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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Moorman  
**Respondent:** FIS Systems Limited  
**Heard at:** East London Hearing Centre  
**On:** 28 February, 1 March and 3 April 2019  
**Before:** Employment Judge Hallen

**Representation:**

Claimant: Mr A Watson (Counsel)  
Respondent: Mr C Parkin (Counsel)

## RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for constructive unfair dismissal is unfounded and is dismissed.

## REASONS

### Background

1 In his Claim Form the Claimant who was a senior sales person working for the Respondent and on contractual remuneration of £174,000 as well as a discretionary non-contractual bonus scheme which provided for financial rewards where his own sales and those of his subordinates exceeded certain targets. In 2018, the Claimant did not like the targets that he had been set and engaged in discussions with his line manager, Mr Renato Lima to try to have his targets reduced. This culminated in the Claimant sending an email to Mr Lima on 4 June 2018 demanding by the end of the day a new remuneration plan which was "acceptable" or he would resign. When the Claimant did not receive a response to the claim by the deadline imposed by him, he resigned the following day

namely 5 June 2018. In his Claim Form he asserted constructive unfair dismissal which the Respondent denied in its Response Form.

2 A list of issues was agreed by the parties at the outset and the questions for the Tribunal were:

- 2.1 Whether at the point of resignation there was a repudiatory breach by the employer; and
- 2.2 Whether the resignation was in response to such repudiatory breach.

3 The issues for the Tribunal in respect of the claim of constructive dismissal were based upon an asserted course of conduct. The Tribunal had to determine the following questions:

- 3.1 Did the Respondent fail to follow a fair process when recruiting to the Europe Head of Sales role?
- 3.2 Did the Respondent remove the Utility product from the Claimant in January 2018?
- 3.3 Did Mr Murray meet with Mr Lima on or around 25 April 2018 to discuss Mr Murray leaving the Claimant's management without informing the Claimant?
- 3.4 Did the Respondent give the Claimant unrealistic targets which would have had the practical effect on preventing him from earning any commission in 2018, and substantially reducing his income for that year?
- 3.5 Did the Respondent fail to address the concerns raised by the Claimant throughout April, May and the beginning of June 2018 about his targets being unachievable?
- 3.6 Did the Respondent remove Mr Murray's team from the Claimant's management without a reasonable or proper cause?
- 3.7 In respect of the last straw did Mr Lima fail to respond to the Claimant's email of 4 June with subject head "current situation"?
- 3.8 If the answer to question 3.7 is "yes", did the failure to respond to the 4 June email itself constitute a repudiatory breach of the implied term of mutual trust and confidence?
- 3.9 If the answer to question 3.8 is "yes" did the Claimant resign in response or partly in response of that breach?
- 3.10 If the answer to question 3.8 is "no", did the failure to respond to the 4 June email form part of a cause of conduct with one or more of the acts listed in sub paragraphs 1 – 6?

- 3.11 If the answer to 3.10 is “yes”, did that course of conduct viewed cumulatively amount to a repudiatory breach of the implied term of trust and confidence?
- 3.12 If the answer to 3.11 is “yes”, did the Claimant resign in response or partly in response to that breach?
- 3.13 If the answer to 3.12 is “yes”, has the Claimant affirmed the contract or waived the breach since the time of the breach?

4 The Tribunal heard from the Claimant in person who prepared a written witness statement plus supplementary witness statement. In addition, the Tribunal heard from Renato Lima who also prepared a written witness statement and supplementary witness statement as well as hearing from Emma Martin who prepared a written witness statement. The Tribunal also had an agreed bundle of documents. The parties’ witnesses were subject to cross-examination by the respective parties’ counsel and from questions from the Tribunal. In addition, the parties’ representatives prepared written submissions for the Tribunal which the Tribunal had the chance to review.

## **Facts**

5 The Claimant was employed by the Respondent which provides Financial Software Solutions and services to the Financial Services Industry and employs over 2000 UK employees. The Claimant was employed as Vice President Trading Sales – Europe between 3 October 2011 until 4 July 2018 which was the effective date of termination. The Claimant was employed under a contract of employment which was at pages 58 – 76 of the bundle of documents on a basic salary of £174,000 per annum. In addition, the Claimant was entitled to a discretionary compensation plan which was at pages 184 – 185 for the year 2018. The compensation for the year 2017 was at page 92 – 97. The Claimant agreed that the discretionary compensation plan was negotiated between himself and the Respondent on a yearly basis. The compensation paid to the Claimant in respect of such plan was based upon his own performance and the performance of those in his team.

6 In October 2017, the Respondent commenced an interview process for Senior Vice President, Head of Sales Europe. This process was commenced by Mr Jim Neve, the Global Head of Sales who was based in the US. Mr Neve kicked the process off by way of an email on October 2003 and recommended four candidates. The Claimant and Mr Renato Lima were amongst three internal candidates and there was also an external candidate. An interview process was instigated by the Respondent and Mr Craig Costigan, Mr Bob Santella and Martin Boyd were senior executives that were involved in the interview and selection process. Each of the interviews lasted for approximately 30 minutes and these were held across a period of one month in October 2017. Most of these interviews were held by telephone in order to accommodate schedule and time zones. The successful candidate for the position was Mr Renato Lima who was at the time an associate of the Claimant and occupied a similar position to that of the Claimant. It was asserted at the Tribunal hearing that this recruitment process was a sham exercise and that Mr Lima had already been earmarked for the position. However, the Tribunal had sight of documentation in the bundle of documents between pages 98 and 139A of the bundle of documents which appeared to be contemporaneous emails between senior managers of the Respondent which demonstrated the process that was applied in respect

of the position of Senior Vice President, Head of Sales Europe. This documentation showed that a process was applied by the Respondent to involve four candidates one of whom was an external candidate and it did not appear to be a sham process as asserted by the Claimant. The emails showed the managers commenting on the quality of the candidates, dedicating interview time to them and providing the candidates with feedback. The Tribunal noted that the Claimant congratulated Mr Lima after the promotion on 1 January 2018 and confirmed that he looked forward to working with Mr Lima. He told Mr Lima that his main objective was to make money and there was no issue for him in respect of the promotion. It should also be borne in mind that the Claimant did not raise a grievance with the Respondent in respect of this recruitment process.

