Case Number: 3352829/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs A Dopson	v	Stag Publications Limited

Heard at: Watford (via CVP) **On**: 1-4, 7 and (in private) 8 June and 6 July 2021

Before: Employment Judge Hyams **Members:** Mrs J Hancock
Mr C Surrey

Appearances:

For the claimant: Ms Susan Chan, of counsel
For the respondents: Mr Jibreel Tramboo, of counsel

UNANIMOUS RESERVED LIABILITY JUDGMENT

1. The claimant was not dismissed unfairly. She resigned and was not dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996. Accordingly, the claimant's claim of unfair dismissal is dismissed.

2. The claimant's claim of wrongful dismissal accordingly also does not succeed and is dismissed.

3. The claimant's claims of discrimination against her because of her age do not succeed and are accordingly dismissed.

REASONS

Introduction

The history of the claims

1 In these proceedings, the claimant claims that she was dismissed by the respondent within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996") as a result of conduct which constituted a breach of the implied term of trust and confidence (which is the obligation not, without reasonable and proper cause, to act in a way which is likely seriously to damage

or to destroy the relationship of trust and confidence that exists, or should exist, between employer and employee as employer and employee) and that that dismissal was unfair within the meaning of section 98 of that Act. The claimant also claims that she was, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA 2010"), discriminated against because of her age.

2 The claim form was presented on 20 December 2017. The claimant commenced the early conciliation period on 9 October 2017 and ACAS issued the early conciliation certificate on 23 November 2017. Accordingly, the claim of age discrimination was in time in respect of things done by the respondent on or after 10 July 2017, but out of time in respect of things done earlier than then unless we concluded that it was just and equitable to extend time.

3 The hearing before us was the second time when oral evidence was heard in the case. That occurred in the following circumstances.

4 There was a preliminary hearing before Employment Judge ("EJ") Bedeau on 22 May 2018, after which the case management summary and orders at pages 51-57, i.e. pages 51-57 of the hearing bundle, were issued. That document was sent to the parties on 24 June 2018. The claim was then the subject of a hearing before an employment tribunal chaired by EJ Henry on Monday 18 to Friday 22 February 2019. Oral evidence was heard and submissions were made but subsequently EJ Henry became unwell and unable to complete deliberations with his colleagues. As a result, on 6 August 2020 Regional Employment Judge Foxwell directed that the case be reheard by a freshly-constituted tribunal and on 11 September 2020 at a hearing before EJ Loy, the case was listed to be heard on 1-7 June 2021 by a freshly-constituted tribunal. We were that tribunal. Both counsel who appeared before us were new to the case, i.e. they had not appeared at the hearing before EJ Henry.

Clarification of the issues

5 After we had read the witness statements and such of the papers in the hearing bundle put before us as we were able to read before 2pm on 1 June 2021, we asked Ms Chan to state the claimant's case with more particularity than it had before then been stated. We did do so by referring to the issues as they had been stated by EJ Bedeau in paragraphs 5-16 of his case management summary at pages 52-54. Ms Chan then, overnight, after taking instructions from the claimant, produced a commendably apt and informative document stating the claimant's claims in more detail. In addition, Ms Chan did not press certain parts of the claim as stated by EJ Bedeau in his list of issues. Those were the claims of wrongful conduct stated in paragraphs 5.5 to 5.7 on page 52, and part of paragraph 8.3 on page 53. Paragraph 5.5. complained of the respondent "removing administrative support In the form of a Personal Assistant". Paragraphs 5.6 and 5.7 were complaints about the failure, which the respondent agreed was mistaken, by the respondent to deduct national insurance contributions from the claimant's pay after the claimant attained the age of 60.

Paragraph 8.3 was originally to the effect that the matters referred to in paragraphs 5.1 to 5.10 inclusive constituted age discrimination. The claimant now relied in that regard only on the alleged "[removal of] client accounts from her and otherwise diluting her sales role", which was the subject of paragraph 5.4 (which we have set out in paragraph 8.4 below). Thus, it was no longer the claimant's case that it was age discrimination to do the things referred to in the other subparagraphs of paragraph 5.

6 In what follows, we first set out what the claimant's case was as a result of those clarifications, in some respects summarising the details of the claim as particularised by Ms Chan. We then refer to the evidence which we heard, after which we state our findings of fact in relation to the claims, after which we refer to a considerable body of case law concerning constructive dismissal. We then state our conclusions in the form of the results of the application of those principles to the facts as found by us. Finally, we state our conclusions on the claim of age discrimination.

The claims

Introduction; the respondent's business and the claimant's part in it at the time of her resignation

7 The respondent is now (as stated by Mr Luke Wikner, to whose evidence we refer further below) "a publishing, media and events company". The claimant commenced employment with the respondent on 25 March 2002 as "Advertising Manager". At the time, the respondent had, according to Mr Jerry Ramsdale (to whose evidence in this regard and otherwise we also return below), around 4 employees. At the time of her resignation, the claimant was the respondent's Sales Director. She was given that role in the second half of 2002.

Constructive unfair dismissal

8 It is the claimant's case that she was dismissed constructively by reason of the doing by the respondent of the following things, which it was claimed were all wrongful in the sense that they were capable of forming part of a series of acts or omissions which, taken together, constituted a breach of the implied term of trust and confidence:

8.1 "Failing to honour in good faith, both the letter and the spirit" of an agreement relating to bonuses; the letter was at page 70 and was dated 24 September 2012. We set out the terms of that letter in paragraph 25 below. The bonus was stated in that letter to be calculable by reference to the respondent's annual profits. The claimant relied in this part of her claim on the custom and practice that had developed in the calculation of the annual bonuses since 24 September 2012. It is her case that the inclusion in the profit calculation of costs associated with the establishment and development of two publications, *Torque-Expo Magazine* ("*Torque*") and

Cycling Industry News ("*Cycling*") was wrong. It is in addition alleged that Mr Ramsdale wrongly neither informed nor consulted the claimant about that inclusion.

8.2 "Manipulating the company accounts to understate profits." The claimed wrongful manipulation included (1) the inclusion of the income and costs of *Torque* and *Cycling* and (2) the fact that Mr Ramsdale "awarded himself a £60k pension contribution".

8.3 "Changing the terms of commission payments from payment on invoice to payment on receipt and doing so without consultation or consent by the claimant."

8.4 "Removing client accounts and otherwise diluting [the claimant's] sales role".

8.5 Failing to deal adequately with the complaints which the claimant stated in the email dated 26 May 2017 at pages 252-258.

8.6 "Presenting altered terms of agreement in the form of a written employment contract in August 2017 (309-316)".

8.7 Mr Ramsdale acting in a hostile manner towards the claimant during meetings occurring in and after November 2016.

Age discrimination

9 The claimant claimed, separately, that the respondent had discriminated against her because of her age (and, to the extent that the claim was made outside the primary time limit of three months extended if at all by any early conciliation period, that it was just and equitable to extend time for making the claim) by

9.1 Mr Ramsdale telling Mr Darren Brett (to whom we refer further below) during the period around Christmas 2016 that the claimant would be retiring soon and asking Mr Brett whether he would like to take over responsibility for some of the accounts which the claimant managed (those relating to light commercial vehicles);

9.2 in May 2017 publishing a review of a car in a magazine in which the claimant was referred to as a "grandmother"; and

9.3 doing the things alleged in paragraph 8.4 above.

Breach contract/unlawful deduction of wages

10 The claimant claimed in addition unpaid commission payments and bonus payments calculated in various ways. The respondent accepted that the claimant was owed some commission payments (but by the end of the hearing

not very much at all), but it denied that the claimant was owed anything by way of a bonus payment.

11 The claimant also claimed notice pay, since she resigned with immediate effect. She was going to be entitled to such pay only if her claim of constructive dismissal succeeded.

12 The claimant also claimed unpaid accrued holiday pay. By the end of the hearing, the parties agreed that the claimant was owed 17.5 days' accrued holiday pay. The proper way in which to calculate that pay was not agreed, however, and we saw from the document that Mr Tramboo sent us during closing submissions concerning this and related matters that the respondent had calculated the claimant's holiday pay by reference to her basic salary only.

13 By the end of the hearing, the parties agreed that the claimant had been overpaid in that the respondent had mistakenly not deducted from her pay national insurance contributions in the sum of £12,137.49, and that the respondent was entitled to offset that sum against any sum to which the claimant was entitled by way of unpaid wages or damages for breach of contract.

The evidence which we heard

14 We heard oral evidence from the claimant on her own behalf and, on behalf of the respondent, from the following witnesses:

14.1 Mr Jerry Ramsdale, the respondent's Managing Director and the ultimate owner, with his wife, of all of the shares in the respondent;

14.2 Mr Luke Wikner, who was at all material times the respondent's Head of Production;

14.3 Ms Tina Watson, a professional graphic designer who has been employed by the respondent since 2007 as a Designer; and

14.4 Mr Alex Grant, who was the editor of the magazine which included the review of the car to which we refer in paragraph 9.2 above.

15 We had a bundle consisting of 880 pages (including a 10-page index) before us, and we read the documents in it to which we were referred. One additional document was put before us during the hearing.

16 Having heard that oral evidence and considered those documents, we made the following findings of fact.

Our findings of fact

The claimant's history before she started to work for the respondent

17 Before the claimant worked for the respondent, she worked, as she said in oral evidence, in "national press" jobs. She was married at a young age, and had two children before being divorced at the age of 22. She started training as an accountant, but after several years moved into sales. After a period of time, she became the managing director of a training company which was part of a publishing group. The company trained sales directors. The claimant then worked as the sales director for several passenger transport magazines such as one which was the equivalent of the Virgin Trains magazine in the United Kingdom, and an in-flight magazine. The claimant was then the sales director for several other press organisations. When the claimant joined the respondent she had no particular experience of the automotive press.

The respondent's business

18 The respondent's target readership at that time was the automotive trade. The respondent publishes *Fleet World* (concerning cars), *Van Fleet World* (which is self-explanatory) and *International Fleet World*. Later on, in the circumstances to which we refer below, the respondent started to publish *Torque* and *Cycling*. In 2013, the respondent organised the first of a short series of annual shows under the "Fleet World" banner. The respondent also publishes booklets for customers such as automotive manufacturers.

19 At all material times, the journals published by the respondent were what one might call free publications. That is to say, they were not paid for by the recipients by subscription or by buying any one or more issues. Rather, the journals were funded purely from revenue generated by advertising. Thus, all costs incurred in the publication of the journals were met from advertising revenue.

20 The Fleet World shows were, however, funded (either in part, or wholly) by automotive industry businesses paying to have a stand, i.e. to exhibit, at the shows. The applicable contractual terms included a requirement to pay in advance for the right to exhibit at the show.

The claimant's employment with the respondent up to November 2016

21 The claimant was initially, for at least the first four months of her employment with the respondent, employed as its Advertising Manager. Her job title changed in September 2002 to Sales Director when another person, Mr Chris Seaton, was employed as an automotive specialist with the job title of Sales Director and the claimant asked to have the same job title.

22 The claimant spent the first year of her employment, as she put it in cross-examination, "learning the automotive industry." By November 2016, the claimant was responsible for (and earned commission on) approximately 80% of the revenue of the respondent. As Mr Ramsdale put it in paragraph 3 of his witness statement (which was not challenged and which we accepted):

> "The company grew in personnel from when Anne [i.e. the claimant] started with around 4 people in 2002 to nearer 20 employees when she resigned in late 2017 (p.454). This made the business and its employees very exposed and extremely vulnerable, given that Anne alone was responsible for over 80% of the revenue."

