



EMPLOYMENT TRIBUNALS

Claimant: Mr K McDonald
Respondent: Halliwell Jones Ltd
Heard at: Manchester (remote public hearing via CVP)
On: 15-16 July 2021
Before: Judge Brian Doyle

Representation

Claimant: In person
Respondent: Mr J Lister, solicitor

RESERVED JUDGMENT

The claimant resigned his employment in circumstances not amounting to a constructive dismissal for the purposes of section 95(1)(c) of the Employment Rights Act 1996. He was not dismissed by the respondent. His complaint of unfair dismissal is not well-founded. The claim is dismissed.

REASONS

Introduction

1. This claim was heard over two days on 15-16 July 2021 as a remote public hearing via the Cloud Video Platform (CVP). There were some technical difficulties that delayed the start of the hearing, and which created a few interruptions during the hearing, but nothing that caused any loss of continuity in the taking and testing of evidence.
2. The Tribunal explained at the start that the hearing would be a split hearing. It would only need to hear evidence on remedy once it had decided liability and then only if the claim was upheld to any extent.
3. At the start of the hearing the claimant made a mildly expressed complaint that the respondent had not adhered strictly to the case management timetable set out in the standard case management orders, especially in relation to its

witness statements. Without needing to investigate that matter, the Tribunal satisfied itself that the claimant had not been disadvantaged by that and that a fair hearing was possible without an adjournment. The claimant confirmed that to be the case. He was reassured that if he was taken by surprise by any matter of evidence he could ask the Tribunal for assistance, which might include an adjournment. In the event, it was readily apparent that, despite being a litigant in person, the claimant had a detailed grasp of the evidence. The Tribunal was satisfied that a fair hearing had been secured.

4. The Tribunal concluded evidence and submissions late on the afternoon of the second day. It felt unable to reach a decision in the time available or one that could be delivered by an *ex tempore* judgment. It reserved judgment.
5. This is the Tribunal's reserved judgment with written reasons.

The claim

6. Early conciliation commenced on 9 February 2021 and ended on 24 February 2021. The ET1 claim was presented to the Tribunal on 10 March 2021.
7. The claimant is Mr Keir McDonald ("the claimant"). His employment with Halliwell Jones Ltd ("the respondent") started on 14 August 2017 and terminated on 18 November 2020 upon his resignation with notice. At the time of his resignation, he was one of three Workshop Controllers employed by the respondent at its Southport site. He commenced new employment on 1 February 2021.
8. The claim contains a single complaint of constructive unfair dismissal. The claimant's pleaded case is that he was placed on furlough in March 2020. While on furlough he was selected for redundancy based on a scoring matrix in which he was scored the lowest of three candidates identified as at risk of redundancy. He questioned these scores, and the size and make-up of the redundancy pool. He believed that this was an unfair redundancy process. His case is that the respondent was unable to justify his scoring and selection, and then changed the basis for his selection in response.
9. The claimant's case is that he was recalled from furlough with effect from 1 July 2020. He was told that he and the others in the selection pool would be the subject of monthly performance reviews and that a decision would be made in October 2020. He believes that he had his first review on 1 August 2020, but that the other two employees in the pool were not reviewed. He believes also that his line manager admitted to reducing his scores to make him bottom in the redundancy selection pool.
10. His case then is that upon his return from furlough his treatment by his line manager was poor. He alleges that he was singled out for unfair, unreasonable, and disproportionate criticism, He asserts that he was shouted at and sworn at in front of another person in the redundancy pool and within earshot of the customer area and members of staff under his direct supervision. Despite being jointly responsible for an error that had occurred, his colleague was told that the reprimand was nothing to do with him. He was also told by his line manager

that in future he would not be allowed to express an opinion in work unless it was to his manager or the assistant manager. His manager said that members of the team were complaining to him about him, thus undermining his position, but without disclosing who had complained.

11. The claimant's case further contends that he was disproportionately reprimanded over the telephone by his line manager when a junior member of staff was present in his manager's office. This amounted to his professionalism and ability being questioned, causing him great embarrassment. Therefore, the culmination of an unfair redundancy process, together with his position and authority being undermined on more than one occasion made his position untenable such that he was forced to resign.

The response

12. In its particulars of response presented as part of its ET3 (undated), the respondent agreed that the claimant resigned his employment on 22 October 2020. He was placed on garden leave for his notice period. His employment ended on 18 November 2020.
13. The respondent denies that there was any fundamental breach of contract, or any breach of contract, entitling the claimant to resign his employment. It is further denied that any act of the respondent amounted to a "final straw" which entitled the claimant to resign. It is therefore denied that the claimant was dismissed.
14. The respondent agreed that while on furlough the claimant was notified that his role as a Workshop Controller was at risk of redundancy. He was one of three Workshop Controllers employed by the respondent who were placed in a pool. The respondent had identified that only two Workshop Controllers were potentially required. However, during the redundancy consultation process, there was an increase in customer demand. The respondent concluded that if this improvement continued redundancies could be avoided. The respondent therefore informed the claimant and his colleagues within the pool that the redundancy consultation process would be suspended for three months. A period of scored performance assessment would take place, up to and including October 2020. This assessment would be used to select the individual who was potentially at risk of redundancy if there was still a redundancy situation. The respondent set out its belief that this approach to a genuine redundancy situation was fair and reasonable, contrary to the claimant's allegation that it represented an unfair process.
15. The respondent denied that the claimant's manager had said that he had intentionally reduced his scores to place him at the bottom of the redundancy pool. This allegation is said to be a fabrication. Further, if it is alleged that the claimant was treated differently to the other two individuals in the pool in relation to the redundancy process, such allegation is denied.
16. The respondent also denied that the incidents described by the claimant in relation to his line manager took place as alleged or at all. Specifically, it is denied that the claimant was shouted at or sworn at by his line manager as

described or at all. The respondent's belief is that the brief incident to which the claimant refers occurred when work on a customer vehicle was not undertaken due to oversight on the part of a few individuals. The claimant alone had denied any responsibility, and his line manager expressed his dissatisfaction in that regard. The incident was trivial and in keeping with the communications that frequently take place in the respondent's vehicle workshop. There was no improper treatment of the claimant, or any unequal treatment of him.

17. The respondent denied that the claimant was told that he was not to express an opinion. The claimant had made several critical comments about the workplace informally and in an unprofessional manner. The claimant's line manager asked him that, if he had such comments, they should be made to him rather than being ventilated informally. In so far as this is the incident referred to, it is exaggerated by the claimant and was a trivial matter.
18. Before this incident a few members of staff had complained to the claimant's line manager about the claimant. His line manager was also concerned about the way the claimant responded when he was asked about the incident referred to above, and other recent issues including a previous oversight which he had spoken to the claimant about on the telephone. In this context, the claimant's line manager advised the claimant that other staff had complained about the claimant's negativity so that he should try to be more positive at work. The claimant's line manager did not feel it was necessary to tell the claimant who the individuals were as he did not want to make the negativity worse.
19. The respondent denied that the claimant was disproportionately reprimanded. The claimant's line manager telephoned him to clarify the situation regarding a customer vehicle. The claimant had confirmed that the work on a vehicle was complete. As a result, the customer had been wrongly advised they could collect the vehicle when in fact the work had not been completed. The other employee on the call was the Service Adviser who had been liaising with the customer and had been tasked with managing the customer complaint. The respondent does not consider her to be a junior member of staff.
20. In the respondent's assessment the claimant's claim lacked particularity. There was no unfair redundancy process. The redundancy scoring had been adjusted in the claimant's favour and the process subsequently suspended. The incidents which the claimant refers to in some instances did not take place, and in others are exaggerated and presented out of context. Having investigated the matter, none of the claimant's colleagues regarded him as having been bullied or treated unfairly in any way. A fundamental element of the claimant's claim is that an unfair redundancy process was taking place. No redundancy process had concluded, and the redundancy process was in any event fair. In any event, in relation to any redundancy process, the claimant's resignation was premature if, as he pleads, it was a reaction in whole or in part to the redundancy process.
21. The respondent rejects any allegation that there was a breach of contract, much less a fundamental breach of contract, entitling the claimant to resign.