7 Throughout 2018, a number of changes were made to the Respondents sales strategy across Europe. 2017 had been a disappointing year in terms of results. The majority of the strategic changes were implemented during January 2018 when Mr Lima took over the position of Senior Vice President, Head of Sales-Europe. The changes were instigated by Mr Lima at the instruction of Mr Jim Neve the Global Head of Sales for the Respondent. The Claimant cited these strategic changes and their alleged impact on his ability to generate payments under the sales compensation plan as underlying reasons for his decision to resign. The Tribunal accepted the evidence of the Respondent that it was not uncommon to make strategic changes year on year. The sales environment did not remain static and changes to strategy were required in order to respond to client demand and help take account of how particular products and services were selling. The yearly renegotiation of the Claimants sales incentive plan also bore this out.

8 The Respondent has a large number of different products which it aimed to sell to its client base. At the beginning of 2018, one of the largest product lines was the Utility services product (Utility). Up until the beginning of 2018, the Claimant had been managing the team that was responsible for the sale of Utility. There were no sales of Utility in 2017 in the Respondent's establishment. In January 2018, Mr Lima took the decision that changes needed to be made to how the Respondent went about trying to sell Utility. The majority of sales made by the Respondent were software products. Utility was about selling a service rather than just a software product. Sales of Utility represented the sale of transformational landscape to a client and they were much larger deals and were therefore more difficult to secure. The objective was to sell Utility to the Respondent's larger clients.

9 The reason for assigning Utility to another Vice President, Martin Taylor, was that Mr Lima wanted to align the people who managed the Respondent's larger client accounts with Utility. At the time, Martin Taylor managed its larger client accounts and he still does so today. The pipeline deals for Utility were with those larger client accounts at the time. From a strategic perspective, it made sense to the Respondent to align those working on the larger client accounts with utility to enable sales of this product. Mr Lima felt that the sales persons working on the larger client accounts would be better placed to sell a large Utility deal and he wanted to align quota to the team which was working on the Utility product. Mr Lima felt that the Claimant's team had a very good tactical sales person within it but the failure to make any sales of Utility in 2017 provided a clear indication to Mr Lima that the change was required.

10 Mr Lima's other reason to reassign Utility was that the sales quota for Utility was very high at the beginning of 2018. It was in the region of \$150million US dollars. This

was disproportionate to the Claimant's overall sales quota of \$90million US dollars. Mr Lima recalled and it was accepted that the Claimant was frustrated with having to carry the sales quota for Utility at a time when it was underperforming. In order to alleviate the Claimant's concern, in carrying a large quota for Utility in 2018 and his belief that he would have to try to make up his overall sales target for the performance of other products, Mr Lima agreed with the Claimant in discussions during early 2018 that he would no longer carry the sales quota for Utility. The Claimant expressed his relief that he would not have to carry the sales quota. The Claimant was content with the decision made by Mr Lima to assign the Utility quota to Martin Taylor.

11 One of the Claimant's concerns with the assignment of Utility was that he had been working on this product for some time and therefore wanted to realise any credit of future sales which were attributable to the work of his team. It was true that the Claimant had been working on Utility but his involvement was not as direct as it was with some other of the products within his portfolio. The Claimant did not attend regular management calls in relation to the status of Utility product and he had specifically hired Stewart Clarke to directly build the sales pipeline in respect of Utility. Mr Lima discussed with the Claimant on several occasions his point about receiving credit for prior involvement in stages of a successful Utility deal. The Claimant and Mr Lima had weekly one-to-one meetings and this was a key forum for discussions of such matters. Mr Lima and the Claimant agreed that the Claimant would not carry the sales quota for Utility but that he would be paid a fixed amount in respect of any sales Utility deals closing during the year 2018. Mr Lima asserted in evidence that they discussed this position in many of their one-to-one meetings including on 3 and 5 April 2018 and the Tribunal accepted this evidence. Mr Lima confirmed that the Claimant had accepted the approach in respect of receiving a fixed amount for any Utility deals which concluded in 2018 but at the time of the Claimant's resignation on 5 June 2018 the amount of this had not been determined by the Respondent. Mr Lima said in evidence and it was accepted that he did not wish to be tied to a fixed number for a successful deal before it had closed. However, Mr Lima did agree and the Claimant did accept that he would be paid a fixed amount to be determined in respect of any Utility deals that had closed during 2018. As it happened, no Utility deals had closed at the time of the Claimant's resignation and as it transpired there were no Utility sales throughout 2018. Even if the Claimant remained employed until the end of 2018, the performance of Utility would ultimately not have helped him towards the achievement of his overall sales target.

12 The Respondent gave evidence and it was accepted that other changes were made to the constitution of the European sales team during the same period. For example one of the Claimant's colleagues was promoted to run risk and performance, the insurance team was integrated into the Respondent's buy site sell team and two new members were appointed in this team. The team responsible for the Respondent's energy products moved from their existing team to the Respondent's cross asset team. It was a time of structural change in the Respondent's business and these changes were relevant not only to the Claimant's team but also to other teams.

13 The Claimant also asserted during the Tribunal hearing that a further organisational change that was introduced by the Respondent at the beginning of 2018 was in respect of the key account manager programme which he said had a negative impact on his ability to generate payments under his sales compensation plan in 2018. The Tribunal heard the evidence of the Respondent and preferred this in respect of the

organisational change that occurred and the fact that it did not have a detrimental impact upon the Claimant's ability to generate sales and commission.