The claimant's remuneration

23 When the claimant was first employed by the respondent, her remuneration consisted of a basic salary and an entitlement to commission. The details of the claim, at page 15, stated that the claimant was entitled to "10% of all sales made by [her]", but in cross-examination she accepted that when she started working for the respondent, commission was paid to her only when sales hit a particular target and apologised for not making that clear. Mr Wikner's unchallenged evidence was that that target was £30,000 per year, and we accordingly concluded that the claimant's initial remuneration was her basic salary plus commission of 10% of all sales above £30,000 per year.

24 In 2009, as shown in the document at page 610, the claimant's basic salary increased from £30,000 per year to £50,000 per year, and her commission entitlement changed to being 5% on all sales, and not just those above any particular target. The claimant said (and we accepted) that that was a result of a new recruit refusing to join on a basic salary of less than £40,000 and him being guaranteed in addition £2,000 per month for three months when he joined.

25 In 2012, the then Managing Director of the respondent, Mr Ross Durkin, and Mr Ramsdale (who was at that time, with Mr Durkin, the joint owner of the shares of the respondent) planned to give the claimant shares in the respondent. That was because (the claimant told us, and we accepted) Mr Durkin was keen to sell the business, and he wanted the claimant to build it up in order to attract a higher price for it. The claimant and Mr Durkin had a meeting with the respondent's accountants, and the accountants suggested instead that the claimant was given a profit share bonus. That led to the letter dated 24 September 2012 at page 70, which was written in the name (i.e. using the letter-heading) of the respondent and signed by Mr Durkin as "Managing Director". The body of the letter was in these terms (and these terms only):

> "Further to our recent discussions I am writing to formalise our agreement that in the event of Stag Publications Ltd being sold to a third-party [sic] – either wholly or in part – we will give you a share of the proceeds equivalent to five per cent of the sale price after taxes have been paid.

> This agreement shall continue in force while you remain an employee of the company and will terminate immediately should you decide to leave the company.
>
> While the company remains in our ownership you will be entitled to an annual bonus equivalent to five per cent of annual profits, before tax."

26 From 2012 to 2015, the respondent's accounting year started on 1 January and ended on 31 December. The claimant's annual bonus of 5% on pre-tax profits was calculated initially towards the end of the year, so that the claimant received an initial payment, which was the majority of the expected 5% bonus, alongside her December salary and commission payments. She then received the balance of the 5% in the following March, when the respondent's annual accounts had been finalised.

The events which led to the claimant's resignation

27 On 15 January 2015, Mr Durkin retired from his position as Managing Director of the respondent and Mr Ramsdale took his place as Managing Director. Mr Ramsdale also bought Mr Durkin's shares in the respondent.

28 At the time of her resignation from her employment with the respondent, the claimant was aged 62. As a result of the Sage accounting software used by the respondent, the respondent did not deduct and pay to Her Majesty's Revenue and Customs national insurance contributions ("NICs") for the claimant after the claimant had attained the age of 60. The claimant was (as recorded by her in her appeal against the dismissal of her grievance to which we refer further below: see page 349) aware at the time that NICs were no longer being deducted and queried it, but was told that if Sage said that NICs were no longer to be deducted then they did not need to be deducted. Sage was in fact in error in that regard. As we record in paragraph 5 above, that error was by the start of the hearing on Wednesday 2 June 2021 no longer relied on by the claimant as part of a series of acts or omissions which were claimed to be a breach of the implied term of trust and confidence, so we say no more about it in that regard. It is, however, relevant to the claim of unpaid wages.

29 The respondent made a profit in 2015, and the claimant was paid 5% of the profits calculated by reference to the calendar year of 2015, by being paid the first payment in December and the second payment in March 2016, as in previous years. However, in the first four months of 2016, the respondent made a loss of approximately £80,000. On 26 August 2016, the respondent formally changed its accounting period for 2015 by extending it to 30 April 2016. That was recorded in the document taken from the Companies House website at page 638.

30 Mr Ramsdale's witness statement explained the situation in that regard in the following manner (it was paragraph 5 of his statement):

> "Anne received her 5% bonus for the 2015/16 tax year as per the 2012 letter (p.70) in December 2015 (p.98), with the balance to her in March 2016 (p.96). The Company's financial year was then extended to April 2016, meaning that Anne would receive her next bonus in April 2017 if the business made a profit. The accounts Anne referenced around October 2016 (p.16) were showing an interim profit but this is because the financial year started with the profitable Fleet Show in May 2016 – which was not even in existence at the time of the 2012 letter – and did not factor in the heavy losses the business sustained from late 2015 to April 2016. Therefore, there was no manipulation and the only thing that affected Anne's capacity to earn her bonus was the company's sales performance. In fact, the business made significant losses between November 2015 - April 2016. If the financial year had started in January 2016, the net result would be the same in terms of her bonus."

31 We accepted that evidence of Mr Ramsdale. We record here that it was not contended by or on behalf of the claimant that the final sentence of that paragraph was incorrect factually. It was, however, contended on behalf of the claimant that "[t]he accounts produced by R since [2016, when the profit and loss sheets showed an interim profit] are wildly varying despite being for the same period", and that as a result of that factor, the accounts were manipulated. However, we concluded that the critical issue here was whether or not the final, audited, accounts for the respondent showed a net profit or a loss. The claimant did not contend that the final figures did not show a loss, or that that loss was the result of a manipulation by the accountants of any material which they were given by the respondent.

32 What was very much in dispute was the extent to which the claimant was aware of the change in the respondent's accounting period and the extent to which the respondent was in financial difficulty. The claimant did not refer in her witness statement to the fact that the respondent had made losses in the first part of 2016. In paragraph 6 of his witness statement, Mr Ramsdale said this:

> "Anne, as our Sales Director, was well aware of the vulnerability of the business. We had conversations about my concerns of how exposed the business would be if anything were to happen to Anne or if she was not able to work for whatever reason, and the damage it would inflict on the business – even though she was determined that nothing needed to change in terms of her role – and the current situation is precisely the scenario that the business was trying to avoid."

33 We did not understand the first sentence of that passage to be challenged, but in any event, having heard and seen the parties give evidence, we accepted Mr Ramsdale's evidence in the whole of that passage.

34 As for the claimant's knowledge of the change in the accounting period (and therefore the reason for it, namely the losses sustained in the first part of 2016), there was a major conflict of evidence. In paragraph 30 of her witness statement, the claimant said this:

> "In February 2017, I learnt that SPL's [i.e. the respondent's] financial year had been changed from December to April. I felt hurt that JR had not informed me about this change even though part of my contractual entitlement was linked to SPL's annual accounts. JR did not even inform me when I raised profit share issues in November 2016. I believe that a reasonable employer would have informed me of such change."

35 In paragraph 7 of the Grounds of Claim (at page 16), this was said:

> "From December 2016, my annual bonus share was reduced to zero as the Respondent stated that they had not made any profits. The Respondent's financial year used to end in December. Around December 2016, I learnt that the Respondent had changed its financial year to April 2017. As a result of the change to the Respondent's financial year payment of my profit share was also delayed. In the past I would have normally received part payment of my profit share with my December salary and the remainder was paid in March after the Respondent's accounts had been audited. I understand that in December 2016, the Respondent's profits were approximately £187,000. I was surprised that the financial year had been changed but no information had been filtered down in advance to me although this would have impacted on my contractual entitlement."

36 During the course of the hearing, we pointed out that at page 253, in the email dated 26 May 2017 which the respondent (as we describe below) treated as a formal grievance but which was not stated to be such a formal grievance, the claimant said this:

> "I said in December my profit share depends on the overall company profitability and not just the revenue I generate so I have always been conscious of this fact. But by taking various parts of my role away it does indeed impact on my ability to earn and dilute my role, as I have pointed this out to you on numerous occasions, only for you to say that it's your company and you can do what you want.
>
> When I pointed out that employment law states that you can't refuse to pay my profit share and I would take advice, you shouted at me and told me to leave the office and take advice do what you want.
>
> The next day having taken advice, I asked you for a copy of our grievance procedures, and said that my Union Representative had told me to ask for a copy, to which you replied we don't have one and we don't have contracts of

> employment either. I said that they should be available to everyone and you replied you knew that already.
>
> I pointed out that I had a letter stating that I was entitled to 5% of the annual profit and to five per cent of the sale price after taxes have been paid if the company is ever sold, and you asked me for a copy, which I gave you.
>
> You then said that you didn't think that there would be any profit left at the end of the year, and I said that we were showing approximately £190,000 profit in our October accounts with November, December to be added and as you had extended the tax year, January, February and March too.
>
> As you and I are both aware, both Darren and Claire receive 10% on everything they sell and mine was reduced to reflect the profit share and potential sale of the company, had I continued on my previous terms I would have earned far more than I have, to which you replied that you wanted to earn more before you paid me anymore [sic] money.
>
> You are always telling us that you are a sales person, and sales people are motivated by money, but your actions are not motivating and serve only to demotivate, you should be delighted with how much commission I earn as for every 5% I earn the company receives 95%."

37 While that passage contained a major error in the form of the assertion (in the penultimate paragraph) that the claimant had given up the right to be paid 10% commission on all sales "to reflect the profit share" (see paragraphs 23-25 above), it was consistent with paragraph 7 of the grounds of claim in that it showed (reading the words of the pre-penultimate paragraph both in isolation and against the rest of the passage) that the claimant was aware at the latest by December 2016 of the change in the extension of the respondent's accounting period so that it ended on 30 April and not 31 December.

38 In fact, given the passage in paragraphs 21-41 of the claimant's witness statement, the passage which we have set out in paragraph 36 above was probably inaccurate in so far as it implied that the claimant first spoke to Mr Ramsdale about the likely amount of her profit share payment in December 2016. That is because that passage started in paragraph 21 with these words:

> "Around mid-November 2016, I asked JR about my profit share bonus and what I would be paid in my December salary."

39 We saw too that the claimant had emailed her trade union representative on 3 December 2016 (pages 198-199), starting the email by apologising for her delay in sending the email and stating that the reason for the delay was that "the last couple of weeks have been hectic due to family illness." The rest of the email was, so far as material, in these terms:

"As discussed in our telephone conversation, I have attached a copy of the letter confirming my profit share, and copies of wage slips showing the bonus payments in previous years.

I also asked for a copy of our grievance procedures, and said that my Union Representative had told me to ask for a copy, to which my boss replied we don't have one and we don't have contracts of employment either.

I said that they should be available to everyone and he replied that he knew that already.

He went on to say that as I had a letter that he would pay me, he then asked for a copy and I gave it to him. He then said that he didn't think that there would be any profit at the end of the year, and I said that we were showing approximately £190,000 profit in our October accounts with November and December to be added. He didn't reply, but went on to say that I had no need to go to my union, as he was in a bad mood that day and did not really mean for me to take any advice from anyone.

A percentage of my profit share is normally in my December salary with the balance payable in March, I appreciate that our profits are not as good as in previous years but that is the economic climate we are in."

40 At 19:32 on 7 June 2021, Ms Chan sent an email to our clerk for our urgent attention. The material part of the email was in these terms:

"Please note that there is one point that arose during closing submissions which I need to correct. My attention was drawn by the tribunal to p.253, where it seemed that a passage from the Claimant's grievance email appeared to show that the Claimant knew in November 2016 that the 'year end' had changed. I conceded that this email did appear to show that C has known of the change earlier than February 2017 (the date that she emailed her union rep saying she had found out about the change in accounting year).

However, my client's instructions are that my impression was not correct. The Claimant was not aware until Feb 2017 that the accounting year had changed, but because the grievance email was written St [sic; presumably "at"] the later date of May 2017, she was amalgamating information she had learned since Nov/Dec 2016, when she wrote in her May 2017 grievance email about months which should be taken into account when calculating the profit bonus.

My apologies for incorrectly conceding a point without express knowledge/instructions from my client. This is one of the hazards of having a limited ability to communicate during CVP hearings."

41 Mr Tramboo had responded at 20:52, in the following terms:

> "I appreciate the email of Ms Chan in respect of the corrections and naturally the nature of the email draws my short rebuttal. It is my assertion that the prose of the email at pg253 is entirely self-explanatory without any need for any further clarifications by the Claimant herself – I am unsure why the Claimant felt this clarification through Ms Chan was necessary at all. Further, pg16, GOC, paragraph 7 speaks for itself; at the very least, the Claimant cannot escape that she knew about the year-end change from as early as December 2016. Despite this, the Respondent is emphatic to state that the Claimant was aware of the change of year preceding this date for the reasons already expressed at the Tribunal and in evidence."

42 In paragraph 4 of his witness statement, which he signed on 13 February 2019, Mr Ramsdale said this:

> "During late 2015 and into 2016, Stag Publications Ltd experienced a significant drop-off in sales, with big losses at the end of the year and extremely worrying cashflow due to low forecasted bookings heading into 2016. This had a significant impact on the business and it was decided with our chartered accountants, Lovetts, to extend the financial year-end (p.16). This was not a personal decision – it was made with the best interests of the business in mind and was intended to minimise our Corporation Tax exposure and the ensuing impact on cash-flow (p.38). Anne was fully aware of this decision at the time and for her to state otherwise is factually incorrect (p.16). The effect of this damaging period was so significant that from this point in late 2015 to now, the company has not recovered and is only just viable (p.549)."

43 The claimant was, we were told (and we accepted), the only member of the respondent's staff other than Mr Ramsdale who was given monthly profit and loss statements. We concluded that that was (1) because of her position as a critical and senior member of the respondent's staff on whose performance the whole of the respondent's business depended greatly and (2) so that she could see how well or otherwise the advertising sales for which she was responsible and on which she earned commission were going, from month to month. In fact, the claimant received by way of remuneration more than any other member of the respondent's staff (including Mr Ramsdale) during 2016.

44 We found it inconceivable that the claimant did not know during 2016 of (1) the losses sustained by the respondent's business in the first part of 2016, (2) the extension of the accounting period of 1 January 2015 to 31 December 2015 to 30 April 2016, and (3) the reasons for that extension.

45 In fact, if the claimant had not known of that extension and those losses during 2016, then, we inferred with one reservation, she would have had no particular reason to ask Mr Ramsdale in November 2016 in the circumstances to which we

turn in the next section below, what her profit share bonus payment for December 2016 was likely to be. That is because she would have been able to predict at least roughly what it would be from the monthly profit and loss figures which she received. Our reservation in stating that is that it was her case that those figures had varied in inexplicable ways in the second half of 2016, which was a potential justification for asking Mr Ramsdale what her profit share payment would be.

46 In any event, we accepted Mr Ramsdale's evidence in paragraph 4 of his witness statement, which we have set out in paragraph 42 above and preferred it to the claimant's evidence in paragraph 30 of her witness statement, which we have set out in paragraph 34 above. We did so in the circumstances described by us in the preceding paragraphs above, and on the balance of probabilities given those circumstances.

47 We therefore concluded that the claimant knew at the very latest by December 2016 (and probably significantly earlier than then) about the extension of the respondent's accounting period to 30 April. We concluded that she also knew during 2016 of the losses of the respondent during the first four months of 2016 and that she did so at the time that the losses were being sustained because she was informed on a monthly basis of the advertising sales revenue received by the respondent on the respondent's automotive publications, for whose advertising sales she was responsible and which formed approximately 80% of the respondent's revenue. The claimant's knowledge that the respondent was no longer as profitable as it had been is shown by the final part of her email of 3 December 2016 set out in paragraph 39 above.

The manner in which the profits of the respondent were calculated in the period from 1 May 2016 to 30 April 2017

48 Paragraphs 36-41 of the claimant's witness statement were to the effect that her profit share should have been calculated only by reference to the automotive publications and related activities of the respondent, and that the profit share should not have been calculated by taking into account the costs and revenue associated with *Torque* and *Cycling*. Paragraph 36 was in these terms:

> "My profit share bonus was always based on Fleet World Group and not Torque or Cycling Industry News as they were not in existence when in 2012, I agreed to the changes to my commission structure. SPL dealt with Fleet related products and this was not an area of work that SPL had contemplated expanding to when I had agreed to the changes to my commission structure."

49 We pause to comment that the profit share bonus conferred on the claimant by the letter of 24 September 2012 set out in paragraph 25 above was <u>not</u> conferred on her by way of a quid pro quo for her giving up the right to earn

commission: her commission payments remained at the same level as they had been since 2009 after she received that right to a profit share bonus.

50 In addition, the letter at page 70 was plainly written in the name of the respondent and from the respondent's business address with all of the respondent's company information given at the foot of the page. It is true that the letter had "FleetWorld", "Van FleetWorld" and "International FleetWorld" at the top right hand corner of the letter (in the same font, typeface and graphics as used in those publications), but it was in our view capable of being read only as a promise to pay 5% of the profits of the respondent as a whole, no matter what businesses the respondent operated.

51 Indeed, we concluded that the claimant had herself recognised that fact when she wrote the email at pages 252-258 which the respondent treated as a formal grievance as we describe below. We say that because the substantive part of the email started (on page 252) with this paragraph:

> "As we have discussed and agreed over the years, the business does need to change and develop to meet current market forces and also to develop into potential new areas."

52 In addition, the first sentence of the first full paragraph on the next page, page 253, was in these terms (which for the sake of convenience we now repeat; they are set out in the passage in full in paragraph 36 above):

> "I said in December my profit share depends on the overall company profitability and not just the revenue I generate so I have always been conscious of this fact."

53 Those things suggested that the claimant did not in fact understand her profit-related bonus to be payable only on automotive-related advertising, but in any event, there was no evidence before us about the time when the costs of *Torque* and *Cycling* started to be incurred and revenue relating to them started to be received by the respondent. The claimant referred in paragraph 37 of her witness statement to Mr Ramsdale establishing "another company called Torque Magazine and Expo Limited" in 2015, and that it was "only during the grievance process" that she "found out" from Ms Petrucci (who determined that grievance as we describe in paragraph 95 onwards below) "that Torque and Cycling Industry expenses were also under [the respondent]".

54 Mr Ramsdale accepted that he had not stated in terms to the claimant before November 2016 that the costs of *Torque* and *Cycling* would be taken into account in calculating the respondent's profits and therefore the claimant's profit-related bonus.

55 As indicated at the end of paragraph 31 above, we did not understand the claimant to be asserting that the profit calculations made by the respondent's

accountants were dishonestly made by those accountants. Certainly there was no evidence before us to justify such an assertion.

56 The only thing that we understood the claimant to be asserting was wrong about the manner of the calculation of those profits as far as the calculation of the claimant's profit share bonus was concerned, assuming (contrary to the claimant's case) that the costs and revenue of *Torque* and *Cycling* were correctly included in that calculation, was that (as stated in paragraph 8.3 above, the content of which Ms Chan repeated in her honed list of the issues) Mr Ramsdale "awarded himself a £60k pension contribution". Mr Ramsdale's evidence was that he had done that for tax purposes, and that he had as a result drawn a smaller salary than he would otherwise have done in that accounting period (he in fact drew a salary of £40,000). We accepted that evidence of Mr Ramsdale.

The manner in which the claimant's commission payments were paid

57 The claimant's commission payments were usually calculated by reference to the sums stated on invoices sent for advertisements. Generally, as far as we could see from the evidence before us, those invoices were sent in the month of the publication of the advertisements to which they related. There were exceptions, but that was not important as far as we were concerned. That is because the claimant claimed that what was done wrongly, and which she said was part of conduct which, taken together, constituted a breach of the implied term of trust and confidence, was that in relation to the Fleet World show of May 2017, Mr Ramsdale said that the claimant should not be paid commission on invoices which were sent for stands at that show which had not been paid for in advance of the show, but that she should instead be paid commission only on the receipt by the respondent of payments in respect of those invoices (so that if the recipient of an invoice negotiated a lower payment, or did not pay anything at all, then the claimant's commission was to be calculated by that which the respondent actually received).

58 Mr Ramsdale's evidence in that regard (which was not challenged and in any event which we accepted) was that before 2017, all stands were paid for in advance by exhibitors, and it was only in 2017 that any exhibitor was permitted (on whose authority it was not said) to attend and have a stand at the show without having paid for it in advance. Mr Ramsdale said that the reason for requiring payment in advance was that exhibitors might later allege that they had not got what they wanted from the show and then seek to avoid paying some or all of the invoice sent to them for their stand. That had happened in 2017, he said (and the claimant accepted).

59 In addition, the claimant accepted towards the end of the hearing, through Ms Chan, that she was entitled to commission only on sums actually received by the respondent, so she implicitly accepted that if she had been paid commission on invoices for stands at the 2017 show which had not been paid for in advance

and those stands were not subsequently paid for, then she would have had to repay that commission.

The matters discussed at the claimant's meetings with Mr Ramsdale from November 2016 onwards and the manner in which Mr Ramsdale conducted those meetings

The meetings of November and December 2016

The subject of the meetings

60 In paragraph 14 of her written closing submissions (for which we were very grateful, as we were for those of Mr Tramboo; both counsel presented their respective client's cases with skill and care and in a commendable manner), Ms Chan said this:

> "In mid-November 2016 C asked JR about her profit share bonus, as she had been expecting it at the end of the year. The account she had seen showed a profit of around £190k (284). This was not an unreasonable request: she was entitled to 5% of annual profits (70) and whilst the accounting year may have been changed in August 2016 (638), she was unaware of the change of year until February 2017 (195-197). C disputes that JR discussed this with her and although JR told the ET C sat 10 feet away, this was in a different office, as he confirmed, although he said the 'door was open'."

61 That paragraph caused the exchange which led to Ms Chan's email of 19:32 on 7 June 2021 which we have set out in paragraph 40 above. We have (in paragraph 47 above) stated our conclusion on the factual issue raised by Ms Chan in that email, and it was significant for the purpose of assessing the manner in which Mr Ramsdale and the claimant interacted in November 2016 and subsequently, as were the factors to which we refer in paragraphs 51-53 above.

The claimant's account given to her psychiatrist in June 2017 of the circumstances from December 2016 onwards

62 The claimant relied in Ms Chan's closing submissions on the content of letters sent by a psychiatrist whom she had consulted (privately, i.e. not via the National Health Service) during 2017. Those letters were at pages 596-606. The first one, at pages 596-598, was dated 8 June 2017 and commenced after two short introductory paragraphs:

> "Since December of last year, [the claimant] has been under considerable stress at work as a result of conflict with one of the firm's directors. As a consequence of the company being restructured, her role has been undermined, and despite making a very significant contribution to its

profitability she has been treated in such a way that has left her feeling totally under-valued."

The claimant's ability to deal with conflict

63 We concluded from the evidence of the respondent's witnesses and that of the claimant herself that the claimant was a strong person who was evidently well capable of standing up for herself.

What the claimant was aware of when she first approached Mr Ramsdale in November 2016, asking what she was likely to receive by way of profit-related bonus

64 The claimant accepted that she was aware of the *Torque* and *Cycling* divisions of the respondent's business, and that was realistic. She could hardly ignore them, as she worked in the same office as the sales people and the journalists who worked on *Torque* and *Cycling*. She was also, as we have concluded in paragraph 47 above, aware by then of the change of the respondent's accounting year and the financial difficulties that the respondent was facing as a result of the drop in turnover which Mr Ramsdale described in paragraph 4 of his witness statement, which we have set out in paragraph 42 above and which as stated in paragraph 46 above, we accepted.

65 We concluded as a result of those conclusions that the claimant was aware that Mr Ramsdale was thinking that the first part of her profit bonus of that year was not going to be paid until at the earliest April 2017.

Mr Ramsdale's request to see a copy of the letter dated 24 September 2012

66 We were at first surprised to hear that Mr Ramsdale had asked the claimant for a copy of the letter of 24 September 2012 at page 70. He accepted in oral evidence that he was at meetings with the claimant and Mr Durkin at which they discussed the proposed new profit-related bonus in 2012, but he said (and we accepted) that he had not himself been given a copy of the letter. He was, we concluded (and it was an inevitable conclusion), aware that during the previous year, the claimant was paid a profit-related bonus in December. Thus, he was aware that the claimant had an entitlement to profit-related pay, but he was not familiar with the terms of the letter stating that entitlement.

The manner in which the claimant approached Mr Ramsdale in November 2016 and asked him about her profit-related bonus

67 Given those factors, we concluded that the claimant approached Mr Ramsdale in November 2016 to ask him what her profit-related bonus was going to be in December 2016 knowing that she was raising a topic which he would find highly problematic. The fact that she contacted her trade union representative as soon as she could after that meeting as shown by her email of 3 December 2016

which we have set out in paragraph 39 above showed, we concluded, how important that meeting was for her.

68 In fact, we concluded that, in common with many people who excel in a sales role, the claimant's main motivation was money, and that at that point, in November 2016, she could see both that her commission entitlement was reduced and that she was unlikely to receive much, if any, profit-related pay. We add that the claimant's own experience of the respondent was that it had at times made little or no profit, as she herself described in paragraphs 6-8 of her witness statement, so it was not a novel situation as far as she was concerned.

69 We concluded too that the claimant's statements about the facts were on occasion fitted to suit the assertions in support of which they were made. We did so primarily because of the factors to which we refer in (1) paragraphs 23-25 and 37 above, and (2) paragraphs 40-47 above. Thus, we concluded that the claimant went to see Mr Ramsdale not with a simple inquiry but, rather, in a combative manner, knowing that by asserting that she should receive any profit-related pay in December 2016, she was going to be controversial. In addition, if and in so far as she was ignoring the impact of the start-up costs of *Torque* and *Cycling*, then she was also going to be controversial, and she knew that too.

70 Furthermore, whether or not the claimant was at fault in regard to the loss of turnover (which was about £600,000), as Sales Director she was in one sense responsible for it. In fact, at that time many manufacturers' advertising budgets were reduced, so that the market was much more difficult than it had been previously. In any event, even though the claimant would have been entitled to a profit-related bonus if a profit had been made by the respondent, the fact that the respondent's revenue was significantly reduced added a piquancy to the situation.

Mr Ramsdale's responses

71 To the extent that Mr Ramsdale responded in his first meeting with the claimant of November 2016 about which the claimant complained in a way that could be regarded as being to any extent hostile (and we accepted that his responses to what the claimant said were to an extent hostile), then it was, we concluded, the result of the manner in which the claimant approached him on that day and what she said to him then. She knew what she was going to say, and was fore-armed. He did not know what she was going to say, and was therefore forced to think quickly and defensively when she asserted an entitlement to receive profit-related pay in December 2016. To the extent that he was hostile in his responses to the claimant on that day, he was, we concluded, hostile to the claimant's assertions.

72 For the first time in the proceedings the claimant said (when giving oral evidence) that Mr Ramsdale had said to her in one of his meetings with her of November or December 2016 when she said that she would take legal advice:

"Fuck off, do what you want". Mr Ramsdale said that he did not think that he used those words or otherwise swore at the claimant during that meeting, but he could not remember whether or not he did so as it was such a long time before the hearing before us when it was alleged that he had sworn at the claimant (it was about four and a half years previously). He said that he might occasionally swear when speaking to the respondent's employees, but "just in speech". The claimant herself said that she might have sworn at work on occasion. Mr Ramsdale did say to the claimant, he told us: "If you wish to take advice, take it". If he had in fact used the alleged swear word in November or December 2016 to the claimant, then it was surprising that the claimant had only raised that fact during the second of the full hearings of her case. In those circumstances, we concluded on the balance of probabilities that Mr Ramsdale did not use the claimed swear word, but we also decided that if we had concluded that he had in fact used that word, then we would not have regarded it as being in itself wrongful in the context in which it was used. That is because if Mr Ramsdale did use that word then he did not intend it to be taken as being offensive, i.e. he did not use it in an intentionally offensive way. We came to that conclusion on the basis that it was not until the hearing before us contended by the claimant that he had used the word and that it was offensive to her.

73 When considering what happened in November and December 2016 between the claimant and Mr Ramsdale, we took into account the fact that an employer is not obliged to accept an employee's assertion of entitlement to pay at face value, and is entitled to be critical of such an assertion. That, we concluded, was all that happened in the meetings of November and December 2016 between the claimant and Mr Ramsdale when they were discussing the claimant's entitlement to a profit-related bonus at that time: Mr Ramsdale was critical of the claimant's assertion of such an entitlement, and he was entitled to be so. He was hostile to the assertion, but not to the claimant.

<u>The allocation of responsibility for automotive industry advertising sales</u>

74 Mr Ramsdale's witness statement did not deal in terms with the changes concerning responsibility for advertising accounts to which he sought to obtain the claimant's agreement. The closest that he got to doing so was in paragraph 7 of his witness statement, which was in these terms (which we accepted):

> 'I wanted her to be, and wish that she still was, heading the sales team, galvanising them to drive sales and bring the business back to profitability and importantly, viability. We had a considerable number of management meetings (eg p.405) to discuss how we could move forward. However, as nothing was ever agreed upon formally, nothing changed as in Anne's words, she "never agreed to it" (p.421), and I didn't want to force a change, so at no point before Anne went on sick leave, were any changes ratified that Anne did not agree with and there was no forced dilution of her sales role. The only reason that changes were implemented after she went off sick, was to keep the business going (p.462). It had to keep afloat. To

> reiterate, nothing changed before she went off sick. That is why there are no emails or paperwork to confirm any changes. It was an ongoing discussion on the direction the business needed to take, for which the ultimate responsibility rested with me (p.42).'

75 What happened was (we concluded) that Mr Ramsdale sought to obtain the claimant's agreement to the allocation of some of the accounts for which she was responsible to other members of staff. The first time that that happened to the claimant's knowledge was when Mr Darren Brett telephoned her during the Christmas period of 2016 when she was in Ireland and in a jokey way said to her that Mr Ramsdale had offered him (Mr Brett) part of the claimant's job. It was the claimant's evidence that Mr Brett had told her also that Mr Ramsdale had said that the claimant "would be retiring/leaving soon", and that he (Mr Ramsdale) thought that Mr Brett could be the claimant's successor.

76 Mr Ramsdale's evidence on this was that he had a conversation with Mr Brett, asking him whether he would be interested in taking over responsibility for the selling of advertising in relation to light commercial vehicles ("LCVs"). Mr Ramsdale thought that the conversation was confidential. He did not, he told us, say that he thought that the claimant might be leaving the respondent's employment soon, whether by retirement or otherwise. It is possible, we concluded, however, that Mr Ramsdale justified the conversation with Mr Brett to Mr Brett on the basis that the respondent's business would be very exposed if the claimant ceased to be employed by the respondent. In any event, we accepted Mr Ramsdale's evidence that he did not say to Mr Brett that he thought that the claimant would be retiring soon. We did so both because we found Mr Ramsdale to be an honest witness, doing his best to tell us the truth, and because it was consistent with the fact that he at first sought the claimant's agreement to any changes which he proposed and, when the claimant rejected them, did not impose them.

77 We also accepted Mr Ramsdale's evidence that the proportion of the respondent's revenue generated by advertising in relation to LCVs was low: the revenue which was in December 2016 being generated in that area was about £71,000 per year, and Mr Ramsdale genuinely thought that it could be increased. In fact, Mr Brett was not interested in taking over responsibility for LCV advertising, and so the responsibility remained with the claimant.

78 Mr Ramsdale also sought the claimant's agreement to relinquish responsibility for other areas of revenue. He did so in conjunction with Mr Steve Moody, who was employed at that time as the respondent's Publisher. On 27 April 2017, Mr Moody sent the email at page 201 to the claimant and Mr Ramsdale, starting it in this way:

> "Morning both

> I thought that was a really constructive meeting yesterday and there is the start of a plan for how we can move forward. The business isn't broken by any means but it clearly needs to develop from just about breaking even to making really good money and we have lots of great ideas, but not enough resources to make the most of them. So I thought [it] was best to just quickly precis where we got to yesterday.
>
> So here are the points that came out of it. Clearly there's still some more thought and development to go into it but for the benefit of clarity, what we discussed was this:".

79 Below that, Mr Moody set out a detailed plan for the development of the respondent's automotive business, with responsibility for some of the areas of advertising for which the claimant had previously been responsible allocated to other persons. It is not material precisely who those other persons were and what were those areas because in our view what Mr Moody set out in that email was a plan for the redistribution of responsibilities which was objectively justified and which it was in our view in no way wrongful to propose to the claimant. That was because we could not see how it could properly be said that the reallocation of some of the accounts for which the claimant was responsible to one or more other members of staff was in the circumstances likely seriously to damage or destroy the relationship of trust and confidence between the claimant and the respondent. In any event, if it had been so likely, then there was in our view reasonable and proper cause for it. Similarly, in proposing in the email that the claimant took responsibility for generating new business with "10-12 new" major advertising accounts and "10-12 new" major event and sponsorship accounts, all that Mr Moody was doing was proposing that the claimant made renewed efforts to do the things that she had in the past done so well and which were within the scope of her role as Sales Director.

80 Similarly, we scoured the passage in the claimant's witness statement describing what had happened before then in regard to the reallocation (or, it is more accurate to say, the proposed reallocation) of her sales responsibilities, i.e. the accounts which she had by hard work and abilities won and retained, to see whether what she described in that regard was in any way wrongful. That passage was paragraphs 42-61. We could also see nothing wrongful on the part of the respondent in the things which were described there, including in relation to the proposed allocation of responsibility for some accounts to Ms Yvonne Wright. That was for the following reasons.

80.1 As Mr Ramsdale said (and we accepted, not least on the balance of probabilities) the claimant would have additional time as a result of the relinquishing by her of any aspect of her sales responsibilities, and would therefore be in a good position to (and would be likely to) increase revenue in the areas which remained within her responsibility.

80.2 In response to a query from us, the claimant, after giving evidence, calculated that the respondent's proposed reallocation of responsibilities would have led to her losing responsibility for (and therefore commission on) sales revenue of approximately £495,000. She claimed that that was about 40% of sales revenue. In fact, the figures on page 534 showed that the amount was 27% of the respondent's sales revenue. If the calculation was done by taking the figure of £495,000 as a proportion of 80% of the respondent's revenue, then the percentage was 34%. Nevertheless, the respondent was not in our view obliged, merely because the claimant had generated the part of the respondent's business the responsibility for which she was now being asked to transfer to another person in the respondent's sales team, to leave that responsibility with the claimant. In our view there was nothing wrongful with forcing a change in that regard on the claimant. In our view that was not conduct which was likely seriously to damage the relationship of trust and confidence, but if it was such conduct then there was reasonable and proper cause for imposing the change. That is because the respondent was, in the circumstance that the claimant was responsible for approximately 80% of the respondent's business, in our view entitled (in the sense that it was entirely reasonable for it, in its own business interests, to do this) to allocate some responsibilities away from the claimant to other salespeople. In fact, if the respondent did that then it would risk losing the business, since the customer might prefer to do business only with the claimant, but that was a risk that the respondent was entitled to take.

80.3 Seeking to obtain the claimant's agreement to the proposed changes was all the more obviously in no way wrongful.

81 Returning to the sequence of events, the claimant appeared for the three weeks after receiving Mr Moody's email of 27 April 2017 at page 201 to be in agreement with the changes proposed in it.

82 On 4 May 2017, Mr Ramsdale sent the email at page 214 to the staff of the respondent, announcing that he had bought "the assets of Vans A- Z News web site, their dbase and their event Drive Vans A- Z." He continued:

> "With it comes Neil McIntee and Kevin Gregory who are both well-known and each have more than 20 years' experience working in LCV publishing.
>
> There is still a lot of planning to do, but Neil will remain editor of Vans A-Z and will also work across the VFW portfolio under Dan Gilkes and Kevin will be selling and responsible for sales in this sector.
>
> Vans A-Z have a strong following and readership with SME's and our strength is Fleet. So it gives us a unique offering to our clients and strengthen [sic] our presence in this sector.

> The official change will take place from June, but they will both be at the Fleet Show on a Vans A-Z stand promoting our whole LCV portfolio."

83 The claimant did not respond to that email overtly, either in writing or otherwise. That may well be because before sending the email, (as the claimant herself said in cross-examination) Mr Ramsdale had called her in Ireland and told her that he had bought A-Z and she had congratulated him on the purchase. In any event, in paragraphs 68 and 69 of her witness statement, the claimant described a meeting which took place on 16 May 2017 and said this about it:

> 'As everything I said was overruled, I decided to disagree and leave. I found the meeting humiliating but tried to remain professional and stated that there was nothing more that I could add so I was leaving. JR's parting comment to me as I stood up was "Oh yes you have a contract" for everyone to hear (pg. 257) I found this comment unwarranted and humiliating. It was clearly made because I had dared to challenge him in relation to my contract and contractual rights. The meeting continued without me and neither JR nor SM update [sic] me on what they had agreed. At the meeting I had clearly stated that I did not agree to pass revenue of £200,000 to YW.'

84 The reference to YW there was to Ms Wright. Mr Ramsdale did not accept that he had said "Oh yes you have a contract". We concluded that the meeting of that day was about the redistribution of responsibility for client accounts and that the claimant, feeling that she was not being listened to, in frustration walked out of the meeting and said something to that effect, to which Mr Ramsdale may well have responded with words to the effect that she had a contract which entitled her to 5% commission on all sales and 5% of the respondent's profits, and that she might therefore be thinking only of her own position.

85 On 19 May 2017, Mr Moody sent the email at page 223 to the claimant (and only the claimant). It was in the following terms:

> "Hi Anne
>
> Jerry [i.e. Mr Ramsdale] called to say you and he had a meeting this morning and you have said that you've changed your mind about all the changes we'd all agreed on in respect to Kevin [Gregory] and Yvonne [Wright] taking on parts of the Fleet World portfolio. I'm incredibly disappointed, and also embarrassed that I'm going to have to go to them and try and explain our U-turn. I'll be honest, I don't know where the business goes from here.
>
> Steve"

86 In paragraph 73 of her witness statement, the claimant said this:

> "Around 19 May 2017, JR told me that if I was not ready to give the accounts that I handled to others then he would have to start sacking people and it will be my fault (pg.257)."

87 Page 257 was a part of the claimant's email that the respondent treated as a grievance, so it was in evidential terms no more than a prior consistent statement made by the claimant. Mr Ramsdale accepted that he did say to the claimant words to the effect that if she did not agree to and give effect to the changes which he was proposing then the jobs of the staff of the respondent would be at risk and he would, for purely financial reasons, have to start making staff redundant.

88 Three days later, on 22 May 2017, the claimant started a period of sickness absence from which she never returned to work with the respondent and during which (on 4 October 2017, by the letter at pages 454-455) she resigned.

The article in *Fleet World* in which the claimant was referred to as a grandmother

89 In the May 2017 issue of *Fleet World* there was a review of a Renault Kadjar. It was written by Mr Moody and started:

> "So the Kadjar has gone back after a year of service on our fleet. In that time myself, Luke Wikner, Nat Middleton, Alex Grant and Anne Dopson have all spent a fair amount of time behind the wheel, which basically means it has had three spells as family transport, one as a ride for the bachelor about town and the other as comfy wheels for a grandmother. You can choose who applies to which category.
>
> But the point is this: it has performed very well in all roles, being stylish on the outside and functionally superb on the inside."

90 The article concluded: "Very impressed indeed, as we all were with the Kadjar."

The claimant's email of 26 May 2017 (i.e. the email which the respondent treated as a grievance)

<u>The way in which the claimant's grievance email was dealt with by the respondent</u>

91 The email which the respondent treated as a grievance at pages 252-258 referred to that article in the following passage, which was on pages 253-254:

> "By offering my LCV manufacturers to Darren on several occasions in December and telling him that you will pay him the same commission that I was on and that he could earn a lot of money, although he pointed out that his commission was higher than mine, I have felt that you are indeed looking for someone to take over my role and edge me out of the company, and I

> am sure that you will recall I have asked you that question openly on several occasions only for you say that I am the company's biggest asset and the greatest threat and you need to protect the company, and whilst I agree that you have to protect the company, you cannot ride roughshod over me because you are the sole owner and have no one else to answer too. [sic]
>
> Either Steve or yourself told Darren that I would be leaving or retiring soon, something I have never said or muted [sic; i.e. mooted], as I always say how much I love what I am doing and indeed have formed friendships with some of my clients over the years, you told Darren that you thought that he would be the ideal candidate to replace me with the LCV manufacturers. I think that Darren is great but I don't appreciate anyone telling anyone that I am retiring or leaving, that should be my choice if and when I choose to do so and only undermines my client relationships should my clients hear this from anyone else but me.
>
> Darren told me that he said to you that it was news to him as I hadn't said anything that led him to believe that and knowing me I could be there for another ten years.
>
> Steve's "Our Fleet" editorial in our May issue of Fleet World makes reference "to a bachelor around town or comfy wheels for a grandmother" doesn't exactly sit well at the moment, and apparently raised a laugh in the office, however even though I made a joke of it with Steve in light of people being told that I am leaving/retiring this can only highlight my age to everyone. I have no problem with being a grandma and I love and have been called Grandma since 1990 by marriage, and for the last seven years since Tom was born and delight in taking every opportunity to show his pictures to all and sundry, but I don't agree with what could be perceived as a dig at my age."

92 The email was otherwise (and was mainly) about the claimant's profit share, and the allocation of accounts to other staff. Other, subsidiary, matters were the subject of complaint, such as the claimant's complaint to which we refer in paragraphs 86 and 87 above. One passage in the email which was particularly material was this one, above the one which we have set out in the preceding paragraph above, but also on page 253:

> "I feel totally insulted and undermined when at every opportunity you are looking to pass my clients to Yvonne having nurtured them over the last fifteen plus years, and built successful relationships during the economic downturn and subsequent years, but your [sic; i.e. you're] more concerned that if she doesn't like what we offer her she may go and work for a competitor."

93 The claimant's email of 26 May 2017 at pages 252-258 was sent in response to one which Mr Ramsdale had sent two days earlier, on 24 May 2017, of which there was a copy at pages 258-259, which was in these terms:

> "Dear Anne
>
> I hope you are feeling better. I thought it was best to write to you to make clear a couple of things for your piece of mind and also to help your recovery. Firstly, the changes in the business we are trying to instigate are in no way intended to dilute your role, or impact your ability to earn, and there are no ulterior motives. As we have made very clear, you are very important to the business, and I hope that will continue to be the case for a long time.
>
> But it is clear and has been for some time that we need to make structural changes, for the good of the business and all of our employees, to ensure that the vast majority of our commercial operation is not dependent on one person, and that we give the business every opportunity to grow and become profitable again so that everyone who works for us can share in the success.
>
> Your illness have [sic] served to underline this, because without you we come to a full stop commercially in many areas, and as the owner of the business it would be remiss of me to not plan and find a way to ensure that it continues to operate smoothly, no matter who from the senior team is missing. Also, as has been said on many occasions, you bring in a huge amount of revenue and are extremely effective and you don't, and we don't, want to lose that. We just need to find new revenues streams off the back of that foundation, and that is where bringing in new sales people to add value would be useful.
>
> So I hope once you have rested and are back, we can find a way forward which fulfils this to the benefit of all of us."

94 Mr Ramsdale responded to the claimant's email of 26 May 2017 at pages 252-258 on the same day, just under two hours after the email was sent. He responded by saying, in the email at the top of page 252, so far as relevant:

> "Thank you very much for your email. Having read it, I understand that there are lots of issues to resolve and so I'm treating this as a formal grievance. I will endeavour to engage the services of an independent external HR consultant to handle your grievance as I am obviously involved quite heavily with the issues.
>
> As soon as I manage to appoint someone, you will be contacted about this further."

95 In paragraph 9 of his witness statement, Mr Wikner described what happened in regard to the grievance. Having referred to the claimant's email at pages 252-258 as "surprising", he said this:

> "Jerry, having sought legal advice, appointed independent HR professional Elizabeth Babafemi Petrucci to handle Anne's Grievance and I recall Elizabeth coming into the office to speak to Jerry. I was also asked by Elizabeth to clarify some elements of Anne's Grievance email. Jerry stated to Elizabeth in the meeting that, to avoid any office conjecture and speculation, we would not be telling anyone in the company about Anne's email and I recall Elizabeth mentioning that from an HR point of view, this would be the most sensitive approach in terms of facilitating Anne's return to work. I also recall Elizabeth being incredulous at how a business like Stag Publications Ltd could be so exposed financially should an employee such as Anne choose to leave or was not able to work for whatever reason. Other than that, I was not mentioned by Anne in the initial Grievance and was not party to any further discussions."

96 Both Mr Ramsdale and Mr Wikner were pressed hard in cross-examination about the manner in which Ms Petrucci had acted in investigating what we will call the claimant's grievance. It was submitted on behalf of the claimant that Mr Ramsdale and Mr Wikner should have been interviewed formally by Ms Petrucci. In fact, Mr Wikner saw her for about 10 minutes at the end of a meeting which Mr Ramsdale said had before then taken about an hour, and Mr Wikner was present only for 10 minutes because he had to attend to an urgent production deadline at the time. In paragraph 50 of her closing submissions, Ms Chan said this:

> "No minutes were taken. This was clearly not EP [i.e. Ms Petrucci] interviewing witnesses to take evidence on C's grievance allegations; instead it is likely it was a quasi-legal meeting to discuss a defensive and co-ordinated response to C's grievance."

97 Ms Chan's submissions continued:

> "51. EP's inappropriately 'cosy' closeness to JR, the alleged perpetrator, is demonstrated in emails at p. 698, 707, 736 and 742. These emails show someone who is not an impartial decision-maker, but someone who will do JR's bidding, hence EP asking JR him on 24.7.17: "*My questions to you tomorrow will really be on your thoughts going forward, if you wish her to stay, or leave etc*". (707). This strongly suggests that if JR's view had been that he wanted C out, EP would frame a decision in a way that facilitated his wishes."

98 Whether or not the approach which Ms Petrucci took at the bidding of Mr Ramsdale was impartial, and whether or not the manner in which Mr Ramsdale asked Ms Petrucci to act was conduct which contributed to a breach of the

implied term of trust and confidence, we accepted Mr Ramsdale's evidence that he did not want the claimant to resign from her employment with the respondent, and that he very much wanted her to remain in the respondent's employment as its Sales Director. Not only did he say that in oral evidence but it was what he had said in his email of 24 May 2017 at pages 258-259 which we have set out in paragraph 93 above. Having heard all of the evidence and considered the parties' submissions, and having returned to that email, we found it to be entirely truthful and factually correct, i.e. it stated the true position as far as Mr Ramsdale and the respondent were concerned. Thus, we concluded, if he gave Ms Petrucci any kind of "steer", then it was that he wanted the claimant to stay in her employment with the respondent.

The allegation stated in paragraph 8.6 above

99 The allegation referred to in paragraph 8.6 above arose from the manner in which Ms Petrucci determined the claimant's grievance. Apart from having the meeting with Mr Ramsdale and Mr Wikner to which we refer in paragraphs 95 and 96 above, Ms Petrucci held a meeting only the claimant and then rejected the claimant's grievance in the letter dated 25 August 2017 at pages 323-337. During that meeting, as recorded by Ms Petrucci on page 325, the claimant "expressed a concern about not having a contract of employment". On the same page, Ms Petrucci wrote under the heading "Resolutions discussed": "A copy of your contract of employment." At the bottom of page 335, Ms Petrucci wrote this:

> "Your contract of employment is attached to this grievance outcome letter. The company has explained the issue to me in more detail – that when you started in the business, there were just 3 employees in the company and your contract was a verbal one and no written contract was given to you. The company recognises they now need to provide you with a contract and one is attached to this letter. Can you please sign this and return this."

100 In paragraph 53 of her written closing submissions, Ms Chan said this:

> '*Change of contractual terms in written contract*
>
> 53. Along with the grievance outcome, C was sent her written contract of employment (309-316) on 25.8.17, some 9 months after she had asked for it. This failed to refer to the 5% post-tax share of proceeds if the company were sold or the 5% profit bonus (which did not reflect the 2012 agreement at p.70). It also said sales commission "will be paid in the month of publication". Although R professes that the terms were up for negotiation, that statement is inconsistent with JR having already signed the contract, nor is there anything in EP's letter to suggest that terms were negotiable (bottom of 335).'

101 The document stated to be a contract of employment for the claimant at pages 309-316 was signed by Mr Ramsdale and dated 21 August 2017. Mr Ramsdale referred to it in paragraph 18 of his witness statement, which was in these terms:

> "At the Grievance meeting with Elizabeth, Anne requested her written contract of employment (p.322), which the company duly sent to her. Since the contract was sent, we were not able to sit down and discuss any changes she wanted to make to the contract – it was intended to be negotiable and Luke Wikner in the Grievance Appeal meeting stated that any issues on the contract were entirely solvable (p.414-415). Anne was accompanied by Unite the Union representatives at both these meetings."

102 We accepted that evidence of Mr Ramsdale, not least because we had already concluded that he genuinely wanted the claimant to remain an employee of the respondent. Given that acceptance, we could not see in the circumstances any attempt by the respondent to impose new terms of employment on the claimant through Ms Petrucci sending the claimant the contract at pages 309-316, despite Ms Petrucci's use of the words set out at the end of the extract in paragraph 99 above, namely: "Can you please sign this and return this."

103 In addition, it was Mr Ramsdale's evidence that the letter did not state any change in the manner in which the claimant's commission payments were made, in that as far as he was concerned, it merely stated the current practice. We accepted that that was what he genuinely believed and that, given what we say in paragraphs 57-59 above, it was a well-founded belief.

<u>Mr Wikner's conduct of the claimant's appeal against the rejection by Ms Petrucci of her grievance</u>

104 The claimant appealed against the dismissal by Ms Petrucci of her grievance in her (i.e. the claimant's) letter dated 31 August 2017 at pages 347-351. By that time, the respondent had created a grievance procedure for its staff. It was dated 23 July 2017 and was at pages 274-277. In paragraph 3.4.4, this was said about any appeal of an employee "where they feel their grievance has not been satisfactorily resolved":

> "The appeal will be dealt with impartially and, wherever possible, will be chaired by a manager who has not previously been involved in the case and is of increased seniority to the one who dealt with the original grievance. This appeal hearing is not a rehearing of the original appeal but a consideration of the specific areas of dissatisfaction in relation to the original grievance."

105 Ms Chan made the following submission about the way in which the claimant's appeal against the dismissal by Ms Petrucci of her grievance was dealt with by Mr Wikner.

> "52. It is also to be noted that LW confirmed in oral evidence that he checked EP's grievance decision before it went to C (although he says he was only checking for factual accuracy). This is inappropriate, given that he knew he was to hear the appeal (his name is already stated as the appeal decision-maker in the outcome letter at 337)."

106 However, while on one level that was a valid criticism, the claimant did not suggest an alternative way in which Ms Petrucci could have had her draft outcome letter checked for factual accuracy without an employee other than Mr Wikner or Mr Ramsdale seeing it. Given that the intention of Mr Ramsdale was that the claimant returned to work, it was in our view objectively reasonable for Ms Petrucci not to ask anyone other than Mr Wikner to check the factual part of her grievance outcome letter. Ms Chan's other submissions concerning the manner in which Mr Wikner dealt with the claimant's appeal against the dismissal of her grievance were in part more obviously cogent. Those submissions included these paragraphs:

> '56. Things were not improved by Luke Wikner's appeal and if anything, things were worsened. Again, LW chose not to interview JR or SM, which given that this was a grievance alleging bullying by JR, is a wholly inadequate investigation, suggestive of a wish by the investigator to protect the perpetrator. On being questioned by me why he had not done so, LW's response was incomprehensible: that EP had decided not to interview JR, and he was only reviewing EP's decision. But that rationale did not preclude him from interviewing 8 other witnesses: Darren Brett (372); Tracy Howell (369) Mark Sutton (370); Victoria Arellano (394); John Harker (371); Claire Warman (374); Alex Grant (371); Tina Ries (374). There can be no reason for LW's failure to interview the 'key players' than that [Mr Ramsdale and Mr Moody] did not wish to be interviewed, as it might be uncomfortable, difficult and require them to commit in a formal record to what they said about their treatment of C .
>
> 57. It is also significant that LW approached the grievance appeal with a singularly partisan and hostile mindset towards C. This is shown by the intemperate comments he made during the appeal hearing and in his outcome letter. ...
>
> 58. Reading the decision, an outside observer could be forgiven for thinking that this was a "disciplinary" decision on an employee's misconduct, rather than a grievance decision sent to an employee who had alleged bullying. It is conduct that inevitably breaks the bond of trust and confidence that exists between the employer and employee.'

107 However, while we thought that Mr Wikner's approach was more overtly critical of the claimant than it needed to be, and that it was in some ways considerably undiplomatic, it resulted from the fact that the claimant had invited him to go and check the information which was available to the respondent, including in its

CRM (i.e. customer relationship management) software, and he had found that it not only did not support what the claimant was saying so far as relevant, it positively disproved it.

108 As for the criticism that Mr Wikner did not interview Mr Ramsdale or Mr Moody formally, Mr Wikner said that he did not interview them formally as he had many conversations with them about the matters raised by the claimant in her appeal letter before determining that appeal. Mr Wikner did, however, hold a formal grievance hearing on 14 September 2017 with the claimant present, at the respondent's offices. The hearing lasted for about five and a half hours.

109 Mr Wikner's decision was to reject the claimant's grievance. He did so in his letter dated 21 September 2017 at pages 401-418. He concluded the letter in this way:

> "My summary is that you have displayed absolute intransigence regarding your clients over the years and, as this investigation has shown me, a complete inability to admit when you are in the wrong and accept responsibility. You may or may not agree with Jerry Ramsdale – I certainly don't some of the time and am happy to voice my opinion when I don't – but ultimately, the company's decisions rest with him.
>
> Also, I must conclude that at no point in this process and the email paper-trails I have had to consider, have you suggested or given any indication that you would like to come back to work. The company has tried to be conciliatory and indicated its desire to have you back asap and firing on all cylinders, but all you could say to me in the hearing was: *"I would have respected a 'how much would it cost to get rid of you approach'".*
>
> You have now exhausted the Grievance Appeal process. My decision is final and this is now the end of the procedure."

110 There were in the bundle at pages 419-435 notes of the grievance appeal hearing which Mr Wikner held. We saw on page 434 that there was the following exchange, which was immediately above the words in italics and underlined in the extract set out in our preceding paragraph above:

> "LW: Would you take a potential if hypothetical short-term hit if it meant you would be making potentially more money than previously in the future?
>
> AD: No
>
> LW: Even if it's for the good of the company?
>
> AD: It wouldn't be for the good of me."

The claimant's resignation letter

111 On 4 October 2017, in the letter at pages 454-455, the claimant resigned with immediate effect. In that letter she did not refer to the content of the letter from Mr Wikner. Nor did she refer to anything that he had said to her during the course of hearing from her in person on 14 September 2017. All that the claimant said about the appeal was this:

> "I appealed against the decision but the appeal was not upheld. I also consider that the person conducting the appeal was not impartial. I therefore consider that the process was flawed."

The claimant's reasons for resigning

112 While giving oral evidence, the claimant said in answer to a question from EJ Hyams that she had resigned in response to (i.e. it was the final thing in response to which she resigned) the rejection of her appeal against the dismissal of her grievance. We were prepared, however, to interpret what she said in that regard as a statement that she had resigned in response in part to the manner in which her grievance appeal was rejected, i.e. in response in part to the fact that Mr Wikner had been rather critical of her in his rejection of her appeal.

113 That did not mean that we concluded that the real reason for the claimant's resignation was the manner in which her grievance had been rejected. We considered the situation in the round very carefully, and concluded that the principal reason for the claimant's resignation was that her income was going to be significantly reduced as a result of

113.1 the drop in revenue of about £600,000 to which we refer in paragraph 70 above,

113.2 the fact that the respondent had made no profit after 31 December 2015 (however it was calculated, i.e. whether by reference to the calendar year of 1 January 2016 to 31 December 2016, or to the calendar year of 1 May 2016 to 30 April 2017), and

113.3 the fact that it was not possible to know whether, or when, the respondent would return to profit.

114 In addition, the claimant realised that she was going to have to make fresh efforts to develop the respondent's business, and, we found, she no longer relished the prospect of doing that.

115 We noted that the psychiatrist whom she saw in early June 2017 (Dr Cohen) and whose resulting report was in the letter dated 8 June 2017 at pages 596-598 said (on page 596) this:

> "Since last Christmas, there has been an insidious deterioration in her mood, to the extent that life is now completely joyless."

116 It is true that Dr Cohen also said what we have set out in paragraph 62 above, so that the "insidious deterioration in [the claimant's] mood" could be attributed to "stress at work as a result of conflict with" Mr Ramsdale, but we concluded that on the facts found by us as stated in paragraphs 29-88 above, that stress resulted from the claimant's mental state rather than from any wrongdoing on the part of Mr Ramsdale.

Relevant case law

What constitutes a "constructive" dismissal, i.e. a dismissal within the meaning of section 95(1)(c) of the ERA 1996

117 The law of constructive dismissal was first stated authoritatively by Lord Denning MR in *Western Excavating v Sharp* [1978] ICR 761, at page 769A-C, in the following passage:

> "If the employer is guilty of conduct which is a significant breach going 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

118 There is this helpful passage in the notes to section 95 of the ERA 1996 in *Harvey on Industrial Relations and Employment Law* ("*Harvey*"):

> "The employee must leave in response to the breach of contract, which may mean the tribunal deciding what was the effective (but not necessarily the sole) cause of the resignation: *Jones v F Sirl & Son (Furnishers) Ltd* [1997] IRLR 493, EAT; the employer's conduct subsequent to a resignation cannot convert that resignation into a constructive dismissal *(Gaelic Oil Co Ltd v Hamilton* [1977] IRLR 27). Earlier cases suggested that the employee must indicate clearly that he is treating the contract as repudiated: *Logabax Ltd v Titherley* [1977] IRLR 97, [1977] ICR 369, EAT; *Walker v Josiah Wedgwood & Sons* [1978] IRLR 105, [1978] ICR 744, EAT; however, the Court of

> Appeal held that there is no legal requirement that the departing employee must tell the employer of the reason for leaving: *Weathersfield Ltd v Sargent* [1999] 1 IRLR 94, CA (disapproving on this point *Holland v Glendale Industries Ltd* [1998] ICR 493, EAT). The acceptance of the repudiation must be unequivocal (*Hunt v British Railways Board* [1979] IRLR 379, EAT—employee filed IT 1 but continued to report for work; 'can't have his cake and eat it'). A fortiori where the termination is by mutual agreement there cannot be constructive dismissal (*L Lipton Ltd v Marlborough* [1979] IRLR 179, EAT)."

119 While it is not directly relevant here, it is helpful to consider the case law concerning the impact of the fact that an employee resigns in order to start another job. Resigning to go to another job does not preclude an employee from claiming constructive unfair dismissal by reason of a breach of the implied term of trust and confidence; rather, the employee can still claim to have been constructively dismissed if a breach of the implied term of trust and confidence played a part in the employee's resignation. That is clear from the following passage from paragraph 33 of the judgment of Keene LJ in *Meikle v Nottinghamshire County Council* [2005] ICR 1, with which Bennett J and Thorpe LJ agreed:

> "'The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."

120 The judgment of Langstaff J in *Wright v North Ayrshire Council* [2014] ICR 77 provides further clarification of the impact of an employee's leaving to take up a job offer. The headnote to that case contains this helpful summary in that regard:

> '*Held*, ... that it was an error of law for the employment tribunal to look for "the" effective cause of the claimant's resignation, in the sense of the predominant, principal, major or main cause; that the crucial question, in establishing whether an employee who had more than one reason for resigning had been constructively dismissed, was whether a repudiatory breach of contract had played a part in the resignation'.

121 The approach to take in deciding whether an employer has breached the implied term of trust and confidence is stated particularly helpfully in paragraphs 14-16 of the judgment of Dyson LJ (as he then was) in *Omilaju v London Borough of Waltham Forest* [2005] ICR 481. There have been subsequent helpful developments in the case law, such as in *Kaur v Leeds Teaching Hospitals NHS*

Trust [2019] ICR 1, which concerned principally the question whether an employee can rely on a breach of the implied term of trust and confidence after which the employee has affirmed the contract of employment. In paragraph 55 of his judgment in that case, Underhill LJ (with whom Singh LJ, the only other member of the court, agreed) said this:

> '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 or her resignation?
>
> (2) Has he or she 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 (applying the approach explained in *Omilaju* [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) [Footnote: I have included "repudiatory" in the interest of clarity, but in fact a breach of the trust and confidence term is of its nature repudiatory: see per para 14(3) of Dyson LJ's judgment in *Omilaju* [2005] ICR 481.] breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?
>
> None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.'

<u>A refusal to pay sums which are claimed by an employee to be owed by the employer</u>

122 An "emphatic denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory": *Cantor Fitzgerald International v Callaghan* [1999] ICR 639, at 649H, per Judge LJ, with whose judgment Tuckey and Nourse LJJ agreed. At 649F-G, Judge LJ said in addition this:

> "In my judgment the question whether non payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental

> to the continued existence of a contract of employment depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events (see, for example, *Adams v. Charles Zub Associates Ltd.* [1978] I.R.L.R. 551). If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the court might be driven to conclude that the breach or breaches were indeed repudiatory."

The obligation to afford an opportunity to remedy a grievance

123 It is possible to say that it is an aspect of the implied term of trust and confidence that employers will (applying *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516) "reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have", although in that case Morrison J said that it was a separate implied term.

The significance of the employer's view of its legal obligations

124 In *Bridgen v Lancashire County Council* [1987] IRLR 58, Sir John Donaldson MR said this:

> "The mere fact that a party to a contract takes a view of its construction which is ultimately shown to be wrong, does not of itself constitute repudiatory conduct. It has to be shown that he did not intend to be bound by the contract as properly construed."

125 There is in the note to section 95 of the ERA 1996 in *Harvey* this very helpful analysis of the correctness or otherwise of that proposition:

> "In *Frank Wright & Co (Holdings) Ltd v Punch* [1980] IRLR 217, the EAT held that an employee is not entitled to claim constructive dismissal if there is a dispute about what the contract requires and the employer is acting in accordance with his own mistaken belief. There are dicta disapproving this in *Financial Techniques (Planning Services) Ltd v Hughes* [1981] IRLR 32, CA, particularly per Templeman LJ, stressing the objective nature of the test whether particular behaviour is repudiatory, an approach also to be seen in *Blyth v Scottish Liberal Club* [1983] IRLR 245, Ct of Sess, *BBC v Beckett* [1983] IRLR 43, EAT, and *Brown v JBD Engineering Ltd* [1993] IRLR 568, EAT; however, an approach similar to that in *Frank Wright* was adopted obiter by Sir John Donaldson MR in *Bridgen v Lancashire County Council* [1987] IRLR 58, CA (though without explicit reference to the above case law). In *Brown v JBD Engineering Ltd*, above, it was held, however, that

while there is no rule that a genuine mistake or belief by the employer means that there cannot be a constructive dismissal, the fact of mistake or belief may be a factor in considering whether in all the circumstances there was a repudiatory breach. In *Roberts v Governing Body of Whitecross School* UKEAT/0070/12 (19 June 2012, unreported) criticism was again voiced of *Frank Wright* and constructive dismissal found in a case where the employer was genuinely acting on its view of a dispute with the employe[e]. This seems to reflect the balance of the authorities."

Constructive dismissal where the conduct relied on is claimed to be discriminatory

126 Where an employee claims to have been dismissed "constructively", i.e. within the meaning of section 95(1)(c) of the ERA 1996, and that the dismissal was discriminatory within the meaning of section 39(7)(b) of the EqA 2010, the following analysis in the recent judgment of Cavanagh J in *De Lacey v Wechseln Ltd* UKEAT/0038/20/VP, which was handed down on 1 April 2021, is of assistance:

'68. ... [I]n principle, a "last straw" constructive dismissal may amount to unlawful discrimination if some of the matters relied upon, though not the last straw itself, are acts of discrimination. There is very limited authority on this point. However, in *Williams v Governing Body of Alderman Davies Church in Wales Primary School* [2020] IRLR 589, at paragraph 89, HHJ Auerbach said that a constructive dismissal should be held to be discriminatory "if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach." At paragraph 90, HHJ Auerbach said that the question was whether "the discrimination thus far found **sufficiently influenced** the overall repudiatory breach, such that the constructive dismissal should be found to be discriminatory." (my emphasis)

69. I respectfully agree with the test as it is set out in paragraph 90 of the *Williams* judgment. Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply. There will be cases in which the discriminatory events or incidents are so central to the overall repudiatory conduct as to make it obvious that the dismissal is discriminatory. On the other hand, there will no doubt be cases in which the discriminatory events or incidents, though contributing to the sequence of events that culminates in constructive dismissal, are so minor or peripheral as to make it obvious that the overall dismissal is not discriminatory. However, there will be other

> cases, not falling at either end of the spectrum, in which it is more difficult for an ET to decide whether, overall, the dismissal was discriminatory. It is a matter for the judgment of the ET on the facts of each case, and I do not think that it would be helpful, or even possible, for the EAT to give general prescriptive guidance for ETs on this issue.'

Our conclusions and our reasons for them

The effect in the law of contract of the letter of 24 September 2012 at page 70

127 Given that it was the claimant's case that the respondent had manipulated the respondent's revenue and profit and loss figures, and that the claimant's profit share bonus should not have been calculated after taking into account the costs of *Torque* and *Cycling*, we had to decide what the letter of 24 September 2012 at page 70 meant, i.e. what was its proper interpretation. We concluded that it could be interpreted to mean only one thing: that the claimant's bonus would be calculated by reference to the respondent's profits, if any, and not just the profits, if any, made on the part of the respondent's operations for whose sales revenue the claimant was responsible. Thus, we concluded, the costs and revenue of *Torque* and *Cycling* were correctly included in the calculation of the respondent's profits for the purposes of determining the claimant's profit-related bonus.

128 We came to that conclusion purely as a matter of the construction (i.e. interpretation) of the contract evidenced by the letter at page 70, read against the factual matrix which gave rise to it (as described in paragraphs 48-51 above). In that regard, we took into account the fact that at the time of the creation of the contract, the respondent's business did not include *Torque* or *Cycling*, and included only the automotive parts of the respondent's business which continued to exist in 2017, when the claimant resigned. We concluded that the only sensible commercial interpretation of the letter at page 70 was that it concerned whatever profit the respondent might make from whatever businesses it conducted from time to time.

Was there any wrongful conduct which could be part of an accumulation of conduct which constituted a breach of the implied term of trust and confidence by the respondent here? A discussion

129 Of the things on which the claimant relied as being wrongful and part of an accumulation of conduct which, taken together, constituted a breach of the implied term of trust and confidence, we saw only one thing which was in itself wrongful, and that was the fact that Mr Wikner's dismissal of the claimant's grievance appeal was in terms which were distinctly undiplomatic. That was, however, the result of an honest expression of genuinely-held and in our judgment objectively-supported views. We concluded that by the time that Mr Wikner had determined the claimant's grievance appeal, he had come to the

view that she was never going to return to her role as Sales Director of the respondent.

130 As for whether or not his determination of the appeal was carried out impartially, we concluded that he started the process impartially, but by the end of it he was no longer impartial in that he had come to some quite critical views of the claimant's then-current stance and her reasons for it. Indeed, the short exchange that we have set out in paragraph 110 above shows just how inimical to the interests of the respondent the claimant's stance had by then become. The contract of employment is a kind of partnership. The way in which that partnership works is shown in legal terms most clearly by the implied term of trust and confidence, but that is a negative obligation, in that it is an obligation not to do things of a certain sort without reasonable and proper cause. There is, however, in addition an obligation of good faith, which has to a certain extent become subsumed in practice by the implied term of trust and confidence. Without knowing of that obligation of good faith, Mr Wikner may have had its effect in mind when writing the first paragraph in the extract from his decision letter that we have set out in paragraph 109 above. Whether or not he had it in mind, in our view it was not in itself wrongful to say what was in that paragraph (i.e. the first paragraph in the extract). That is because (1) in so far as that paragraph referred to the claimant being unable to accept that she was in the wrong, that was genuinely Mr Wikner's view, and (2) otherwise the paragraph was objectively supported by the circumstances which had led to the claimant's grievance, in that her grievance was in substance about the fact that Mr Ramsdale was seeking to distribute to other staff the advertisers' accounts for which she was responsible.

131 In this regard, the strength of Mr Wikner's feeling about the claimant's approach can be gauged by what he wrote in paragraph 33 of the response to the claim (headed "Grounds of Claim Resistance"). Paragraph 33 included these words:

> '[T]he Respondent accepted the Claimant's absolute intransigence regarding what she considered to be "her" clients for 15 years, even though it left the business extremely exposed from a sales point of view should the Claimant not be able to work for whatever reason – as has been proved. ... Jerry Ramsdale as Managing Director has to consider what is best for the business and its employees in the long-term – to do otherwise would be a dereliction of his duty as a Director of the company.'

132 Whether or not the rest of paragraph 33 was completely accurate is not material here. What is material is that we regarded that part of paragraph 33 as being completely accurate. We did so not least because of the passage in the claimant's grievance which we have set out in paragraph 92 above.

Our conclusions on the allegations set out in paragraphs 8.1-8.7 above

133 Taking in turn the allegations set out in paragraphs 8.1-8.7 above, our conclusions were as follows.

Paragraph 8.1: "Failing to honour in good faith, both the letter and the spirit" of the letter at page 70

134 Given our conclusions in paragraphs 127 and 128 above, we concluded that there was no such failure.

Paragraph 8.2: "Manipulating the company accounts to understate profits"

135 Given our acceptance (in paragraph 31 above) of paragraph 5 of Mr Ramsdale's witness statement, which we have set out in paragraph 30 above, this allegation did not succeed. We add that we did not understand the claimant to have alleged in terms that the change of the accounting year was a manipulation, but that if she had done so then we would have rejected that allegation. The change was made for the reasons given by Mr Ramsdale in paragraph 4 of his witness statement, which we have set out in paragraph 42 above and which, as we say in paragraph 46 above, we accepted. Those reasons were for the avoidance of doubt in our judgment ones which were objectively justified so that if there had been in the change in the accounting period conduct which was likely seriously to damage the relationship of trust and confidence, then there was reasonable and proper cause for it. The only possible claim that could have been made here was that the change in the accounting period had the effect of removing a right to profit share. However, that was not so here because (as we say in paragraph 31 above) we accepted Mr Ramsdale's evidence that (see the final sentence of paragraph 5 of his witness statement, set out in paragraph 30 above) "[if] the financial year had started in January 2016, the net result would [have been] the same in terms of [the claimant's] bonus".

136 Turning to the allegation that it was wrong of Mr Ramsdale to cause the respondent to pay him £60,000 by way of pension contributions in the accounting year to 30 April 2017, given what we say in paragraph 56 above, we concluded that there was nothing at all wrongful in him doing that.

Paragraph 8.3: "Changing the terms of commission payments from payment on invoice to payment on receipt and doing so without consultation or consent by the claimant"

137 Given our factual findings in paragraphs 57-59 above, we concluded that there was nothing wrongful in the decision by Mr Ramsdale not to pay the claimant commission on sums invoiced but not paid for the 2017 Fleet World show. Since that was, we concluded, the only change made by Mr Ramsdale in regard to the manner in which the claimant was paid commission, we concluded that in doing

what was referred to in paragraph 8.3 above, the respondent did nothing wrongful.

Paragraph 8.4: "Removing client accounts and otherwise diluting her sales role"

138 Given our conclusions stated in paragraphs 79 and 80 above, we concluded that the respondent did nothing wrongful in regard to the proposed allocation to other staff of the respondent of responsibility for some of the accounts for which the claimant was responsible. We also, essentially for the same reasons, saw no dilution of the claimant's sales role in the circumstances. That is because the claimant's role remained the same, but she was being asked to relinquish some client relationships in favour of other members of the respondent's staff. In addition, at the same time, she was (as was clear from the terms of the email of 27 April 2017 at page 201, to which we refer in paragraphs 78 and 79 above) being asked to go and win more business, which was plainly part of her role. For the avoidance of doubt, we did not see the exchange to which we refer in paragraph 84 above as involving any wrongdoing on the part of Mr Ramsdale, acting on behalf of the respondent.

Paragraph 8.5: Failing to deal adequately with the claimant's grievance

139 The allegation stated in paragraph 8.5 above was much broader than as there stated. That is because it was stated much more broadly on page 4 of the list of issues as honed by Ms Chan and by what Ms Chan said in paragraphs 56-66 of her written closing submissions. As we indicated through EJ Hyams during the hearing, we were not aware of any case law showing that an employer is obliged to determine a grievance in any particular way, such as in the way that a court or tribunal would consider the grievance if it were stated as a claim. Ms Chan did not put any such case law before us. We concluded that the obligation was as stated in paragraph 123 above, and that we simply had to ask ourselves whether what the respondent did was either in itself a breach of the implied term of trust and confidence, or conduct which contributed to such a breach.

140 In doing so, we took into account the reference in paragraph 3.4.4. of the respondent's own (newly-adopted) grievance procedure to the determination of an appeal impartially (see paragraph 104 above), but we also (necessarily) took into account the fact that the same paragraph of the grievance procedure stated (and for convenience we now repeat the relevant sentence) this:

> "This appeal hearing is not a rehearing of the original appeal but a consideration of the specific areas of dissatisfaction in relation to the original grievance."

141 Here, the fact that the respondent had procured the services of an independent professional consultant was a relevant factor. If that consultant, Ms Petrucci, had been asked to respond to the claimant's grievance in a way which was designed to shut down any kind of debate, for example, then that would have been a

material factor, but here, if Ms Petrucci was given any kind of steer then it was (see paragraphs 96-98 above) that the respondent wanted the claimant to remain in her employment with the respondent. Such a steer will necessarily have been in no way wrongful.

142 As for the manner in which Mr Wikner considered the claimant's appeal against the dismissal by Ms Petrucci of her grievance, given

142.1 the factors which we set out and discuss in paragraphs 129-132 above, and

142.2 the part of paragraph 3.4.4 of the grievance procedure that we have set out in paragraph 140 above,

we concluded that what Mr Wikner did in the course of determining the claimant's appeal against her grievance was not in itself a breach of the implied term of trust and confidence.

Paragraph 8.6: "Presenting altered terms of agreement in the form of a written employment contract in August 2017 (309-316)"

143 On the basis of our factual findings stated in paragraphs 99-103 above, we concluded that the manner in which the respondent, through Ms Petrucci, offered to the claimant the written terms at pages 309-316 was in no way wrongful. We say that for these reasons.

143.1 The terms were offered in response to the claimant's complaint that she did not have a written set of terms of employment or a written contract of employment. They were not intended to be a set of terms which the claimant had to "take or leave", i.e. either accept or leave her job with the respondent.

143.2 If and to the extent that the new terms offered did not incorporate the effect of the letter of 24 September 2012, then they could not properly (as a matter of interpretation against the factual background that we describe above) be taken to remove such entitlement as was given by that letter.

Paragraph 8.7: "Mr Ramsdale acting in a hostile manner towards the claimant during meetings"

144 Given our findings in paragraphs 60-73 above, we concluded that the manner in which Mr Ramsdale acted towards the claimant in the meetings at which the claimant claimed that he had acted in a hostile manner, was in no way wrongful.

Was there, then, a breach here of the implied term of trust and confidence?

145 As can be seen from what we say in paragraphs 129-144 above, we concluded that the only thing done by the respondent that was in any way wrongful was the way in which Mr Wikner dealt with the claimant's grievance. As we have said in paragraph 142 above, we concluded that what Mr Wikner did was not in itself a breach of the implied term of trust and confidence. Thus, the claimant's claim to have been dismissed "constructively", i.e. within the meaning of section 95(1)(c) of the ERA 1996, did not succeed and had to be dismissed.

146 Given that conclusion, what we say in this paragraph is not strictly necessary, but we say it for the avoidance of doubt. As stated in paragraphs 113 and 114 above, we concluded that the claimant's resignation was triggered by (1) the fact that her earnings were significantly reduced by reason of the drop in revenue income, which had led to a drop in her commission income, (2) the fact that she was not, and could see that she was not, entitled to any profit-related bonus, and (3) the fact that she no longer relished the prospect of rebuilding the respondent's business. Given those factors, we concluded that if and to the extent that the claimant resigned in response to the dismissal of her grievance, it was not because of the things that Mr Wikner had said, or the way in which he had said them. Rather, it was that it had not led to her being permitted to return to work without Mr Ramsdale continuing to press her to agree to accept changes which she could not (we concluded, in part because of the passage from the claimant's email of 26 May 2017 set out in paragraph 92 above) bear to accept.

The claim of age discrimination as stated in paragraph 9 above

<u>Paragraph 9.1</u>

147 Given our factual conclusions stated in paragraph 76 above, we concluded that the first limb of the claim of age discrimination was not well-founded on the facts. Thus, it did not succeed.

<u>Paragraph 9.2</u>

148 Turning to the claim stated in paragraph 9.2 above, namely about the reference to the claimant having used the review vehicle as "comfy wheels for a grandmother", we accepted that the article the material part of which we have set out in paragraph 89 above was detrimental treatment within the meaning of section 39(2)(d) of the EqA 2010 and that it was less favourable treatment of the claimant because of her age, i.e. direct discrimination within the meaning of section 13 of the EqA 2010.

149 That article was not relied on as part of an accumulation of conduct which, taken together, amounted to a breach of the implied term of trust and confidence. That approach was in our view correct because the article was an isolated incident, and was peripheral. That meant that the claim of age discrimination in respect of

the article was made outside the primary time limit of three months (of which there was in fact no extension by reason of early conciliation, since the article was published in May 2017 and, as stated in paragraph 2 above, the early conciliation period commenced only on 9 October 2017). We therefore had to decide whether it was just and equitable to extend time for the making of the claim. In that regard, we took into account the following factors.

149.1 If and to the extent that the claimant delayed making the claim because of her mental state as described by Dr Cohen in the letters to which we refer in paragraph 62 above, she nevertheless pressed her grievance actively and to a conclusion during the summer of 2017, showing that she was capable of doing what was required by way of making a claim to the tribunal.

149.2 In addition, the claimant was evidently (as could be seen from the part of Dr Cohen's letter of 14 June 2017 at page 599, where he said "I have encouraged her from hereon to allow her legal representatives to deal with her employment issue") being given legal advice at the latest by 14 June 2017.

150 In those circumstances, we could see nothing which could justify the conclusion that it was just and equitable to extend time for making the claim of age discrimination in regard to the article to which we refer in paragraph 89 above. We therefore concluded that that claim was made out of time and the tribunal did not have jurisdiction to determine it.

Paragraph 9.3

151 The claim stated in paragraph 9.3 above depended for its success on the success of the claim stated in paragraph 8.4 above. Given the failure (see paragraph 138 above) of the claim stated in paragraph 8.4 above, the claim stated in paragraph 9.3 above had to fail.

The claim of wrongful dismissal

152 Given our conclusion that the claimant was not dismissed within the meaning of section 95(1)(c) of the ERA 1996, the claimant's claim of wrongful dismissal could not, and did not, succeed.

The claim for unpaid bonus

153 Given our conclusions stated in paragraphs 127 and 128 above, the claimant's claim for unpaid bonus payments could not, and did not, succeed.

The claim for unpaid commission payments

154 The parties did not agree about the amount of the commission payments owed by the respondent to the claimant. The claimant claimed to be entitled to at least £4,422.37, but the respondent said that the sum owed was £292.72. We did not have sufficient evidence before us to determine that dispute and the parties agreed (but if they did not then we now determine) that that dispute must be determined at the hearing which we provisionally listed to determine what remedy the claimant should receive in the event of the success of any part of her claims.

Resumed hearing

155 We initially agreed with the parties that that hearing would take place on 8 October 2021. After the hearing had ended on 7 June 2021, we realised that 8 October 2021 was not convenient for us, and we agreed via our clerk with the parties that the hearing would instead take place on 7 October 2021. We now give formal notice that the resumed hearing will take place on 7 October 2021.

156 We also now record that at that hearing we will determine what is the claimant's entitlement to accrued holiday pay.

In conclusion

157 In conclusion, the claimant's claims of (1) unfair dismissal, (2) wrongful dismissal and (3) age discrimination do not succeed. Whether or not the claimant is entitled to anything by way of unpaid holiday pay or commission payments will be determined at the hearing of 7 October 2021 unless before then the parties compromise those claims. If they do so then they should without delay inform the tribunal that they have done so.

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Employment Judge Hyams

Date: 6 July 2021

JUDGMENT SENT TO THE PARTIES ON

12 July 2021
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THY
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FOR THE TRIBUNAL OFFICE