The issues

22. This claim has not been the subject of bespoke case management. There is no agreed list of issues. There is no disadvantage in that. The issue is clear.
23. Was the claimant constructively dismissed by the respondent by virtue of the claimant terminating the contract under which he was employed (in this instance, with notice) in circumstances in which he was entitled to terminate it without notice by reason of the respondent's conduct?
24. That is the question posed by section 95(1)(c) of the Employment Rights Act 1996. The legal tests inherent in that question are set out in the relevant legal principles below.

The evidence

25. The Tribunal had before it an agreed bundle of documents prepared for the final hearing. That bundle comprises 225 pages inclusive of an index. References to the documentary bundle are contained in square brackets below.
26. The claimant gave evidence on his own behalf. He called no further witness evidence, but he tested the respondent's witnesses in cross-examination, by which means the full extent of his evidence was aired.
27. For the respondent, the Tribunal heard witness evidence from David Ogden (Aftersales Manager); Yvonne Watton (Head of Business); Alistair McAlpine (Assistant Service Manager); Kevin Foster (Workshop Controller); Richard Horton (Service Adviser); Matthew Kerevan (Technician); and Samantha Thomas (Receptionist).

Submissions

28. At the end of the evidence both parties summed up their respective cases.
29. The respondent made a relatively lengthy submission addressing the evidence, but also integrating the respondent's defence to the claim, particularly in relation to the questions posed by *Kaur* (see the relevant legal principles discussed below). The Tribunal does not reproduce those submissions here, but it has had them firmly in mind.
30. The claimant made a very short submission, effectively relying upon the particulars of his claim and the evidence that he had given. He was reassured that there was no disadvantage to him in so doing. The Tribunal has paid close attention to his pleaded case and to his witness statement, in addition to his testing of the respondent's witness evidence.

Assessment of the evidence

31. The Tribunal has found this a difficult exercise in assessing the evidence and making findings of fact, which is in large part why it has reserved its judgment.

All witnesses gave their evidence confidently and competently. No obvious questions of honesty or disingenuousness arose.

32. The claimant appeared to have a detailed recollection of the events upon which he relied to support his resignation as amounting to a constructive dismissal. The Tribunal did not doubt his frankness, candour, or sincerity in his belief that he had been badly treated by the respondent. He had a fervent belief in the truth and correctness of his case. In large part, he was not prepared to agree that his interpretation of events might have been skewed or misplaced.
33. On the other hand, the respondent's witnesses offered a subtly different account to that of the claimant which, if accepted by the Tribunal, might serve to put a different complexion upon events that had been observed from two different perspectives – that of the claimant in contrast to that of the other parties involved in those events. The weight of the respondent's witness evidence is not, of course, measured by the greater number of those witnesses. Yet, those witnesses gave an account that was largely and broadly consistent within each account, between the witnesses as a whole and with the documentary evidence. The respondent's evidence was also marked by a willingness to make admissions or to give concessions or to express doubt or (as was the case with Richard Horton, Matthew Kerevan and Samantha Thomas, who were added to the cast list late in the day in order to respond to aspects of the claimant's evidence) to agree that their recollection might not be perfect at some remove.
34. Of course, a witness might be wrong on one matter, but otherwise right on others. They may be mistaken, or their account may be influenced by subjectivity rather than by desirable objectivity. It is not necessary to reject an account by concluding that a witness was lying or being dishonest. The claimant had his own self-interest in advancing his claim, but the Tribunal was also alert to the fact that all 7 witnesses called by the respondent are still its employees. It approached their evidence sceptically, but it could detect no signs that their evidence was the result of individuals collaborating in the expectation that they should produce a corporately convenient account in defence of their employer.
35. Doing the best that it can with those finely differing accounts of events, the Tribunal has made the following findings of fact on the balance of probabilities (and relying less upon there being any formal burden of proof upon the claimant to establish a constructive dismissal).

Findings of fact

36. Halliwell Jones Limited is part of the Halliwell Jones Group, which is a franchised dealership of BMW and Mini motorcars. The Group has dealerships in North Wales, Warrington, Chester, Wilmslow, and Southport. The claimant worked at the Southport dealership, which is based at Southport Road, Southport.
37. David Ogden (Aftersales Manager) was responsible for recruiting the claimant in 2017. He was taken on initially as a Service Adviser and did very well.

38. The claimant became a Workshop Controller in the early part of 2019. A vacancy had arisen for Workshop Controller of BMW. Both the claimant and Kevin Foster wanted to take up that role. David Ogden thought that the respondent could accommodate both as Workshop Controllers, which was a new development, as previously the respondent had had one Workshop Controller for each of BMW and Mini. David Ogden was aware that he could be criticised for employing two BMW Workshop Controllers. He had to make a business case to the board before he was allowed to recruit two Workshop Controllers for BMW. He went out on a limb to promote the claimant when it would have been easier not to do so. He regarded himself as a supporter of the claimant, rather than someone who was looking to do him down.
39. The claimant's contract of employment is at [18-30 and 34-38] and his job description is at [31-33]. The Tribunal was not taken to these documents in evidence and no assistance is derived from them. The claimant did not appear to be relying upon a breach of an express term of his employment contract.
40. The role as Workshop Controller did not involve working on cars. Both the claimant and Kevin Foster are not Technicians, and they are not qualified to work on cars. The role involves managing six Technicians and an Apprentice, and being responsible for paperwork, car keys, and managing customer requirements and satisfaction, keeping track of jobs on a whiteboard, allocating tasks, handling job cards, calculating estimates and liaising with clients in relation to estimates and instructions. Essentially, it is the interface between customers and the workshop Technicians.
41. When the first Covid lockdown began on 16 March 2020, and the furlough scheme was announced, it was immediately obvious that most of the respondent's staff would be furloughed. At Southport, staff went on furlough in stages over a short period of time. The claimant was among the first to be furloughed. That was at his request because he was concerned about the virus, and he wanted to go home as soon as possible. Kevin Foster stayed at work for a week or so, but then he also went on furlough shortly after the claimant. David Jones did not go on furlough because he can do all aspects of the technical and administrative side of aftersales. He covered several roles during the furlough period, as did Alistair McAlpine, the Assistant Service Manager. All three Workshop Controllers were furloughed.
42. In June 2020, David Jones was informed that the respondent's board had decided that the cost base of the company was too high for its expected turnover and that redundancies were being proposed in several areas. Yvonne Watton (Head of Business) had been involved in discussions at board level about a potential restructure of Halliwell Jones Group in response to the Covid pandemic. As part of the restructuring plans, a decision had been made to reduce a significant number of roles in the Southport dealership. Among the proposed redundancies was one affecting the workshop control department, and the proposal was that the three Workshop Controllers would be reduced to two.

