EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms H Tumidajska		**(1) Alliance Personnel Limited**
		(2) Mr C Bradbury

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 15, 16, 17 & 18 July 2019
19 July 2019 (Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS: Mr N Forward**
Mr MP Machon

Representation
For the Claimant: **Mr P Ward (Counsel)**
For Respondent: **Mr D Maxwell (Counsel)**

Interpreter: **Ms MJ Lloyd - Polish**

JUDGMENT

The judgment of the tribunal is that:

1 The respondents did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of direct discrimination on the grounds of race and/or sex and/or age, pursuant to Section 120 of that Act, are dismissed.

2 The respondents did not, at any time material to this claim, act towards the claimant in contravention of Section 40 of the Equality Act 2010. The claimant's complaints of harassment related to race and/or sex and/or age, pursuant to Section 120 of that Act, are dismissed.

3 The claimant's claim against the first respondent for unlawful deductions from wages is dismissed upon being withdrawn by the claimant.

4 The claimant was not dismissed by the first respondent: her claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1 The claimant in this case is Ms Hanna Tumidajska, who was employed by the respondent, Alliance Personnel Limited (the respondent), as an Administrative Assistant from 12 July 2013 until 20 November 2017 when she resigned. The claimant also had an earlier period of employment with the respondent between November 2008 and November 2010.

2 Following the claimant's resignation, on 8 February 2018, she presented a claim form to the tribunal naming the respondent and also a second respondent, Mr Craig Bradbury (Mr Bradbury), who was employed by the respondent as a Recruitment Consultant. The claims brought by the claimant are for direct discrimination on the grounds of race and/or sex and/or age; harassment related to race and/or sex and/or age; unlawful deductions from wages; and unfair (constructive) dismissal. The claimant is a Polish woman who, during the second period of her employment with the respondent, was aged 22 - 26 years.

3 The claims are denied in their entirety: the respondent and Mr Bradbury deny any discrimination or harassment; the respondent denies that there are any unpaid wages; and that it acted in fundamental breach of the claimant's employment contract.

4 The claim for unlawful deduction from wages was pursued throughout the evidence, but it was formally withdrawn by Mr Peter Ward during closing submissions. We have dismissed that claim upon its withdrawal.

Preliminary Rulings

5 At the commencement of the Hearing, each of the parties had an objection to a witness statement which had been served late by the other. It was necessary for us to make rulings as to admissibility: -

(a) The respondents were jointly represented and had served witness statements from three witnesses: Mr Bradbury; Mr Aaron Kidson - Director of the respondent; and Mr Graham Ward - Director of the respondent - these witness statements had been served in good time prior to the hearing. But, on Thursday 11 July 2019 at 2:58pm, the respondent had served a supplemental witness statement for Mr Kidson; the claimant objected to this evidence. We read the supplemental witness statement; its purpose was to correct an inaccuracy in Mr Kidson's original witness statement; the correction being made once Mr Kidson had read the claimant's witness statement. Put simply, the position was that Mr Kidson was not now in a position to confirm under oath that the original

witness statement was true to the best of his knowledge and belief as he now realised that it was not. Our analysis of the position what's that, if there had been no supplementary witness statement, and Mr Kidson had come to the witness table to give evidence, upon being sworn he would have been obliged to make the necessary corrections verbally. There was clearly an advantage to the claimant in having had some advance notice the necessary corrections: it would still be open to the claimant to question Mr Kidson's reliability; and we were quite willing to allow Mr Ward to ask the claimant reasonable additional questions during evidence-in-chief to take account of the supplementary witness statement if necessary. Having analysed the position in this way, our conclusion is that there can be no legitimate objection to Mr Kidson supplementary witness statement. The witness statement was accepted and read by the tribunal in advance of Mr Kidson giving evidence.

