EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Khandelwal**
Respondent:	**Virgin Media Ltd**
Heard at:	via CVP at Newcastle Employment Tribunal
On:	20, 21 and 22 September 2021 – evidence and submissions 15 November 2021 – in chambers
Before:	Employment Judge Jeram, Mr O'Connor and Ms Woodward
Representatives:	
Claimant	in person
Respondent	Mr M Green of Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The claimant's claims of race discrimination are not well founded and are dismissed.
2. The claimant's claim of unfair constructive dismissal is well founded and succeeds. Directions to enable the parties to prepare for a remedies hearing will be provided separately.

REASONS

1. By claim presented on 22 March 2020, the claimant complains of unfair constructive dismissal and direct race discrimination.

2. The issues in the case were identified at a Case Management rehearing on 18 March 2021 and were confirmed at the outset of the hearing as being broadly as follows:

Race Discrimination

a. The claimant describes his race as being: of Indian origin, his colour (brown).
b. Did the following events amount to less favourable treatment because of the claimant's race:
   i. The claimant's manager ON holding a meeting with the claimant, when similar meetings were not held with others. The is no issue between the parties that this meeting was likely to have occurred on 28 October 2019;
   ii. at the meeting above, ON instruct the claimant to stop carrying out 'cancel and resigns' though not immediately;
   iii. formally investigating the claimant for carrying out 'cancel and resigns' and holding meetings on 12 November and 29 November 2019;
   iv. suspending the claimant;
   v. ON advising the claimant on 29 November that it was in his best interest to resign;
   vi. as a result of the foregoing, constructively dismissing him.

Unfair Constructive Dismissal

c. Did the respondent act without reasonable and proper course in a manner that was calculated or likely to destroy the implied term of trust and confidence by acting in the manner set out at paragraphs i. to v. above.

Evidence

3. We had regard to a file of documents consisting of 114 pages. We heard from the claimant. On behalf of the respondent we heard from Chris White (Regional Manager) and Keith Hall (Regional Direct Sales Manager).

Credibility

4. We found the claimant to be a compelling witness. The evidence he gave was internally consistent, largely consistent with the documents and credible. He answered questions in a direct fashion, at times, disarmingly so. The claimant's case from the outset was that he accepted that he had disconnected customers with a view to entering into new contracts, which generated sales commission, but his manager, ON, and ON's own manager, Chris White were aware of this wide spread practice and condoned it.

5. The respondent's case, by contrast was inexplicably unclear and inconsistent. In its response, the respondent contended there was one investigation commencing in approximately October 2019 and continuing until 29 November 2019. At a Case Management hearing, the respondent contended that its case was that the claimant was not the only one who was being investigated. At the outset of the hearing, it was clarified on behalf of the respondent that there were, in fact, two investigations and not one; that was how the case was put to the claimant in cross examination. On CW's oral evidence no investigation at all had taken place in October 2019 – 'management' had decided to draw a line under some troubling sales advisors' figures.

6. We found the written evidence of CW omitted significant factual information, if his oral evidence were to be accepted, but significant aspects of his oral evidence lacked credibility in light of the documentary evidence. We do not discount the possibility that some of the quality of the evidence may be as a result of less than optimal preparation, but e.g. had the reason for the claimant's suspension been as simple as that introduced for the first time in CW's oral evidence, we find the lack of reference to that in the respondent's pleaded case and in CW's written evidence all the more incomprehensible. Insofar as there were conflicts in their evidence, we preferred that of the claimant.

7. Given the nature of the allegations discussed and the fact that we have not heard from certain persons, their names have been anonymised. The initials used below are <u>not</u> those of the persons to whom they refer.

Findings of Fact

8. The claimant was employed by the respondent from 1 March 2009, latterly as a Virgin Venue sales adviser until he resigned on 29 November 2019. He had a clean disciplinary record throughout his employment. He worked in a team of two alongside his colleague IB at a sales stand located in Beaumont Leys Shopping Centre in Leicester. His role was to sell internet television and telephone contracts to passing members of the public. He received commission on new contracts entered into. He and IB were line managed by ON (Field Sales Manager. The claimant is of Indian origin in the only person in ON's team who is of colour.