14 The key account manager (KAM) programme was not unique to Europe. It was a global programme. It was designed by Jim Neve the Global Head of Sales. A key objective of the KAM programme was to target those client accounts which generated the most income. Mr Neve felt that the largest client accounts needed to have a central source of coordination in the form of a KAM rather than have a large number of different sales persons targeting a particular client from different directions and at different intervals. In 2018, the KAM programme was used in conjunction with the Respondent's 30 largest accounts. The KAM programme had been introduced in the United States towards the end of 2016. It was gradually introduced to Europe throughout 2017 but it did not take effect until the beginning of 2018. Throughout 2017, the KAM team was built up by moving some employees around teams and hiring others externally. Martin Taylor became Head of the KAM programme and all employees had been made aware of the KAM programme and how it would work through this building process. The intention behind the KAM model was for the KAMs to generate further sales opportunities on a client account. Where a sales manager has had his team targeting the sale of a specific product to a client, a KAM would oversee this activity at a senior level and look for opportunities to grow that client further by aiming to sell all of the Respondent's product rather than a single product.

15 One effect of the KAM programme was to reduce the sales quota carried by a Vice President such as the Claimant in respect of a particular product. From the beginning of 2018, the KAMs took on the responsibility for a percentage of a Vice President's sales quota on a particular product. In turn, this led to a small overall sales target for a Vice President. If a KAM realised a sale of that product, the KAM would split the realised revenue 50/50 with the sales manager. A KAM did not take 100 percent of the credit for the sale. The clear quid-pro-quo with the KAM structure was that a Vice President such as the Claimant's overall sales target was reduced. In exchange for a reduced overall sales target and being able to take 50 percent of the credit for any KAM sales, a Vice President had to allocate 50 percent of his/her teams sales to the KAM. In order to allay the Claimant's concerns about the 50/50 split arrangement, the first quarter of 2018 was deliberately designed by Mr Lima to allow the Claimant to take 100 percent credit for any deals his sales made in that period. The Claimant did not have to distribute anything to the KAMs from these deals during the first quarter of 2018. The Claimant and Mr Lima called these "holdout deals" and these represented very advanced 2017 deals which were going to be concluded in 2018 and for which the Claimant took credit. It was only from the beginning of the second quarter of 2018 onwards that the KAM structure applied to the Claimant. It had only been in place for the Claimant for just over two months as of the date of his resignation.

16 The Claimant's target for 2018 were neither the highest nor the lowest and the targets for the teams he managed did not represent the largest incremental increase from 2017 – 2018. The Claimant managed in the region of 20 different products. It was the collective performance of his products at the end of the year which would trigger a pay out under his sales compensation plan. If a particular product performed poorly this would not necessarily prevent the Claimant from achieving his targets. Provided that the sales quota was meant for a combination of the performance of one or all of the products, this would be sufficient to trigger a payment. It was not the case that the Claimant's year would have

been made or broken on the performance of one or two products. The Claimant was given the additional products of Adaptiv and ACBS to manage at the beginning of 2018 whilst Utility was assigned to Martin Taylor's team during the same period. The Claimant told Mr Lima at the time that he wanted these products. The Claimant had a choice. None of these products were imposed on him. The Claimant was given management of the Respondent's Energy product in April 2018. The Adaptiv product had been managed by a peer of the Claimant who had left the organisation towards the end of 2017. The Claimant told Mr Lima that he could run this product more effectively than the previous Vice President and that the poor performance of Adaptiv in 2017 was down to the management of the former Vice President. The Claimant was given the Energy product after a peer of his left his employment with the Respondent towards the end of April 2018. This colleague ran a large number of different products including the Energy product. The Energy business made sales to clients such as oil, gas and commodity trading houses. At the time, the Claimant looked after the Respondent's trading business so Mr Lima felt that the assignment of the Energy product to the Claimant was a good fit and logical.

17 In the first two months of 2018, the Energy team had concluded a very large sale. When Mr Lima handed management of the Energy product to the Claimant it was very much on target. Mr Lima did not increase its quota when he handed it to the Claimant so he took on a product which had already realised the big sale in the early part of the year. At the end of 2018 sales year, the Energy product made its target. The Claimant did not raise any concerns to Mr Lima at the time about taking on the Energy product. Had the Claimant remained in employment until the end of 2018, the successful performance of the Energy product would have made a contribution towards meeting the Claimant's overall sales quota.

18 The Claimant sent an email to Mr Lima on 6 April 2018 suggesting that year on year growth targets of 110 percent and 141 percent for the ACBS and Adaptiv product lines respectively had been imposed on him. The Claimant also suggested that the target growth for ACBS and Adaptiv was "ridiculous". Targets at the level quoted by the Claimant were not targets given to him by the Respondent. The Respondent gave evidence which was accepted that target growth of 100 percent year on year would never be required. This would be entirely unrealistic. Whilst year on year target growth depended on consideration such as the previous year sales results, by applying opportunities and the perceived ability of sales managers to be successful, target year on year sales growth around 20% was the appropriate amount that the Respondent set. In the email of 6 April, the Claimant also said "so in summary, for 2018 I have had the Utility taken away from me (it looks like having a fantastic year) and been given two dogs at ridiculous growth rates. As agreed let's discuss further once the OHJ issue is finalised" (page 176). This email was sent to Mr Lima the day after the Claimant and Mr Lima had had a meeting on 5 April 2018. During this meeting, the two individuals discussed the Claimant's targets for 2018 and potential changes to his responsibilities that Mr Lima was looking to implement. The key change Mr Lima was looking to implement was movement of Andrew Murray's team from the Claimant to Martin Taylor. Mr Lima did not send a response to the Claimant but these were points that they had been discussing and continued to discuss. As stated earlier the parties spoke frequently at one-to-one meetings and shared adjacent offices.

19 Mr Lima was surprised at the comment "utility looks like having a fantastic year" and had been given "two dogs at ridiculous growth rates". Mr Lima was surprised as the

Claimant had specifically asked for ACBS and Adaptiv products back in January 2018 and he had told Mr Lima that the poor performance of Adaptiv in 2017 was due to the way it had been managed by the previous Vice President. The Claimant was confident in his ability to turn around the performance of this product. In addition, Utility was not on course for a “fantastic year”. At most, there was the possibility of one Utility deal during that year and in the end there were no sales in the Utility in 2018.

20 Indeed, Mr Lima agreed with the Claimant about the target “for ACBS” products being slightly aggressive. He therefore looked to reduce the target quota and was in discussion with the Claimant about this at the time the Claimant resigned. At the end of the sales year on 31 December 2018, the ACBS product performed favourably against its forecast rate. The Energy product also performed well and the Adaptiv fell just shy of its target.

21 A further strategic change made in 2018 was to move Andrew Murray’s team from the Claimant’s management to Martin Taylor’s team. Mr Lima explained his rationale to the Claimant prior to the implementation of the change in May 2018. The parties discussed these change in detail for the first time during the meeting that occurred on 5 April 2018. Mr Lima explained to the Claimant that he was looking to combine the post trade derivatives and utility sales teams. Historically, Andrew Murray’s team sold a large combination of different products including derivative software products. The idea was to merge these teams into a post trade services team with Andrew Murray’s team becoming a back office team alongside the Claimant’s front office team. Mr Lima wanted the Claimant to focus on the areas of trading and risk with his objective to create a front office and back office team so that these would take on a clear identity for clients. Mr Lima implemented these changes because he felt that the sales teams which had reported into the Claimant did not have clear synergies or identities with the target clients. The Claimant initially objected to the proposal on the basis that he felt he would lose credit for several Utility deals his team had been working on. Mr Lima assured the Claimant during the meeting that if any Utility deals closed at a time when the Claimant was no longer responsible for the management of Utility then the revenue obtained from these deals would count towards the Claimant’s targets for 2018. He told the Claimant that he would work on a structure that would mean he would not be penalised on this credit for any Utility sales when he was no longer responsible for Utility. The Claimant did not present business reasons to Mr Lima at the time for why he felt that Andrew Murray’s team should not move to Martin Taylor’s team.

22 On 30 April 2018, Mr Lima emailed Mr Jim Neve with his proposal for organisational changes to be made within the European sales team for the remainder of 2018. (Page 188). He set out various proposed changes to the structure of the team including changes to impact on Marina Bony, the Claimant, Martin Taylor and Marcio Machado. The proposed changes did not relate only to the Claimant. Mr Lima told Mr Neve that he had explained to the Claimant that he wished to create a consolidated strategy for post trade services by bringing together the post trade derivatives and utility teams. Mr Lima felt that by putting Andrew Murray under Martin Taylor, this would align these individuals working on the quota for Utility.

23 Almost six weeks after the meeting between Mr Lima and the Claimant on 5 April 2018, Mr Lima explained to the Claimant in a meeting on 14 May 2018 that he would soon be looking to implement the structural change which would involve Andrew Murray being



moved under Martin Taylor's management. He informed the Claimant that he would no longer carry the responsibility for the sales quota of this team and his overall sales target for 2018 would be reduced accordingly.

24 The Claimant emailed Mr Lima on 15 May 2018 and again raised his concerns about the compensation plan calculations and the KAM structure. (Page 191). In particular he complained about the KAM model was not working for his products (Page 192). Mr Lima was surprised by the Claimant's comments relating to the KAM model. At the time the KAM model had only applied to the Claimant from the beginning of the second quarter of 2018 being approximately six weeks. He was also surprised as there was no guarantee that he would manage the same level of business in 2018 as he had done in 2017. At the time he made these comments, Mr Lima felt it was short sighted for him to say that the KAM model was not working for his products given that it had only applied to him for just six weeks.

25 In Mr Lima's view and in the view of the Tribunal it would not have been possible for the Claimant at the time to see what effect the KAM model would have ultimately had on his ability to generate payments under the sales compensation plan and hit his target for 2018. It would also not have been possible to understand the effect of the KAM model when he resigned three weeks later with over six months left to run on the annual sales cycle.

26 Mr. Lima asserted and it was accepted that only at the end of the sale cycle would the Claimant been able to see what effect the KAM model would have had on his ability to generate payments. In addition, the Claimant failed to mention in his email of 15 May 2018 that he would not be required to carry such a high quota for his portfolio products and that he would benefit from any sales made by KAMs that he was not involved in.

27 On 22 May 2018, Mr Lima received an email from Emma Martin in relation to the Claimant which was at page 208 in the bundle of documents. Mr Lima had not met Emma Martin in person at this point but he was due to meet her at the beginning of June shortly after his return from a business trip to New York. He had previously worked with Amisha Patel who was the Human Resources Business Partner working with the sales team. Amisha Patel left the business in mid May 2018. During the time Amisha Patel was Human Resources Business Partner for the sales team, Mr Lima used to speak to her about matters relating to the sales team. Ms Martin had had a meeting with the Claimant on 22 June 2018 which took place in a meeting room in the Canary Wharf offices of the Respondent. During the course of this meeting, the Claimant had expressed to Ms Martin his disappointment with the appointment of Mr Lima into the role in January 2018. He also discussed his unhappiness with the way his sales quota had been dealt with by Mr Lima and the impact it may have in relation to the generation of payments under his sales compensation plan. The Claimant explained to Ms Martin that he had other offers of employment and had been interviewing for other roles. In addition, the Claimant told Ms Martin that he had successfully sued previous employers in the past in relation to his employment with them and raised the topic of exiting the business with a settlement agreement. At the Tribunal, the Claimant disputed raising the issue of the settlement agreement but on balance the Tribunal preferred the evidence of Ms Martin in relation to the Claimant directly raising the issue of settlement agreement and exiting by way of one. It seemed to the Tribunal that he was unhappy with the business and was interviewing for alternative positions. Ms Martin gave evidence to the Tribunal which was accepted that it

was her view that the Claimant was looking to bring a constructive dismissal claim which she concluded after hearing the Claimant specified that he had previously sued other employers and was not happy about the sales incentive plan. She also came to this conclusion because the Claimant had raised the issue of a settlement agreement. Following the meeting with the Claimant, Ms Martin sent an email summary to Mr Lima of this meeting which was at page 208 of the bundle.

28 Mr Lima responded to Ms Martin via email on the same day and expressed how disappointed he was with the Claimant for having raised these issues. He told Ms Martin that there was an ongoing dialogue with the Claimant and that changes had and would be included in relation to his compensation structure to incentivise him further. In response to Ms Martin's indication that the Claimant wished to leave by way of a settlement agreement, Mr Lima made it clear in his email response that he did not want to consider the option of a settlement agreement as the Claimant was a valued member of the Respondent's sales team. In addition, Mr Lima was trying to introduce a package that was acceptable to the Claimant and there were ongoing discussions about this at the time. Mr Lima wanted the Claimant to stay employed with the Respondent and hence why he was in direct dialogue with the Claimant about changes to the compensation structure. Furthermore, Mr Lima was taken aback by the fact that the Claimant had approached Ms Martin only a few working days after what he felt had been constructive discussions with the Claimant in respect to introducing a more acceptable incentive plan for the Claimant. At that meeting the Claimant did not mention anything about leaving the business under the terms of a settlement agreement.

29 On 23 May 2018, Mr Lima sent an email to Emma Martin to set out the Respondent's position and made it clear that he wanted to retain the Claimant and did not want to enter into settlement discussions. This email was at page 213 of the bundle. Mr Lima felt that the best approach would be to speak again with the Claimant as soon as possible. He was confused by the messages he was communicating to Emma Martin after the discussions that he and the Claimant had previously been having. Based on what Ms Martin related to Mr Lima on her meeting with the Claimant, Mr Lima felt as if the Claimant was saying one thing to him during his discussions and something different to Emma Martin. He felt that he was making progress with the Claimant in respect of modifying his compensation structure to something he was happy with but the effect of the Claimant raising concerns with Ms Martin was to undermine what he had been previously discussing. He felt in effect that the Claimant was acting duplicitously.

30 On 23 May following her discussions with Mr. Lima, Ms Martin sent an email to the Claimant explaining how Mr Lima was very keen to speak with him later that day and that he would call him from New York (page 214). Ms Martin expressed to the Claimant that Mr Lima had told her that the Claimant was a key member of the team and that he did not want to enter into exit discussions and that he was confused by the Claimant's feedback. Ms Martin understood from a conversation she had had with Mr Ranato Lima on 22 May 2018 that following a conversation on 18 May 2018 Mr Lima felt the discussions were moving in the right direction with the Claimant in terms of how to incentivise him. In her email to the Claimant Ms Martin emphasised that she felt it would be helpful to have an open conversation with Mr Lima to try and find a resolution. She also reiterated that she would be very happy to set up a mediation meeting between the Claimant and Mr Lima on Mr Lima's return from New York. It is interesting to note that the Claimant did not take up the offer of a mediation meeting

31 Mr Lima sent an email to the Claimant on 23 May asking if the Claimant was free to speak. He tried to call him but only managed to reach his voice mail. This email was at page 217 of the bundle of documents and the response was at page 218. The Claimant responded by email the same day to say that he had taken an afternoon of annual leave to play cricket and that he and Mr Lima should have coffee on the following Tuesday (29 May 2018). Mr Lima was ready and available to speak to the Claimant about his concerns raised with Ms Martin but the Claimant at this stage was prepared to wait until the following Tuesday. The Tribunal reviewed this email at page 218 and noted that the Claimant did not appear to be overly stressed or concerned about the nature of discussions and that "it can all wait until then" then being the following Tuesday (29 May 2018). Given that Ms Martin had told Mr Lima in her email of 22 May 2018 that the Claimant felt the employment relationship was no longer tenable moving forward he was very surprised that the Claimant then said everything could wait for almost a week to be discussed further. In the light of the Claimant's ultimatum to the Respondent in his letter of 4 June, the Tribunal was also surprised by the relaxed attitude of the Claimant at this stage a few weeks before his resignation.

32 In a one-to-one meeting with the Claimant on 29 May 2018, Mr Lima and the Claimant had a discussion following Mr Lima's return from his New York business trip. The Claimant had concerns about the impact of the KAM programme and the targets that had been set for Adaptiv and the ACBS products in 2018. The Claimant told Mr Lima that he required a reduction to the sales quota in the region of \$30million US dollars. Mr Lima said to the Claimant that he would consider a reduction in the region of \$10million US dollars but that he would need to take this to Mr Jim Neve for discussion and approval. Mr Lima also told the Claimant that he would now soon be moving Andrew Murray's team to the management of Martin Taylor for the business reasons already explained to him. This was an ongoing discussion that had been going on since 5 April 2018.

33 As well a potential overall sales target reduction of \$10million US dollars, Mr Lima proposed an alternative compensation structure for the Claimant. This would have involved payment structure under which the Claimant would have received payment even if the initial trigger target of 80% under his sales compensation plan had not been met. Mr Lima was looking to introduce an initial trigger target of 60%. This would have been a significant concession. A trigger for payment of all other employees at the Claimant's level was 80% of target and for Mr Lima himself it was 90% target. These were tangible ideas on the table at the time. Mr Lima told the Claimant that he needed to know that the Claimant was happy with these proposals before he went to discuss them with Mr Jim Neve. The Claimant told Mr Lima during this meeting that he would be happy if he could get the payment structure in place for him which would pay out even if he only managed 60% of target. Mr Lima explained to the Tribunal that he would never have gone to Mr Neve with these proposals unless the Claimant told him he was happy with them. It would have been pointless if he had obtained approval only for the Claimant to subsequently say he was unhappy. At the Tribunal hearing there were some disputes about whether Mr. Lima had proposed that the initial trigger would be reduced to 60% from 80% of target. It was true that the only mention of 60% of target was in the witness statement of Mr Lima. However, the Tribunal accepted that the Claimant and Mr Lima had numerous one-to-one meetings and that this was the preferred course of discussion between the parties at this stage. The Tribunal also noted that Mr Lima and the Claimant were having various discussions with each other to reduce and vary the Claimant's incentive plan on the basis that the Respondent wanted to keep the Claimant being a valuable member of the team. The Tribunal was persuaded by Mr Lima's efforts to retain

the Claimant's services and his ongoing efforts to agree an acceptable plan with the Claimant. Therefore, the Tribunal accepted the evidence of Mr Lima in this regard.

34 Mr Lima told the Claimant at the end of the meeting on 29 May 2018 that he would come back to him as soon as he could and did not give him a specific deadline but the parties had been in discussions for some time about this particular matter and that a response would be forthcoming. Mr Lima needed to know that the Claimant would be happy and get back to making sales if he could make the adjustments discussed with him. In the face-to-face meeting on 29 May 2018 the Claimant told Mr Lima that he would be happy with this proposal.

35 After the meeting with the Claimant on Tuesday 29 May, Mr Lima had a call with Jim Neve on Friday 1 June to discuss the proposals agreed with the Claimant at the meeting on 29 May 2018. Immediately after the weekend, Mr Lima followed up with an email to Mr Neve on 4 June 2018 with the proposal which was at page 222 of the bundle. Mr Lima's proposal was to reduce the sales quota for the ACBS products by approximately \$4million US dollars and the Adaptiv products by \$2-3million US dollars. As Mr Lima had explained earlier on, he did accept that the target for the ACBS programme product was ambitious. This was only in relation to one of the approximate 20 products the Claimant managed.

36 Less than an hour after his email to Mr. Neve, Mr Lima received a long and detailed email from the Claimant entitled "current situation" which was at page 225 of the bundle. Mr Lima recalled at being surprised about the length and the content of the email. Firstly it was not the Claimant's style to send such long emails. As Mr Lima explained at the Tribunal, the parties sat adjacent to each other in offices from which they could easily communicate in person. Indeed they did so at various one-to-one meetings which Mr Lima recounted to the Tribunal. Secondly, the ultimatum put forward by the Claimant in his email "that he would resign if he did not receive an acceptable plan by the end of the day" did not corroborate with what the parties had been discussing and had agreed would be the next steps during the meeting on 29 May 2018. Mr Lima had said to the Claimant that he would approach Mr Neve about the alternative compensation structures which he was in the process of doing and the Claimant told Mr Lima that he was happy with this. A few days later he then came back at Mr Lima with this long laundry list of concerns in writing. Mr Lima was particularly surprised by the allegation that he had taken away Utility from the Claimant for no reason. Mr Lima was very surprised by the Claimant's comments that his current plan would "not pay a penny" (page 225) unless he made at least 80% of target which he claimed at the time he would have no chance of doing and "all my other teams will do at best 70% of target due to one or more of the Adpativ target, ACBS target or the KAM 50% sharing. All these teams hit target last year".

37 Mr Lima did not understand these comments being made less than half way through the sales year. The Tribunal also failed to understand how the Claimant could come to such a conclusion half way through the sales year. It appeared very premature to say half way through the year that targets would not be met. The Respondent gave evidence that the sales team worked right up until the final day of the fourth quarter to get deals done and signed. At the time of the Claimant's resignation on 5 June 2018 there was over six month left at the sales cycle and therefore a considerable amount of time to shape and influence deals. Furthermore, the parties were in discussion at the time about a new compensation structure which would have seen the Claimant receive financial

incentive for his performance of 60% target. The parties had spoken about this only a few days previously on 29 May 2018.

38 On 4 June 2018 Mr Lima drafted an email which was at page 227 of the bundle which he ultimately did not send to the Claimant. He asked Emma Martin for her thoughts on this email as he had detected a swift change in approach from the Claimant. What he thought were good faith constructive conversations had moved in a matter of days to uncharacteristically long email which he felt betrayed what the parties were discussing. In his draft email, Mr Lima reiterated to the Claimant how he was engaged in dialogue and how he had been under the impression that the parties were making progress with their discussions. He really had not expected to receive an ultimatum from the Claimant that he would resign if he was not given a compensation plan on the terms he was looking for within in 24 hours. The email confirmed that the parties were in dialogue over the quota and compensation plan for a few days and that Mr Lima was under the impression that they were making progress in brainstorming discussions. It confirmed that he was not expecting the ultimatum that was delivered on 4 June and discussed various reductions that were being contemplated with the Claimant to make him happy. Mr Lima ultimately decided that the ultimatum from the Claimant that was made to the company and to himself personally was made in bad faith and it made Mr Lima decide not to send the email to the Claimant that day. He was already beginning to feel uncomfortable about the lengths he was considering going in order to modify the Claimant's compensation structure and had to rationalise this with the fact that there was considerable value in retaining the Claimant even if it meant his performance target would be lower than the usual base line for the reward culture within the Respondent namely 60%.

39 At 9.39am on 5 June 2018, Mr Lima received a resignation letter from the Claimant which was at page 230 of the bundle of documents. Whilst Mr Lima was now less surprised to receive the resignation given the ultimatum the previous day, he was very surprised by the comments that "it is clear that you are not prepare to resolve the legitimate concerns raised". This comment was entirely inconsistent with the fact that Mr Lima and the Claimant were engaged in dialogue in relation to ways to intensify the Claimant and to revisit his compensation plan with significant concessions. Less than two weeks earlier when Mr Lima attempted to speak to the Claimant on 23 May 2018 in order to discuss the comments he made to Ms Martin about his position being untenable, the Claimant said that he was at a cricket match and that the matter could wait until almost a week later. The parties had had that meeting on 29 May 2018 and Mr Lima took away to Mr Neve the proposals that the Claimant said he would be happy with if he could get them signed off. Unsurprisingly Mr Lima was very disappointed when he resigned from his employment only five working days later asserting that the Respondent had made no efforts to resolve the legitimate concerns raised by the Claimant. Mr Lima believed that there was some level of duplicitous conduct on the Claimant's part and felt disappointed with the Claimant's conduct in resigning when he knew full well that efforts were being made to incentivised and comply with the Claimant's wishes.

40 Following the Claimant's resignation Mr Lima called the Claimant to ask him if he was sure about his decision particularly given the recent and lengthy conversations that the parties had been having in ways to motivate the Claimant moving forward. The Claimant told Mr Lima that he would not change his decision. There was some dispute as to whether this conversation had occurred on 5 June. Mr Lima said that it was by way of a telephone conversation and the Claimant denied such conversation. The Tribunal

accepted the evidence of Mr Lima in this regard. It appeared to the Tribunal that the company through Mr Lima had been making efforts to resolve the concerns between the parties in respect of the Claimant's incentive plan and that the Claimant was exhibiting a level of conduct and behaviour towards Ms Martin which was inconsistent with this conduct and behaviour with Mr Lima. Therefore, the Tribunal accepted the evidence of Mr Lima that he did attempt to discuss the Claimant's resignation and whether he was sure that he wished to stick by his decision to resign. The Claimant told Mr Lima that he was not prepared to reconsider his decision. Thereafter, the Tribunal was not altogether surprised that Mr Lima did not wish to have further contact with the Claimant given the nature of his conduct and behaviour with himself and Ms Martin. The Respondent determined that it was not necessary for the Claimant to work out his notice albeit he was placed upon 'garden leave' during the remainder of his notice period for which he was paid. The above was confirmed in an email to the Claimant on 5 June 2018 which was at page 234 of the bundle of documents.

### Law

41 The implied term of trust and confidence provides that the employer "shall not without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously harm the relationship of trust and confidence between employer and employee" (Malik v BCCI [1997] ICR 606). This term has been applied to different factual situations within the employment context.

42 In a case such as the present one, in which the employee relied on a series of acts as amounting cumulatively to a breach of the implied term of trust and confidence, the leading case remains Omilaju v Waltham Forest London Borough Council [2005] ICR 481. In that case Dyson LJ held that the last straw does not have to be unreasonable or blameworthy, but it must contribute something to the breach, even if what is added to might be relatively insignificant.

43 In the recent case of Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA CIV 978, the court of appeal considered the situation where a course of conduct ending in the last straw included a repudiatory breach which had been affirmed prior to the last straw. In this situation, the later act effectively reactivated or resurrected the earlier fundamental breach so that the employee could rely on it as part of the course of conduct which amounted to a repudiatory breach.

44 In Kaur, Underhill LJ summarised the questions which will arise in a constructive unfair dismissal claim as follows:-

- (a) What was the most recent act or omission on the part of the employer which the employee says caused or triggered his/her resignation?
- (b) Has he/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 (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions to

which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?

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

45 The test of whether there has been a breach of the implied term of trust and confidence is objective: the question is whether the conduct relied on as constituting the breach, when looked at objectively, is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

46 A separate line of cases has arisen concerning claims in contract arising out of the exercise of the employer's discretionary powers. Most of these cases have involved claims by employees that their discretionary bonus was set too low: see for example Clarke v Nomura International Plc [2000] IRLR 766. More recently in the Supreme Court in Braganza v BP Shipping Ltd [2015] UKSC 17 involved an employers decision not to pay a death service benefit on the basis that the deceased employees death resulting from suicide.

47 In all of these cases, the Claimant was seeking contractual damages for breach of contract; the breach being the incorrect exercise of the contractual discretion. This distinguishes these cases from the Claimant's case. The Claimant was not seeking contractual damages because, for example, his targets were set irrationally too high and prevented him from getting his bonus. Rather, his case was that a course of conduct by the Respondent amounted to a breach of the implied term of trust and confidence and one part of that was that the Respondent set his target far too high, failed to deal with his concerns about his target being set too high and made decision which made achieving targets even harder.

### **Tribunal's Conclusion**

48 In order for the Claimant to succeed in his claim for constructive unfair dismissal, he must demonstrate that the Respondent repudiated the contract of employment entitling him to resign. In this case he asserted that there was a breach of the implied term of mutual trust and confidence and in this regard the conduct in question impinged on the relationship in the sense that looked at objectively it was likely to destroy or seriously damage the degree of trust and confidence that the employee was reasonably entitled to have in his employer. Anything less than seriously destroying or damaging will not be sufficient as far as the Claimant is concerned.

49 In this case, the Tribunal was not satisfied that the course of conduct outlined in the facts section of this judgment amounted to a breach of the implied term of trust and confidence in the Claimant's contract of employment looked at objectively and furthermore the failure to respond to his ultimatum of 4 June did not constitute a last straw. The matters outlined by the Claimant in his email to the Respondent of 4 June 2018 in the Tribunal's view did not properly characterise themselves as a last straw as the matters raised had been the subject of ongoing discussion between Mr Lima and the Claimant for some time. The timeframe imposed by the Claimant for a response of less than one day was not reasonable or appropriate given the course of negotiations between both parties that were previously going on for a number of months. As noted in the facts section of this judgment, just two weeks prior to his resignation the Claimant had postponed a discussion

on the very matter that was raised in respect of the compensation plan by nearly a week as he was playing cricket and had taken a half days holiday. As part of the chronology of events, this in the Tribunal's view undermined the Claimant's demand for an urgent response in 24 hours in his email of 4 June and thus characterising the lack of response as "a last straw". Furthermore, it seemed strange to the Tribunal that the Claimant had previously ignored an effort by Emma Martin to discuss the matter and mediate with the Claimant and Mr Lima to find an acceptable solution.