(b) The claimant provided witness statements for herself and three additional witnesses: Mr Richard Scragg - a personal friend of the claimant with considerable HR experience and who had accompanied the claimant to a grievance hearing; Mr Steve Bargota who worked for the respondent from 19 March 2014 until 24 July 2017 as a Recruitment Consultant; and Mr Vijay Neyer who was employed by the respondent from 2004 until 2014 as a Work's Manager. The claimant's witness statement, the first statement of Mr Scragg and the statement of Mr Bargota had all been provided in good time. Mr Neyer's statement had been served on the afternoon of Friday 12 July 2019, unheralded and with no explanation for its late service. The respondent objected to the claimant's reliance on the evidence of Mr Neyer. We read the statement: it contained nothing material to the claimant's employment or to the circumstances of her resignation; the claimant was complaining with regard to events which had occurred wholly after Mr Neyer had left the respondent's employment. If anything, the statement appeared to be an attempt to adduce evidence of "bad character" against the respondent. In our judgement, the evidence provided by Mr Neyer was irrelevant and therefore inadmissible. We declined to accept the statement which had been provided late.

(c) So far as Mr Bargota is concerned, his witness statement ran to some 9 Paragraphs: Paragraphs 1, 2 and 8 were not disputed by the respondent; Paragraphs 3 - 7 and 9 were wholly irrelevant to the issues in the case. Accordingly, we ruled that the evidence in those paragraphs was not admissible and we accepted as read the evidence contained in the 3 uncontroversial Paragraphs. It was not therefore necessary for Mr Bargota to give oral evidence: he attended the tribunal on the 2nd day to give evidence, but he was released.

(d) The respondents indicated as an early stage that it had no challenge to Mr Scragg's evidence as served - his statement could be taken as read with no need for him to give oral evidence. But, on the 3rd day of the trial, the claimant adduced a supplemental witness statement from Mr Scragg

which was not agreed. Our judgement was that this supplemental witness statement contained nothing of evidential value; we declined to admit it; and it remained the position that Mr Scragg was not required to give oral evidence; he too was released.

The Evidence

6 We therefore heard oral evidence from four witnesses: the claimant; Mr Bradbury; Mr Kidson; and Mr Ward. We considered the uncontroversial first statement of Mr Scragg and the three uncontroversial paragraphs of Mr Bargota's witness statement. In addition, we were provided with an agreed trial bundle running to approximately 200 pages; we have considered those documents from within the bundle to which we were referred by the parties during the Hearing.

7 The claimant gave evidence with the help of the interpreter, Mrs Lloyd. Prior to the claimant affirming her witness statement, Mrs Lloyd read it through to her in Polish. It became apparent that the claimant was in fact a fluent English speaker; and indeed, is part of her employment history she had herself worked as a Polish interpreter to the medical profession - primarily assisting GPs with Polish patients. The claimant explained however that she had requested the services of an interpreter because she was concerned that there may be legal phrases used during the course of the Hearing with which she was unfamiliar.

8 We found Mr Bradbury, Mr Kidson and Mr Ward to be credible and compelling witnesses. Their evidence was consistent with each other and with contemporaneous documentation.

9 By contrast, the claimant was a deeply unsatisfactory witness. She was evasive and unwilling to answer straightforward questions; her evidence was internally inconsistent and fluctuated during the course of cross-examination; and it was inconsistent with her claim form, her witness statement, other uncontroverted evidence and some of the contemporaneous documentation. Examples of the inconsistency are set out below: -

(a) It was the claimant's case that she was fearful of going to work for Mr Bradbury (and objected to doing so) because he had previously been accused of sexual harassment. In fact, there was no record of any complaints of sexual harassment and the claimant could not support this assertion by reference to any evidence at all. More importantly, whilst making this complaint in her claim form, the claimant omitted to make reference to the fact that at the time of her transfer to work for Mr Bradbury she was having (her case), or shortly thereafter commenced (Mr Bradbury's case), a consensual sexual relationship with him. The fact of

that relationship on the claimant's own account is entirely inconsistent with her assertion that she was fearful of working for Mr Bradbury because of the complaints.

(b) The claimant did not make any contemporaneous complaint in writing (by letter or email) about the various matters she now alleges. This has not been adequately explained. The claimant asserts that that she did not know how to complain about such matters. This is highly implausible, she is plainly an intelligent person capable of being proactive when she wishes. The assertion is inconsistent with her written queries about sick pay in June 2017 and inconsistent with her grievance letter in September 2017.