43. Following discussions with Louise Clough, who is the Head of HR at Halliwell Jones, it was decided that all three of the Workshop Controllers would be included in the pool because any of them would be able to carry out those roles. Yvonne Watton took guidance from Louise Clough in relation to fair redundancy processes. She was provided with a scoring matrix to apply in the workshop control area. She was also given guidance as to how to properly carry out scoring to comply with legal requirements.
44. As noted above, one of the areas that had been identified as being affected by a potential redundancy situation was the workshop at Southport. This did not come as a surprise to David Ogden, as it had three Workshop Controllers for two business streams, which was not the case in the other dealerships within the Group. David Jones was not involved in the decision to start a redundancy process. That decision was taken at board level, as already noted. David Jones was informed by his immediate manager, Yvonne Watton, that the pool for redundancy selection in the Workshop Controller pool was going to include all three Workshop Controllers – the claimant, Kevin Foster and Rebecca Wood. He was told that this was because all of them had interchangeable skills. The plan was that there would be one Workshop Controller for BMW and one for Mini. However, Rebecca Wood (the Workshop Controller for Mini) was still at risk because any of the three Workshop Controllers could undertake the Mini role which she was undertaking at that time. The decision as to who would be in the workshop control pool was taken by Yvonne Watton and Louise Clough, who is the Group Head of HR at the respondent's Warrington site.
45. The scoring of the three Workshop Controllers was done by Yvonne Watton and David Jones working together. Yvonne Watton is David Ogden's line manager in the dealership managerial hierarchy. They used a scoring matrix which was provided to them by the respondent's HR department and which in turn was based on a scoring system on the ACAS website. David Jones was not involved in drawing up that scoring system.
46. In her role as Head of Business, Yvonne Watton knew all three Workshop Controllers very well. She would see their work on a very regular basis. David Jones considered her well placed to judge their performance based on her personal experience. She did not work with them as closely as he did.
47. They carried out the initial scoring process in Yvonne Watton's office at Southport. The scores which they gave to the claimant are at [53-55]. The scoring meeting took place on 9 June 2020. This was during the furlough period. There were very few people in at that time. They were given guidance on how they should approach scoring. They knew that to give scores they had to have evidence to justify those scores. This instruction was reflected on the scoring form [55].
48. The scoring process was not easy. David Jones and Yvonne Watton were concerned that they did not always have the written evidence available to allow them to justify the judgements that they made in relation to individual scores. Very often, they shared a perception about the skills or attributes of a particular individual, but they then struggled to find documentary evidence to back up those judgements.

49. David Ogden and Yvonne Watton approach the task by scoring each of the three individuals in the pool separately. They then went through each category and reviewed how they had scored each person in relation to each criterion. They challenged each other over whether the scores were consistent as between the three Workshop Controllers based on their experience of each of them. The scoring system was based on a score of 1-4 for each category, with performance below average scoring 1, average performance scoring 2, above average performance scoring 3 and excellent performance scoring 4. The scoring form provided a written description in relation to each of the scoring criteria, giving guidance on what types of behaviours or factors were average or good, for example. This was set out on the scoring matrix itself.
50. The scores that they gave to the claimant are at [53]. He was scored initially at 3.6 out of 4 overall, with above average scores for everything, other than in relation to work performance, where he was scored at 2 for each of quality, quantity and initiative. As a result of those scores, the claimant was the lowest scorer of the 3 Workshop Controllers. The difference between the 3 in the pool was not at all great. Although David Ogden and Yvonne Watton felt that they had scored fairly, they also felt that there was not very much between them as individuals, and they were all good at their job.
51. Once it had been established that the claimant was the lowest scorer based on the provisional scores, Yvonne Watton wrote to him to tell him that his role was potentially redundant [49-50]. He was also sent the supporting documents in preparation for the proposed first consultation meeting with him. This included the redundancy selection matrix form on which he was scored [53], the redundancy selection criteria guidelines [54-55] and the scoring matrix [56]. David Ogden and Yvonne Watton did not consult with the other two Workshop Controllers in relation to their scores at that time because they were not at that stage at risk of redundancy based on their scores.
52. Prior to the first consultation meeting the claimant emailed Yvonne Watton on 10 June 2020 with some observations and initial challenges to his scores [51-52]. He asked for further information relating to his attendance record, time-keeping record, and his most recent work appraisal.
53. There were two consultation meetings with the claimant. The first was on 19 June 2020 and the notes of that meeting are at [56A-E]. The second meeting took place on 23 June 2020 and the notes of that meeting are at [61-63]. The claimant raised several issues at the first meeting on 19 June 2020, which are recorded in the notes. It is also apparent that the claimant audio-recorded the telephone calls with the respondent's permission. Transcripts appear at [109-132] and [133-146].
54. Prior to the first meeting on 19 June 2020, David Ogden and Yvonne Watton had agreed that, on reviewing the claimant's challenge to his scores, they did not have any documentary evidence of lateness or absences, and that therefore it was right that they should increase his score in that regard to a 4 in both instances to the maximum score available. Once those scores had been increased, the difference in scores between the claimant and the other two

individuals in the pool was very small. The claimant was scored at that stage at 3.8, and the others were scored respectively at 3.9 and 4.

55. David Ogden and Yvonne Watton were both concerned that the gap was very narrow and that really it was hard to differentiate between the people in the pool. That put them in a difficult position because they had been directed to reduce the number of Workshop Controllers to two, and they knew it was going to be a challenge to differentiate between the Workshop Controllers, given that all of them were good performers and comparable in terms of performance and skills.
56. At the meeting on 19 June 2020, they discussed several issues. The claimant wanted to go into detail in relation to his performance. When they had scored the claimant, David Ogden and Yvonne Watton had considered a few performance issues that David Ogden had spoken to the claimant about over the preceding period. One of the claimant's concerns was that some of those errors may have arisen outside of the 6 months period prior to the redundancy situation arising, which was the period for which they had scored the individuals in the pool. He also felt that in relation to some of the errors or oversights, there were mitigating circumstances that had not been considered. He took issue with a score which had been affected by an informal performance discussion which David Ogden had had with him, both because he felt that it had taken place more than 6 months before the redundancy process began, and because it was not in any case a disciplinary or performance discussion. He also raised issues around the subjectivity of the definitions set out on the scoring categories.
57. Following the meeting on 19 June 2020, it was agreed that David Ogden and Yvonne Walton would review the scores, and check dates relating to a few issues, to identify whether all of them fell within the period of 6 months leading up to the date the scoring was carried out. The claimant sought additional information from the respondent [57-60].
58. An issue which the claimant felt strongly about was that he had had an appraisal on 27 September 2019 [39-48] at which he had been scored as exceptional [45]. He could not understand why this evidence was not accounted for as it appeared to fall within the period from which David Ogden and Yvonne Watton were assessing performance – that is September 2019 to March 2020. The answer was that that appraisal was based on the period of 7 months preceding that appraisal and any overlap with the assessment period for the redundancy exercise was short.
59. At the second meeting on 23 June 2020 (which was regarded as a continuation of the first consultation meeting) they discussed a few performance issues in more detail. The claimant also raised issues over the pool. He suggested that the pool could have included Sales Advisers as well as Workshop Controllers, though in fact a separate redundancy process was also being undertaken in relation to the Sales Advisers. The notes of that meeting are at [61-63].
60. Following that second meeting on 23 June 2020, David Ogden and Yvonne Watton discussed where they had got to. They both felt that they did not have

sufficient evidence to justify the scores that had been given. They agreed that Yvonne Watton would report back to the board that they were not comfortable with making any redundancies at that time, but they wanted to review the performance of the business over the next few months. Both felt that in fact there would be a need for three Workshop Controllers in the long term. That was the structure David Ogden had argued for in the first place. He still believed that once Covid restrictions were lifted they would need all three of the Workshop Controllers, so that in fact there would not be a redundancy situation.