50 It needs to be borne in mind that the Claimant's ultimatum arose in the context of a negotiation. A sales plan had been offered to the Claimant (pages 184 – 186) which the Claimant had an opportunity to have input into (page 158). The Claimant did not like the targets and was negotiating on them. Mr Lima's evidence in cross-examination and re-examination was that it was in every sales person interest to achieve a lower target to be able to achieve it with greater ease. Mr Lima had never met a sales person who had not complained about their targets. He regarded these discussions as normal dialogue. The Tribunal accepted this evidence on the basis that the compensation plan between the Claimant and the Respondent was renegotiated on a yearly basis and the Claimant openly acknowledged that he was in the process negotiation. He told the Tribunal in cross-examination that he had spoken to Emma Martin the Respondent's People Direct Lead in order to get leverage for his position. Furthermore, during the course of that meeting, he told Ms Martin that he had sued two further employers and that a settlement agreement was discussed. Ms Martin's evidence was that the Claimant raised the prospect of a settlement agreement and the Tribunal accepted this evidence.

51 It was the Tribunal's view upon hearing the evidence that the Claimant's resignation was not responsive to the lack of a reply by Mr Lima to his email of 4 June 2018. It appeared to the Tribunal that the Claimant had already made his mind up by the time that he met with Ms Martin on 22 May 2018 approximately two weeks before the 4 June letter was sent in which he acted in a way that it was clear that he was positioning himself for a constructive dismissal claim and intended to leave (page 208). The fact that during the meeting the Claimant made reference to suing former employers and raised the possibility of a settlement agreement indicated that the Claimant had already made his mind up to go. The Claimant accepted in cross-examination that it was "fair comment" to suggest that mentioning that he had sued his former employers was not the conduct of someone who was trying to make the relationship work. Furthermore, he had referenced that he had been looking for work and had had a number of offers. It was also instructive that the Claimant ignored Ms Martin's attempts to mediate on the issue and did not make a formal grievance at any stage.

52 With regard to the course of conduct that the Claimant asserted, the Tribunal was not satisfied that objectively viewed this amounted to a breach of the implied term of trust and confidence. The main assertion made by the Claimant was that he was set unrealistic targets by Mr Lima his new line manager. He said in his witness statement "in summary my constructive dismissal claim is about the Respondent's failure to respond to my concerns about changes to my remuneration which if implemented would result in around £200,000 in my annual remuneration". The Claimant's base salary was £174,000. He was eligible to participate in the discretionary non contractual bonus scheme (page 57). The terms of that plan provided for the Respondent to amend it at its sole discretion and the Tribunal noted that the plan was negotiated between the parties on a yearly basis. The compensation plan set an annual target. If the aggregate of the sales people the



Claimant had responsibility for reached 80% of that target he would start receiving a bonus. The value of that bonus would increase as a target was reached and exceeded. It did not matter what products were sold (or the relative spread of such sales across those products) as long as the target was reached. The substance of the Claimant's complaints related to the effect of certain structural changes and his ability to reach its targets. Those structural changes including the creation of a separate team for renewals, the creation of the KAM programme, the removal of Utility from his remit and the reorganisation that saw Mr Murray's team moved. The Tribunal noted that firstly in respect of these changes, the Claimant was informed that his quota would be reduced to redress the changes or his quota was in fact reduced. Secondly, the Claimant's resignation came five months into the sales year. The Respondent's sales plan worked on the assumption that 40% of annual sales were to be achieved in the final quarter (pages 92 and 184). It was the Tribunal's view that at the date of his resignation, the Claimant was simply not in a position to properly assess whether or not he was in a position to meet his targets that year especially given such discussions were ongoing at the time of his resignation and the Respondent had made significant efforts to accommodate the Claimant.

53 With regard to the Claimant's assertion that the recruitment process that appointed Mr Lima to his position was unfair, the Tribunal has noted in the facts section of judgment it could find no evidence that the recruitment process was a sham. The documentation referred to by the Respondent showed that an interview process had been set and the Claimant was one of four individuals that were interviewed for the position.

54 In so far as the removal of the Utility products, the Tribunal accepted the evidence of the Respondent in this regard. Mr Lima removed Utility in discussions with the Claimant who was frustrated in carrying a significant quota for a product that had no sales in 2017 and indeed at the end of 2018 also had no sales. This removal was to the advantage of the Claimant. In essence the effect of removal of Utility from the Claimant was that his sales quota was substantially reduced and he was in a position to receive a fixed bonus outside the ordinary sales plan structure which Mr Lima promised to him. This was not conduct which would be said to seriously damage or destroy the implied term of trust and confidence.

55 Mr Lima's meeting with Mr Murray on 25 April 2018 was entirely proper. Mr Lima was the Claimant's manager and the Claimant was Mr Murray's manager. Mr Lima had ultimate responsibility for Mr Murray. Mr Lima had at that stage spoken to the Claimant about his plans concerning Mr Murray's role in the organisation. Mr Lima explained in cross-examination that he did not hide from the Claimant the fact that he was having conversations about changes to the structure and identity of teams. The Claimant had been informed of the potential clients by Mr Murray. With this in mind the conduct complained of could not be said to be conduct which could destroy or damage trust and confidence.

56 With regard to addressing the Claimant's concerns, the Tribunal accepted the evidence of the Respondent that the Claimant's concerns were discussed frequently in the Claimant's weekly one-to-one meetings with Mr Lima. The Claimant himself described them as "very regular" and the chronology of events leading up to the Claimant's resignation illustrated the steps that the Respondent was taking to address the Claimant's concerns.

57 Finally with regard to the movement in Mr Murray's team, Mr Lima told the Claimant about this proposal on 5 April. The Claimant acknowledged that Mr Lima informed him he would no longer have to carry Mr Murray's quota and the Claimant accepted that he was not the only person affected by the broader reorganisation that Mr Murray's move formed a part of. That reorganisation was discussed at page 188. The Claimant accepted that Mr Lima and Mr Neve were the managers and that it was ultimately their decision as to who took on what responsibility within the organisation.

58 In conclusion, for the reasons stated above, the Claimant's claim for unfair constructive dismissal is dismissed. The conduct of the Respondent did not impinge on the relationship in the sense that objectively looked at it destroyed or seriously damaged the degree of trust and confidence that the Claimant is reasonably entitled to have in the Respondent.

Employment Judge Hallen

8 May 2019