(c) The claimant's account of the Grievance Meeting was that Mr Kidson had behaved towards her in an aggressive and intimidating manner. This assertion is fundamentally undermined firstly, by the evidence of Mr Scragg, a Senior HR Professional, independent of the respondent, and who was the claimant's companion at the Grievance Meeting. In his witness statement, Mr Scragg makes no reference to any improper or unacceptable conduct by Mr Kidson. Further, in the claimant's internal appeal there is no reference to this alleged behaviour which is also lacking from her claim form and her further and better particulars. The allegation first emerges in the claimant's witness statement.

(d) The claimant is recorded as having given "*no comment*" responses to the majority of the questions she was asked during the Grievance Meeting. In oral evidence, she questioned the accuracy of the record and asserted that she had not given such responses: but, in the claimant's witness statement, at Paragraphs 15 and 16, she gives a fairly full explanation as to why she gave "*no comment*" responses.

(e) The claimant had seen the record of the meeting prior to the exchange of witness statements: she had not challenged the accuracy of those parts of the record relating to "*no comment*" responses. In oral evidence, she claimed that she did not think it was open to her to make such a challenge: but, at Paragraph 21 of her witness statement she did in fact challenge another section of the record.

10 In the light of our assessment as to the reliability of the witnesses, where there is a factual discrepancy between the evidence given by the claimant and that given by the respondent's witnesses, we prefer the evidence of the respondent's witnesses. We have made findings of fact accordingly.

The Facts

11 Between November 2008 and November 2010, the claimant was employed by the respondent as a Recruitment Consultant - she had no previous experience in such a role and was to be trained. However, during this first period of employment, it became clear to all concerned that the role of Recruitment

Consultant not one to which the claimant was best suited. The claimant was therefore re-deployed as an Administrative Assistant in the Operations Team. In November 2010, the claimant left the respondent's employment because she relocated to live in Italy; she left on good terms such that, when she returned to live in Birmingham, she contacted the respondent to enquire as to any available vacancies.

12 Thus it was that, in July 2013, the claimant became employed by the respondent as an Administrative Assistant. She was not assigned to any particular Team but would help out when and where necessary. Shortly afterwards, in an attempt to progress the claimant's career, she transferred to the Accounts Department for training. This move proved unsuccessful: the claimant was unable to work without supervision; and her work was rarely if ever to the necessary standard. It was noted she spent an excessive amount of her time making private calls on her mobile phone.

13 There was a meeting: the claimant agreed that she was struggling in the Accounts Department; she liked the thought of returning to the Operations Team. But, around this time, the respondent had identified that Mr Bradbury, one of the respondent's most successful Recruitment Consultants, needed a dedicated Administrative Assistant. This was identified as a suitable opportunity for the claimant; she was happy to take on the role and transferred into it in spring 2016. This move was agreed by consent; it was not a demotion; the claimant's earnings were not diminished in any way. The claimant was replaced in the Accounts Department by Mrs Anna Sikora, a Polish lady of similar age to the claimant.

14 Between the spring of 2016 and June 2017, the claimant worked as Mr Bradbury's Administrative Assistant and the respondents were unaware of any concerns on her part with regard to the role.

15 The claimant did ask to be placed on a sales course with a view to resuming employment as a Recruitment Consultant. This request was considered, but it was decided that, in view of the respondent's earlier experience with claimant, she was unsuited to the role of Recruitment Consultant and her request for such training was therefore denied. The claimant claims that she was never given an explanation for being denied this training and asserts that it was on grounds of her race. However, when giving evidence the claimant agreed that the respondent did employ five Polish female Recruitment Consultants.

16 The only issue of which the respondent became aware was approximately six months after the claimant's transfer to Mr Bradbury. The claimant and a fellow female employee approached Mr Kidson and expressed concerns regarding Mr Bradbury's conduct. They appeared to be complaining that Mr Bradbury had sexually harassed them - but neither would be specific. The claimant and the

other employee were at the same time complaining, but also arguing with each other. It transpired that both had had consensual sexual relationships with Mr Bradbury: the two women believed that the periods of these relationships had overlapped (something which Mr Bradbury denies). Mr Kidson concluded that the complaint was not one of sexual harassment but of Mr Bradbury's behaviour within consensual relationships which were not a matter for him. Neither the claimant nor her colleague wished to make a formal complaint the matter went no further. Mr Kidson hoped that any issues were resolved.

17 The claimant's move to assist Mr Bradbury was less satisfactory from Mr Bradbury's point of view. The claimant was unreliable: having excessive amounts of time off work; and, on her working days, she was frequently late; he could not leave her to work under her own initiative; and tasks took her longer to complete than he would have expected. Nevertheless, Mr Bradbury was grateful for the claimant's assistance and, overall, she did make a positive contribution to the smooth running of his desk. At one point, Mr Bradbury became exasperated by the claimant's attendance record and offered to supplement her wages by payments of £50 per week for any week that the claimant attended work every day and on time. A number of these payments were made but there was no real sustained improvement in the claimant's attendance record. Mr Bradbury was also concerned the claimant spent excessive amounts of time on personal telephone calls.

18 Both during her time as an Accounts Assistant, and during her time working for Mr Bradbury, the claimant was warned about the excessive use of her mobile phone. But, we reject her assertion that she was required to switch it off and lock it away; and that she could not use it during working hours even in the case of an emergency.

19 In June 2017, the claimant went off sick: she had no entitlement contractual sick pay but was of course entitled to receive statutory sick pay. It is conceded that there was initially an error in the calculation of sick pay: the claimant queried this by email on 29 June 2017; the error was acknowledged by letter dated 30 June 2019; and the error was corrected. It is however the claimant's case that the respondent's failure to pay her full pay whilst off sick was an act of direct sex discrimination. Her comparator for this purpose is Mr Bargota: Mr Bargota was employed as a Recruitment Consultant; and, during a period of sickness, he did receive full pay. This was a discretionary decision and the respondent has explained that the reason for it is that Mr Bargota was a very senior Recruitment Consultant whose continued retention with the respondent was a significant priority. The respondent's case is that the decision was unrelated to the claimant's sex or that of Mr Bargota.

20 The claimant asserts that, during the period of her employment with Mr Bradbury, he made a number of derogatory comments towards her. All of these

are denied. The comment of greatest significance for the purposes of claim is when it is alleged that Mr Bradbury was commenting upon the claimant's status and level of earnings: he is alleged to have said "*aren't you a bit too old to make that kind of money*" and "*aren't you too old to make pennies*". On other occasions he is alleged to have said "*you are here to do a dogs job*"; "*you are going to do what I tell you or else*"; and "*carry on making pennies*". We find as a fact statements such as these were not made by Mr Bradbury. For the reasons already explained, we reject the claimant's account and prefer that of Mr Bradbury.

21 Having been off sick for approximately three months, on 19 September 2017, the claimant submitted a grievance. In summary, the matters about which she complained are these: -

(a) She asserts that the move from the accounts department to Mr Bradbury's desk was a demotion forced upon her.
(b) She asserts that she was reluctant to make the change because of previous allegations of sexual harassment against Mr Bradbury.
(c) She asserts that she was ordered to work for Mr Bradbury and told that she could accept that offer or "*there's the door you don't like it*".
(d) She complained about working for Mr Bradbury: claiming that it was a volatile working atmosphere; that he had massive mood swings; and constantly undermined the claimant in front of colleagues.
(e) The claimant complained about the comments she alleges was said by Mr Bradbury as set out at Paragraph 20 above.
(f) The claimant stated that she had informed Mr Graham Ward of these problems as they occurred, but her complaints had been ignored.
(g) She complained at not having been placed on the sales course.
(h) She complained about the workspace allocated to her which she stated was positioned so that it her chair was constantly hit by opening doors. She claims that when she complained about this she was told" *there's the door if you don't like it*".
(g) She complained that the failure to correctly pay statutory sick pay; and of the fact that she did not receive full wages whilst off sick.

22 The grievance was followed up by a letter shortly afterwards in which the claimant made further allegations namely, that telephone calls at the respondent were recorded illegally; and that the claimant had been instructed to falsify documents for a Freight Traffic Association audit.

23 The grievance meeting was held on 17 October 2017: the meeting was conducted by Mr Kidson; and the claimant was accompanied by Mr Scragg. The respondent's usual grievance procedure was relaxed to allow for Mr Scragg's attendance (he was neither a work colleague nor a trade union representative). Mr Kidson provided his written response; the grievance was rejected; the

claimant submitted an appeal dated 3 November 2017. Before this was dealt with the claimant resigned by email dated 12 November 2017 - she gave a few days-notice - terminating her employment on Friday 17 November 2017.

24 In the meantime Mr Kidson had scheduled an appeal hearing to take place on 10 November 2017. He intended hearing the appeal himself; and had prepared an agenda. The claimant emailed Mr Kidson shortly before the scheduled hearing to say that she could not attend. By this time Mr Kidson had also recognised that he should arrange for another director to conduct the appeal. However, before the arrangements could be made, the claimant resigned. Attempts were nevertheless made to conduct a formal exit interview with the claimant. The claimant did not respond to requests for meetings; and no exit interview or appeal meeting ever took place.

25 Having heard the evidence of Mr Graham Ward, we find that none of the matters raised in the claimant's grievance had previously been raised with him as she suggests.

26 Before presenting her claim form, the claimant consulted Mr Peter Ward under the Bar's Public Access Scheme. Mr Ward served a discrimination questionnaire on the respondent. It is the claimant's case that it was partially but not entirely responded to. Mr Ward accepts that the formal questionnaire procedure under Section 138 of the Equality Act 2010 no longer applies; but nevertheless, he invited us to draw an inference from this failure.

27 We have considered Mr Ward's letter incorporating the questionnaire which is dated 4 January 2017 and requests a response within 21 days. The respondent's solicitors in fact responded by letter dated 27 February 2018: they did not provide the information requested at question 2(b) regarding the monitoring of any equality/harassment/bullying policies nor to question 3 requesting a detailed and comprehensive list of the respondent's employees (past and present) stating their positions; dates of employment; rates of pay; gender; and ethnic origin.

The Law

28 In his written closing submissions, Mr Maxwell for the respondent set out a concise, but complete and accurate statement of the relevant law. With one addition this was accepted as such by Mr Peter Ward during his verbal closing submissions. We gratefully adopt it, setting it out in full below: -

Extract from Respondent's Closing Submissions

"In the employment field and so far as material, section 39 of the Equality Act 2010 *("EqA")* provides:

> 39 Employees and applicants
>
> (1) An employer (A) must not discriminate against a person (B)—
>
> (a) in the arrangements A makes for deciding to whom to offer employment;
>
> (b) as to the terms on which A offers B employment;
>
> (c) by not offering B employment.
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.

As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An unjustified sense of grievance cannot amount to a detriment for these purposes; see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL.

Direct Discrimination

EqA section 13(1) provides:

> (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.

The Tribunal must consider whether:

the claimant received less favourable treatment;

if so, whether that was because of a protected characteristic.

The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison the Tribunal must be sure to compare like with like and particular to apply Section 23(1) of the Equality Act 2010, which provides:

> (1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

The burden of proof is addressed in EqA section 136, which so far as material provides:

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision 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 occurred.

EqA section 136 provides for a two-stage test. The claimant has the initial burden of showing a prima facie case, which if discharged shifts the burden onto the respondent to prove there was no discrimination. Although decided under the former legislative provisions, the guidance of the Court of Appeal in Igen v Wong [2005] IRLR 258 is still of assistance; per Peter Gibson LJ:

> 22 ***[…]*** The words ***"in*** the absence of an adequate ***explanation",*** followed by ***"could",*** indicate that the employment tribunal is required to make an assumption at the first stage which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage so that unless the respondent provides an adequate explanation, the complainant will succeed. It would be inconsistent with that assumption to take account of an adequate explanation by the respondent at the first stage. ***[…]*** It is of course possible that the facts found relevant to the first stage may also relate to the explanation of the respondent.

In Madarassy v Nomura [2007] ICR 867 CA the Court of Appeal confirmed that a mere difference in status and difference in treatment will not suffice satisfy the first stage; per Mummery LJ:

> 56. The court in Igen Ltd v Wong [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent ***"could have"*** committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only

indicate a possibility of discrimination. They are not, without more, sufficient material from which *879 a tribunal ***"could conclude"*** that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57. ***"Could… conclude"*** in section 63A(2) must mean that ***"a*** reasonable tribunal could properly ***conclude"*** from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory ***"absence*** of an adequate expla***nation"*** at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

Harassment

Insofar as material, EqA section 26 provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

[…]

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

Whilst the unwanted conduct need not be done *'on* the grounds *of'* or *'because of",* in the sense of being causally linked to, a protected characteristic in order to amount to harassment, the need for that conduct be *'related to'* the protected characteristic does require a *"connection* or *association"* with that; see Regina (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] ICR 1234 QBD.

Notwithstanding it was decided under the prior legislation including the formulation *"on* the grounds *of",* the observations made by by the EAT in Nazir v Asim [2010] ICR 1225 may still be of some relevance:

> 69 We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law—such as a ***person's*** race and gender.

In connection with the threshold for conduct satisfying the statutory definition, guidance was given by the EAT in Betsi Cadwaladr University Health Board v Hughes [2014] 2 WLUK 991; per Langstaff P:

> 10. Next, it was pointed out by Elias LJ in the case of Grant v HM Land Registry [2011] EWCA Civ 769 that the words ***"violating*** dig***nity",*** ***"intimidating,*** hostile, degrading, humiliating, ***offensive"*** are significant words. As he said:
>
> > ***"Tribunals*** must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of ***harassment."***
>
> 11. Exactly the same point was made by Underhill P in Richmond Pharmacology at paragraph 22:
>
> > ***"..not*** every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate ***phrase."***

> 12. We wholeheartedly agree. The word ***"violating"*** is a strong word. Offending against dignity, hurting it, is insufficient. ***"Violating"*** may be a word the strength of which is sometimes overlooked. The same might be said of the words ***"intimidating"*** etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

In relation to the proscribed effect, although *C*'s perception must be taken into account, the test is not a subjective one satisfied merely because C thinks it is. The ET must reach a conclusion that the found conduct reasonably brought about the effect; see Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT.

Constructive Unfair Dismissal

So far as material, section 95 of the Employment Rights Act 1996 *("ERA")* provides:

> 95 Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if ***[…]***
>
> > (c) 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.

Where, as here, the respondent denies dismissal, the claimant has the burden of proving dismissal within section 95(1)(c).

In accordance with Western Excavating v Sharpe [1978] IRLR 27 CA, it is not enough for the claimant to leave merely because the employer has acted unreasonably, rather a breach of contract must be established. In order to prove constructive dismissal four elements must be established:

there must be an actual or anticipatory breach by the respondent;

the breach must be fundamental, which is to say serious and going to the root of the contract;

the claimant must resign in response to the breach and not for another reasons;

the claimant must not affirm the contract of employment by delay or otherwise.

Implied into all contracts of employment is the term identified in Malik v BCCI [1997] IRLR 462 HL:

> The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

In Baldwin v Brighton and Hove City Council [2007] IRLR 232 the EAT held that a breach of trust and confidence may be caused by conduct calculated or likely to have the proscribed effect.

When determining whether, objectively, the *employer's* conduct was likely to seriously damage trust and confidence, the *employee's* behaviour may also be relevant, see Tullett Prebon PLC v BGC Brokers LP [2010] IRLR 648 per Jack J:

> 84. An alternative approach as to how the employee's own misconduct should be taken into account was suggested, and perhaps preferred, by Mr Bernard Livesey QC, the judge in RDF, namely that the employee's conduct may have so damaged the mutual relationship of trust and confidence that the employer's conduct is of little effect. I refer to paragraphs 120 and 141 of the judgment. But I think that this breaks down on analysis. I accept that the relationship is a mutual one, but that means only that the employer is entitled to have trust and confidence in his employee, and the employee is entitled to have trust and confidence is his employer. If the one is damaged it does not follow that the other is damaged. Nor does damage to the one party's trust and confidence in the other entitle him to damage the other's trust and confidence in him.
>
> 85. In my judgment the conduct of the employee may be relevant in this way. Whether the employer's conduct has sufficiently damaged the trust and confidence which the employee has in him objectively judged, is to be judged in all the circumstances. The circumstances will include the employee's own conduct to the extent that it is relevant to that question. There may in practice be little difference with the approach suggested by Mr Livesey.

In a last straw case, the final act relied upon need not in isolation constitute a breach of contract, nor even amount to unreasonable or blameworthy conduct, although an entirely innocuous act will not suffice; see Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA.

Whilst mere delay will not amount to affirmation, where the employee continues to perform their contract a point may be reached when that becomes persuasive evidence they have indeed affirmed the contract; see W E Cox Toner (International) Limited v Crook [1981] ICR 823 EAT. A

helpful summary of current state of the law with respect to affirmation was provided by the EAT in Colomar Mari v Reuters Limited [2015] UKEAT/0539/13/MC; per HHJ Richardson:

> 38. In Hadji v St ***Luke's*** Plymouth His Honour Judge Jeffrey Burke QC summarised the position as follows (paragraph 17):
>
> ***"T***he essential principles are that:
>
> (i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. Western Excavating v Sharp [1978] ICR 221 as modified by W E Cox Toner (International) Ltd v Crook [1981] IRLR 443 and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.
>
> (ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay - see Cox Toner para. 13 p446.
>
> (iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12/07/2011) paras. 45/46.
>
> (iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: Fereday, para. ***44."***

If a constructive dismissal is established the employment tribunal must still consider whether the respondent has shown a potentially fair reason for dismissal within ERA section 98(1) and whether or not dismissal was reasonable in all the circumstances under section 98(4)."

29 The only additional legal matter raised by Mr Peter Ward is a reference to the case of Dattani -v- Chief Constable of West Mercia Police [2005] IRLR 267 (EAT) which is authority for the proposition that notwithstanding the abolition of the questionnaire procedure under the Equality Act 2010, a tribunal may still draw such inferences are proper from a respondent's failure to reply.

The Claimant's Case

30 The claimant's case can be summarised as follows: -

(a) It was an act of direct sex discrimination that she was paid only SSP whilst off sick rather than discretionary sick pay at the full rate;
(b) Her dismissal was an act of direct sex discrimination.
(c) It was an act of direct race discrimination that she was refused access to sales training.
(d) Her dismissal was an act of direct race discrimination.
(e) The comments attributed to Mr Bradbury which specifically referred to the claimant's age (Paragraph 20 above) were an act of direct age discrimination.
(f) Her dismissal was an act of direct age discrimination.
(g) The following were acts of harassment related to the claimant's sex and/or race and/or age: -

(i) The demotion from the accounts department.
(ii) The requirement that she should work under Mr Bradbury.
(iii) The comments attributed to Mr Bradbury (Paragraph 20 above).
(iv) The repeated response to the claimant's concerns being that if she didn't like things she could leave.
(v) The refusal of her request for sales training.
(vi) The location within the office whereby the back of the chair was hit by the door.
(viii) The payment of only SSP rather than discretionary sick pay.
(ix) The claimant's grievance was ignored.

(h) An inference can be drawn as to the respondent's discriminatory tendencies by its refusal to properly reply to the discrimination questionnaire.
(i) By reason of all of the respondent's conduct as set out above, the respondent acted in fundamental breach of the employment contract and the claimant was, accordingly, constructively dismissed.

The Respondent's Case

31 The respondent's case can be summarised as follows: -

(a) There were good reasons, unrelated to sex, for the differential in treatment between the claimant and Mr Bargota with regard to the payment of sick pay.
(b) There were good reasons, unrelated to race, for the refusal of the claimant's request sales training.
(c) The comments attributed to Mr Bradbury were never made. But, even if he did comment on the apparent lack of progress in the claimant's career by reference to her age, this was not unfavourable treatment on the grounds of age; but an adverse comment on her career progression to date.
(d) The claimant's transfer from accounts to Mr Bradbury's desk was not a

demotion. It did not involve any reduction in status or remuneration. It was a move to a role thought to be more suited to the claimant; and a move which she embraced.

(e) The claimant was never told that if she didn't like something she could simply leave.

(f) What the claimant says about the location of her chair and it being hit by the door is untrue.

(g) The claimant's grievance was not ignored. It was dealt with in a proper manner.

Discussion & Conclusions

Direct Discrimination

32 We are satisfied that, by the payment of SSP, claimant was paid all that she was contractually entitled to during her sickness absence. The respondent's decision to pay Mr Bargota his full pay on a discretionary basis related to his seniority and value to the respondent - this was clearly unrelated to his or the claimant's sex. The mere fact of this differential treatment is not sufficient even to shift the burden of proof - but in any event, as part and parcel, of the primary facts of the case, the reason for the differential treatment is clear and it is non-discriminatory.

33 The respondent had previously employed the claimant as a Recruitment Consultant and believed that it was a role to which she was unsuited. The respondent employed no less than five Polish women as Recruitment Consultants - the evidence is clear, that the refusal to train the claimant to pursue such a role was unrelated to her race. Again, this refusal of itself together with the claimant's Polish race is not sufficient even to shift the burden of proof. But from the primary facts, the reason for the refusal clearly emerges and it is non-discriminatory.

34 As previously stated, we accept Mr Bradbury's evidence that the comments about the claimant's earnings with specific reference to her age were never made. But, in any event, to the extent that these comments amounted to less favourable treatment it was not by reason of her age; but by reason of her lack of career progression.

35 We therefore find that the claims for direct discrimination on the grounds of sex and/or race and/or age are not made out and they are dismissed.

Harassment

36 We repeat the findings we have made on the direct discrimination claims (Paragraphs 32 – 34 above).

37 We find that the move from the accounts department to Mr Bradbury's desk was not a demotion. It was an opportunity for the claimant and one which she embraced at the time. She had no objections to working for Mr Bradbury and this was not forced upon her. On her own case, she was already engaged in a consensual sexual relationship with Mr Bradbury at this time.

38 We have already found that Mr Bradbury did not make the comments attributed to him.

39 We accept the respondent's evidence that the claimant did not make any contemporaneous complaints to Mr Graham Ward. She was never told that if she did not like something then she could leave.

40 We reject as false, the claimant's evidence with regard to the location of her workstation.

41 We are satisfied that the claimant's grievance was properly and conscientiously dealt with: if anything, it was the claimant who failed to engage in the process. No appeal hearing took place because of the claimant's resignation.

42 Accordingly, and for the reasons stated, we reject the claims of harassment related to sex and/or race and/or age. These claims are dismissed.

43 Regarding both the claims for direct discrimination and the claims for harassment, we have considered Mr Peter Ward's submissions with regard to the questionnaire. Our judgement is that the respondent substantially replied to the questionnaire and nothing adverse is to be drawn from the fact that it did not do so within the arbitrary timescales set by Mr Ward. Neither do we find that any inference could be drawn from the respondent's failure to comment on specific processes for monitoring its anti-discrimination and related policies. Nor was the respondent remotely obliged to provide a response to the wide-ranging request about all of the respondent's current and recently departed workforce. What Mr Ward knew or should have known is that when the claimant moved from accounts she was replaced by a Polish woman of similar age to the claimant and that the respondent employed no less than five Polish female Recruitment Consultants. Finally, the question of inference can only arise if primary facts are established from which the tribunal could conclude that acts or omissions complained of were discriminatory. No such primary facts were established in this case.

Constructive Dismissal

44 We have dismissed as factually incorrect or untrue all of the acts/omissions relied upon by the claimant which she claims either individually or

collectively amount to a fundamental breach of employment contract such as to ground a claim for constructive dismissal.

45 In our judgement, there is no basis to conclude that the respondent acted in fundamental breach of the employment contract - and absent such a breach there can be no constructive dismissal.

46 We find that the claimant was not dismissed. Her claim for unfair dismissal is therefore not well-founded; and it is dismissed.

Employment Judge Gaskell
15 October 2019