61. David Ogden expressed that view to Yvonne Watton, and she also communicated that to Louise Clough. Yvonne Watton subsequently reported to David Ogden that the business had agreed that they could suspend the redundancy process on the basis that, if they did need to make redundancies, it would be based on a performance assessment during a review period so that they would have a better evidential basis for any decisions that were made.
62. As a result, David Ogden and Yvonne Watton met with Kevin Foster, Rebecca Wood, and the claimant on 1 July 2020 to explain the situation. Because all of them had been under stress, they had decided to ring each of them as soon as the business had authorised them to suspend the redundancy process, and so they had all been informed of the situation over the phone before the meeting on 1 July 2020.
63. A note of that meeting is at [66-67] and was provided to the three Workshop Controllers by email on 1 July 2020 [64-65]. Yvonne Watton explained at that meeting that the redundancy process had been suspended, and that if redundancies were required in the future, redundancy scoring would be based on performance over the period of the review. It was made clear that during that period, to address the problems they had had with documentary evidence, any performance issues would be documented on a template, which they provided at that meeting. They made clear that they hoped that, if the financial performance of the dealership improved, their focus was on avoiding any redundancy situation. They confirmed that the process had been suspended for 3 months, and during that period, there would be a monthly documented performance review with each of the Workshop Controllers.
64. At that stage, all the Workshop Controllers were brought back from furlough. David Ogden made it clear to each of them, including the claimant, that if they got their heads down, they could avoid redundancies. This is what David Ogden wanted and in fact that is how things turned out. The dealership soon got very busy, and the risk of redundancy fell away shortly after everyone returned from furlough on 1 July 2020. Within just a few weeks, the dealership became more concerned about recruiting extra staff than making redundancies.
65. It is worth noting here the claimant's view that the selection pool should have included the Service Advisers and the Assistant Service Manager (Alistair McAlpine). The claimant took photographs of the service whiteboards on his first day back at work [68-70]. This revealed what appears to be Alistair McAlpine's handwriting. In fact, the work of the Workshop Controllers and the Service Advisers had been carried out during the furlough period by the handful of staff or managers who were not furloughed. Alistair McAlpine and David

Ogden had carried out duties that the claimant would have carried out, among other duties. The claimant also knew, of course, that he had previously been a Service Adviser and he regarded many of the skills of these different roles as being interchangeable.

66. The Tribunal accepts the respondent's evidence as to unfeasibility of having one larger selection pool. There had been two relevant pools – one for the Workshop Controllers and one for the Service Advisers – because the respondent wanted a reduced headcount in each of those roles (in the Workshop Controllers case, from three to two). It would not have been appropriate to have included the Assistant Service Manager in either of those pools. His role was different, and it was not redundant. The fact that during furlough he had “mucked in” with others to carry out several functions ordinarily assigned to distinct roles did not necessarily make it appropriate for him to be placed in a pool for selection alongside the claimant.
67. Nor did the fact that the claimant had been a Service Adviser before being promoted to Workshop Controller point obviously to a conclusion that the Workshop Controllers and the Service Advisers should be in one combined pool. He might have been able to do the job of a Service Adviser, but it did not follow that a Service Adviser could do the job of a Workshop Controller. Tribunals afford an employer a considerable degree of latitude in constructing the appropriate pools for redundancy selection. It knows its business needs better than the Tribunal and indeed better than the claimant. The Tribunal does not usually second-guess the respondent's decisions on the pools. Of course, had the redundancy consultation progressed further, who knows what the claimant might have suggested by way of alternative employment or the avoidance of redundancy (including the possibility of reverting to his previous role as Service Adviser perhaps), but the redundancy exercise was suspended.
68. The Tribunal notes in passing at this point that the purpose of consultation is not simply for the employer to propose alternatives to redundancy. The respondent had none and there were no options for alternative employment in the circumstances that the respondent faced. Consultation is just as much about the employee making proposals that might lead to him avoiding redundancy or retaining his employment in some way. The claimant did not seem to approach consultation in that way.
69. David Ogden carried out only four performance reviews with the Workshop Controllers – one each with the claimant and Kevin Foster, and two with Rebecca Wood – contrary to the claimant's impression in his evidence. The only reason there were two reviews with Rebecca Wood was that she was a little less busy, and they were able to fit it in. The performance review he undertook with the claimant is recorded at [71-72]. It represented a positive outcome, as did the reviews of the other two employees. There were no more after this date. The principal reasons for that were that they were too busy; that the risk of redundancy had fallen away; and that further performance reviews were unnecessary. There was never a formal announcement that redundancies were no longer on the cards, but David Ogden believed it was obvious, and that everybody knew it. That seems to have been the case.

70. Three incidents then happened and are relied upon by the claimant in relation to his resignation on 22 October 2020.
71. The first of these was on 31 July 2020. It is referred to in the claimant's resignation email [77-78]. The allegation is that David Ogden told the claimant that he had deliberately scored the claimant the lowest in the redundancy process to make him redundant.
72. That refers to an exchange that took place on 31 July 2020. On that occasion, David Ogden was in the workshop control office with the claimant and Kevin Foster. He felt that there was a negative atmosphere, mainly from the claimant, which David Ogden put down to the fact that the claimant was unhappy at the fact that he had been scored lowest of the three Workshop Controllers. David Ogden said that he wanted to put the redundancy situation behind them. He said he regretted that it had been necessary, and that in terms of the scoring, he had been given a job to do, which he did not want to, but which he had done. He said that it was in the past. He did not think that there would be any redundancies because of the amount of work the dealership had. David Ogden said it was "up to us" (meaning the team), and if they did the job correctly, then there would be no need for any redundancies.
73. David Ogden denies the claimant's allegation that he said that he had deliberately scored the claimant lowest. The claimant did not make any such allegation at the time, to David Ogden or to anyone else. David Ogden describes this allegation as being simply untrue. The claimant did not raise this in the appraisal of him that David Ogden carried out a few days later on 8 August 2020. On that occasion he gave the claimant a good appraisal and he did not criticise his performance in any way. The Tribunal accepts David Ogden's evidence as the more plausible and the more likely account of this incident. It is also corroborated by Kevin Foster's evidence.
74. The second incident took place in the week commencing 12 October 2020. David Ogden criticised the claimant in relation to a customer job card. It arose from a customer complaint received by Yvonne Watton. A customer was unhappy with a vehicle provided by the dealership, and arrangements were made to pick up the car for repair. That was arranged by Sophie Stevens, who is a Service Office Adviser. The customer asked for another issue to be dealt with as well, and Sophie Stevens put that additional job on the job card and passed it to the claimant. In fact, the job was not done, which was likely to result in a further customer complaint. This was spotted by Sophie Stevens just before the customer was due to collect the car, and she took it up with the claimant who, as David Ogden understood it, simply said that he had forgotten and that it was too late to do the job now because the workshop was fully booked for that day.
75. Sophie Stevens involved David Ogden, as she was entitled to do, who called the claimant to ask him what he could do to address the problem. David Ogden made that call together with Sophie Stevens. The claimant told David Ogden over the phone that he had forgotten the job. David Ogden told him that was not good enough. He did not shout or swear. The doors to the office were closed. It is agreed that Sophie Stevens was present.

76. David Ogden describes this exchange as being typical of exchanges that happen all the time. The dealership does sometimes have demanding customers and mistakes are made. The claimant suggests that David Ogden humiliated him by reprimanding him on the phone in front of a junior employee. The Tribunal accepts David Ogden's account that this is incorrect. This was a relatively minor matter. David Ogden did not raise his voice. He made it clear that he was dissatisfied with the issue arising in the first place and the lack of an urgent response from the claimant. Sophie Stevens is not a junior employee, but she is an experienced and relatively senior service adviser. The incident was not at all notable. In the Tribunal's view, the claimant is mistaken to characterise this exchange in the way that he did.
77. The third incident took place on 20 October 2020. The claimant gives an account of this incident in his resignation email [77]. It took place in the workshop office. Present at the time were the claimant, David Ogden, Alistair McAlpine, and Kevin Foster.
78. The claimant suggested in his resignation email that the incident had undermined him because he was shouted at by David Ogden in the earshot of employees in the workshop, and potentially in the earshot of customers. The workshop office is about 25 metres from the customer area, down a corridor, and around a corner. In David Ogden's view, it is impossible that anything said within the workshop control office could be heard in the customer area. In relation to the workshop, there is a door between the workshop control office and the workshop itself, which is kept closed because of the noise. The door is always closed, and it was closed on this occasion. In David Ogden's assessment, nothing said in the workshop office on that occasion could have been heard by anyone in the workshop, even if there was shouting, which there was not.
79. This account is corroborated by the witness evidence of Alistair McAlpine and Kevin Foster who were present, and to an extent by Richard Horton, who was not present, and who has provided his recollection sometime after the event. He was at his desk in the service advice area, which is between the showroom and reception, at one end of the building, and the workshop, Workshop Controllers office and the parts department, at the other end of the building. Richard Horton could hear raised voices rather than shouting. He assumed, but did not know, that the participants were David Ogden and the claimant. He could not make out what was being said or by who. He described it as an argument.
80. Richard Horton's recollection is also corroborated by Matthew Kerevan, a Technician, who had left the workshop, passing the Workshop Controllers office and was standing near the Service Advisers desks. He also heard raised voices rather than shouting. He could not hear what was being said, but he described it as being a disagreement or a heated discussion.
81. Samantha Thomas also added a little to the evidence of this incident. She was passing close to the Workshop Controllers office when she heard raised voices

rather than shouting. She could not hear what was being said or who was speaking.

82. There is disagreement among the direct and indirect witnesses of this incident as to whether the door to the Workshop Controllers office was open or shut or wedged ajar. Nothing hangs upon that disagreement. What is clear is that the discussion between David Ogden was a heated exchange with voices raised rather than shouting, and that it would not have been possible for those outside the office to hear what was being said or to identify with certainty who was speaking. The incident was one that was not worth recollecting or remarking upon.
83. The incident arose from a relatively minor matter – an oversight involving a BMW XS which was in for service or repair. The customer wanted to pick it up in the morning. Alistair McAlpine (the dealership Assistant Service Manager) had asked Kevin Foster and the claimant to see that it was charged in time for the customer pick up. It turned out that both had forgotten to arrange for the battery to be charged, which created a problem with the customer. That had led to a sarcastic remark from Alistair McAlpine (“smashing it already lads?”) aimed at both the claimant and Kevin Foster. The claimant shrugged his shoulders in response.
84. Kevin Foster was apologetic about the mistake. David Ogden was disappointed that the claimant was unwilling to accept any responsibility. The claimant was clearly unhappy that David Ogden was challenging them about it as an issue. His attitude appeared confrontational.
85. In David Ogden’s opinion, it was not like the claimant to behave in that way, at least not before his return from furlough. David Ogden asked him if everything was alright. He suspected that things were difficult for him at that time. Kevin Foster had told David Ogden that the claimant was having a difficult time with his new baby, and he was not getting very much sleep, and was sometimes driving the baby around in his car late at night to get it to sleep. However, the claimant replied that yes, he was alright.
86. David Ogden told the claimant that he had had reports from a couple of people that he was being quite negative at that time, and that if he had problems, he should talk to him about it. The claimant asked David Ogden who had been reporting that he was being negative. David Ogden said that he could not share that with him. David Ogden had been approached by two colleagues, Sophie Stevens and Phil Rogers, about the claimant. In David Ogden’s mind, the dealership had a supportive work environment, and it was unusual for staff members to approach management about concerns over a colleague, and so these approaches were notable and out of the ordinary.
87. Sophie Stevens had approached David Ogden shortly before this incident and reported that the claimant had been negative about the company, suggesting to her that she should not do anything "extra" for the company – essentially that she should work to rule, in David Ogden’s assessment. He had also advised her that she should take all her holidays.

88. Phil Rogers had also approached David Ogden to say that he had been (in his view) unfairly and repeatedly criticised by the claimant, in relation to Covid safety arrangements at the dealership. Phil Rogers had taken on the role of ensuring Covid safety as part of his health and safety duties.
89. David Ogden did not think it was helpful to tell the claimant who had raised these issues with him, because in part he thought it likely that Sophie Stevens and Phil Rogers had approached him expecting that what they said would be confidential.
90. David Ogden told the claimant that he was worried about what he saw as a negative attitude, and by implication that he should address that. Nevertheless, there was one aspect of this exchange that David Ogden regrets. He agrees that, in relation to the claimant's negative attitude, he referred to him "spreading cancer around". He accepts that this was an insensitive choice of words. Kevin Foster later made it clear to him that he was hurt by that use of words, because of his own family experiences with cancer. David Ogden regrets his choice of words on that occasion. He apologised when Kevin Foster raised it with him. Had the claimant raised it with him, he would without hesitation have unreservedly apologised to him also.
91. David Ogden told the claimant that if he had problems with issues at work, he should discuss it with him or Alistair McAlpine. The claimant presents this to the Tribunal as an instruction by David Ogden that he was not to express any opinions, other than to David Ogden or Alastair McAlpine. The Tribunal accepts David Ogden's characterisation of this exchange, which is corroborated by Alistair McAlpine and Kevin Foster. He did not say anything about the claimant expressing opinions. David Ogden said that, if the claimant had criticisms about arrangements at work, he should discuss them with him. He thought that was a reasonable thing to say. The Tribunal agrees.
92. At the end of the meeting, David Ogden told Kevin Foster that any criticism of attitude or negativity was not aimed at him. However, he was clear that he thought that Kevin Foster and the claimant were equally responsible for the oversight relating to the battery.
93. David Ogden did not shout at either of them. The Tribunal accepts that that is not his style. It is more probable that he raised his voice somewhat above his normal speaking volume for emphasis, but no more than that. The Tribunal also accepts that he did not swear and that do so would not be his style. The Tribunal can easily accept that the working environment in and around a vehicle workshop can be quite robust at times, such that it is possible to hear disagreements, shouting and swearing. It is a high-pressured job. It is not an office environment. Nevertheless, the Tribunal is unable to uphold the allegation that David Ogden shouted and swore at the claimant or to anyone on that occasion. Nor did he shout and swear within the earshot of colleagues or customers. The meeting had become heated, and the direction of the discussion had become unfortunate and unplanned, but David Ogden had not lost his temper, although he was not observed to be as calm as he might usually be.

