investigation Meeting

18. On 16 January 2018 Mr Maloney telephoned the claimant inviting him to an investigation meeting on 17 January 2018. It was to take place at head office with himself and HR in attendance. The claimant was worried and asked what it was about and whether he needed to prepare but was told it would be explained on the day.

19. The investigation meeting took place on 17 January 2018. The typed notes are at [73 – 79]. They record, amongst other things:
    - It was fact finding exercise to gather evidence and not a disciplinary;
    - After the meeting they would review all the information and Mr Maloney would decide whether there was enough information for it to go to a disciplinary or if there was no case to answer;
    - They discussed the September 2017 concerns by CP and the claimant provided his view, including that things had happened with kit that were outside of his control;
    - Mr Maloney summarised the concerns received from TW and RC and the claimant provided his comments including that;
        - Business had been lost to the competitor because of price;
        - That the feedback did not accord with what RC and TW had been telling him;
        - That some problems may be historic or because the customers were not running their accounts well with last minute requests;
        - that he had an email to show that it was RC who had cancelled a surgery case;
        - that RC had not been clear about broken equipment and when she was he had dealt with it;
        - he did not know what had gone on in reference to the allegation of dishonesty and he gave his account of his

understanding of the situation (albeit, as set out in Mr Maloney's statement it would appear the claimant did not fully understand what that particular allegation was as it appears he thought the allegation was about the quantity of the products ordered as opposed to the type);

- he thought the frustrations expressed lay with the respondent as a whole.

20. After an hour the meeting was adjourned and Mr Maloney had a discussion with EA from HR. A decision was made that the allegations required further investigation. A decision was also made to suspend the claimant whilst the investigation progressed. Mr Maloney states that he felt that until the matters were fully investigated he could not trust the claimant to be in his customer facing role. He was also concerned about the claimant attending the annual sales conference the following week.

21. After 10 minutes the meeting was reconvened and the claimant was told that the matters needed to be further investigated and that the claimant was being suspended whilst that happened. Mr Maloney said "I have no opinion one way or another, what I am saying is that I need more information and because of the business reputation I need to thoroughly investigate and at the moment I think this is the right course of action."

22. The claimant was told not to speak to any customers and colleagues and to keep it confidential. The claimant asked if he could be involved in the investigation and could he show Mr Maloney things he had and was told "that would be helpful yes." He was told by EA: "Yes this is just an investigation at this stage if this does progress to a disciplinary we will share the information with yourself, you can also send us any information that you think might be relevant to the investigation, you will be suspended on full pay and you will receive a letter confirming." The claimant said he was shocked as "you said nothing would happen." Mr Maloney responded to explain that was a reference to it being a fact finding process, not a formal disciplinary process.

Contact after the investigation meeting

23. On 18 January 2018 the claimant was sent a letter confirming his suspension pending "an investigation for allegedly bringing the company into disrepute" [81 – 82].

24. On the morning of 18 January 2018 the claimant emailed EA [84] asking for the notes of the meeting, a copy of his contract and HR handbook, the reasons for his suspension and the original versions of the alleged complaints. He also asked for access to his full emails by his laptop being

provided to him (it happened to be with IT at the time for reconfiguration as it had recently been stolen). He also asked whether he should have been offered the opportunity have a representative at the meeting and that he had been told nothing would happen at the end of the meeting. EA responded in the late afternoon confirming there was no right to representation at an investigation stage and provided a copy of the disciplinary policy saying "if it does progress to a formal disciplinary all information will be shared with you." She asked Mr Maloney to respond, when back from annual leave, about the IT equipment.

25. In the afternoon of 18 January 2018 the claimant emailed EA again saying it was increasing his stress levels immensely as he was aware customers needed assistance for ordering kits and covering cases and that he was worried his reputation and ability to work in the future was being dramatically affected by the lack of communication to customers. EA forwarded it on to Mr Maloney who responded [87] to say he understood the concerns about making sure customers were looked after and he asked the claimant for a list of key contacts so that Mr Maloney could give them cover contact details but "keeping this situation confidential so not to affect future relationships."

Resignation

26. On 23 January 2018 the claimant emailed [94] Mr Maloney saying:

"As of today, 23 January 2018, I feel that I have no option but to hand in my letter of resignation. As of immediate effect I hereby give you 3 months notice. Please accept this email as confirmation of this."

27. Mr Maloney sought advice from EA in HR and sent a reply [96] that same day asking the claimant to reconsider:

"In reference to your email below I'm sorry to hear that you feel as though you have no choice to resign. I just want to reiterate to you again that your suspension is by no means an admission of guilt. This is a temporary measure to allow me to fully investigate the allegations made against you. I am at conference this week but am aiming to have this investigation concluded as soon as possible. I would therefore ask you to reconsider your resignation."

28. The claimant responded to state that his decision was a final one [95]. The claimant says in his statement that after he returned home after the suspension: "Thereafter I remained very distressed and depressed. I had to inform my family and parents of the situation. I felt that I was being pushed out and they agreed with me. I could not contact or inform any customers or colleagues. I tried reasoning with Mathew Maloney offering to cover my cases, but this only seemed to exacerbate things further. I felt

I could not put my point of view across anymore as it would only lead to more arguing and intimidation: to be honest I had had enough." He also says "This decision was not taken lightly but after a week of zero contact, not being able to communicate the situation with my colleagues and clients, not being able to defend myself with counter information from customers, I could not possibly return or continue working for TJ Smith and Nephew. I felt I could no longer represent a company which outwardly promotes Patients first and being ethical, yet, inwardly has a desire to drive profits above everything. It creates a laddish outdated drinking culture and a clear disregard for Employment law and Acas procedure. This behaviour is supported by documents relating to the Christmas party, (bundle document – 10/40)."

29. To complete the timeline, as the claimant resigned with notice the investigation and ensuing disciplinary process continued during his notice period. On 9 March 2018 AW, who was appointed to conduct the disciplinary hearing, wrote to the claimant to confirm that the company had decided that no formal disciplinary action will be taken against him. She stated: "The reason for this is whilst I do not dispute the customers had raised concerns regarding your support, from the evidence you have provided, I consider that you had taken the necessary steps to fulfill what was required of you." The claimant was to be paid in lieu for the remainder of his notice period.

The legal principles / The issues to be decided

30. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 is Section 95(1)(c) which provides that an employee is dismissed by his employer if:

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

It is usually known as a "constructive dismissal".

31. Case law has established the following principles:

(1) Th employer must have committed a repudiatory breach of contract. A repudiatory breach is a significant breach going to the root of the contract. This is the abiding principle set out in Western Excavating v Sharp [1978] ICR 221.

(2) A repudiatory breach can be a breach of the implied term that is within every contract of employment 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 trust and confidence between employer and employee.

(3) Whether an employer has committed a breach of that implied term must be judged objectively. It is not enough to show merely that an employer has behaved unreasonably. The line between serious unreasonableness and a breach is a fine one. A repudiatory breach does not occur simply because an employee feels they have been unreasonably treated nor does it occur when an employee believes it has.

(4) The employee must leave because of the breach.

(5) The employee must not waive the breach or affirm the contract by delaying resignation too long.

(6) There can be a breach of the implied term of trust and confidence where the components relied upon are not individually repudiatory but which cumulatively consist of a breach of that implied term.

(7) In appropriate cases, a "last straw" doctrine can apply. This states that if the employer's act which was the proximate cause of an employee's resignation was not by itself a fundamental breach of contract the employee can rely upon the employer's course of conduct considered as whole in establishing that he or she was constructively dismissed. However, London Borough of Waltham Forest v Omilaju [2005] IRLR 35 tells us that the "last straw" must contribute, however slightly, to the breach of trust and confidence. The last straw cannot be an entirely innocuous act or be something which is utterly trivial.

(8) In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal set out the questions that the tribunal must ask itself in a "last straw" case. These are:

(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 several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach.

(e) Did the employee resign in response (or partly in response) to that breach?

32. If it is established that the resignation meets the definition of a dismissal under section 95(1)(c), the employer has the burden of showing a potentially fair reason for dismissal before the general question of fairness arises under section 98(4).

Submissions

33. I received oral submissions from both parties which I have taken into account.

Findings

34. Applying the case law principles identified above, I have carefully considered the criticisms that claimant makes about the respondent in support of his claim that he was entitled to resign and consider himself constructively dismissed. I should also make clear that in reaching my conclusions I have to do so on the basis of the evidence as actually presented before me by the parties and applying the law as I have summarised above. This means that I must focus upon the events or incidents that the claimant says led to his decision to resign objectively assessed at the time they occurred, and not upon what happened after that resignation.