9. The respondent has a Guide to Sales Compliance entitled 'Fifteen Shades of Grey', in which the respondent identifies certain priorities. Against each priority is described what must, and what must not, be done as well as identifying where caution must be exercised. In the section entitled 'Disconnections & Re-connections', the policy states that *"the business loses considerable revenue from customers disconnecting services to simply reconnect under a different name at the same premises in order to benefit from a new customer offer".* Services within 30 days of a disconnection is a 'reconnection order' and that they should not advise the customer to disconnect their services for the purpose of reconnecting as new customer to either benefit the customer or the agent. In the section identifying where caution must be exercised, the policy states *"inform your line manager if you feel that a reconnection was necessary due to a customer led circumstance. Re-connections are monitored and deliberate manipulation to gain additional sales and commission is potentially fraudulent".* (Emphasis applied).

10. The Tribunal explored with CW the circumstances in which, according to the respondent, it was permissible for a sales adviser to reconnect a customer who had in the last month given notice of cancellation. We found his evidence inconsistent, unclear and confusing.

11. The claimant and IB had their own individual iPads to facilitate sales. The device has a web chat facility that connects the advisor or a customer to the

respondent. It is possible for a customer to seek to disconnect their current contract with the respondent via that web chat facility. There was no evidence before us that the claimant ever verbally encouraged a customer to cancel an active contract in the first place, but he accepted that where a customer sought to cancel their contract, he allowed customers to use the web chat facility on his iPad to give the respondent notice of cancellation. That allowed the claimant to effect a new sale, and receive commission on it. IB and others in ON's team did as the claimant did.

12. ON knew that this was happening; he facilitated cancellations by sending to the claimant screenshots of his own computer screen of personal data belonging to customers speaking to the claimant, who wanted to cancel their contract. We consider it significant that the respondent was able to provide no legitimate explanation, despite the claimant having informed the respondent of this before he presented his claim. We accept that ON did so to enable the claimant to pass that information back to the claimant's customer at the stand, so as to enable the customer to cancel their contract with the respondent, whether via the web chat facility or otherwise. ON not only knew that the claimant was enabling customers to cancel their contracts and condoned it, he actively facilitated it. Given the content of the email which follows, we accept that ON was doing this with other sales advisers, also.

13. On 8 October 2019, Matt Murdock (Head of Commercial, Field Sales) emailed Chris White (Virgin Venue Regional Manager) ('CW') stating:

"Hello Chris
As part of the focus on quality around the business it is been asked why some of our team have significantly higher reconnect sales than other agents. This is ultimately driving the channel to also stand out in the percentage of Venue sales that are reconnected accounts.

IB 65 (nearly all 65 re-connections reconnected within 48 hours of account closure)
Sankalp Khandelwul [sic] 65 (nearly all reconnected within 48 hours)
IL 42
XX 40
YY 31

CV 28
BC 25
RS 24

The above accounts for 320 of the total 552 reconnected accounts for Venue (58%). The remained of the agents with reconnect average 8 YTD so you can see that the volume are significantly higher than the majority. For clarity re-connections are accounts linked by details or by time at the address and recently disconnected from our services in the same premise (<30 days). [sic]

***No action** required currently as a business is looking in detail at all reconnected sales to gain a full understanding.*

Thanks"

14. There were 5 or 6 Field Sales Managers. XX and YY were sales advisors managed by two separate FSMs. They were the only two sales advisors on the list who were not managed by ON. Between them, ON's sales advisors had been responsible for 40% of all the reconnections carried out within 30 days across the entire country; we find CW's claimed lack of concern about this *somewhat surprising.*

15. On 10 October 2019 CW arranged a call with almost all Field Sales Managers save for ON who was on leave.

16. There were no notes of this telephone meeting on 10 October 2019 or the subsequent, separate call to ON and we remain unclear whether CW had made notes in preparation for the meeting, or notes of the meeting, or was asked for the purpose of this litigation to retain those notes. According to CW, 'management' – by which we understand him to mean Peter Dickinson – had decided to take no further action and draw a line under the information provided by Matt Murdoch.

17. A separate, later, call was made by CW to ON, on his return from leave. On CW's evidence, what was said in the call to ON was no different to that which he said to all other Field Sales Managers i.e. that they must reiterate to their sales team that they must not promote the cancellation of active customer accounts with a view to reconnecting it.

18. According to his oral evidence, CW did not seek from ON any written account or explanation for the high reconnection figures in relation to his sales team; he said he did not find odd to continue to receive emails from ON after the call. In light of the number, detail and contents of the emails sent by ON to CW, we find both those claims unlikely.

19. On 24 October 2019, ON emailed CW an email approximately 1.5 pages in length. ON described meeting with IB; their discussion was about the Beaumont Leys stand generally. It contained a lengthy account explaining that a branch of Carphone Warehouse was located nearby and that they offered cheaper contracts thereby attracting customers away from the sales agents. The email continued that IB was frustrated by this *"as he feels he is missing out on potential business where the Carphone Warehouse actively promote this and he manages to sometimes pick up some pieces along the way when we have better office and they have already cancelled".* According to ON, *"it would seem to explain why both [IB and the claimant] had so many more [reconnections] than anyone else".* ON continued IB *said "he wouldn't do these any more, however I insisted that he not stop if the customer had already cancelled and that we should not be turning business away if the same customer will go to the shop 50m away and sign up, I have told him to make sure that he is not leading the customer to cancel but he assured me he has never done this and is aware this is not acceptable".* ON continued *"I feel at this point of the customer is aware of the offer and he is cancelled already, that we would be missing out on sales when they would sign up through another channel if not us".* He ended the email *"I'm happy to feedback to them any* changes you want them to make".

20. On 28 October OMB sent another, much shorter, email to CW having spoken to IL and CV. He attached a photograph of the venue stand in Bulwell, Nottingham. He said that the stand had a strong presence with customers passing by *"reading the new prices and asking why they are paying more and asking for a better sale, again they always say that they don't encourage people but when they come back to the stand saying it's been cancelled they will sign*

them up and put them on a new offer. Again, I have told them both not turn any potential customers away but not push this behaviour".

21. On 29 October, OMB sent a third email to CW, this time reporting his discussion with the claimant the previous day. He stated *"his story is very similar to [IB]".* He reported that the claimant said he had a large network in the Asian community in Leicester who *"put the business for him as they have known him for a long time. Again he said he doesn't encourage this behaviour yet he wouldn't turn it down when his phone rings",* that the stand was in a good location and was very productive, drawing customers actively searching for cheaper monthly rates, whether *"by changing supplier or by looking to recommit to the same company and the guys will not turn this business away, I have reiterated to him they shouldn't be encouraging this. Sankalp agrees".*

22. In a later email on the same date, OMB again emailed CW, after a discussion with RS. He stated that the position was similar to that at Beaumont Leys i.e. there was a Carphone Warehouse located 30m away. Customers notice a better deal there, he suggested, and return to RS to ask for a 'new customer offer'. He continued: *"I have thought about this and I could move them around, this would remove the numbers but more likely spread the number of disconnections around the team rather than attributed to those working there on a permanent basis, as you know I have the reps working on the stand is best suited to the demographic of the surrounding area so this wouldn't be a good idea but may dilute the number that each rep has done. As much as all the stands are producing reconnects of the also producing high numbers of normal sales, I definitely wouldn't want to pull out of any of these locations that produce numbers on a consistent basis, as you know it's been a struggle to find good locations that produce sales consistently, this is something that we can't expect the reps to turn away".*

23. We do not accept the evidence of CW that he was content with the explanations contained within the emails for the high reconnection figures, not least because he was unable to recount any meaningful explanation to us. ON's emails to

CW contain no credible or even comprehensible alternative explanation for why his sales advisors had managed to recapture so many accounts, often within hours of disconnection. Insofar as it is possible to construe any coherent explanation, the emails appear to suggest that two Carphone Warehouse stores located in the East Midlands were the cause of a significant proportion of the respondent's disconnections nationally. Furthermore, in the case of the Beaumont Leys site, the emails appear to suggest that the claimant and IB, worked so proficiently that they recaptured what amounted to almost 23% of all disconnections nationwide within 48 hours of cancellation. We consider that to be unlikely. CW must have been aware that at the very least, ON was condoning of disconnecting and reconnecting within his team. Furthermore, the clear message given to CW by ON was that what was happening in his team was for a legitimate (albeit incomprehensible) reason and that he intended to allow his sales advisors to continue as before, subject only to the instruction that they were not to '*encourage'* customers to disconnect.

24. In any event, at this stage on the CW's oral evidence, no questions were being asked by management who had drawn a line under the disconnection figures provided in the email from Matt Murdoch, no investigation was sought of ON in respect of his sales advisors, and he, CW was apparently content with the explanation that ON had given him.

25. We note that the situation on the respondent's case to be entirely consistent with the claimant's case i.e. that insofar any measures that were going to be taken about these disconnection figures, they would be taken discreetly.

26. In the meantime, and indeed, consistent with the emails sent by ON to CW, ON had met with the claimant on his own on 28 October 2019 at a local branch of McDonalds. ON showed the claimant either the email from Matt Murdoch, or information similar to it, illustrating that the claimant and others in his team were responsible for a high number of reconnections within days of a customer giving notice of cancellation. ON told the claimant to stop the practice of encouraging or facilitating disconnections in order to reconnect customers, but to do so gradually, because a sharp decline in figures was likely to attract attention and

arouse suspicion, not only in respect of the claimant and his team but also, we infer, of ON. The claimant agreed to do this.

27. On 2 November 2019, an outsourced data analyst based in Manila in the Philippines identified a device from which high number of disconnection reconnections were being made. It identified 13 disconnections having taken place from 23 October 19 until 2 October 2019. From the data provided, it is apparent that nine of those disconnections occurred after 29 October 2019. Of all of those entries, many stated the reason for disconnection as being because the customer was moving abroad.

28. Two days and several emails later, it was identified that the iPad in question belonged to the claimant and that the webchat facility on it had been used to facilitate disconnections. CW's manager, Peter Dickinson, sought a discussion with CW on 5 November 2019.

29. On 6 November 2019, ON emailed his entire team stating *"As some of you know the business has been looking into the volume of cancelled accounts that have been re-signed in a new name, this number is currently way above the company average of other departments. I need you all to be clear about this, the only time it's acceptable to do this is when a customer comes to us with the account already either cancelled or a pending disconnection all other times a customer must be referred to customer services. We are NOT to encourage them to cancel then come back to us under any circumstances. I'm aware customers always look for cheaper offers but these must be sent customer services, our job is to approach and sign up new customers and our focus needs to be on this.".*

30. This email was sent by ON because CW had been instructed to ensure that a clear message was given to the rest of the team. It was the first email in which ON had sent any written instruction to any of his team; CW had no explanation why ON had not sent an email in these terms to his team before now.

31. On 12 November 2019, the claimant was suspended. ON, as the claimant line manager, was the appropriate person to carry out the suspension; he was unavailable to do so, for reasons that CW was unable to recall. CW therefore suspended the claimant. The meeting lasted approximately 15 minutes; notes were taken of the discussion. In summary, the CW asked the claimant to estimate how many 'cancel and re-signs' he had performed that month and how they were performed and asked how he was carrying them out. The claimant stated that he allowed customers to use his phone or iPad to cancel active services but qualified it by saying that he did not instruct them to do it. The claimant was informed that he presented a risk to the business by facilitating disconnections and was suspended.

32. We reject CW's oral explanation for the suspension, which appeared to crystallise only during questioning by the Tribunal, that in fact the reason for suspension was that the claimant had failed to obey a reasonable management instruction to immediately desist whatever it was that he should not be doing. The instruction, he said, had been issued to the claimant verbally by ON on 29 October 2019 and he was aware of that the instruction, he said, because ON had told him of it during a phone call. This evidence did not appear in CW's own written evidence and it was not put to the claimant in cross examination. CW could not explain why, if a failure to comply with a management instruction was indeed the reason for the claimant's suspension, he had not told the claimant that, in order to allow the claimant to respond. CW had notice of what he was about to do, the claimant did not. Furthermore, the claimant, on the respondent's case, was not being suspended for reconnecting customers; he was being suspended for appearing to facilitate disconnections by allowing customers to use his iPad. If, as CW told the Tribunal, he explanation given by ON as to why his advisers had such high disconnection and reconnection figure was satisfactory, and ON had informed CW in writing that he intended to allow his team to continue as before, subject to the reminder that they must not encourage disconnections, then we do not understand the circumstances in which ON would be instructing the claimant and other sales advisors to cease

doing anything much less what, precisely, they had been doing that they were told that they could no longer do.

33. CW suspended the claimant, we consider in direct consequence of an instruction to do by case managers. He knew that the claimant had until days before been part of a wider issue involving other sales advisors, and that the common factor was his own direct report, ON. He took no steps to identify whether any of those other sales advisors were behaving as the claimant did, despite potentially amounting to gross misconduct. It did not suit the sales team to attract any further scrutiny from the fraud team.

34. The claimant was, that same evening, sent a written confirmation of his suspension. The letter made no mention of an apparent failure to comply with the management instruction, but instead informed him of the existence of *"allegations of gross misconduct relating to the facilitation of cancelling and reconnecting Virgin Media customers for personal gain".*

35. The letter continued *"it is anticipated that the suspension will last no more than five working days, at the end of which you may be called to attend a disciplinary hearing. If necessary, any further extensions to your suspension will be confirmed to you in writing. The company will ensure that you have sufficient written notice of the date and time of any hearing, together with any background* evidence".

36. At no stage did the respondent inform the claimant that the suspension did not amount to disciplinary action.

37. On 21 November 2019, CW emailed the claimant at his personal address stating that the suspension would be extended for a further five working days *"as the investigation into the allegations made against you are concluded" [sic].*

38. The Tribunal was taken to an internal email from an investigation manager in the respondent's Fraud & Revenue Assurance department. The investigation

identified the concern as *"knowingly facilitating the disconnection/reconnection of customer accounts in order to achieve sales targets and provide customers with a new improved deal to which they may not have been entitled".* The investigation stated it examined a *"three-month period".* The investigation report identified that the meeting on 12 November 2019 between CW and the claimant as being *"an initial fact find meeting".* The report continued that a Fraud Analyst had identified 42 instances of behaviour which were under suspicion. It continued *"on closer inspection it was found that 20 had been disconnected 24 hours prior to a new sale being on boarded at the same address".* These observations are inconsistent with the oral evidence of CW. If 'management' had 'drawn a line under' the figures generated by ON' sales team upon receipt of the Matt Murdoch email, the Fraud Investigator ought not have been investigating a three-month period. CW was already aware that the claimant appeared to have facilitated a significant number of reconnections within hours of a disconnection, in the same way as IB had. If the claimant was being suspended for failing to comply with a reasonable management instruction given to him on 29 October, only 9 disconnections ought to have been under examination by the Fraud team.

39. The author of the investigation report identified the next step is being a fact find meeting with the claimant. There were no plans for that investigation meeting to involve CW.

40. On the morning of 29 November, ON telephoned the claimant about a meeing that was due to take place at 2p that afternoon, and in respect of which he had received only verbal notification. During the call, he informed the claimant that *"the situation [wasn't] looking good".*

41. The claimant panicked and called ON back. He asked ON to meet him and they agreed to meet in the car park of Fosse Way Shopping Centre to talk further about the meeting. ON asked the claimant to get into his car; he refused and instead they sat in the claimant's car. ON asked the claimant whether he was recording the meeting, and the claimant said he was not. He told the

claimant that at the meeting at 2pm would be conducted by himself and CW; it was not but we have little doubt that the mere mention of someone as relatively senior as CW being present would serve to add pressure on the claimant. He told the claimant that the evidence was against him and that the respondent had discovered that the claimant had access to the Icoms system. At the time, the claimant understood this comment to amount to a criticism of the fact that he had access to the Icoms system – it was only later that he remembered that he was given access to the system in his previous role and in any event, he was still using it with ON's knowledge. We consider equally likely that all ON was stating at the time was that the respondent was able to follow his digital footprint via Icoms - but that the distinction was likely to be lost on him given the pressure he was under. ON told the claimant that if he resigned, he would be entitled to a 'good reference', that he would retain his monthly salary, his commission payments and his accrued annual leave.

42. The claimant was either told in terms, or he believed that ON was telling the claimant, that if he went to the meeting he either was, or was likely to be, dismissed and that he would therefore forfeit the chance to resign. We find that his belief was genuine and was reasonably held. The respondent had not written to the claimant to inform him of the nature of the meeting that afternoon. We do not ignore the fact that it had written to the claimant to inform him that he would receive written notice of a disciplinary meeting. He had not been told that his suspension did not amount to disciplinary action. He had been told that his suspension had been extended to allow 'an investigation' to 'conclude' at the end of which he 'may be called to a disciplinary hearing'. The letters written to the claimant are at least as suggestive to an unaccustomed eye that an investigation had concluded and that he was being invited to a disciplinary hearing, as suggesting that the meeting might not be a disciplinary hearing but of some other, unidentified, status. The claimant was never informed by the respondent of even the possibility of an interim stage, at which he may be called to an investigation meeting. The respondent's own correspondence had been far from clear.

43. In addition, ON did not tell or explain to the claimant that the forthcoming meeting was only an investigation meeting; he did not tell the claimant that no disciplinary proceedings had even commenced. He did not tell the claimant that there was no rush to resign, and we have little doubt that it served his own interests to be rid of the claimant before the claimant reflected further and said or did anything that might compromise his own position.

44. The claimant was deeply concerned about his ability to secure an alternative job; he had a spouse and a young family to support as well as a mortgage to pay. He was panicked. The claimant trusted ON and believed that ON was assisting him; that ON was doing him a favour by meeting him and telling him as much as he already had. ON told the claimant that in his opinion the best way to deal with the situation was to resign. If he did not, ON said, he may end up being dismissed and entitled only to a 'bad reference'. He told the claimant to go home and have a think about it.

45. Believing ON had given him advice with the claimant's best interests at heart, and having decided that it was, indeed, in his best interests to resign, the claimant went home and at 12.28pm he emailed ON as follows *"hi [O], I would like to resign from my current role from immediate effect due to personal reasons [sic]".* The claimant heard nothing until 2 December 2019 when ON emailed the claimant with an email that was, in the circumstances, unsurprisingly perfunctory and uninquisitive: *"I acknowledge receipt of your resignation. I ask that you take an additional 48 hours to consider your decision and confirm by midday on Wednesday 4 December that this is your final decision".* CW said in evidence that he had no recollection of any discussion he had with ON about the claimant's departure from employment.

46. The claimant remained in touch with IB and learned that his colleagues continued to behave as before, seemingly untouched by the investigation to which the claimant had been subject. He spoke with friends and family and realised that he was the only person who was not white and been treated in the way he had. It dawned on him that ON had his own interests to protect by

encouraging the claimant to leave as soon as possible and in particular before he said anything to implicate ON.

47. The claimant became particularly upset when he learned that his colleagues, including ON, had been given notice of termination of employment by reason of redundancy and would therefore soon be in receipt of redundancy payments. He felt he had acted no differently to others, but been placed by ON in a position where he was forced to resign; it was after all ON who had advised him to continue with cancels and resigns as before, and only tail off that practice gradually. He therefore wrote a letter dated 8 February 2020 to the respondent's head office. It was 2.5 pages long. It set out his position, almost all of which is consistent with his claim form and oral evidence, save in one respect where he stated that he had been *'told to stop which I did'*. Given that this statement came after (a) the claimant's admission during the suspension meeting and (b) after his resignation, we do not attach the significance to this inconsistency that the respondent invites us to. The claimant made it plain in his letter that the practice of 'cancels and resigns' was widespread and that ON was facilitating it; the claimant stated he had screenshots sent to him by ON to assist with the practice. The claimant indicated that he would issue proceedings in the absence of an appropriate reply; he was approaching the time limit within which to present a claim to the Tribunal. He was not contacted by the respondent about his letter.

48. On 2 March 2020, Keith Hall (KH), Direct Regional Sales Manager, interviewed ON. By this stage, ON's employment was shortly to terminate, by reason of redundancy. KH interviewed ON because he had been instructed by a case manager to obtain ON's reply to the claimant's letter; he was not carrying out an investigation into the claimant's grievance, or anything approaching one. It was a self-serving exercise undertaken with a to securing evidence for use in any future litigation. The note of the discussion, features the one and only occasion in any of the documentary or written evidence of the respondent where it is contended, by ON, that *"the reason why CW suspended [the claimant] was because it came to light that he carried on after being told to stop*

[by me]". We attach no weight to it in circumstances where we remain unaware of why the respondent did not call ON as a witness and we have rejected CW's own evidence on the point.

49. The claimant had at no stage been given a copy of the respondent's disciplinary policy, or had his attention directed to it. The document is available to employees via the respondent's intranet. It provides principles that the respondent will follow, and which are described as being in line with the ACAS Code of Practice. The principles include being 'clear at every stage' why the employee is being taken through 'a process'. The investigation stage is not addressed in the Policy.

The Law

Unfair Dismissal

50. An employee has a right not to be unfairly dismissed: section 94 ERA 1996. This includes where the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct: s.95(1)(c) ERA 1996.

51. The implied term of trust and confidence was defined by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [*[1997] IRLR 462*](), [*[1997] ICR 606*]() as follows:

"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."

52. The test is an objective one; it matters not whether the employee's confidence is or is not in fact undermined. Equally, the employer's subjective intention is irrelevant: *reaffirmed in Leeds Dental Team Ltd v Rose* [*[2014] IRLR 8*](), *EAT.*

53. The correct approach to a claim of unfair constructive dismissal was summarised by Underhill LJ in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978:

54. 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*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a [repudiatory] breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation. . . .)

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

Direct Discrimination

55. Section 13 of the Equality Act 2010 provides as follows: *"(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".*

56. Section 23 of the Equality Act 2010 requires there to be no material difference between the circumstances of person A and a comparator.

57. Section 136 of the Equality provides *"(1) this section applies to the contravention of this Act. (2) if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravene the provisions concerned, the court must hold that the contravention occurred. (3)*

But subsection (2) does not apply if A shows that A did not contravene the provision."

58. Guidance on the burden of proof is to be found in the Court of Appeal case of *Igen Ltd v Wong* [2005] ICR 931, as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054. The first stage requires the claimant to discharge the burden of establishing facts from which an inference of discrimination be drawn, before at the second stage requiring the employer to provide an explanation that excludes the proscribed ground.

59. At the first stage, adducing facts which indicate the possibility of discrimination is not enough to shift the burden: a difference in status and a difference in treatment indicate only the mere possibility of discrimination and are, without more, insufficient to discharge the prima facie burden of proof that rests on the claimant: *Madarassy v Nomura International plc* [2007] ICR 867, CA.

60. It may sometimes be appropriate to proceed directly to the second stage of the analysis where the claimant relies upon a hypothetical comparator. In such circumstances, the first question, the 'less favourable treatment' issue cannot be resolved without at the same time deciding the second question i.e. 'the reason why' issue: *Shamoon v Chief Constable of the RUC* [2003] ICR 337.

Discussion and Conclusions

Unfair Constructive Dismissal

61. The last act complained of which the claimant says caused or triggered is resignation was the meeting with ON in the claimant's car in the car park of Fosse Park Shopping Centre on 29 November 2019. No issue of affirmation arises in this case and so we consider whether this event by itself amounted to a repudiatory breach of the implied term of trust and confidence.

62. We find that the meeting on 29 November 2019 amounted to a conduct calculated or likely to breach the implied term of trust and confidence. The

respondent did not seek to argue that the actions of ON were done outside the course of his employment. ON agreed to conduct a clandestine meeting with the claimant. It took place in a car shopping centre car park; ON had no legitimate reason to be there. The meeting took place in advance of, and about the forthcoming meeting which was due to commence only two or so hours later. ON was chairing the meeting and he discussed details of the investigation with him, wholly improperly, given the circumstances in which he found himself.

63. ON did not tell the claimant that the meeting that afternoon was simply a fact-finding meeting, and one at which he was entitled to provide ON/the respondent with further information about what led him to do as he did. He did not tell the claimant that the respondent had not in fact even commenced formal disciplinary proceedings. Some information ON gave the claimant was plainly false: CW was not attending the meeting but his stated presence would do nothing other than add to the pressure that the claimant was feeling. In the event that the claimant was – eventually – dismissed, he would not forfeit any accrued but untaken leave.

64. ON told the claimant that he thought it was in the claimant's best interests to resign. He did so having told the claimant that CW was attending the meeting and having told the claimant that there was a significant chance he was going to be dismissed. Objectively, there was no rush at all to resign. Disciplinary proceedings had not yet even commenced. The claimant had nothing to lose by attending the investigation meeting to identify what information the respondent had. He had nothing to lose by taking his time to reflect on his position and to seek advice on any information he received at the investigation stage and then to act accordingly.

65. The claimant plainly and reasonably, on the facts as we have found them to be, believed he was quickly running out of time to act. The reason he believed that is because of a combination of ON's own actions and the respondent's lack of any clear communication with the claimant generally. The advice that resignation was in the claimant's best interests was given by ON in

circumstances where ON had already amplified the pressure and confusion the claimant was under.

66. The conduct above is sufficient to breach the implied term of trust and confidence. The respondent had no reasonable and proper cause to act as it did. We reject the respondent's contention that all ON did was to give the claimant sound and sensible advice whilst sitting in claimant's vehicle. There was no reasonable and proper cause for ON to be there at all, much less give the claimant advice to resign.

67. Having found that the respondent was guilty of a repudiatory breach of contract, it is not strictly necessary for us to identify the extent to which, if at all, any earlier acts added to the breach we have identified above, but in summary we would have also found as follows:

    a. The respondent subjected the claimant to an investigation was without reasonable and proper cause. On the respondent's own evidence, he ought not have been subject to any investigation before 8 October 2019, being the date CW received the email from Matt Murdoch, since 'management' had 'drawn a line' under the events contained in that email. Thereafter the respondent knew, because CW had been told in terms by ON, that his sales advisors would continue to act as before, save that they were not to 'encourage' disconnections. After 29 October 2019, the claimant was simply doing what his manager had told him to do i.e. continue to allow customers to disconnect and reconnect and reduce those instances over time so as to avoid attracting further scrutiny.

    b. We find that the claimant was suspended without reasonable and proper cause for similar reasons. The respondent suspended the claimant knowing that ON had informed him that he intended to allow his sales advisers to continue as before save that they must not encourage disconnections. The respondent already knew that the claimant was involved in cancel and resigns, and the Manila evidence added little to that. No written or otherwise

clear direction was given to ON's sales advisors until after the Manila data was received. Given the lack of clear instruction, no attempt was made at the suspension meeting to identify what instruction the claimant had received in order to decide whether he was a risk to the business. He therefore was afforded no opportunity to avoid suspension. Only the claimant was suspended and no consideration had been given to investigating whether this instance was part of a wider problem that was self evident from the pattern revealed in the email from Matt Murdoch i.e. whether the real risk to the business lay with ON. ON allowed the claimant to be suspended despite knowing that the claimant was doing what ON had instructed him to do. The respondent did not inform the claimant that suspension did not amount to disciplinary action, contrary to the ACAS Code of Practice and contrary to its own disciplinary policy.

68. We are satisfied that the claimant resigned, at least in part, to the respondent's breach. He trusted ON. He was given no reason to doubt what he was being told by ON, and believed that ON was giving him reliable advice precisely because ON was going out of his way to meet with him in secret; in the claimant's words, he thought ON was 'doing him a favour'. The claimant plainly resigned because he thought it was the most effective way of protecting his position, but he thought that because ON had told him that resignation was in his best interests.

69. For the avoidance of doubt, and for the sake of completion, plainly the claimant was unaware of some of those matters set out at paragraph 66a and 66b above and those matters could not therefore have been a factor in his to decision to resign. However, what he was aware of was that he had been suspended and was being investigated for carrying out cancels and resigns that not only did his manager know about, and had facilitated, but had instructed him to continue and reduce only over a period of time.

70. The claimant's claim of unfair constructive dismissal is well founded.

Direct Race Discrimination

71. We find that the claimant's claims of direct race discrimination are not well founded for the reasons below:

    a. Holding a meeting with the claimant by himself when similar meetings were not held with others. ON did have discussions with all of the sales advisors whose names appeared on the email from Matt Murdoch. The claimant was treated no differently to IB or RS, who were also spoken to individually. Both were British born and white. We are not satisfied the hypothetical comparator would have been treated differently, much less are we satisfied that they would have been treated more favourably. We recognise that IL and CV were spoken to together, but we are not satisfied that being spoken to individually would amount to a detriment in any event; what was being discussed was their own personal sales practices. The claimant has not established a prima facie case;

    b. Being told to stop 'cancel and resigns', but not immediately. There is no evidence before us that the claimant was the only sales adviser who had been instructed in this way. We are not satisfied the hypothetical comparator would have been treated any differently. On the claimant's own case, the reason why the claimant had been instructed to behave in this way was to ensure that they steep decline in sales figures would arouse suspicion in both the claimant and ON. The claimant has not established a prima facie case;

    We add that we understand why at one stage the claimant might have believed that he had been in some way singled out and set up by ON to continue to as before thereby raising the risk of being subsequently 'caught out', after all, he had never seen or had explained him the source of the information that led to his suspension and investigation was entirely randomly received from a third party data analyst;

c. Suspension. The claimant has failed to satisfy us that a hypothetical comparator would be treated more favourably. The reason why the claimant was suspended was because the data was received from Manila about the claimant's iPad, and it did not suit the respondent to widen the scope of the investigation;

d. Being advised that resignation was in his best interests. We are not satisfied that hypothetical comparator would have been treated any more favourably by ON. The reason why ON told the claimant it was in his best interest resign was because it minimised the risk of the claimant speaking up and implicating himself and others in his team;

e. Constructive dismissal. It follows from findings above that we reject the claimant's allegation of direct discriminatory dismissal.

Employment Judge Jeram

Date: 14 February 2022

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