94. Although she was not present during these incidents, Yvonne Watton gave evidence to the effect that, in terms of David Ogden's personal management style, she has never heard him swear. He is passionate about customer care, and he is openly critical when his high standards are not met. However, she has never seen him conduct himself in a way that she would describe as bullying or inappropriate. In her analysis, it is doubtful that David Ogden was in any way seeking to target the claimant. She did not see any evidence of that during the scoring meetings or at any time, or of David Ogden seeking to undermine or denigrate the claimant. He was a strong advocate for retaining all three Workshop Controllers, and that meant that he was actively advocating for the retention of the claimant's employment. The Tribunal accepts this evidence.
95. The evidence of Alistair McAlpine is also instructive. His account is that he had known the claimant for a number of years. He had recommended the claimant's appointment. They had previously got on, but on the claimant's return from furlough he seemed to have changed. His attitude was negative, and he seemed unaccommodating. The claimant stopped talking to Alistair McAlpine. He cannot explain his change of behaviour, but it was obvious. The Tribunal accepts this evidence.
96. In David Ogden's analysis of what occurred, he does not know why the claimant chose to resign. His job was no longer at risk of redundancy in October 2020. That was obvious to everyone, not least because performance meetings had not been taking place for around 3 months, and it was obvious that the dealership was extremely busy. The claimant's role has not been filled, because the dealership has not been able to find a candidate with the right experience. Had the claimant not resigned, it is likely that he would still be in his role at Halliwell Jones. David Ogden did not want him to leave.
97. On 21 October 2020 the claimant exchanged text messages with a friend (Paul) [156-159]. He intimated that he had had "a torrid few days"; would be giving notice the next day; and described David Ogden in uncomplimentary terms. He referred to his manager having "had a massive go at [him] over next to nothing" and had shouted at him in front of a colleague. There is a reference to what David Ogden supposedly said to Kevin Foster about it not being about him. There is also a reference to strictures being placed on him voicing an opinion. The suggestion in these texts is that David Ogden and Alistair McAlpine were picking on him and that this was the final straw.
98. The Tribunal records that the claimant resigned his employment by email to David Ogden on 22 October 2020 [77-79]. It sets out the relevant parts of that email here:

I am writing to inform you that I am resigning from my position of Workshop Controller with immediate effect. Please accept this as my formal letter of resignation.

I feel that I am left with no choice but to resign in light of my recent experiences regarding numerous breaches of the implied contractual term of trust and confidence; whereby you have acted in a manner that damages my reputation and undermines my position.

On Tuesday 20th October I was singled out for unfair, unreasonable and disproportionate criticism of myself and my performance for something that I was jointly responsible for, while the other party was present and not reprimanded. You shouted and swore at me

within earshot of other employees and potentially customers as the office door was open which is adjacent to the customer toilets and not far from the reception area and service desk. This undermined my position. I also overheard you say to the other workshop controller moments later that 'none of that was aimed at him', confirming that I was singled out unfairly.

Furthermore, you have previously (last week) severely reprimanded me over the phone, questioning my ability and professionalism while a member of staff in a junior position to myself was in your office, possibly on speaker phone; again both embarrassing me in front of one of my peers and severely undermining my position and authority. This breached the implied contractual term of trust and confidence.

You also reprimanded me for 'spreading cancer around' and the only example you could provide was that I had questioned to my colleagues as to why sufficient paper towels were not being provided in the toilets, in response to an email about the risk of coronavirus infection while in the toilets sent by the board of directors.

This has been improved, however other issues such as the provision of bags to place customer's keys in are detailed in the Company's own risk assessment in relation to COVID-19, are still not being implemented at Halliwell Jones Southport.

You implied that numerous members of staff had complained to you about my raising of concerns, however were unwilling to give any details of by whom and what the concerns were. This, I believe constitutes an attempt to undermine and make me question my position in the team.

I am still under my redundancy notice which was due to be reviewed on 1st of October but hasn't. I have also not received the monthly performance review for the last 2 months (September and October) that was outlined in my conditions when I returned to work from furlough on 01/07/20.

You have also admitted to me that you attempted to make me redundant by intentionally reducing my scores in the scoring matrix from which candidates for redundancy were selected; saying that it 'wasn't personal' that I was intentionally given the lowest score and that you were 'given a job to do and you did it.' This was witnessed by another member of staff.

Finally, on Tuesday, you told me that moving forward that I should keep my opinions to myself and I am only permitted to express any opinion to you or the Assistant Aftersales Manager, no one else.

As a consequence of the conduct outlined above and the fact that I have previously on many occasions had my professionalism and ability questioned in front of other members of staff, I now consider my position at work to be untenable. This leaves me no option but to resign. I have delayed my resignation by one day due to you being on annual leave on Wednesday 21st October.

I will fulfil my contractual obligations with regards to notice period (which I believe is 4 weeks) in good faith to Halliwell Jones and my colleagues, up to and including my last day of employment – Wednesday 18th November.

99. The claimant's resignation was acknowledged by the respondent's HR department on 23 October 2020 [75-76]. It referred to the company's anti-bullying and harassment policies and its grievance procedure.

100. Yvonne Watton became aware on 22 October 2020 that the claimant had resigned his employment in an email to David Ogden and to HR. Louise Clough and Rachel Newbury called Yvonne Watton to say that they had had a resignation letter. They asked her to speak to the claimant. She did so. The

content of that discussion is set out in her email to Louise Clough and Rachel Newberry later that day [80-81].

101. The claimant was emotional during that meeting. He broke into tears on a couple of occasions. Yvonne Watton was concerned that he was not thinking straight. She suggested to him that he should take two or three days away and think about his decision to resign. He had already booked a few days holiday. She suggested that he spent that time thinking about whether he wanted to resign. Yvonne Watton was hopeful that he would change his mind. She reminded him that the respondent had a grievance policy, and he could raise a grievance, and that was a good way of sorting out any misunderstandings or difficulties.
102. The only issues the claimant raised with Yvonne Watton at that meeting were his perceptions that he had been spoken to inappropriately by David Ogden. He said he knew he had made some mistakes recently, but that he did not think that justified the way he had been spoken to. He made the point that sometimes it is not what is said, but the way that it is said. There was no doubt in Yvonne Watton's mind that the claimant genuinely believed that he had been badly treated by David Ogden in relation to these incidents. She gave him a copy of the grievance and bullying procedure, and she hoped that he would calm down and change his mind.
103. Yvonne Watton understood that one of the issues the claimant had raised is that he was told that other people had complained about him. Phil Rogers, who was responsible for Covid safety at Southport, had approached her to complain about criticisms that the claimant had made of him relating to matters of Covid safety. She had spoken to the claimant about that at the time to understand his concerns, which related to customer toilets being used by staff, and hand gel running out.
104. Yvonne Watton also understood that the claimant had expressed concern that he was reprimanded in front of Sophie Stevens, who he described as a junior employee. In Yvonne Watton's account, it would be misleading to refer to Sophie Stevens as a junior employee. She was an experienced and valued Service Adviser and not at all junior. The Tribunal agrees. She was junior only in the sense that the claimant had been a Service Adviser and had been "promoted" to be a Workshop Controller.
105. Despite his discussion with Yvonne Watton on 22 October 2020, the claimant confirmed his resignation by further email on 27 October 2020 [74], although the email left open the possibility of resolution. Yvonne Watton replied by email of 29 October 2020, referring again to the grievance procedure, and expressly declining to make any financial proposal to resolve the matter [73, 82].
106. There is also an undated text exchange between the claimant and Richard Horton [160-161]. It is likely to be on 21 October 2020, the day after the incident in the Workshop Controllers office. The claimant's evidence is that he spoke to Richard Horton shortly after the incident, when Richard Horton asked him if he was OK because he had heard shouting from where he was at the service

desks. Richard Horton's evidence is that this was not his recollection; that he did not speak to the claimant about the incident; he did not recall the claimant speaking to him; he did not ask the claimant whether he was OK; and he did not say that he had heard shouting.

107. Richard Horton is sure of his evidence on this because of the text message he sent the claimant on 21 October 2020 above [160-161]. The wording of the text message does not suggest that he had already discussed this with the claimant the previous day. The Tribunal agrees. The claimant is mistaken. Richard Horton's text message is in response to an email that the claimant sent to his colleagues informing them of his resignation. That email has not been put in evidence.
108. Richard Horton said that he was totally shocked by the claimant's resignation and that he had not seen it coming. He said that he had noticed for a while that the claimant was not happy at work. The claimant replied saying that it had been sudden, and that he was sorry to be leaving. He said that something had happened on Tuesday (that is, 20 October 2020) which crossed a line and he had decided to call it a day. Richard Horton replied saying again that they were all shocked by his resignation. He said that they had no idea what had happened, but that they had heard shouting. The fact Richard Horton said this in the text message made him sure that he had not spoken to the claimant about it on the 20 October 2020. The claimant replied saying that he had got emotional on his leaving day over leaving without saying goodbye to people. He said again that he thought a line was crossed and after that he could not see himself carrying on.
109. Richard Horton had been shocked at the claimant's resignation. Things had changed since the return from furlough because furlough had made things difficult from a work point of view – covering for colleagues. He conceded in evidence that his recollection of the incident on 20 October 2020 was not perfect; that it was a long time ago; but that it was not a major deal at the time.
110. The claimant's evidence also suggests that some time on the same day as the incident on 20 October 2020 Matthew Kerevan asked the claimant "did you get a bollocking before?! I could hear David (Ogden) shouting". Matthew Kerevan's evidence is that he does not remember a conversation like the one described. He does not recall asking the claimant if he was alright or saying that he had heard a bollocking. He did not hear what was being said, or who was speaking. He was not in the workshop when he heard raised voices from the workshop control office. The Tribunal prefers Matthew Kerevan's account, which is of a piece with that of other witnesses.
111. What is more likely is the account given by Samantha Thomas of what occurred later that day. She was working at her normal station (in reception). She noticed the claimant in the reception area, looking visibly upset. He was crying. She did not know why, and she did not connect it with the raised voices she had heard earlier. She asked the claimant if he was OK. She invited him into her work bay. She did not know the claimant very well. He did not tell her anything about what had happened in the workshop office. He might have told her that there had been an argument, but he did not tell her any details. He did

say that he was going to see the Head of Business, Yvonne Watton. She was alone when she spoke to the claimant when she saw him crying. She did not hear any raised voices while she was in the reception or customer area.

Relevant legal principles

112. Section 95 of the Employment Rights Act 1996 deals with the circumstances in which an employee is dismissed for the purposes of unfair dismissal. So far as is relevant to the present case (a constructive dismissal), 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 (section 95(1)(c)).
113. The Tribunal draws upon the commentary on section 95(1)(c) in *Harvey on Industrial Relations and Employment Law*, but only so far as is necessary to resolve the issues in the present case. The only case law cited to the Tribunal was *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 CA.
114. In section 96(1)(c), "entitled" means "entitled according to the law of contract". A resignation amounting a constructive dismissal arises only where the employer is guilty of conduct which goes to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract: *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27 CA. The employer's conduct must constitute a repudiatory breach of the contract. This is a question of fact: *Woods v WM Car Services (Peterborough) Ltd* [1982] IRLR 413 CA; *Pedersen v Camden London Borough Council* [1981] IRLR 173 CA.
115. This is not an application of the range of reasonable responses test. The Tribunal is simply considering objectively whether there was a breach of a fundamental term of the contract of employment by the employer. However, the reasonableness of the employer's actions may be evidence of whether there has been a constructive dismissal. Nevertheless, the test remains contractual: *Courtaulds Northern Spinning Ltd v Sibson* [1988] IRLR 305 CA.
116. It is the employer's conduct that is relevant in a constructive dismissal issue, not the employee's reaction to it: *Tolson v Governing Body of Mixenden Community School* [2003] IRLR 842 EAT.
117. The incident which causes the employee to resign may be insufficient to justify his resignation, but it may amount to constructive dismissal if it is the "last straw". The final episode does not in itself need to be a repudiatory breach of contract. The alleged last straw must itself contribute to the previous continuing breaches by the employer: *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35 CA; *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 CA.
118. As the Court of Appeal put it in *Kaur*, in the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions: (1) What was the most recent act (or omission)

on the part of the employer which the employee says caused, or triggered, his resignation? (2) Has he affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation) (5) Did the employee resign in response (or partly in response) to that breach?

119. In the present claim, the claimant's case for a constructive dismissal is implicitly put based on the implied term of mutual trust and confidence. Breach of an express term is not relied upon.
120. The employer must not by its conduct destroy or seriously damage the relationship of mutual trust and confidence between the parties: *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84 EAT; *Lewis v Motorworld Garages Ltd* [1985] IRLR 465 CA; *Woods v WM Car Services (Peterborough) Ltd* [1982] IRLR 413 CA; *Malik v BCCI SA* [1997] IRLR 462.
121. The question is whether the employer's conduct so impacted on the employee that viewed objectively the employee could properly conclude that the employer was repudiating the contract. The test is an objective one. The employer must not conduct itself in a manner calculated or likely to destroy confidence and trust. It may also be significant that the employer's conduct must have been "without reasonable and proper cause". Employer conduct which is repudiatory on its face will not breach the term of trust and respect if the employer has reasonable and proper cause for it: *Hilton v Shiner Ltd* [2001] IRLR 727 EAT.

Discussion and conclusions

122. Although the claimant was an impressive witness, and a more than competent litigant in person, in the Tribunal's assessment his evidence was plausible and even credible, but ultimately not persuasive or compelling in the face of the respondent's consistent individual witness evidence corroborated by the documents and the accounts of different witnesses. In broad terms, the Tribunal considered that the respondent's explanation or interpretation of events was the more likely or probable account of the facts.
123. The claimant's case is based upon a breach or breaches of the implied term of mutual trust and confidence. Looking at each of the incidents relied upon in isolation and cumulatively, did the respondent act towards the claimant in a way that destroyed or seriously damaged the relationship of mutual trust and confidence? Could it be said objectively that the respondent had repudiated the contract? Had the employer acted in a way that was calculated or likely to destroy the employee's trust and confidence? Was the employer's conduct – in addition – without reasonable and proper cause?
124. The Tribunal answers these questions in the negative for the following reasons.

125. First, there was a genuine redundancy situation in June 2020. The respondent was entitled to reduce headcount. It was entitled to do that across separate and self-contained pools, of which the Workshop Controllers were one pool, and the Service Advisers were another. The respondent devised and applied perfectly reasonable selection criteria against which the employees at risk of redundancy were scored. However, the scoring process turned out to be problematic. It was not entirely free from subjectivity. In places it lacked good, hard evidence upon which to base some of the scores. The overall process was otherwise fair and within the range of reasonable responses.
126. However, the managers concerned recognised that it was invidious to try to separate the three Workshop Controllers, who were regarded as equally good employees very much on a par with each other. The attempt to select one of them for redundancy soon came to be regarded as an artificial and near impossible exercise. They sought to put the redundancy exercise on hold and to replace it with an ongoing performance review. The board agreed. The threat of redundancy was suspended. The business recovered so well and so quickly that the prospect of redundancy soon fell away.
127. It is very difficult to describe the June 2020 redundancy exercise as amounting to a breach of the implied duty of mutual trust and confidence. Had the claimant been dismissed for redundancy, which he was not, it is likely that the respondent could have established a fair dismissal and that it had acted with the range of reasonable responses. Looking at this event in isolation, the respondent did not act towards the claimant in a way that destroyed or seriously damaged the relationship of mutual trust and confidence. The respondent had not repudiated the contract. It had not acted in a way that was calculated or likely to destroy the employee's trust and confidence, although that is how subjectively the claimant saw it. Nevertheless, his employer's conduct was based upon reasonable and proper cause.
128. Second, the incident of 31 July 2020 is when it is alleged that David Ogden told the claimant that he had deliberately scored the claimant the lowest in the redundancy process to make him redundant. The Tribunal has found as a fact that that did not happen in the way alleged. Importantly, the Tribunal infers that by that time the claimant was harbouring a continuing grievance that earlier he had been provisionally selected for redundancy. That seems to have infected his attitude and perspective thereafter.
129. As a result, he was mistaken in his interpretation of what David Ogden had said and meant on 31 July 2020. David Ogden said that he wanted to put the redundancy situation behind them. He said he regretted that it had been necessary, and that in terms of the scoring, he had been given a job to do, which he did not want to, but which he had done. He said that it was in the past because he did not think that there would be any redundancies because of the amount of work the dealership had. David Ogden said that there could be no need for any redundancies. David Ogden had not deliberately scored the claimant lowest.
130. Looking at this incident in isolation, the respondent did not act towards the claimant in a way that destroyed or seriously damaged the relationship of

mutual trust and confidence. The respondent had not repudiated the contract. It had not acted in a way that was calculated or likely to destroy the employee's trust and confidence, although that is how subjectively the claimant saw it. There was reasonable and proper cause for what David Ogden actually said and meant.

131. Third, the incident in the week commencing 12 October 2020 was when David Ogden criticised the claimant in relation to a customer job card, following upon a customer complaint, which was being handled by Sophie Stevens. The claimant was at fault and he appeared unwilling or indifferent to taking steps to recover the situation. David Ogden told the claimant that that was not good enough. He did not shout or swear or raise his voice. Sophie Stevens was present. The exchange was not unusual or atypical. It was not calculated to humiliate or embarrass the claimant, The Tribunal concluded that the claimant was mistaken to characterise this exchange in the way that he did.
132. Although this incident might have been handled differently, it did not amount to a breach of the implied duty of mutual trust and confidence. Looking at this incident in isolation, the respondent did not act towards the claimant in a way that destroyed or seriously damaged the relationship of mutual trust and confidence. The respondent had not repudiated the contract. It had not acted in a way that was calculated or likely to destroy the employee's trust and confidence, although that is how subjectively the claimant saw it. David Ogden's conduct was based upon reasonable and proper cause.
133. Fourth, and finally, came the "final straw" incident that took place on 20 October 2020. The Tribunal has not accepted the claimant's account of this incident. Again, there had been a performance issue involving a customer and for which the claimant was at least jointly responsible. He did not accept that responsibility and became confrontational. The discussion with David Ogden became a heated exchange, with voices raised rather than shouting. David Ogden did not lose his temper and he did not swear. The incident was one that was not otherwise worth recollecting or remarking upon.
134. David Ogden was disappointed that the claimant was unwilling to accept any responsibility. The claimant was clearly unhappy that David Ogden was challenging them about it as an issue. His attitude appeared confrontational. The conversation took an unexpected turn, but the allegation that David Ogden shouted and swore at the claimant is not made out.
135. David Ogden told the claimant that if he had problems with issues at work, he should discuss it with him or Alistair McAlpine. This was not an instruction by David Ogden that he was not to express any opinions, other than to David Ogden or Alastair McAlpine. At the end of the meeting, David Ogden told Kevin Foster that any criticism of attitude or negativity was not aimed at him. However, he was clear that he thought that Kevin Foster and the claimant were equally responsible for the oversight.
136. This incident is the more difficult one to assess against the implied duty of mutual trust and confidence. In its judgment, however, the Tribunal concludes, for the reasons explained immediately above, that it did not amount to a breach

of the implied duty of mutual trust and confidence. Looking at this event in isolation, the respondent did not act towards the claimant in a way that destroyed or seriously damaged the relationship of mutual trust and confidence. The respondent had not repudiated the contract. It had not acted in a way that was calculated or likely to destroy the employee's trust and confidence, although that is how subjectively the claimant saw it. David Ogden's conduct was based upon reasonable and proper cause.

137. As the claimant puts his case as a "final straw" case, the Tribunal now stands back to consider all four incidents cumulatively and in the round.

138. Looking at the matter through the lens adopted in *Kaur*, what was the most recent act or omission on the part of the employer which the employee says caused, or triggered, his resignation? That was the heated meeting on 20 October 2020. Has the claimant affirmed the contract since that act? He has not. If not, was that act (or omission) by itself a repudiatory breach of contract? The Tribunal has concluded that it was not.

139. 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 of the implied term of trust and confidence? None of the four incidents were in or of themselves a breach of contract. Taken together they do not evince, in the Tribunal's judgment, a course of conduct calculated or having the effect of repudiating the contract. They do not amount to a fundamental breach on the part of the employer. The employer was entitled to conduct the redundancy selection exercise as it did. David Ogden did not deliberately score the claimant in a way designed to ensure he emerged bottom of the selection matrix and he did not say otherwise. He was entitled to upbraid the claimant regarding the two matters of performance, and he did not overstep the acceptable boundaries in this working environment in so doing.

140. Although the claimant resigned in response to what he regarded as the final straw and the cumulative effect of the four incidents, as a matter of contract he was not entitled to do so. There were no breaches, singly or cumulatively, that entitled him to do so. Any challenge to the reasonableness of the employer's conduct does not make good any contractual breach required. The respondent had not breached the implied term of mutual trust and confidence. It had not committed a fundamental breach. It had not repudiated the contract. The claimant was not entitled to resign his employment in circumstances that might amount to a constructive dismissal.

Disposal

141. The claimant resigned his employment in circumstances not amounting to a constructive dismissal for the purposes of section 95(1)(c) of the Employment Rights Act 1996. He was not dismissed by the respondent. His complaint of unfair dismissal is not well-founded. The claim is dismissed.

Judge Brian Doyle
Date: 23 July 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

23 July 2021

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.