35. I do not consider that any of the acts relied upon by the claimant constitute individually a repudiatory breach of contract or more specifically a breach of the implied term of trust and confidence. Nor do I consider that cumulatively those acts form a course of conduct comprising several acts and/or omissions which viewed cumulatively amount to a repudiatory breach/ a breach of the implied term of trust and confidence. I set out below why I have reached that conclusion.

The customer concerns

36. I have found as a matter of fact that the conversation between RJ and Mr Maloney took place. I do not find it was unreasonable on the part of Mr Maloney to wish to meet with TW (together with JD the Theatre Manager) to discuss with her any concerns. The claimant states that it would have been reasonable or standard practice for Mr Maloney to discuss it with him first or indeed to take him along to the meeting. However, the particular

course of action that it is appropriate to take will depend upon the individual circumstances. Here I do not consider it unreasonable for Mr Maloney to have wished to speak to TW first and understand the nature of her concerns without the claimant present in view of the particular message he had received from RJ.

37. Mr Maloney made arrangements to meet with TW and he also made arrangements for a follow up meeting with Hereford County Hospital. I do not consider it unreasonable for Mr Maloney to have arranged a follow up meeting with Hereford County Hospital. The claimant alleges that the timing of that meeting is suspicious and that, as I understand it, he considered that Mr Maloney was trawling for negative information about him, such that he specifically targeted Hereford County Hospital with a visit. He points out that there are many other customers that Mr Maloney could have visited to obtain a view. I do not find, however, that Mr Maloney was undertaking a deliberate trawl to obtain information about the claimant. I accept Mr Maloney's evidence that he was simply arranging a follow up visit with Hereford County Hospital and that he arranged for his own diary purposes for the two meetings to happen on the same day. Mr Maloney's responsibilities covered a large geographical area across the South West of England and South Wales. I also do not consider it unreasonable for Mr Maloney to have sought to meet with RC at Hereford County Hospital without taking the claimant with him. I accept his explanation he did so as it was a secondary/ follow up visit and it was not unreasonable for him as a regional manager, with individual discretion how to undertake his managerial responsibilities, to decide to do so.

Decision to follow a formal disciplinary process

38. Following the meetings on 5 January 2018 Mr Maloney was in possession of the information summarised at paragraphs 10 to 13 above. I accept that Mr Maloney was surprised and concerned about what he had been told such that he contacted HR for some advice. I do not find that it was unreasonable for him to do so rather than speaking first with the claimant. He was in receipt of, on the face of it, potentially serious concerns that including an allegation that the claimant was "dishonest and unreliable." It was perfectly reasonable and sensible to obtain advice from HR.

39. It was not unreasonable for Mr Maloney and HR to decide that the situation warranted a formal route rather than an informal discussion with the claimant. They were potentially serious concerns. It was also not unreasonable to decide to use a disciplinary pathway rather than a performance pathway. In a situation such as here there is considerable overlap between whether a concern should be categorised as a performance or a disciplinary concern and an employer must have a margin of discretion in deciding how to pursue it, provided a fair procedure is

followed. Here there was an allegation from RC, in her words, of dishonesty and it was not unreasonable to choose the disciplinary pathway.

40. I also find that it was not unreasonable for Mr Maloney and HR to proceed down the disciplinary route without obtaining written and signed witness statements from RC or TW or some other kind of written account or complaint directly produced or approved by RC or TW (or indeed anyone else). I accept it was reasonable instead for Mr Maloney to produce a typed summary of what was said in the meetings. I do not agree with the claimant's analysis that without a formal, approved account or complaint that formal proceedings should not have been commenced against him, or that somehow those proceedings were inherently unlawful from the outset. Each situation must be judged objectively on its own facts. These were concerns raised by customers in a meeting with Mr Maloney that from the customers' perspectives would have been part of their general views of the services being provided by the respondent and that they left with Mr Maloney to take forward as he viewed appropriate. It is clear that this is a market in which personal relationships with stakeholders within a customer organisation is very important and the relationship needs careful management. I do not find it unreasonable for the respondent to have decided not to ask RC or TW to make a formal written complaint or have signed a formal witness statement in those circumstances. Mr Maloney had possession of their concerns and could take them forward. The claimant would be able in due course to provide a response and any documents countering RC and TW's views. There was also scope to ask RC or TW for more information if it became necessary. There was therefore no intrinsic unfairness to the claimant.

41. The claimant complains that as originator of the complaints that Mr Maloney should not have then been appointed as the investigating manager. He relies on an article apparently published in Personnel Today headed "A 10-step guide to conducting a disciplinary investigation" in which step 3 says "Make sure that the investigating officer is not connected in any way to the facts giving rise to the disciplinary charge." That statement is not within the Acas Code of Practice on Disciplinary and Grievance Procedures or within the accompanying guide. The guide simply says "Any investigatory meeting should be conducted by a management representative and should be confined to establishing the facts of the case." I accept that in some specific circumstances the tip contained in the Personnel Today article could be a sensible guiding statement. Here, however, I do not find that it was unreasonable for Mr Maloney to act as the investigating officer. He had been in the meetings with RC and TW and had received their accounts. He was the claimant's line manager. He was in a good position to investigate the concerns and understand and explore the claimant's response to them. He was not acting as the disciplining officer and there was no blurring of roles in that regard. I also accept Mr Maloney's evidence that he had

discussed the issue with HR who had agreed he was the most appropriate individual to be the investigating manager.

Mini Lab

42. Mr Maloney made a mistake in not telling the claimant about the mini lab. It would have been a good opportunity for the claimant to build a relationship with the consultant concerned. I do not find, however, that this was a deliberate omission by Mr Maloney to cause the claimant harm or disadvantage. I find it was simply an oversight, borne as a result of human error, and the fact that the arrangements for the mini lab had started to be made some months before the restructuring of territories and in respect of which the Cheltenham & Gloucester consultant had been a later addition to a mini-lab originally aimed for RUH Bath. I do not find that Mr Maloney's failure in that regard was so serious that it was conduct likely to seriously damage or destroy the duty of mutual trust and confidence.

Genmed Contract

43. I do not find there was a conscious or deliberate decision by Mr Maloney not to tell the claimant about the detail of the Genmed contract in its final form. Its implementation, which was not handled by Mr Maloney, was in train months before the claimant changed territories. Its ultimate terms were, on the balance of probabilities, cascaded through to the claimant and Mr Maloney at the same time. I also accept that it was not a contract, once its terms were known, that was likely to substantially affect the claimant's work in the territory. I do not find that the criticism of Mr Maloney in this regard was warranted but in any event if there were a failure it was not so serious that it was conduct likely to seriously damage or destroy the duty of mutual trust and confidence.

Deliberate plan against the claimant?

44. I also do not find that Mr Maloney was engaged in a deliberate policy of excluding the claimant or seeking to cause him harm or seeking to oust the claimant. The events with the mini lab and the Genmed contract were not deliberate conduct or omissions on the part of Mr Maloney aimed at the claimant. Mr Maloney was at the same time in receipt of, and starting to deal with, the concerns from TW and RC. But that was, I find, a separate situation that was borne of the information that came from RJ and the meetings on the 5 January 2018. I can understand that the claimant may have been feeling vulnerable following the change in territories and that, as I understand it, he learned about the missed mini lab and the Genmed

contract from OS at about the same time, on or around 11 January 2018. It was followed by, from the claimant's perspective, shortly thereafter the phone call on 16 January 2018 calling him to an investigatory meeting the next day. I can understand that subjectively the claimant may have felt suspicious about what was happening and the timings. However, viewed objectively there was no campaign or plan in place by Mr Maloney to harm or disadvantage or to seek to oust the claimant.

Investigation Meeting

45. Once Mr Maloney and HR had decided that the concerns from RC and TW needed to follow the formal disciplinary process it was clearly appropriate to invite the claimant to an investigation meeting. I do not find it was unreasonable to invite the claimant, in work time, with a day's notice or to tell him that the reasons would be explained on the day. The reasons were explained and the claimant was given the opportunity to comment at the meeting.

46. The claimant complains that he was told by Mr Maloney in advance that no action would result from the meeting. I do not find, on the balance of probabilities, that a statement was made to the claimant in those exact terms. The investigation meeting notes show the claimant was told that it was a fact finding exercise to gather evidence and not a disciplinary. They also show he was told that after the meeting the information would be reviewed and Mr Maloney would decide whether there was enough information for the situation to go forward to a disciplinary.

47. I do not find that it was unreasonable on the part of the respondent to not offer the claimant the right of representation at the investigation meeting. There is no statutory right or any such right within the respondent's disciplinary policy and the claimant had never been given any indication that he would have the right to take someone with him.

Decision to continue with the investigation/disciplinary process

48. The claimant asserts that once he gave his account at the investigatory meeting that the process against him should have stopped. The claimant accepted in cross examination that the emails he had produced related to a specific allegation from RC about the cancellation of a surgery case. He also accepted that there was an outstanding issue on the question of the allegation of dishonesty that the respondent needed to get to the bottom of, if it was genuine. I do not find it was unreasonable for Mr Maloney to have therefore concluded that there were matters which still required further investigation.

Suspension

49. Turning to the decision to suspend the claimant, the respondent's disciplinary policy provides for the possibility of suspension while a matter is being investigated and during a disciplinary process and says "suspension during an investigation is not disciplinary action or pre-judgement of the issue." What ultimately has to be assessed, however, is how and why that discretion was exercised on the facts of the claimant's situation. I do not find that the forthcoming sales conference was sufficient reason by itself: it was a one off event and cannot justify suspension for the duration of the investigation process. Mr Maloney also states in his witness statement:

> "At this point I was concerned about Stuart's reaction to the allegations and the fact that he didn't seem to take on board the customer's criticism and that it was he who was being singled out on the issue. I was also concerned by the categorisation of his behaviour as being dishonest by a customer and that it seemed like his ongoing involvement with these customers was causing the business to lose money. Ultimately, my feeling was that until these matters were fully investigated I couldn't trust Stuart to be in the role and being out on his own and working with customers. I considered whether there were options for Stuart in the meantime but there were no projects or things he could be doing given the nature of his role in sales. Therefore, having discussed the options with [EA], I took the view that suspension was the most appropriate course of action whilst we completed the investigations."

50. I have no cause to disbelieve Mr Maloney's account. As set out above, he reasonably concluded there were further investigations to be undertaken including that relating to the purported allegation of dishonest behaviour. It was not unreasonable, in all the circumstances, to have concerns about the claimant continuing in a customer facing role whilst the investigations were conducted. Mr Maloney also gave consideration to alternatives to suspension. I can entirely understand the claimant's concerns about his relationship with customers as expressed in his email on the afternoon of 18 January 2018. However, Mr Maloney responded to put a plan in place and to reassure the claimant that confidentiality would be maintained to not affect future relationships. There is nothing before me to suggest that commitment had not been respected at the time the claimant resigned.

51. Whilst I can understand that the claimant would not have subjectively seen it this way, I find that the decision to suspend was not objectively the unfair or unreasonable imposition of a disciplinary action or sanction against him. That was further explained in the suspension letter at [81] and in EA's email to the claimant again on the 18 January 2018 at [90]. When the claimant

resigned on 23 January 2018 Mr Maloney again (on the advice of HR) contacted the claimant to say "I just want to reiterate to you again that your suspension is by no means an admission of guilt. This is a temporary measure to allow me to fully investigate the allegations made against you." The claimant was encouraged to reconsider his resignation, but declined to do so.

Allegation of aggression

52. The claimant also complains that Mr Maloney was aggressive in the investigatory meeting. It is of course difficult to get the feel for the tone of a meeting based on a written summary. However, there is nothing within the notes that suggests aggression or that the claimant was complaining about inappropriate conduct or pressure at the time or indeed in the immediate aftermath including the claimant's emails to EA on 18 January 2018. There is no intervention from the HR representative present. Mr Maloney is pressing the claimant for an account on specific allegations which were unfavourable to the claimant and no doubt the claimant would have found it stressful. It is then brought to a close with Mr Maloney saying "I adjourned as I felt we were going round [in circles] what I think is that this needs to be further investigated.." On the balance of probabilities I do not find that aggression is established or indeed that the meeting was conducted in an inappropriate or unreasonable manner. That is not to say the claimant did not find it a stressful experience, but that is not enough to be a repudiatory breach.

Other events/incidents before the claimant's resignation

53. I have found above that the claimant was not the victim of a plan to push him out. Bearing in mind the allegations and the suspension the instruction not to contact colleagues or customers was not inappropriate or unreasonable. Steps were put in place by Mr Maloney to provide cover to the customers without breaching confidentiality.

54. The claimant complains of a week of "zero contact" however, his emails of 18 January 2018 had been promptly responded to and he resigned less than a week after the investigatory meeting.

55. The claimant also complains of "not being able to defend myself with counter information from customers." However, he was at the start of the disciplinary process. It had been explained to the claimant that a decision had to be made in due course to decide whether he would proceed to a disciplinary hearing or if there was no case to answer. EA explained at the end of the investigation meeting and in her email at [90] that he was only at the investigation stage and that if it proceeded to a formal disciplinary then all information would be shared with the claimant and he was given a copy

of the disciplinary policy. The claimant was told at the investigation meeting that it would be helpful if he was able to share material he had relevant to the allegations and that he would be able to defend himself at a disciplinary hearing and he could send them any information he thought was relevant to the investigation. The claimant did not have his laptop because it was with the IT department for unrelated reasons. However, at the point of his resignation there is nothing before me to suggest that his request for its return so that he could locate documents to support his case would not be accommodated.

56. The claimant also asserted that it was unreasonable for Mr Maloney not to have spoken to the many other customers who could have positive things to say. Further, that Mr Maloney only spoke to selective individuals within the two hospitals in question and did not speak, for example, to surgeons who were the most important stakeholders in a customer base. At the point the claimant had resigned the investigation was of course ongoing. Mr Maloney explained that he spoke with TW because that was who had made the comment to RJ and that she was accompanied by JD because he was the Theatre Manager. He spoke with RC because she was the Theatre Manager at Hereford County Hospital and he was undertaking a follow up. These are reasonable explanations why he spoke to these particular individuals and then reacted specifically to what they said. I have already found that I am satisfied that Mr Maloney was not deliberately trawling for negative information about the claimant. He said in evidence that once he had those concerns expressed to him he did not want to cast the net wider and be potentially seen to have been extending his enquiries. He said that the advice from HR had been to focus on the information he had. The claimant's point is a double edged one because of course there is no objective way to know whether enquiries of other customers or stakeholders would elicit positive or negative commentary (or indeed both). It would have potentially exposed Mr Maloney to the risk of further criticism that he was trawling for allegations against the claimant. Positive feedback from other customers also does not of itself mean the specific concerns from RC or TW were untrue or unjustified. In respect of those, as I have said, there was no objective reason at the time of the claimant's resignation for him to form the view he would not be permitted to fairly defend himself against those concerns or be able to access evidence.

Christmas Party

57. For completeness, I should address an allegation made by the claimant that Mr Maloney's evidence should not be believed or should be treated with caution because of his alleged behaviour at a Christmas party which the claimant felt did not show Mr Maloney to be a reputable manager. Mr Maloney gave me his account. It was an event that does not relate to the claimant's reasons for resignation that he gave in oral evidence. It was not

an event or an allegation that I found of any real assistance or relevance in assessing Mr Maloney's veracity as a witness. I found him to be a straight forward witness, (as indeed I found the claimant to be; he simply has a perspective different to that of Mr Maloney).

Final Conclusions

58. The claimant also complained that Mr Maloney should not have been allowed to conduct further investigations as, the claimant alleges, he was not impartial. However, my understanding is that the further investigatory steps took place after the claimant decided to, and communicated, his resignation. They are therefore not relevant to whether there was a breach of the implied duty of trust and confidence at the time the claimant actually decided to resign.

59. I have used the word "reasonable" above when evaluating the criticisms the claimant makes of the respondent. It is, however, not the ultimate legal test. It is, however, as commented upon by the Court of Appeal in Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121 a potential "tool in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach." To confirm, it is my finding that the criticisms the claimant makes of the respondent which he says related to his decision to resign *do not*, once objectively analysed, on any individual basis demonstrate that the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee or otherwise amounted to a repudiatory breach of the contract of employment. Furthermore, when assessed cumulatively, on an objective analysis, there was no course of conduct by the respondent where the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee or otherwise amounted to a repudiatory breach of the contract of employment.

60. I have borne in mind the "last straw doctrine" however whether one views any last straw as the alleged conduct at the investigation meeting, or continuing the investigation/its ongoing manner, or suspending the claimant, or subjecting him to restrictions on suspension, or the extent of contact after the investigation meeting the claimant's criticisms or any other criticism the claimant makes proximate to the time of his resignation, they do not meet the threshold for being a "final straw" and in any event any such component or components is not part of a course of conduct which when viewed cumulatively amounts to a breach of the implied duty of trust and confidence.

61. The claimant resigned and was not dismissed. His constructive unfair dismissal claim does not succeed. The claimant's claim is dismissed.

Employment Judge Harfield
Dated: 17 October 2019

JUDGMENT SENT TO THE PARTIES ON 18 October 2019

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS