EMPLOYMENT TRIBUNALS

Claimant: **Mr J Wilshaw**

Respondent: **Anthony Motors Ltd**

Heard at **Aberystwyth** **On: 10 September 2018**

Before: **Employment Judge R McDonald**

Appearances

For the Claimant: Mr E D Jones (Legal Executive)
For the Respondent: Mr B Blakemore (Counsel)

JUDGMENT

The Judgment of the tribunal is as follows:

1. The claimant's claim that he was unfairly dismissed fails.

2. The claimant's claim for a redundancy payment fails.

3. The claimant's claim that the respondent was in breach of an implied term to provide a reference fails.

REASONS

1. The claimant worked as a Sales Executive at the used car site owned by the respondent at Glanyrafon Industrial Estate, Llanbadarn near

Aberystwyth ("Glanyrafon"). He was employed by the respondent from 19 January 2011 until 28 February 2018. (It was agreed that the reference in section 5 of his claim form to his employment starting in 2001 was an error). The claimant said that he was constructively dismissed by the respondent and that that dismissal was unfair. He also claimed a redundancy payment.

2. At the hearing the claimant was represented by Mr Jones, a legal executive who is also a friend of the claimant's. The respondent was represented by Mr Blakemore of counsel.

3. There was a 127 page agreed bundle of documents for the hearing

4. At the hearing I heard evidence for the claimant from: the claimant; from Jeff Jeremiah (the former manager of the respondent's Tyre Fitting Department at Glanyrafon); and from Mr Jones (his representative). For the respondent I heard evidence from Anthony Richards (the respondent's managing director); from Justin Manley (a director of the respondent); and from Kevin Payne (a Sales Manager employed by the respondent).

5. At the end of the evidence I heard oral submissions from Mr Blakemore and Mr Jones. I then reserved my decision.

The issues in the case

6. Mr Blakemore had prepared a list of issues. Mr Jones confirmed they were agreed subject to two additions. The first was the addition of an incident in March 2017 relied on by the claimant as part of the bullying conduct by Anthony Richards ("Mr Richards"). The second was a claim for a redundancy payment. Given the time available on the day and the number of witnesses I told the parties that I would only deal with the question of liability at the hearing. If I decided the claimant was entitled to compensation the question of how much that compensation should be would need to be dealt with at a further hearing. The issues I needed to decide were:

"**Bullying**

a. Has the claimant proved the actions of Mr Richards he asserts on the following dates, namely:
    i. Incidents in February 2016 (set out in paragraph 14 of the claimant's witness statement);
    ii. March 2017;
    iii. 1 December 2017;

iv. 7 January 2018;

b. Did the acts complained of, and proven, constitute bullying such as to fundamentally undermine the implied term of trust and confidence in the employment contract between the parties?
c. Was the claimant dismissed/did the claimant resign directly as a result of any proven bullying?
d. Did the claimant's conduct by continuing to work until handing in the letter of 27 January 2018 [in which he gave a month's notice of resignation] amount to an affirmation of the contract?

Grievance

e. Did the claimant raise a grievance appropriately/adequately and in accordance with his contract of employment?
(If so)
f. Was the grievance adequately dealt with by the respondent?
g. Did the respondent's action/inaction in response to the grievance have any influence over the claimant's decision to resign?

Redundancy payment

h. Was there a redundancy situation entitling the claimant to a redundancy payment

7. At the start of the hearing I checked with Mr Jones whether the claimant was pursuing a claim for a redundancy payment. I explained that for the claimant to be entitled to such a payment there needed first to be a redundancy situation, i.e. a reduction in respondent's need for work of the kind done by the claimant. I pointed out that there was no evidence in the claimant's witness statement suggesting there was such a reduction. Mr Jones confirmed that the claim was being pursued and that the claimant would give evidence about this orally.

The relevant law

<u>Constructive unfair dismissal</u>

8. The claimant claimed that he was constructively dismissed and that his dismissal was unfair.

9. For an employer's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract: **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, Court of Appeal**.

10. In order to claim constructive dismissal, an employee must establish that:
    a. there was a fundamental breach of contract on the part of the employer ("Breach")
    b. the employer's breach caused the employee to resign ("Causation")
    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal ("No affirmation").

Breach

11. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, **Malik v Bank of Credit and Commerce International SA [1998] AC 20.** This is usually called "the implied term of trust and confidence".

12. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, **Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A**. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

13. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in **Malik** at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

14. A course of conduct can cumulatively amount to a repudiatory breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident, even though the last straw by itself does not amount to a breach of contract: **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA**.

15. The "last straw" must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. It will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test.

16. Verbal abuse (even a single incident) can amount to a breach of the implied term (**Moores v Bude-Stratton Town Council [2001] I.C.R. 271**). Clearly, however, not every criticism of an employee's conduct can amount to such a breach, otherwise an employer would potentially be in breach every time they took disciplinary action against an employer. It could never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause for the suspension, or for taking the disciplinary action (**Hilton v Shiner [2001] I.R.L.R. 727**).

Causation

17. To be a constructive dismissal, the employee's resignation has to have been caused by the employer's repudiatory breach. The crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon: **Abbycars (West Horndon) Ltd v Ford EAT 0472/07.**

18. It is for the tribunal in each case to determine, as a matter of fact, whether or not the employee resigned in response to the employer's breach rather than for some other reason. A delay in resigning following a repudiatory breach may indicate that the claimant has affirmed the contract. It may alternatively indicate that the repudiatory breach is not the effective cause of the resignation.

No Affirmation

19. If an employee waits too long after the employer's breach of contract before resigning, they may be taken to have affirmed the contract. If so, they lose the right to claim constructive dismissal However, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there has really been an affirmation.: **Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA.**

<u>Redundancy</u>

20. A dismissed employee is entitled to a redundancy payment if they have been dismissed wholly or mainly by reason of redundancy.

21. Redundancy is defined in S.139(1) of the Employment Rights Act 1996 ("ERA"). An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —

"(a) the fact that his employer has ceased or intends to cease —
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business —
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.'

22. Where a redundancy payment claim is made, there is a presumption that an employee who has been dismissed has been dismissed for redundancy unless the contrary is proved — s.163(2) ERA. In practice, therefore, if an employer wants to resist making a redundancy payment it must prove, on the balance of probabilities, that the dismissal was not for redundancy.

Evidence and findings of fact

23. The respondent is a vehicle sales company. It has a new car sales site at Llanbadarn Road, Aberystwyth ("the Llanbadarn site"). In 2010 it acquired premises at Glanyrafon to be used as a dedicated used car sales centre ("Glanyrafon"). The claimant was hired as the salesman for the centre. The respondent employed three technicians and two tyre fitters at Glanyrafon. Mr Richards, Mr Payne and Mr Manley are based at the Llanbadarn site.

24. At the start of the hearing, Mr Jones asked that the respondent's witness be excluded from the hearing when not giving evidence. I explained that it is usual practice in employment tribunals in England and Wales for all witnesses to be present during the hearing. I asked Mr Jones whether there were exceptional circumstances which meant that I should not follow that usual practice in this case. Mr Jones said that his concern was that witnesses would hear other witnesses' evidence and tailor their evidence in light of that. I did not accept that amounted to a reason for departing from the usual practice and allowed all the witnesses to remain in the tribunal room.

25. Mr Jones confirmed that the claimant's case was that all the incidents at para a) of the list of issues together amounted to a breach of the implied duty of trust and confidence. I have set out below the evidence and my findings of fact in relation to each of those incidents and, stepping back, in relation to the overall picture of the relationship between the claimant and Mr Richards.

26. The list of issues referred to "incidents in February 2016" (para a)(i)) and cross refers to para 14 of the claimant's statement. There are nine "incidents" set out at sub-paras 14(a)-(j) of that statement. In fact, not all of them are said to have taken place in February 2016 and not all amount to allegations of incidents of bullying. However, to maintain consistency with the list of issues, I have dealt below with all nine under the heading "Incidents in February 2016" using sub-headings to cross-refer to the relevant sub-paragraph in the claimant's statement.

27. I have at paras 63-74 below set out my findings about the more generalised evidence I heard including about Mr Richards's character. When assessing the evidence I have focussed on the specific evidence relating to an incident. However, in many cases it came down to deciding between the claimant's evidence and Mr Richards's. In general, I found Mr Richards's evidence to be more credible than the claimant's. On occasions there were inconsistencies between the claimant's written and oral evidence, e.g. the holiday "cancellation" issue and the dates of his contacts with ACAS, both discussed below. On occasions he also accepted that he could not remember specific dates or details of events. In contrast Mr Richards's evidence was consistent and clear even if it was potentially damaging e.g. his acceptance that he did not know about the ACAS Code of Practice on Disciplinary and Grievance procedures.

<u>Incidents in February 2016</u>

Para 14(a) – 1 Feb 2016 incident

28. According to para 14(a) of the claimant's statement, the first specific incident relied on by the claimant took place on 1 February 2016. He says that Mr Richards arrived at the forecourt and was "looking for something to pick on me". In his statement, the claimant said that when he couldn't find anything, Mr Richards started shouting at the top of his voice that he was going to close the used car centre and the tyre fitting centre.

29. In his cross examination evidence, the claimant said that his evidence about this incident was based on contemporaneous notes. No such notes were produced in evidence.

30. In cross examination questions, Mr Blakemore put it to the claimant that Mr Richards would not have visited the Glanyrafon site on 1 February because it is the day after the respondent's financial year end. That makes it one of the busiest days of the year for Mr Richards. When this was put to him the claimant said that he could not remember dates.

31. The claimant said his version of events was corroborated by the evidence in the statement by Mr Jeremiah. However, Mr Jeremiah's written statement confirms that he left the respondent in August 2015. Clearly, he could not have witnessed any incident in February 2016.

32. Mr Richards's evidence was that this incident had not happened and that, as Mr Blakemore had said, he would not have visited Glanyrafon on that day.

33. I found Mr Richards's evidence on this point more convincing than the claimant's. I accept that it is unlikely he would have had time to visit Glanyrafon on 1 February 2016 given it was the day after the respondent's year end and the auditors were in. The claimant's case was undermined by his uncertainty as to the date of the incident when challenged. Mr Jeremiah's evidence provided no corroboration. I prefer the respondent's evidence and find that Mr Richards did not on 1 February 2016 visit Glanyrafon or act as alleged by the claimant in para 14(a) of his statement.

Para 14(b) – Losing service histories – 4 February 2016

34. The claimant said that on 4 February 2016 Mr Richards accused him "nastily" of losing the service history of two cars (a Peugeot 207 van and an A Class Mercedes Benz car). The claimant says Mr Richards had already handed them to the valeting department. The claimant said in his statement that "there was never an apology". As I understand it, his case is that Mr Richards blamed the claimant for his own mistake.

35. In cross examination, the claimant's evidence was that Mr Richards had said "where are the service books for these two vehicles". However, when it was put to him by Mr Blakemore that the service records for the vehicles were electronic (and so it would have been nonsensical for Mr Richards to accuse the claimant of having lost them) the claimant said he could not remember whether the records were electronic or paper copies. Again, the claimant did not produce any contemporaneous notes to support his version of events.

36. On balance, I prefer Mr Richards's' evidence and find that this incident did not happen as alleged by the claimant.

Para 14(c) – Shouting incident on 5 February 2016

37. The claimant said that on 5 February 2016 Mr Richards arrived at his office "shouting that [he] was 68 years of age and that he was going to

replace [the claimant] with someone younger". He says Mr Richards then shouted that he was going to close the [used car] branch down. The claimant claims that when he said that he was doing his best Mr Richards "squared up" to him to a point where he got very scared of him.

38. In cross examination, the claimant confirmed there were no contemporaneous notes of this incident. He also confirmed he did not raise any complaint at the time of the incident.

39. Mr Richards denied this incident took place, describing it in his oral evidence as "total fantasy". He did accept that he probably did say to the claimant at some point that if sales didn't improve he would have to close the used car sales down but he denied shouting when he did so.

40. I prefer Mr Richards's evidence. I do not find it credible that the claimant did nothing by way of raising a complaint or taking other action if there had been as serious an incident as his statement suggested. In preferring Mr Richards's evidence I also take into account my findings about the relative credibility of the claimant's and Mr Richards's evidence in general and my findings about Mr Richards's behaviour and character at paras 63-74 below. I accept that Mr Richards did at some point (or points) say he would have to close down the used car business if sales did not improve but do not find that he shouted at the claimant in doing in the way the claimant alleged.

Para 14(d) – Paying too much incident - 28 February 2016

41. The claimant said in his statement that Mr Richards arrived at the claimant's office complaining that he was paying him too much for the lack of results. The claimant said that the lack of results was caused by Mr Richards's lack of stock control.

42. There was no real dispute that sales at the used car site did drop around February 2016. The claimant accepted this at paras 7 and 14(e) of his statement. In cross examination he also accepted that, unlike most of the other salesmen (Mr Payne being another exception) he was on a fixed salary rather than basic salary plus commission.

43. Mr Richards in his oral evidence accepted that he did tell the claimant that he was overpaid for the results achieved.

44. I find that Mr Richards did tell the claimant he was overpaid for the results achieved. That was in the context of a drop in sales. Unlike with some of the other incidents in para 14, the claimant did not suggest that on this occasion Mr Richards had shouted or threatened him in any way.

Para 14(e) – sale downturn in February to March

45. This paragraph did not in fact include evidence of any specific incident but recorded that "this kind of situation" went on until March 2017 (sic) when sales of cars started to pick up. The claimant's statement said that "February and March is the best time of year for car sales. The whole industry suffers". No further specific evidence was given about the "kind of situation" to which this refers. Presumably, it should say that February and March is the "worst time" for car sales given the subsequent sentence.

Para 14(f) – criticism of computer skills

46. The claimant said in his statement that "about a month later" than the preceding incident, Mr Richards said that the claimant lacked computer skills and that he needed to employ a younger person. In his statement, he said that he was able to carry out all the tasks expected of him and had no problem using the computer.

47. In his statement (para 6) Mr Richards said that the claimant had received training on how to maintain the web pages showing the used car stock. The claimant acknowledged that he had been given training but said that the training was given by a part-time valeter.

48. Mr Richards in oral evidence accepted that he probably did raise the issue of the claimant's lack of computer skills with the claimant. In his statement (para 7(e)) Mr Richards said that he specifically raised with him the importance of engaging with the respondent's new customer management system. That system was used to log customer enquiries so that they could be followed up. Mr Payne in his statement (para 6) said that both he and Mr Richards raised with the claimant his reluctance to use that system. Mr Payne's and Mr Richards's evidence that the claimant failed to engage with the customer management system was not challenged in cross examination.

49. At p.106 of the bundle there was an exchange of emails between the claimant and Mr Payne on 12 December 2017. Mr Payne asks the claimant to update an entry on the customer management system. The claimant's response is "how the fuck can I do it when I don't know how, if I knew how to do it I would have done it?"

50. In cross examination, Mr Manley also gave evidence that the claimant did not use the new customer management system. He also gave evidence that 2 different trainers had attended the site to give the claimant training.

51. I find that Mr Richards did raise with the claimant the issue of his lack of computer skills and that both Mr Payne and he criticised the claimant for his lack of engagement with the computerised customer management system. The claimant's response to the email from Mr Payne on 2 December 2017 supports the respondent's case that there were genuine issues with the claimant's computer skills and in particular his use of the customer management system. I accept Mr Blakemore's submission that the claimant's own evidence does not suggest that the criticism was done in a bullying or aggressive way.

Para 14(g) – criticism of car pictures

52. In his statement the claimant said that "on another occasion" Mr Richards "remarked that the pictures on the ebay site and the A.Motors site were rubbish". The claimant considered the photographs to be of good quality, that he did his best with the equipment he was given but did not profess to be a qualified photographer. By implication, it seems to me, the claimant accepted the photos could have been better.

53. In his cross examination evidence Mr Richards said that he did make a passing comment about the photos being terrible. In cross examination, the claimant accepted that there was nothing wrong with an employer criticising an employer's work. He did not in his written or oral evidence suggest that the "remark" was made in a particularly bullying or aggressive way.

54. I find that Mr Richards did make a remark criticising the quality of photos of cars taken by the claimant. There was no evidence to suggest he did so in a particularly bullying or aggressive way. The incident was not significant enough for the claimant to be able to pin it down to a date or even a month.

Para 14(h) – closing boot lids

55. In his statement the claimant said that he always opened the boot lids on all cars on nice days to attract attention and show activity on the site. He said that "one day" Mr Richards arrived, walked round the site and came to the office to tell him to "close them boot lids". The claimant says he closed them.

56. Mr Richards in oral evidence confirmed that he would have told the claimant to close the boots of cars on the lot had he seen them open. He said that VW have for a number of years had a policy of not having boots open on cars for sale. Mr Richards said that even though the used car site is not specifically affiliated to VW he likes to operate consistent standards across the new and used car sites.

57. As with the allegation in para 14(g) the claimant's own evidence did not suggest Mr Richards acted in a particularly bullying or aggressive way when he told the claimant to close the boots. Again the incident was not significant enough for the claimant to be able to pin it down to a date or even a month. I find the incident did occur but did not involve any aggression or bullying on Mr Richards's part.

Para 14(j) – holiday request incident

58. In his statement, the claimant said that he always booked his holidays 2 weeks in advance so that there was advance notice to the respondent of the need for cover on the Glanyrafon site. He said that a week prior to his holiday Mr Richards approached him and said that they had not been able to find cover for his holiday so the used car site would have to close. The claimant said that Mr Richards knew that he would not allow that to happen so he had to cancel his holiday but was never thanked for doing so.

59. That evidence was inconsistent with the evidence the claimant gave in cross examination. In answer to Mr Blakemore's question, he confirmed that he had not actually booked his holiday. Instead, what he was saying was that this holiday request was turned down because no cover could be found.

60. Mr Richards in oral evidence said that he did not get involved in dealing with the claimant's holidays – that was something Mr Payne did. Mr Payne in his oral evidence confirmed that this was the case. The claimant in his cross examination evidence confirmed that he would email Mr Payne to request holiday and Mr Payne would confirm having checked the calendar for availability of cover. However, he said that on this occasion Mr Payne had said he would have to run it by Mr Richards because there was no cover. The claimant said that on this occasion Mr Richards had said that he couldn't have the holiday requested and would have to take holiday in December instead.

61. Mr Payne's in cross examination evidence confirmed that there was an incident when the claimant had requested holiday but it was not possible for it to be taken when he wanted because of a lack of cover. Mr Payne said he had suggested to the claimant that he speak to Mr Richards about it but heard nothing further.

62. There was no real dispute that on one occasion the claimant had not been able to take holiday when he wanted to because of lack of cover. However, I find the claimant's version of this incident in his statement is misleading. By his own admission in cross examination evidence, this

was not a case of Mr Richards deliberately forcing him to cancel a holiday he had already booked. Instead, a request to take holiday at a certain time was declined because there was no cover available. I've no doubt the claimant was disappointed by that. However, to characterise it as an incident of bullying is simply not accurate.

The working relationship between the claimant and Mr Richards

63. I have set out above my findings in relation to each specific incident in paragraph 14. It's convenient here to record my findings in relation to the more generalised evidence about the claimant's working relationship with Mr Richards. Where there was a conflict of evidence about a specific incident I have taken that more general evidence into account in assessing whether, on the balance of probabilities, the incidents took place as alleged by the claimant.

64. In terms of corroborating evidence, the claimant included in evidence what he referred to in para 29 of his statement as a "medical statement" from his GP. In fact, it is a one page print out which provides brief notes of the claimant's visits to his GP from 13 December 2013 to 9 October 2017. There are two entries which refer to visits to ACAS. The first is on 16 February 2016 and the second on 18 March 2016. Both refer to "has contacted ACAS". The relevant parts of that entry for February say "feels bullied and harassed at work. no union, has contacted ACAS." The relevant parts of the entry for 18 March 2016 say "depression interim review coping mechanisms discussed. Whether worth stopping work. Has contacted ACAS". There is no subsequent reference to feeling bullied at work, problems at work or ACAS in the records.

65. The entries in the GP records do show that in February and March 2016 the claimant was feeling bullied and harassed and considering giving up his work. I can't see any reason why he would tell the GP that he had contacted ACAS if he had not done so. What the GP entries do not do is say what he contacted ACAS about. They also cannot carry much weight when it comes to establishing whether the claimant was <u>in fact</u> being bullied at work. They do not include any details of specific incidents.

66. There is one aspect of the GP records which does not appear to support the claimant's case. In his statement he refers (para 34) to being "bullied and harassed for months on end". However, there are no references to problems at work or bullying and harassment in the GP records after March 2016. While accepting that an employee doesn't always turn to a GP for help when facing problems at work, it does seem to me a little surprising that if the bullying and harassment was as persistent as the claimant suggested he did not go back to his GP about it after March 2016.

67. The claimant's case portrayed Mr Richards as acting in a nasty and, on occasions, violent way. His statement (para 30) refers to Mr Richards as being "morally unfit to be a boss". However, he accepted in evidence that Mr Richards had in the past helped him out with some tax-related problems. His statement also says that "all seemed to be happy and a nice place to work" until February 2016, i.e. for the first five years or so of his work for the respondent.

68. Mr Jeremiah in his statement referred Mr Richards as an "arrogant and bad tempered" employer and said he had had four major rows with him. On one occasion, he said Mr Richards had "asked him to go outside" which he considered to be a threat. In cross examination, however, he accepted that in his letter of resignation he had thanked Mr Richards for employing him. He also accepted that his Facebook profile referred to himself as a "former slave of [the respondent]". It did not seem to me his evidence was objective and I gave it little weight, particularly as it could only relate to the period up to August 2015 when he left the respondent's employment, i.e. before any of the incidents cited by the claimant.

69. Mr Jeremiah only gave detailed evidence about one incident. He said he heard Mr Richards shouting at the top of his voice in the claimant's office. However, in his statement he said that he was "quite a way outside" and so could not hear what was said. In cross examination, he also said that he had problems with his hearing after working for the respondent for a few months, leading to him wearing a hearing aid in his left ear. He accepted that there were a number of noisy tyre fitting bays between him and the claimant's office where the alleged incident took place. In those circumstances I do not find it credible that Mr Jeremiah could have heard what was happening in the claimant's office or give reliable evidence about that incident.

70. Mr Jones's evidence also sought to portray Mr Richards as aggressive and threatening. His witness statement referred to an incident at Glanyrafon in November 2017. He said that he would visit the claimant at work once a week or so usually during his lunch break and chat to him for 15 minutes. He said that he was standing in the sales office at the Glanyrafon site talking to the claimant when Mr Richards came in. According to Mr Jones, Mr Richards accused him of smoking in the office. Mr Jones denied it and said Mr Richards carried on arguing with him, shouting "at the top of his voice" that [he would] "sort [Mr Jones] outside".

71. In cross examination, Mr Jones accepted that during the incident he had told Mr Richards to "fuck off". He said he had not wanted to include foul language in his statement. His credibility was damaged by the failure to include in his written statement the fact that he had told Mr Richards to

"fuck off" during their altercation at the office in November. In answer to my question, Mr Jones confirmed that he had had conversations with Mr Richards before that day and there had never been any trouble. To the extent that Mr Jones's evidence was seeking to suggest that Mr Richards was in general a violent person I reject it. It seems to be understandable that a business owner told to "fuck off" on his own premises by a friend of an employee might well have lost his temper with him, but I accept Mr Richards's evidence that he did not threaten Mr Jones.

72. In cross examination, Mr Jones accepted that he had added the names of Peugeot, Ford and VW to the bottom of his letter dated 4 December 2017 (p.102-103) to Mr Richards about the incident. He said he had not actually copied the letter to those car firms but it seems likely to me that he did so in order to cause trouble for Mr Richards, either by actually sending the letter to those suppliers or by giving Mr Richards the impression he had. In relation to his evidence I accept Mr Blakemore's submission that Mr Jones's input into the case was very one-sided (perhaps understandably given he is a long-standing friend of the claimant's).

73. Mr Richards himself said that the respondent had some 40 staff and some of them had been there since the 1980s. He suggested that it was unlikely staff would stay if he behaved the way the claimant and his witnesses suggested. He had never been taken to the employment tribunal before. He said his helped out a number of employees over the years and that he tried to look after his staff.

74. On more than one occasion during Mr Richards's cross examination evidence exchanges between him and Mr Jones become very heated to the extent that I had to intervene. I am very cautious about extrapolating what someone's behaviour might be in the workplace on a day-to-day basis from their behaviour in the witness box in the tribunal. It is an artificial and stressful environment. In this case, that was exacerbated by the evident dislike between Mr Jones and Mr Richards. However, having witnessed his demeanour in giving evidence I do find it credible that Mr Richards might when sufficiently provoked express his annoyance in a robust way. That seems to me consistent with his own evidence, e.g. at paragraph 16 of his statement which says (in relation an incident in December 2017 discussed below) that "[Mr Richards] was annoyed and the claimant would have understood I was annoyed". I did not, however, hear any credible evidence that Mr Richards was violent or prone to unprovoked threatening or aggressive behaviour.

<u>Incident in March 2017</u>

75. In his statement (para 15) the claimant described an incident in the first week of March 2017. He said that Mr Richards came into the claimant's office, made a cup of coffee and "was all smiles". According to the claimant, Mr Richards said "we have made the Ford target". The claimant said he replied "that's great, thought you were 4 cars down. That was what [Mr Payne] told me a couple of days ago." The claimant said that as soon as he said that Mr Richards "went mad and confronted me, and was about to put both his hands around my neck. I said 'you'd better not'. He put his hands down and left [the claimant's] office". In his statement the claimant said that he contacted ACAS after this incident who suggested he report the matter to a senior member of staff. The claimant said he reported it to Mr Manley.

76. When his evidence was challenged by Mr Blakemore in cross examination the claimant maintained that he had been threatened by Mr Richards and that he had spoken to ACAS about it. He said that ACAS did not provide a record of the conversation but that he had made his own notes. However, no such notes were produced in evidence. As I have noted above, there is reference in the GP records to the claimant contacting ACAS but that is in February and March 2016 not March 2017.

77. The claimant also confirmed when challenged that he had raised the matter with Mr Manley, although he accepted there was no written complaint. In answer to my question he said he had raised the matter with Mr Manley the day after the incident. He claimed that Mr Manley had told him that he should have "walked away". The claimant confirmed he did not pursue the matter further at that point.

78. He did accept when cross examined that meeting the Ford target would have been exceptional. The target is for the number of new Ford cars to be sold per quarter. The claimant accepted that the target is set deliberately high, i.e. it is designed not to be met. Mr Blakemore submitted that it was incredible that the target would have been met by March and that the supposed context for the incident therefore made no sense.

79. When cross examined about this incident Mr Richards's evidence was categorical: the incident described did not happen. He described it as "pure fantasy" on the claimant's part. He said that he had not been involved in violent activity since he was a child. He said there was no reason for him to have launched such an unprovoked attack on the claimant.

80. Mr Manley in his oral evidence in chief said that the claimant made no complaint to him about an incident in March 2017 nor did the claimant speak to him about having contacted ACAS around that time. He said that

had such a serious allegation been made he would have taken action. Mr Jones did not challenge his evidence on this point in cross examination.

81. As I have recorded above, I do not accept that there is credible evidence that Mr Richards prone to behaving in a violent or threatening manner with minimal or no provocation. If the claimant's version of this incident is correct, Mr Richards physically threatened him "out of the blue" because he questioned whether the respondent had in fact met the Ford target. That does not seem to me to be credible. In any event, I accept the submission made by Mr Blakemore that the respondent would not have met the Ford target by March when the incident is said to have occurred (and would be unlikely to do so at all).

82. Given the seriousness of the alleged incident, I also find it surprising that the claimant did not either pursue it further at the time or raise it in what he refers to as his grievance letter (p.104-105) in December 2017. On the balance of probabilities, I find the incident in March 2017 as described by the claimant did not happen.

<u>1 December 2017 incident and 5 December meeting</u>

1 December incident and related text messages

83. This incident was linked to the sale of a Skoda Yeti. Some of the surrounding facts were not in dispute. The claimant accepted that he made a mistake in filling in the paperwork, invoicing it at £10495 rather than £10995, a shortfall of £500. The original and corrected used car vehicle order forms were at pp.97 and 98 of the bundle. There is, as the claimant says, a difference of £500 between them (although the figures are £10490 versus £10990 rather than those quoted by the claimant in his statement).

84. The claimant said he spotted the mistake within about 10 minutes and called the customer who came in to sort out their differences. There is also no dispute that when Mr Richards saw the original and altered paperwork on 1 December 2017 he thought there was something "fishy" about the change in sale price. There is also no dispute that the claimant and Mr Richards had a telephone conversation about the issue on the 1 December 2017. There is a dispute about who instigated the call and what was said.

85. There is no dispute that the claimant sent Mr Richards a text message at 1 a.m. on the morning of the 2 December 2017 (p.100). It said "Now 1 a.m. still not asleep your comments were disgusting this evening. Why are you like this when you don't know the facts?" Mr Richards's response by text (p.101) said "Please do not send messages at gone 1 am. Really

not appreciated. You leave me with no alternative other than to commence formal disciplinary action next week".

86. In his statement (para 19) the claimant said that he rang Mr Richards "later" on the day when the mistake took place. His statement said that the mistake was made on the 1 December 2017. However, the order forms at p.97-98 are both dated 29 November 2017. Mr Richards's statement says that the mistake happened on 29 November 2017 and that it was him who rang the claimant on 1 December 2017 when the documents were brought to his attention. I prefer Mr Richards's evidence on this point – it is the version consistent with the agreed date of the telephone conversation between him and the claimant.

87. There is also a dispute about (some) of the content of the conversation. According to the claimant's statement (para 19), Mr Richards "went mad and said, I quote "IF YOUR FACE WAS IN FRONT OF ME ID BLOW IT OUT OF THE WATER". The claimant said that Mr Richards then said "there's something fishy going on here" and put the phone down.

88. Mr Richards in his statement accepted that he said that there was something fishy going on and that "[he] was certainly annoyed and the claimant would have understood that". In cross examination evidence he accepted that he could not remember the exact words used and that he was angry but denied using the specific words quoted. Mr Manley's evidence in cross examination was that he had worked with Mr Richards for 19 years and never heard him use the phrase quoted by the claimant in his statement.

89. The claimant said his version of what was said was corroborated by another employee of the respondent. The evidence in his statement (para 19) is that shortly after the call with Mr Richards he received a call from an employee at the Llanbadarn site (where Mr Richards's office was). That person asked him "what was that about, blowing you out of the water?" However, I heard no evidence from that individual. The claimant said in his statement that he could not name that person "for obvious reasons" but did not set out those reasons. As far as I know, the claimant (or Mr Jones on his behalf) made no attempt to seek a witness order or otherwise ensure their evidence was before me. It cannot therefore stand as corroboration of the claimant's version of events.

90. In his letter date 5 December 2017 (p.104-105) the claimant refers to that conversation on 1 December with Mr Richards. Although on that occasion he quotes the words in a different order as "I will blow you out of the water if I see your face" the letter was written only a few days after the conversation it refers to. If Mr Richards did not use those words I do find it slightly strange that he did not challenge the claimant about their being

attributed to him in that letter. Mr Richards said in his statement (para 23) that he accepted the letter as "the most [towards an apology] as [he] was going to get". In answer to my question he said that despite the "slight" on him in the letter he did not want to stir up trouble again so (in effect) "let it lie".

91. The quoted phrase itself is a slightly odd one and Mr Richards said he did not understand what it meant. The claimant in cross examination evidence said it meant that Mr Richards was going to sack him. Mr Blakemore submitted that this showed that the phrase was one which the claimant was familiar with but Mr Richards was not. On balance, taking into account my findings about the relative credibility and reliability of the claimant and Mr Richards's evidence I accept Mr Richards's evidence that he did not use the phrase attributed to him by the claimant.

92. The actual words used may not in any event be at the heart of the matter. In his cross examination evidence, the claimant explained that the reference to "disgusting" comments in his text (p.100) was to Mr Richards saying there was "something fishy" about the change in sale price. That is also the thrust of his letter on 5 December 2017 which, while apologising for sending the text when he did, maintains that "you would not listen to what I had done and this caused me great stress and anxiety" and that "because you did not understand what I had done, in front of members of staff you accused me again". In other words, it seems to me it was what the claimant saw as an accusation of dishonesty which was the claimant's main issue with what was said. Mr Richards's evidence (which I accept) was that the phone call to the claimant was made from his private office. The claimant accepted that there was no one else on the line so any accusation was not made "in front of staff".

5 December 2017 meeting

93. There is no dispute that on the 2 December 2017, Mr Manley visited the site and "sorted out" the issue with the customer. Mr Richards's evidence is that Mr Manley's report of what had happened satisfied him that there was nothing suspicious in what had happened. It seems that matters would have been left there had it not been for the text sent to Mr Richards by the claimant at 1 a.m. on 2 December. As a result of that text, Mr Richards decided initially to convene a "disciplinary hearing" (to quote his text at p.101). However, at some point, Mr Richards's unchallenged evidence is that he had decided against disciplinary action but decided to have a "clear the air" meeting. That meeting took place on the 5 December 2017 at the Llanbadarn site between the claimant, Mr Richards and Mr Manley.

94. It's not clear from the claimant's statement when and how he was told about the meeting on 5 December. In answer to my question he said that he received a phonecall but could not remember whether it was from Mr Manley or Mr Richards. He also couldn't remember what he was told during the phonecall other than that there was going to be a meeting.

95. One thing is clear to me, which is that the meeting was not a grievance meeting held in response to the claimant's letter at p.104-105 (which he refers as a letter of grievance). In his statement, the claimant said (para 21) that he delivered the letter by hand to the reception desk at the Llanbadarn site on 5 December for the attention of Mr Richards. His statement goes on to say (para 22) that "about 3 days later I was asked to call in at the main office to see [Mr Richards]." At para 23 he refers to the "lack of minutes" of the meeting and that "there was no appeal possible". That, it seems to me, is an attempt by the claimant to portray the meeting of 5 December as the respondent's inadequate response to a formal grievance letter. The evidence is not consistent with that.

96. First, the suggestion that the meeting took place "3 days" after the letter was delivered is clearly wrong. It is accepted the meeting took place on 5 December, the same day as the date of the letter. The claimant's own cross examination evidence was that he delivered the letter on the morning of the day of the meeting. In cross examination the claimant claimed that his statement was meant to say that the meeting took place 3 days after the "incident" complained about in the letter. However, the incident complained about in the letter happened on 1 December so that does not fit. It may be that the "3 days later" was meant to refer back to the reference to 2 December in para 20 of the claimant's statement. The statement as submitted in evidence is at best confused and at worst misleading at this point.

97. Second, the evidence from Mr Richards and Mr Manley was that they had not seen the letter before the meeting took place. Mr Manley's unchallenged evidence was that he did not see the letter until some time later because it was not addressed to him. Mr Richards's evidence was that he received the letter after the meeting. In his statement he refers to the letter as a "letter of apology" (para 22). The claimant did not suggest that he delivered the letter to Mr Richards in person and he could not know whether he saw it before their meeting. I accept the evidence of Mr Manley and Mr Richards that neither had seen the letter at pp.104-105 before their meeting with the claimant.

98. Third, the claimant in cross examination evidence said that he could not remember the letter being discussed at the meeting. He did not suggest that he had referred to the letter at the meeting which might be expected

if he really thought that the meeting was a grievance meeting in response to his letter as his statement suggests.

99. I find that the meeting on 5 December 2017 was not a grievance meeting held in response to the claimant's letter at pp.104-105. I do, however, think that the claimant might have been justified in being uncertain what the purpose of the meeting was. In his text message (p.101) Mr Richards had referred to holding a disciplinary meeting. Although in his evidence he said he had decided not to proceed with that it's not clear when or even whether that was made clear to the claimant.

100. In terms of the meeting itself, the claimant in his statement (para 22) said it was unfair that he was unaccompanied while there were two managers present. His statement seems to imply that the set-up of the meeting was intimidating: "[Mr Richards and Mr Manley] were sat on one side of the desk while I was sat on the other" (para 22). In cross examination evidence, however, the claimant accepted that the three of them were sat in a triangle, with Mr Richards on one side of the desk, the claimant on the other and Mr Manley on the end of the desk. The claimant denied that this meant his statement was wrong but it is another instance of the claimant's statement evidence being inconsistent with his oral evidence and of the statement seeking to portray the respondent's behaviour in a worse light than the reality of the situation.

101. There were no notes of that meeting nor any letter or email recording what, if anything, was agreed. The claimant in his statement (para 22) said that he apologised for sending Mr Richards a "late text one evening" (referring to his 1 a.m. text at p.100) but not for the content. He said that Mr Richards started the meeting by saying that he was at the point where he was considering closing the used car site down and that he "continued to slag me off by saying I had not run the place properly for the last 7 years". He said Mr Richards told him that "[the claimant] had cost him a lot of money" and that he was paying the claimant far too much. The claimant said in his statement that his explanation for the pricing error regarding the Skoda was accepted but that Mr Richards then started waving the corrected sales document around and said "if you take me to the Employment Tribunal I will show them this document and you won't have a chance". The claimant said Mr Richards said they would give each other a month to see how things went.

102. In his statement (paras 21 and 22) Mr Richards largely agrees with the claimant about what was discussed at the meeting. He confirms the claimant apologised for sending the text when he did; that he accepted the claimant's evidence about how the pricing error had happened; that he raised issues with the claimant about his performance telling him his

performance was mediocre in relation to his salary and that he would need to "pull his socks up" if he wanted to keep his job.

103. Mr Richards, however, did not in his evidence accept that he had made the comment about the Employment Tribunal attributed to him by the claimant. He said in oral evidence that they had all left the meeting as "happy bunnies". I accept his evidence that at that time he thought that he had successfully given the claimant a "gentle gee-up" and managed to clear the air after the 1 December incident and exchange of text messages." Mr Manley corroborated Mr Richards's version of events (paras 4 and 5 of his statement). He was not cross examined by Mr Jones about the meeting in any detail but confirmed in oral evidence that he "remembered it well".

104. It does not seem to me that the comment which the claimant alleges Mr Richards made about the Employment Tribunal is consistent with the evidence about what happened at the meeting. Given that Mr Richards's evidence was that he had never been taken to an employment tribunal before it seems unlikely to me he would have raised it as a possibility off his own bat. It might make sense if it was a response to a comment from the claimant about making an employment tribunal claim, but he does not suggest that he made such a comment in his statement or oral evidence. On the balance of probabilities I find that Mr Richards did not make that comment.

105. In answer to my question, Mr Manley confirmed that although the outcome of the meeting was that they would "review matters" in a month, no date was fixed for a further meeting. He suggested that another meeting would have happened if the claimant had not handed in his resignation on 27 January 2018.

106. It is accepted that there was no letter or email sent to the claimant confirming the outcome of the meeting. That lack of formality around steps taken by the respondent was a feature of this case.

107. In his statement (para 26) the claimant said that he decided to leave the respondent on 9 December 2017. I will return to the timing of his resignation later but for now I simply note that his evidence was that he took no steps after the meeting on 5 December 2017 either to resign or to seek a follow up to what he calls his "grievance letter" of 5 December 2017. His evidence on this point was confused. In response to a question from Mr Blakemore he said that so far as he was concerned his grievance was addressed at the meeting of the 5 December 2017. However, in answer to my question he said that he did not think the grievance was resolved because Mr Richards had said they would give each other a month. I asked him what his expectations were after the

meeting and he said he did not really know but didn't expect anything to happen. However in his statement he said (para 26) that he was waiting for a letter after the meeting before resigning. What is clear is that he did not in the immediate wake of the meeting suggest to the respondent (either Mr Richards, Mr Payne or Mr Manley) that he was unhappy with the outcome or was intending to resign.

7 January 2018

108. The claimant in his statement (para 25) said that on 7 January 2018 he decided to rearrange a few cars. He put a set of keys on his desk and went to the toilet for a wee. He said that while he was in the toilet, Mr Richards came to the office and shouted "hello". The claimant said he shouted "hello" back but that "as soon as [the claimant] had come out of the toilet [Mr Richards] had gone and drove away at fast speed like a lunatic". An email from the claimant (p.107) confirms this version of the incident but is dated 3 January 2018. At para 26 of his statement the claimant refers to Mr Richards's "behaviour and reactions on the 3 January 2018 [as] disastrous". I find that this incident happened on the 3 January rather than the 7 January as stated in the claimant's statement.

109. I heard a certain amount of oral evidence from Mr Payne and from the claimant in cross examination about this incident. It focussed on whether there really was a risk of the keys being taken by a third party while the claimant was in the toilet and whether or not Mr Payne had put the keys in the safe or left them on the desk. Ultimately that is academic because the claimant's case is that this incident was another example of Mr Richards bullying him. Given his own evidence was that Mr Richards did not see him on this occasion it is hard to see how it could amount to bullying. The claimant cannot say whether Mr Richards or Mr Payne heard him saying "Hello" nor (given he was still in the toilet) can he claimant realistically give evidence about the way Mr Richards (or Mr Payne) drove off.

The Grievance

110. I have already to some extent dealt with the evidence relating to this issue. I have noted that, contrary to what the claimant's statement implies, the meeting on 5 December 2017 was not a grievance meeting called in response to his letter (pp.104-105).

111. The respondent's grievance procedure was included in the bundle at p.43. It sets out the requirements for a formal grievance. These are that "the employee should set out in writing the basis of the grievance with sufficient information to enable the issues to be understood".

112. The letter at pp.104-105 is a handwritten letter which is a page and a half long. It nowhere specifically says it is a grievance. It contains an explanation of the Skoda mis-pricing incident; an apology for the early morning text sent to Mr Richards on 2 December (but "not for the content"); a complaint that Mr Richards has had a "massive downer" on the claimant for the previous 2 years and a reference to the claimant being criticised for mediocre performance. The second page of the letter does refer to "bullying tactics". That seems to me clearly to refer to the preceding sentence which says "I do not understand that when you accuse a person of something why do you not want to listen to the reason the accusation has arisen". In other words, the reference to bullying tactics is in relation to Mr Richards thinking there was "something fishy" about the change in price on the two Skoda order forms. There is no reference to any other acts of bullying or harassment nor (as the claimant accepted in cross examination evidence) any supporting evidence relating to any other incidents.

113. The claimant in evidence said he did not have access to the grievance procedure (and by implication did not know what the formal requirements for a grievance were under that procedure). However, it does seem to me that an employer cannot be expected to respond to a grievance unless it contains specific enough information about the issue the employee wants resolved. The claimant's letter does not contain any specific information about any incidents other than the conversation with Mr Richards on the 1 December 2017. In oral evidence, the claimant suggested that there were too many incidents of bullying to include in the letter. It seems to me, however, that he cannot criticise the respondent for not dealing with allegations of bullying before 1 December 2017 when he did not set any out in his letter. In fact, the letter does not suggest that there had been incidents of bullying prior to that date – only that Mr Richards had "had a downer" on the claimant for the past 2 years.

114. It does seem to me that the letter contains specific enough information to constitute a grievance. If I am wrong about that, and it did constitute a grievance about the conversation with Mr Richards on 1 December 2017 then the claimant's own evidence is that that issue was addressed by the respondent at the meeting on 5 December 2017 (even if not specifically in response to the letter). The claimant explained at that meeting how the mispricing had come about and Mr Richards accepted his explanation.

115. Although the claimant now suggests that the issues raised in his letter were not dealt with at the meeting on 5 December 2017, he confirmed that he did not take steps to chase up a further response to his letter. In fact, in answer to Mr Blakemore's cross examination question,

the claimant said that his complaint was about bullying by Mr Richards not that the respondent didn't deal with his grievance.

116. Given that the claimant did not at any point after 5 December 2017 suggest that he was still awaiting an outcome or (to use the words in his statement) that he wanted to "appeal" against what had happened on 5 December 2017 it seems to me understandable that the respondent regarded the issue raised in the letter as having been dealt with. I accept Mr Richards's evidence that having dealt with the subject matter of the letter at the meeting on 5 December 2017, he regarded it as resolved. There was no need to re-open the matter and create bad feeling (Mr Richards's' words) when Mr Richards saw the letter some time after the meeting took place.

Resignation

117. The claimant resigned by a letter date 27 January 2018 (p.109). It says that the reason for termination of his employment is "you have Bullied and humiliated me so much in the last 6 months that I cannot tolerate it any further and have lost all confidence in you as an employer". It said that the last straw was "before Christmas 2017 when I sent you a grievance letter but you did not formally reply. It is admitted that you called me to a meeting at your office but no further communication was recieved [sic] from you". The claimant was put on garden leave and his employment ended on 28 February 2018.

118. In his statement the claimant gave two different reasons for delaying his resignation. At para 26 he said that he had decided on 9 December 2017 to resign but did not do so because he was "waiting for a letter" (presumably following the meeting of 5 December 2017). At para 27 he says he was afraid to leave and that "due to [his] financial commitments [he] did not hand in his notice until the 28 January 2018". When asked about this in cross examination by Mr Blakemore, the claimant said that he had rent to pay and a partner to support and left when he had been able to make financial provision for those. He also said that he had decided to leave in December 2017, so logically any incidents in January were irrelevant.

119. However, paragraph 26 of his statement is confused and confusing. It says that he decided to leave on 9 December. It also says "what [Mr Richards] did in December 2017 and January 2018 [my underlining] was the "last straw" for me". In the last sentence of the same paragraph he said "His behaviour and reactions on the 3 January 2018 was disastrous", implying that incident in January did have a bearing on his resignation.

120. On balance I find it more probable that the claimant had decided to resign in the wake of the meeting on 5 December 2017. I find his oral evidence more convincing than the confused evidence in his statement. It also seems to me implausible that what happened on 3 January 2018 would be enough to cause him to resign. It did not even involve any contact between him and Mr Richards and I find it hard to understand in what way Mr Richards's behaviour was "disastrous" as suggested by the claimant's statement. I accept his evidence that he did not resign straight away because he wanted to have a financial cushion when he did so. That would seem to me to explain why (as Mr Blakemore pointed out) he waited for two further monthly pay days before resigning.

The redundancy payment claim

121. As I have mentioned, the claimant's witness statement made no reference to there being a redundancy situation. I gave Mr Jones the opportunity to ask the claimant questions about this as part of his oral evidence in chief. He did not do so. Mr Richards in his oral evidence in chief confirmed that after the claimant left they advertised his job and appointed a new employee. The used car business continues as before. I find that there was no reduction in the kind of work previously carried out by the claimant – instead he was replaced on a like for like basis.

Discussion and conclusion

Constructive dismissal – bullying

122. I have set out my findings of fact on the incidents said by the claimant to constitute bullying by Mr Richards. I found that Mr Richards did tell the claimant that he would have to close the Glanyrafon site if business did not improve (para 14(c)); that he did say he was overpaid for the results he achieved (para 14(d)); that he did criticise his computer skills (para 14(f)); that he criticised the photos on the website (para 14(g)) and that he asked him to close the boot lids on the lot (para 14(h)). Those incidents all happened before March 2017. The claimant did not suggest that these incidents were repeated, the incidents either having a specific date or being recorded as "on another occasion". It seems to me on the evidence I heard that these were examples of legitimate criticisms of an employee's work by an employer. I accept that the claimant did not like to hear them (and might even disagree with them and feel they were bullying) but viewed objectively I do not think that they amounted to a breach of the implied duty of trust and confidence. That is particularly given my findings that none of them were made in an aggressive manner or involved Mr Richards shouting at the claimant.

123. Of the other incidents relied on, I find that the incident in March 2017 did not take place. I find that the "holiday incident" (para 14(j)) and the "keys" incident in January 2018 did take place but cannot see that either constituted bullying or in any way amounted to a breach of the implied term either in themselves or taken with other incidents.

124. I do accept that during his conversation with the claimant on 1 December 2017, Mr Richards was angry with the claimant and said that he thought there was "something fishy" going on. I do not accept that Mr Richards used the "blow out of the water" phrase attributed to him. As I understand it, the claimant's case is that what he saw as an accusation of dishonesty during that conversation was a breach of the implied term, either in itself or as the last straw taken with the previous incidents.

125. The question for me is whether, viewed objectively, the conduct breached the implied term. I do not think the incident did so when taken in isolation. The context for the conversation was that Mr Richards had become aware that two order forms for the same car had been submitted with two different prices. It was obviously something that called for an explanation. Whatever the explanation it would require sorting out and would potentially damage relations with the customer involved. The claimant in his evidence accepted he had made a mistake, i.e. that Mr Richards was ringing up about something which was his fault. There is no question of Mr Richards humiliating the claimant in front of other staff because I have found the conversation did not take place in front of other staff. The fact that Mr Richards showed his annoyance is not sufficient to amount to a breach of the implied term.

126. I have also considered whether that incident could be the "last straw" amounting to a breach of the implied term when taken with the previous incidents. I do not think it could. As I've suggested above, I do not think that this is a case where there was a campaign of bullying and harassment. It is clear that Mr Richards was not happy with the claimant's performance and that he did on occasions criticise aspects of his work. There is no evidence about specific instances after March 2017 until December 2017. As I have said, it seems to me that the incidents in para 14 which I found did occur amount to no more than legitimate criticism of the claimant's performance and a realistic assessment of the consequences if business did not improve.

127. I find that the respondent did not breach the implied term of trust and confidence by bullying and harassing the claimant as alleged.

<u>Constructive dismissal – failure to address grievance</u>

128. The claimant in his evidence said that his claim was not in fact based on a failure to deal with his grievance but on the alleged campaign of bullying. As it was in the list of issues, however, I will deal with it. I found that the "grievance letter" (p.104-105) did not amount to a grievance letter. The respondent could not therefore be in breach of the implied term by failing to address it.

129. If I am wrong about that, then it could only have been a grievance in relation to the conversation with Mr Richards on 1 December 2017. There was no detail or supporting evidence relating to any other incidents. That incident was addressed at the meeting on the 5 December 2017. The claimant did not pursue the matter further and it does not seem to me there was anything to alert the respondent that the issue was still a "live" one. Viewed objectively I do not think there was a breach of the implied term of trust and confidence by a failure to address a grievance.

Constructive dismissal-conclusion

130. Since there was no breach of the implied term of trust and confidence, there was no fundamental breach of contract entitling the claimant to resign. He was not constructively dismissed so his unfair dismissal claim fails.

Redundancy payment

131. I found that there was no redundancy situation and in those circumstances there can be no claim for a redundancy payment.

Implied term - reference

132. Mr Jones at the end of the hearing suggested that the claimant was also alleging that the respondent was in breach of contract by failing to provide him with a reference. He presented no evidence in relation to this and provided no authority for the proposition that there is an implied term that a reference will always be provided. I reject that claim.

The ACAS code

133. Neither Mr Manley nor Mr Richards had heard of the ACAS Code of Practice on Disciplinary and Grievance Procedures. I asked Mr Richards why, given the numerous issues he raised about the claimant's performance in his statement (para 7 in particular) the respondent had never taken formal performance measures to try and address what he regarded as the claimant's unsatisfactory performance. Mr Richards's response was that he felt strongly was that once matters have progressed

down the formal performance route the relationship between employer and employee is irretrievably damaged.

134. I understand the sentiment behind that but it seems to me that in some cases a lack of formality (even if motivated as Mr Richards said by wanting to avoid "bad feeling") can actually make matters worse. It can lead to a lack of clarity about the employer's expectations of an employee. It can also leave room for dispute (as in this case) as to whether an employer is bullying an employee or legitimately criticising their performance. It can also lead to an increase in compensation against an employer who is found to have unfairly dismissed an employee. There is no doubt that had I found an unfair dismissal in this case the compensation would have been increased to take into account the failure to comply with the Code. It would be prudent for the respondent to familiarise itself with it and consider how to apply it to its business.

Employment Judge McDonald
Dated: 23 October 2018

639 JUDGMENT SENT TO THE PARTIES ON

24 October 2018

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS