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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr R W Armstrong	**AND**	Lyons Presentations Group Ltd

Held at: London Central

ON: 26 January to 1 February 2017
(and 15 February 2017 in Chambers)

Employment Judge: Ms A Stewart

Members: Mrs J Cameron
Ms S Boyce

Representation

For the Claimant: Mr N Gibson, Solicitor
For the Respondent: Mr W Dobson of Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1 The Claimant's complaint of constructive unfair dismissal is not well-founded and fails.

2 The Tribunal has no jurisdiction to consider the Claimant's complaints of sexual orientation discrimination against Ms N Gee because they were presented to the Tribunal out of time, were not part of conduct extending over a period within the meaning of section 123(3)(a) of the Equality Act 2010 and it is not just and equitable to extend time.

3 The Claimant's other complaints of sexual orientation discrimination are not well-founded and fail.

Employment Judge A Stewart
17 March 2017

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REASONS

Introduction:

1 The Claimant, Mr Rory Armstrong, brings the following complaints before the Tribunal;

a) That he has suffered harassment and/or direct discrimination on the ground of his sexual orientation, contrary to **sections 13 and 26 of the Equality Act 2010**, in the following respects:
(i) From Spring 2013 being subjected to several disciplinary hearings regarding late attendance to work and receiving warnings each time.
(ii) In November 2014, being accused of gross misconduct in relation to an unsent email.
(iii) After November 2014, having his role within the company changed several times without consultation, thereby reducing his importance being told to do demeaning and belittling work: In particular being removed from dealing with Rocket Production USA; being appointed factory compliance administrator; being told he was a project manager and then not a project manager not long afterwards; being required to work in sales support for Ms Gee in February 2015 and being told to cover post sales duties for Rocket Production UK.
(iv) Ms Gee being impossible and overbearing in her dealings with the Claimant, for example making personal comments about what he was wearing, timing his breaks and accusing them of being too long, "character assassination in his absence" and 'picking apart' the Claimant's symptoms, implying that he was faking his sickness absences.
(v) In mid-December 2015 at the Christmas party, Ms Gee picking up a pink glittery jumper and saying that it must be the Claimant's, as the colour pink suited him.
(vi) In September/October 2015, Ms Gee muttering in a full office that the Claimant was "king of fags".
(vi) In autumn 2015 Ms Gee saying of the Claimant; "he needs a good shag".

(viii) On 29 February 2016, being told by Mr Daniel Lyons that he would be better off finding alternative employment and that they would assist him financially in doing so, as he took too many breaks and many people thought badly of him.
(ix) After 29 February 2016, leaving the Claimant in suspense without setting up another promised meeting or resolving matters.
(x) In March 2016, Ms Gee shouting out in the office; "first I've heard of you being a project manager".
(xi) A meeting of 5 April 2016, a meeting at which the Claimant was offered £3,000 to leave his employment, told he would not be given a reference unless he left and that life would be made difficult for him if he stayed.

b) That he was constructively dismissed on 7 April 2016, by virtue of the harassing and/or discriminatory conduct set out in paragraph a) above, constituting breaches of the implied term of trust and confidence, whereby the Claimant was left with no alternative but to resign.

2 The Tribunal heard evidence from the Claimant himself and from Mrs Iwona Anderson, called by him; Ms Louisa Lingley was unable to attend and her statement was admitted in evidence, with the commensurate reduction in its weight because her evidence had not been tested by cross-examination. Both were previously employees of the Respondent and colleagues of the Claimant. The Respondent called the following witnesses; Mr Andrew Greaves, Human Resources Manager and Line Manager of the Claimant; Mr Daniel Lyons, Managing Director of the Respondent for 30 years; Ms Nikki Gee, Accounts/Sales Manager; Miss Monika Sustrova, Production Manager and Miss Marilyn Noel, Sales Co-coordinator/Account Manager with the Respondent.

Conduct of the Hearing

3 The case was listed to begin on 26 January 2017. However, the Employment Judge originally listed to hear the case recused herself on the first day because she realised, upon beginning to read into the case with her panel, that one of the witnesses for the Respondent was known to herself and her family. Therefore, the present Employment Judge took over the case with the same Members on the morning of day two of the Hearing, Friday 27 January 2017.

The Issues

4 The Claimant having withdrawn his complaints of discrimination on the grounds of religion or belief at a Preliminary Hearing on 6 January 2017, the issues which this Tribunal has had to determine are as follows:

(i) Has the Claimant satisfied the Tribunal that his resignation on 7 April 2016 was in fact a constructive dismissal because (a) the Respondent's cumulative treatment of him, as set out in paragraph 1 above, amounted to a fundamental breach of the implied term of trust and confidence, namely, that an employer will not, without reasonable and proper cause, do anything calculated or likely to destroy or seriously damage the trust and confidence inherent in the employment relationship? He asserts, in his Claim Form, that the meetings of 29 February and 5 April 2016 together constituted the 'final straw'. (b) that he resigned as a result of such fundamental breach? Did he conduct himself, subsequently to any such breach, so as to affirm the contract?

(ii) If the Claimant was dismissed, has the Respondent satisfied the Tribunal as to a potentially fair reason for dismissal, for example one related to conduct or capability?
(iii) If the Respondent satisfies the Tribunal as to a potentially fair reason for dismissal, did the Respondent act reasonably or unreasonably in all the circumstance in treating this reason a sufficient reason for dismissing the Claimant?
(iv) If the dismissal is found to be unfair, has the Respondent satisfied the Tribunal that if it had adopted a fair procedure then the Claimant would have been fairly dismissed in any event and if so, on what date?
(v) If the dismissal is found to be unfair, to what extent did the Claimant contribute to his own dismissal by his own culpable conduct?

(vi) Has the Claimant, who identifies himself as a gay man, shown facts from which the Tribunal could find, in the absence of an alternative explanation, that he has suffered either harassment related to his sexual orientation within the meaning of **section 26 of the Equality Act 2010** and/or direct discrimination because of his sexual orientation within the meaning of **section 13 of the Equality Act 2010,** in the manner listed in the complaints set out in paragraph 1 of these reasons, or any of them?
(vii) If so, has the Respondent satisfied the Tribunal, on a balance of probabilities, that it did not commit those acts of harassment/discrimination, or any of them?

(viii) **Jurisdiction:** Does the Tribunal have jurisdiction to consider any of the alleged acts of discrimination/harassment which took place prior to 4 April 2016, which the Respondent contends are out of time? The Claimant contends that the conduct of which he complains was a state of affairs or series of acts extending over a period of time culminating on 5 April 2016 and therefore all are in time and the Tribunal has jurisdiction to consider all of his complaints.
(ix) In respect of any alleged acts which are found to be out of time, is it just and equitable nevertheless to consider them, within the meaning of **section 123 of the Equality Act 2010?**

(x) **Admissibility:** Was the meeting of 5 April 2016 privileged as being on a 'without prejudice' basis, and therefore inadmissible in evidence, as contended by the Respondent? The Claimant disputes that this was the status of the meeting.
(xi) Is the Tribunal precluded from hearing evidence of the meeting of 5 April 2016, for the purposes of the Claimant's unfair dismissal claim, because it was a 'protected conversation' within the meaning of **section 111A of the Employment Rights Act 1996?**

The Facts

1. The Respondent is the parent company of Rocket Production, a leading UK manufacturer of promotional merchandise trading in the UK and mainland Europe. Rocket Production USA LLP now operates as a separate operational and financial entity although with some overlap of administrative services. In the past, during the earlier period of the material time, there was considerably more interconnection between the two companies. The Respondent is a small company with about 28 employees. Until September 2015 it was located in a large open plan office in Kentish Town where all departments shared the same floor. From September 2015 the company relocated to Kings Cross where the Production Department was located on the 1st floor and the Sales Team, which included the Claimant, was located on the 3rd floor.

2. The Claimant joined the Respondent as a Sales Co-ordinator (as stated in his employment contract) on 9 January 2012. There was some controversy before the Tribunal as to whether or not his title was, as sometimes stated, 'PA/Sales Co-ordinator'. However, nothing in particular turned upon this label since it was accepted that for the first three years of his employment, his duties included a fair proportion of PA support duties, in particular while he worked for Helen Davey and Shane O'Connor. At this time he provided sales support to them, including liaising regularly with Rocket Production USA. The Claimant's appraisals at the end of the first three months and then subsequently annually, showed him developing well in his role in skills, knowledge and experience and taking on additional responsibilities such as managing three trade shows in Chicago and running the US office for a short period, in the absence of an office manager, and a variety of duties managing production and sales assistance. The Claimant was ambitious and at the end of three years he came to a point of it being envisaged that he may train as a project manager. The Claimant came from a design background prior to his employment with the Respondent and he wanted to develop his creative side. He was the acknowledged company expert in bags. The Respondent thought highly of his skills and potential.

3. However, there was, throughout his employment, an admitted issue with his time keeping. The Tribunal concluded unanimously that the Respondent company, having a traditional and rigorous attitude to timekeeping, kept records of all staff lateness, up to and including the management level of Mr Greaves, and each departmental manager was responsible for reporting daily all late arrivals and absences, which were then entered and recorded on a spread sheet. It was not in dispute that the Claimant's lateness record showed an average 18 days per annum by comparison to the general staff annual lateness average of 1.8 days.

4. There was an informal meeting relating to the Claimant's timekeeping and sickness absences on 2 May 2013; a formal meeting on 20 June 2013 resulting in a written warning; a further formal meeting in November 2013 resulting in a further warning. There was a further formal disciplinary hearing resulting in a further first warning again on 22 September 2014 and a further disciplinary resulting in a final warning to last for nine months on 12 December 2014. The Tribunal had before it a variety of communications and texts from the Claimant on various occasions apologising for being late and sending pictures of overcrowded tube station entrances for example. The Respondent however was aware of other members of staff, including Mr Greaves, who travelled a very similar journey to work but who clearly allowed sufficient time in order to arrive on time, despite the vicissitudes of public transport. Further, the Claimant's lateness record showed a tendency, after periods of improvement following a warning, to slip back into further lateness after the expiry of the relevant warning periods. An example of this was in autumn 2015. The Respondent warned the Claimant informally in between disciplinaries, for example on 7 August 2015 where he was informed that he had now nine late days that year and that with no overall improvement, being on a final written warning, he was in danger of a further disciplinary which may result in dismissal.

5. There was an informal verbal warning again on 23 November 2015 and on 17 December 2015, the Claimant was again issued with a formal written warning to last on his record for a period of 12 months. At this meeting on 17 December 2015, Mr Greaves said; "what are you going to do to improve things?" The Claimant said "I won't be late again, I don't want to be in this meeting again" and Mr Greaves said "this can't happen again, we have been here so often."

6. The Tribunal noted that in late 2013, the Respondent decided not to pursue any disciplinary procedures for lateness because the Claimant had had a very difficult year, including the death of a very close friend, as well as his own health issues and also because for a period he was tasked with staying a little later in order to lock up the office. The Claimant complained to Mr Greaves on 14 November 2014 that he felt he was being targeted and made an example of unfairly in relation to his timekeeping which he had tried hard about and offered the example of other people in accounts coming in late all the time and no one saying anything. He ended up "it seems whatever happens I will always get into trouble and be pushed out." The Respondent told the Tribunal that certain members of staff had explicit permission to come to work at a later time on a regular basis. The Tribunal concluded unanimously that the Claimant was under no more scrutiny regarding his time keeping than any other member of staff.

7. In early November 2014, an email which the Claimant sent to a customer regarding a delivery in the United States remained in his inbox, creating some delay and inconvenience for the client. After some investigation by Simon Kenny, new head of sales, it was not pursued as a disciplinary matter. Mr Greaves told the Tribunal that it had been a complex issue where the evidence was not clear in relation to IT glitches and that the Claimant's explanation had been very genuine and they had given him the benefit of the doubt as to whether he had indeed sent the email. When asked to forward the email to the Respondent during the investigation, the Claimant had sent a word document of the text of the email rather than forwarding the actual sent email itself.

8. Helen Davey, Sales Manager responsible for Rocket Production UK left the Respondent in February 2015, at the end of a three month notice period. Mr Greaves told the Tribunal that Ms Davey was the most senior person beneath Mr Lyons MD, was a source of profound Rocket Production knowledge gathered over a period of some 12-15 years and was an invaluable repository of knowledge and advice to senior management, including staff coaching and co-ordinating supply management. Her departure had an enormous impact on the Respondent and Mr O'Connor subsequently left in the summer of 2015 and the two of them eventually set up a rival business to the Respondent. During the period of Ms Davey's notice, Nathan Ginsbury recruited five members of the team in USA and, knowing that he had lost the knowledge source of Helen Davey in the UK, began to operate more independently from the UK office, in his office in the USA. He was head of Rocket Production USA operating at that point as a consultant and not an employee.

9. The Tribunal formed the view that this chain of events came as a considerable shock to the Respondent's senior management and created a period of upheaval and difficulty during which the Respondent did the best that it could in the circumstances to find alternative work for the Claimant to fill the void created by the departure of Ms Davey and the transfer of substantive Rocket Production USA work to the United States. The vast majority of his support work in sales and production had disappeared with the departure of Ms Davey and Mr O'Connor and the transfer of the Rocket Production USA work to the USA office.

10. The first area of work tasked to the Claimant after these changes was training up Mr Mark O'Hara as UK and European Sales Manager for Rocket Production UK, using the Claimant's knowledge and experience gathered when he had worked for Ms Davey,

whom Mr O'Hara was to replace. The second aspect was that he was a floating sales co-ordinator to cover any other sales co-ordinator who were absent and thirdly he was given the role of factory compliance administrator, which Mr Greaves told the Tribunal was an area of growing importance with increasing requirement for suppliers to provide transparency in the supply chain in order to ensure compliance with updated environmental safety and modern slavery standards, as increasingly expected by clients.

11. The Claimant told the Tribunal that as a result of the departure of Ms Davey, he experienced his new allocated work tasks as a huge demotion and a decrease in his workload of about 70%. He was not happy about this situation and complained to Mr Greaves. The Claimant in his appraisal of November 2015 said that there had been a complete change of direction in quite the opposite way from his previous appraisals where he had expressed the wish to take on more responsibility and that he now felt he had less responsibility and that his skills and strengths were not being used to their full extent, which was not something he regarded as progression.

12. The Tribunal formed the view that it would have been open to the Respondent, at the start of 2015, to give serious consideration to whether the Claimant's role was substantially redundant. The Tribunal accepted the Respondent's evidence that it did not, however, wish to lose the Claimant's skills, experience and knowledge of the business and wished to retain him because of his abilities and potential for development, hopeful that other business opportunities within the company would present themselves which the Claimant would want to fulfil. As it transpired, the sales co-ordinator of Ms Nikki Gee left the company and the Claimant undertook this role starting in February 2015.

13. The Claimant had not been overjoyed at the prospect of working as Ms Gee's sales coordinator because, as he told the Tribunal, she had a 'terrible reputation' within the company as being difficult to work for and he believed that she had a history of bullying, having witnessed several of her previous support staff going to the bathroom in tears. Nevertheless, he began working in this role and at the same time was tasked with covering post-sales duties for Mr O'Hara. There was some question as to whether the Claimant was 'playing Ms Gee and Mr O'Hara off against each other' in claiming that he was too busy with the other's work at certain times, leading to Mr Greaves' intervention with the aim of instilling some structure to the Claimant's workload. The Claimant was unhappy about his role assisting Mr O'Hara, since he felt that it amounted to no more than packing boxes.

14. The Claimant's evidence was that he found Ms Gee's management style overbearing, controlling, intimidating and bullying, including asking him personal questions, commenting on his clothing and eating habits and criticising and disrespecting him behind his back in front of the rest of the staff. He also alleged discriminatory commentary and behaviour related to his sexual orientation and stated that this gave others the confidence to be nasty to him. Mrs Anderson's evidence confirmed that of the Claimant in material respects, adding that Ms Gee was the most chaotic and disorganised sales person one could ever work with and that keeping up with her was an impossible task. Ms Linley's evidence was that Ms Gee would complain about every aspect of the Claimant's work and personal life when he was away from the office. Both Mrs Anderson and Ms Linley are ex-employees. Miss Sustrova and Miss Noel, current employees, on the other hand denied hearing any derogatory or discriminatory remarks by Miss Gee about the Claimant. The Tribunal

noted that one paragraph in each of their statements was in virtually identical wording on this matter. They said that Mr Greave had drafted their statements for them, on the basis of oral information supplied by them.

15. Ms Gee herself denied any derogatory or discriminatory or bullying behaviour towards the Claimant. However, the Tribunal noted that her witness statement contained two phrases suggestive of a disparaging and patronising tone lacking in respect; the Claimant was "often on health kicks" and his stomach problems were "not assisted by his faddy diets". She appeared to have strong views about what constituted the correct diet for everyone. She stated that she had "no recollection of ever negatively commenting on his clothing or making personal remarks to him" although she admitted complimenting him at times as part of 'friendly chat'. The Tribunal also noted that on 19 June 2013 in response to the Claimant being off sick Ms Gee emailed him as follows: "You actually look like you've been to the Caribbean!" She stated that this was "a light hearted comment to cheer him up" although she accepted during Tribunal questioning that she could see how it might imply that she did not believe that he was ill, but had not intended that. The Tribunal did not find credible her explanation that the obviously barbed 'Caribbean' comment had been innocently intended to cheer the Claimant up on his sickbed and found Ms Gee to be generally evasive in her answers to cross-examination questions. She did accept, when pressed, that her questioning aloud in the office of where the Claimant was or why he hadn't done a particular task could have been more sharply than neutrally expressed.

16 The Tribunal carefully considered all of the conflicting evidence before it on the issue of Ms Gee's behaviour towards, and in regard to, the Claimant, including the lesser weight to be attributed to Ms Lingley's statement and weighing the credibility on both sides. It concluded unanimously as follows:

(i) Ms Gee had a loud, forthright and outspoken management style, regularly demanding to know where the Claimant was and/or whether or not he had completed a certain task. Miss Noel, whilst denying that Ms Gee was "a nasty cow" in a text message on 28 October 2015, did confirm that these demands went on in the Claimant's absence and also stated that rather than demanding to know in front of everyone, Ms Gee should have addressed such matters one to one with the Claimant personally. She also confirmed that Ms Gee was difficult to work with due to her way of doing things. Miss Sustrova was not in the same department but she accepted that she was aware that Ms Gee voiced her frustration with the Claimant when a job was not completed or when he was late or when he was absent from his desk. Other members of staff did not confirm Ms Gee's own view that she was 'laid back'. The Tribunal formed the view that, at the very least, her style lacked any sensitivity.
(ii) During 2015, the Claimant was to a considerable degree feeling demoralised, demotivated and disaffected as a result of the changes resulting from the departure of Helen Davey and Shane O'Connor, leaving him with less stimulating and interesting work and a sense that he had moved backwards rather than forwards. The Tribunal accepted, on all the evidence, that this lack of enthusiasm and engagement together with his struggles working for Ms Gee, led to him taking extended breaks from his desk, and did not assist his long standing lateness and absence records.
(iii) Ms Gee very probably vented her frustration and anger with the Claimant's lack of engagement in the way in which she managed him, including loud comments and questions, being watchful regarding his whereabouts in the building, sarcastic jibes and personal interrogation and commentary, although it was not established by the evidence that Ms Gee followed the Claimant about specifically looking for him during

his breaks. The Tribunal concluded unanimously her conduct included two of the alleged comments relating to the Claimant's sexual orientation, as set out below, although it was unable to make a specific finding on Mrs Anderson's allegation that Ms Gee many times in her hearing made very derogatory remarks about how lazy and useless the Claimant was, followed by jokes about him being "a queer".

17 The pink jumper: On the evidence of the Claimant (whose evidence the Tribunal found credible) and Miss Langley, both of whom were present and the evidence of Mrs Anderson, who was not present but immediately after the event asked the Claimant what was the matter and had the matter reported to her by him, the Tribunal on a balance of probabilities accepted that the event occurred as alleged by the Claimant. That Ms Gee, in front of everyone, including the Claimant, had picked up the pink fluffy sequined jumper and said that it must be the Claimant's, since pink suited him, causing everyone to burst out laughing and the Claimant to feel upset and mortified. Ms Gee's evidence was less credible. Her stance shifted to some extent at first denying that the event ever took place 'although had a pink jumper been left lying around in the office I may reasonably have believed that it belonged to the Claimant as he did often wear pink jumpers and shirts." The Tribunal did not find this explanation either credible or convincing. In Tribunal Ms Gee identified the pink jumper in question, a patently female fluffy pink jumper with a large white shiny sequinned polar bear and cub on the front belonging to a female employee, from a group photograph. Ms Gee also said that didn't have a clear recollection of the Christmas party in question nor the jumper in question. She then said that she had 'no recollection' of the incident. The Claimant and Mrs Anderson both denied that he wore pink to the office.

18 "King of fags": the Claimant alleged that this comment was muttered by Ms Gee after the Claimant said that he was going to the gym with friends (something he began to focus on after he was diagnosed with IBS). The Claimant heard it, felt very upset and felt that others probably heard it too. Ms Gee stated that it was not something she would ever say. The Tribunal found the Claimant's evidence on this matter consistent and credible. It was something that he was more likely to remember, since he was very upset by it, than Ms Gee, for whom it may well have been a throw-away remark – consistent however with the gay-stereotyping inherent in the pink jumper event and with the anger and frustration which appeared to inform Ms Gee's management of the Claimant in general. On a balance of probabilities, the Tribunal concluded unanimously that this event happened as alleged by the Claimant.

19 "Needs a good shag": On a balance of probabilities on the evidence before it, the Tribunal was not satisfied that this event occurred as alleged. The Claimant was not present and had the allegation reported to him by Mrs Anderson, as hearsay. Mrs Anderson's statement alleges that she heard Ms Gee and Miss Sustrova joking on more than one occasion that the Claimant "needed a good shag". Ms Gee and Miss Sustrova deny any such comments. On balance, the Claimant has failed to satisfy the Tribunal on this issue.

20 The Claimant complains that in March 2016 Ms Gee shouted across the office that it was the first she had heard that the Claimant was a project manager. However, he accepted in Tribunal that he may have got his dates confused because this allegation appears to relate to the occasion of the general checking of Job Titles which was carried out in December 2015 by Iva Doncheva. Ms Gee stated that she remembered on one occasion querying with the Claimant the fact that he considered

himself to be a Project Manager, since she understood his job title to be Sales Coordinator.

21 The Claimant's end of year appraisal in December 2015 expressed both his own dissatisfaction regarding his reduction in responsible and interesting work and his desire to build towards a more fulfilling role and Mr Greaves expressed that this needed to be based on building trust between Ms Gee and the Claimant and her confidence in his ability to deliver consistent, reliable and efficient support. Mr Greaves also commented that the Claimant's time keeping had become poor again.

22 In February 2016 Mr Greaves had a conversation with Mr Lyons in which he informed him that Mr O'Hara had complained that the Claimant was not happy to continue doing any work for him in respect of Rocket Production or that he wanted to pick and choose which elements of the role he wanted to do. At the same time Ms Gee had expressed concerns about the Claimant not performing to the required standard or in a timely fashion. Further, he often seemed to be on lengthy breaks from his desk. There was also a live disciplinary warning on the Claimant's file regarding his lateness. They decided to hold a meeting with the Claimant in order to discuss their concerns about his ongoing lateness and seeming lack of engagement and focus.

23 This meeting took place on 29 February 2016. The Claimant states that without any warning he was invited to have 'a conversation'. No notes were taken by the Respondent but at 17.32 that same day the Claimant emailed Mr Gibson (a relative and his representative in these proceedings) setting out his recollection of what had been said at the meeting. There was broad agreement between the parties as to the content of this meeting: Mr Lyons expressed his concerns about the Claimant's apparent lack of motivation and engagement and his negativity and the Claimant explained why he had felt negatively about the company, due to the changes in his role and essentially being under-used relative to his abilities. Mr Lyons said several times that the Claimant was very capable and very bright. The thrust of Mr Lyons' message to the Claimant was that he needed to choose whether he was committed to a positive future with the company sufficiently to turn around what Mr Lyons described to the Tribunal as his 'dysfunctional behaviour', or would be happier elsewhere, in which case Mr Lyons would assist him to that end, but that the choice was his. Mr Lyons told the Tribunal that he had tried to convey to the Claimant that getting stuck long-term in a negative rut was not a good option and would tend to sour relationships in the small team. The Claimant tried to reassure Mr Lyons as to his commitment.

24 The Tribunal accepted the Claimant's evidence and his virtually contemporaneous note that Mr Lyons said at the end of the meeting that he wished to have a further conversation on Thursday, ie. 3 days later. Mr Lyons' evidence was that he had placed the onus on the Claimant and was waiting for a positive impetus to come from him. However, the Tribunal was not convinced that he had made this clear to the Claimant since it formed the impression that Mr Lyons had a tendency to understate what he had in mind. The Claimant, for his part, was expecting another meeting to be convened by Mr Lyons and was, to some extent, dreading it. As it transpired, Mr Lyons was unwell and then travelling in the period following this meeting and there followed Easter holidays and diary clashes. The Claimant felt unhappy with this threat hanging over him.

25 On 5 April 2016 the Claimant was called to a further meeting with Mr Greaves and Mr Lyons. Mr Greaves made a short note of the content of this meeting

immediately afterwards. There was some material dispute between the parties as to what had occurred during this meeting. The Claimant stated that Mr Lyons was in 'a foul mood' and was angry and bullying throughout the meeting. Mr Lyons and Mr Greaves strongly deny this. The Respondent's version of events was that the meeting began with Mr Lyons recapping the previous meeting and that he had been awaiting the Claimant's response. Then Mr Greaves reiterated the ongoing performance and attitude issues which had continued to come to his attention since the first meeting, particularly his apparent lack of commitment. The Claimant denies that his performance was discussed. He stated that the meeting was simply to hear his decision from the previous meeting and that he finally was able to say that he had felt used and was now being asked to leave. At a point about a quarter way through the meeting, Mr Lyons asked if the Claimant would be prepared to have a 'without prejudice' meeting. Mr Grieve stated that he asked the Clamant if he understood what this meant and the Claimant replied that he did. The Claimant accepted that this exchange had taken place but said that he had felt that he had no choice in the matter, since he felt that his job was on the line, and also that he had no idea that it had legal ramifications which meant that the conversation could not be given in evidence in any subsequent legal proceedings. This crucial point was not explained to him by either Mr Grieve or Mr Lyons. Mr Grieve said that he would have explained if the Claimant had not said that he understood and, when asked what he himself meant by the phrase, said that he meant free to discuss matters which would otherwise be considered a breach of contract; to have a protected conversation.

26 There followed a discussion during which Mr Lyons said that as the Claimant did not appear to be happy at work, he may be happier working elsewhere and if he wished to leave, he was prepared to offer the Claimant 3 months net pay, that he would not be required to work during that period and would get a good reference. The Claimant expressed concern about how it would look to recruiters if he was applying for jobs whilst not working and Mr Lyons suggested that he speak to some recruiters in order to clarify this point. There was a further dispute: the Clamant asserted that Mr Lyons said that he would not give him a reference unless he agreed to leave and would make life unpleasant for him if he decided to stay. Both Respondent witnesses and the meeting note says that it was the Claimant who asked whether Mr Lyons was saying that if he did not accept the offer, things would get nasty, which Mr Lyons denied, and that the Claimant then asked if he was trying to push him out, which Mr Lyons also denied. Mr Lyons suggested that they meet again early the following week to discuss again and that the Claimant needn't come in to work until then. The Tribunal concluded, on the evidence before it, that it was the Claimant who first raised the question of whether things would get nasty and whether he was being pushed out because he was very upset and apprehensive at the meeting and was probably expressing those lively fears in his questions. On balance, the Tribunal did not accept that Mr Lyons himself first used these phrases since this was inconsistent with his giving the Claimant time to speak with recruitment agencies and to make his mind up, with his desire to keep the Claimant on board, provided he amended his attitude and commitment, and also with Mr Lyons' reply to the Claimant's resignation on 22 April 2016 (paragraph 29 below).

27 As to Mr Lyons manner: The Tribunal formed the view that Mr Lyons' management style was generally hands-off, preferring to allow those to whom responsibility was delegated to assume full responsibility and only becoming involved when large questions required resolution. He was generally rather distant and mild in manner. He was, however, frustrated because he wanted the Claimant to stay, provided he came forward with a positive plan for improvement at work, but was

prepared to assist the Claimant by way of a financial payout and a good reference so that any parting would be on good terms, if the Claimant said that he would prefer to work elsewhere. He stated that he did want some resolution of the matter because the Claimant's ongoing negative attitude was potentially destructive to team morale and the business. On all the evidence, including its observation of Mr Lyons' demeanour during the Hearing, the Tribunal concluded that he had not behaved in an aggressive manner during his meeting with the Claimant. His style as MD seemed paternalistic and benign in a rather traditional way, valuing loyalty and commitment and proud that many of his small team had been in his employ for at least a decade. Both Mr Lyons and Mr Greaves struck the Tribunal as measured and professional in manner and dealings with the Claimant, both oral and in writing, for example throughout the various disciplinaries and appraisals.

28 The Claimant was very upset after the meeting, believing that the 2 meetings were part of a longstanding campaign of discrimination and bullying designed to force him to resign. On 7 April 2016 he wrote a letter terminating his employment forthwith, contending that he had been "constructively dismissed by continued bullying in the work-place and sexual discrimination by various people, including Nikki Gee, Andrew Greaves and Mr Lyons". He alleged that Ms Gee had been overbearing and overcritical over many months and had made discriminatory comments; that Mr Greaves had been critical of his performance and that people were character assassinating him behind his back, about which he had complained to Mr Greaves, who had done nothing; that the proposed resumed 'conversation' had been kept hanging over him for a month and that the last straw was the eventual meeting on 5 April where a 'derisory sum' had been offered after 4 years of hard work and at which he was threatened that life would be made unpleasant if he did not leave and he was threatened with disciplinary hearings; such that he had been forced to resign. He stated that he intended to make a substantial Tribunal claim against the Respondent. This was the first time the Claimant had raised an allegation of discrimination.

29 On 22 April 2016 Mr Lyons wrote a reply, drafted by Mr Greaves, acknowledging the Claimant's resignation letter, refuting his allegations in detail and stating that the company would have welcomed the opportunity to address his concerns using the grievance procedure.

30 The Claimant presented his complaints to the Tribunal on 2 September 2016.

The Law:

31 As to the law, the Tribunal directed itself as follows:

31.1 In the light of his resignation, it is for the Claimant to show, on a balance of probabilities, that he was dismissed; that is, that he terminated his contract of employment, whether or not with notice, "in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct." (**Section 95(1)(c) of the Employment Rights Act 1996)**.

31.2 It is a repudiatory breach of the employment contract for an employer, without reasonable and proper cause, to conduct itself in a manner "calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties" (**Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84, EAT**).

31.3 The Claimant must also show, on a balance of probabilities, that any such repudiatory breach or breaches were the effective cause of his resignation.

31.4 A repudiatory breach may consist of a series of lesser breaches culminating in a 'final straw', which may not in itself be a serious breach, but must not, however, relate in some way to the earlier breaches with which it is alleged to be cumulated and must not be entirely innocuous **(London Borough of Waltham Forest v Omilaju [2005] IRLR 35).** There cannot be more than one last straw **(Vairea v Reed Business Information Ltd (UKEAT/0177/15/BA).**

31.5 The Claimant's right to resign and claim constructive unfair dismissal may be lost if he conducts himself in such a way as evinces an intention to continue to be bound by the contract, after having discovered the employer's repudiatory breach or breaches.

31.6 If the Claimant shows that he was dismissed within the meaning of **section 95(1)(c),** then it is for the Respondent to show the reason for dismissal and that it was a potentially fair reason falling within **section 98(2) of the Employment Rights Act 1996.**

31.7 If the Respondent so satisfies the Tribunal, then the dismissal is actually fair if the Respondent acted reasonably in treating the reason shown as a sufficient reason for dismissing the Claimant, in all the circumstances, and this question shall be determined in accordance with equity and the substantial merits of the case **(section 98(4) of the Employment Rights Act 1996).**

31.8 If the dismissal is found to be procedurally unfair, the employee's compensation will be reduced to the extent that the Tribunal finds that correcting the procedural irregularities would have made no difference to the dismissal outcome (**Section 123(1)** of the **Employment Rights Act 1996** and **Polkey v Dayton Services Ltd [1988] ICR 142).**

31.9 Compensation shall be further reduced to the extent that the Tribunal finds that the employee's own actions caused or contributed to his own dismissal (**Section 122(2)** and **123(6)** of the **Employment Rights Act 1996**).

31.10 **Section 13(1) of the Equality Act 2010** provides that a person (A) discriminates against another (B) if, because of a protected characteristic (including sexual orientation) A treats B less favourably than A treats or would treat others.

31.11 **Section 23 of the Equality Act 2010** provides that: "on a comparison of cases for the purpose of **Section 13**, there must be no material difference between the circumstances relating to each case."

31.12 **Section 39(2) and (4) of the Equality Act 2010** provide that an employer (A) must not discriminate against an employee of A, (B): (a) as to the terms of B's employment; (b) in the way that 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."

31.13 **Section 26 (1) of the Equality Act 2010** provides that "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 violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B." **Sub-section (4) of section 26** provides that "in deciding whether conduct has the effect referred to in **(1) (b)** above, 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."

31.14 **Section 136(2)(1) of the Equality Act 2010** provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the Tribunal must hold that the contravention occurred. **(3)** But this does not apply if A shows that A did not contravene the provision."

31.15 **Section 123(1) of the Equality Act 2010** provides that a complaint may not be brought before the Tribunal after the end of a period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. For the purposes of this section, conduct extending over a period is to be treated as done at the end of the period **(section 123(3)(a)).**

31.16 The Tribunal reminded itself that discrimination may not be deliberate and may consist of unconsciously operative assumptions on the part of the employer. It is therefore incumbent upon the Tribunal to examine indicators from the surrounding circumstances and events, both prior and subsequent to the acts complained of, in order to assist it in determining whether or not particular acts were discriminatory. (**Anya v University of Oxford [2001] IRLR 337**).

31.17 Inferences of unlawful discrimination may not properly be drawn solely from the fact that the Claimant has been unreasonably treated, although they may properly be drawn from the absence of any explanation for such unreasonable treatment. (**Bahl v The Law Society [2004] IRLR 799**).

31.18 The Tribunal had regard to the cases of **Igen v Wong [2005] ICR 931** and **Madarassy v Nomura International Plc [2007] IRLR 246**, in setting about its task.

31.19 **Section 111A of the Employment Rights Act 1996** provides as follows:
(1) 'Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under **section 111** (unfair dismissal).
(2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee. …
(4) In relation to anything said or done which in the Tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the Tribunal considers just.'

31.20 The 'without prejudice' rule makes inadmissible in subsequent litigation things said or written by either party in prior, failed, negotiations genuinely intended to settle the dispute between them, unless the operation of the rule would act to cloak any 'unambiguous impropriety'. The use of the 'without prejudice' label is not determinative either way since it is the substance of the matter which counts and any waiver must be agreed by both parties. The rule is rooted in the principle of public policy that parties to a dispute should be enabled to speak freely in order to reach a settlement, without recourse to litigation.

31.21 The Tribunal was further referred to the following cases during submissions: **Fairthorn Farrell Timms LLP v Bailey [2016] IRLR 839; Woodward v Santander UK PLC [2010] IRLR 834; Framlingham Group Ltd v Barnetson [2007] IRLR 598; Brodie v Ward t/a First Steps Nursery UKEAT/0526/07/LA; Wright v North Ayrshire Council [2014] IRLR 4; WE Cox Toner (International) Ltd v Crook [1981] ICR 823; Amnesty International v Ahmed [2009] ICR 1450; Shamoon v Chief Constable of the RUC [2003] ICR 337 HL; Martin v Devonshires Solicitors [2011] ICR 352; Hewage v Grampian Health Board [2012] ICR 1054 SC; CLFIS (UK) Ltd v Reynolds [2015] IRLR 562 CA; IPC Media v Millar [2013] IRLR 707; Nazir & anor v Asim & Nottingham Black Partnership [2010] ICR 1225; Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336; Grant v HM Land Registry [2011] IRLR 748 CA; Hendricks v Commissioner of Police for the Metropolis [2003] ICR 530 CA; Aziz v First Division Association [2010] EWCA Civ 304; Robertson v Bexley Community Service [2003] IRLR 434 CA; British Coal v Keeble [1997] IRLR 336; Gestmin SGPS SA v Credit Suisse (UK) Ltd & anor. [2013] EWHC 3560.**

Conclusions:

32 It was a fundamental contention of the Claimant's case that from the time that Mr Lyons discovered that he was gay, about 6 to 7 months into his employment, Mr Lyons embarked upon a management campaign to oust him from the business because, being an orthodox member of the Jewish faith, homosexuals are abhorrent to him. Mr Lyons stated that he did not know that the Claimant was gay until he resigned and that, in any event, it was a matter of irrelevance in the workplace. The Tribunal scrutinised this contention with care. The Claimant had spoken openly about his personal life in the small office so that it was very probable that all of his colleagues knew of his sexual orientation. Although Mr Lyons spent only part of his time at the Respondent offices since he has business interests elsewhere and was out a good deal the Tribunal concluded that he may very well have picked up the fact that the Claimant was gay during the period up to the office move in 2015, when the whole company was in the one open-plan office, had he chosen to register this fact as being of any significance.

33 The Tribunal found Mr Lyons' evidence, and that of Mr Greaves, in rebutting the Claimant's allegation of an intention and campaign to oust him both credible and convincing. Firstly, it is a generalisation and a stereotypical assumption that all orthodox Jews hate gays and would therefore embark upon a campaign to oust them from their company. Descending to specifics, the Tribunal unanimously found there to be no evidence whatever to support this allegation in this case. In fact, all the evidence indicated quite the contrary to be the case. Had a campaign to oust the Claimant been instigated some 6 months into his employment, that is in about June/July 2012, the Respondent had several unforced opportunities to dismiss him, notably: (i) his disciplinary record for lateness stretching from May 2013 to December 2015; and (ii) when 70% of his workload disappeared in January/February 2015 at the point when Helen Davey left and substantial work transferred to the USA. The Respondent did not do so. Instead the Tribunal found that it conducted the succession of disciplinary processes relating to the Claimant's time keeping in a measured, procedurally correct and occasionally merciful way (for example in September 2015). The Tribunal found that the Respondent treated the Claimant no differently to all the rest of the staff in monitoring lateness and absences across the board. It was not disputed that the Claimant's lateness record was an average of 18 days a year compared to the average staff absence of 1.8 days. Further, rather than make the Claimant redundant in early

2015, which it may well have been open to it to do, the Respondent searched around for sufficient tasks to keep the Claimant employed until a vacancy arose as Ms Gee's Sales Co-ordinator. These are not the actions of a company seeking to dismiss an employee. On all the evidence before it, the Tribunal was satisfied that the Respondent actively wished to retain the Claimant's experience, skills and knowledge of the business gained over a period of more that 3 years and thought highly of his abilities.

34 The Tribunal concluded unanimously that there was no such intention emanating from Mr Lyons or anyone else, nor any campaign to dismiss the Claimant, and found no evidence of a conspiracy among management to that end.

Admissibility of evidence:

35 **Section 111A of the Employment Rights Act 1996** precludes the admission of pre-termination negotiations as evidence in a complaint of unfair dismissal, as to both fact and content. The Tribunal found that the conversation on 5 April 2016 fell within the broad statutory definition of "any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee." **(section 111A (2)).**

36 Nevertheless, the Tribunal decided that the whole conversation should be admitted in evidence in this case because certain aspects of the way in which the conversation was conducted fell within the meaning of 'improper' contained in **section 111A(4)** and that it was therefore just to admit it in its entirety. These improper aspects were as follows:

(i) The Tribunal accepted the Claimant's evidence that he did not understand that the phrase used by the Respondent ('without prejudice') in order to protect the conversation meant that he could not use it in evidence in any subsequent litigation. This was important since he had already sent an account of the first part of the meeting on 29 February to his lawyer/relative. The Respondent does not aver that any explanation of this crucial significance of the phrase was offered and there was some conflict between the evidence of Mr Lyons and Mr Grieve as to who had given such explanation as was made. The Claimant told them that he understood what it meant but in fact did not. He told the Tribunal that in the circumstances he had felt pressure to agree.

(ii) The Tribunal noted that this lack of explanation was not in accord with the (non-binding) **ACAS Code of Practice (No 4) on Settlement Agreements** which states that "the parties may still offer and discuss a settlement agreement *in the knowledge that their conversations* cannot be used in any subsequent unfair dismissal claim." (Italics supplied). This assumes that both parties are aware of the legal consequences of a **section 111A** protected conversation. Surely, for informed, valid consent to a protected conversation to be given, both parties must understand its intended consequence.

(iii) Whilst not directly binding in that it was obiter in a case relating to a 'without prejudice' case in the strict sense of that phrase, the Tribunal noted that in the case of **Paribas v Mezzotero, the EAT** opined; "It is unrealistic in my judgment to refer to the parties expressly agreeing at this meeting to speak without prejudice, given the unequal relationship between the parties, the vulnerable position of the applicant in such a meeting as this and the fact that the suggestion was made by the Respondents only once the meeting had begun."

(iv) In this case, Mr Lyons acknowledged that he had felt frustration and impatience for some resolution at the meeting, although he denied any aggression.

The Tribunal did not accept that Mr Lyons was bullying and aggressive at the meeting, as the Claimant contended. Nevertheless, the Claimant, who was feeling apprehensive and vulnerable, was faced alone with the unequal power situation of two senior management and had not been offered the choice of being accompanied at what was an important meeting.

(v) Further, the Claimant had had no prior warning of a protected discussion and the idea was only mooted part way through the meeting.

(vi) The Tribunal was mindful of the differences between **section 111A** and the without prejudice rule and that the **Paribas case** related to the latter. However, it may reasonably be argued that the view enunciated by the EAT in paragraph (iii) above is even more applicable to the **section 111A** situation, since in the latter case there is no requirement for any consciousness of a potentially litigious dispute between the parties.

(vii) In summary, the Tribunal concluded unanimously that the Respondent's conduct of this meeting, as a resumption of the adjourned meeting of 29 February 2016, taking cumulatively the matters set out in (i) to (vi) above, fell within the meaning of 'improper' in **section 111A(4) of the Employment Rights Act 1996**. It further concluded that since the improper manner of conduct of this meeting went to the very root of the Claimant's understanding and consent to a protected meeting in the first place, it was just to permit the meeting to be adduced in evidence in its entirety and not precluded by the operation of **section 111A of the Employment Rights Act 1996.**

37 **'Without prejudice'.** The Respondent further and alternatively contends that the conversation of 5 April 2016 is inadmissible for all purposes from the point during the meeting at which there was a purported agreement to continue on a 'without prejudice' basis. The Claimant disputes this. The Tribunal is mindful that the use of the phrase itself is not determinative per se, but substantively the Tribunal unanimously concluded that there was sufficient consciousness of the potential for litigation on both sides, in all the circumstances and history, and that the conversation was part of a genuine attempt to resolve the dispute without recourse to litigation. The Claimant had, after all, sent a detailed account of the 29 February meeting to a relative who was a qualified and practicing solicitor.

38 The meeting of 5 April 2016 is therefore covered by the without prejudice rule, since the Respondent refuses to waive it, subject to the removal of such protection in cases where the rule would cloak 'unambiguous impropriety'. The Tribunal was mindful that this is a high threshold and concluded that there was nothing in this case which satisfied this test. The manner of its conduct as set out in paragraph 36 of these Reasons and which was sufficient to constitute 'improper' within the meaning of **section 111A of the Employment Rights Act 1996**, is not enough to constitute 'unambiguous impropriety' in the context of the 'without prejudice' rule. The Tribunal was also mindful that the fact that the rule may deprive a Claimant of the 'last straw' in a constructive unfair dismissal complaint, makes no difference (**Brodie v Ward case**).

39 Accordingly, the content of the meeting of 5 April 2016, from the time when the parties agreed that it would continue on a without prejudice basis, is not admissible in evidence for the purposes of either of the Claimant's complaints. However, the Tribunal also concluded that the Respondent's flawed conduct of this meeting up to that moment, including the fact that it had failed to explain to the Claimant the legal consequences of the phrase, allow him to be accompanied or give any warning before the meeting, amounted to conduct falling short of 'innocuous' so as to be capable of constituting 'the last straw' for the purposes of the Claimant's complaint of constructive

dismissal. His Claim Form pleads that the two meetings, of 29 February and 5 April, together constitute 'the final straw'. The Tribunal accepted that the meeting of 5 April was a resumption of the meeting of 29 February, which, at the time, was intended to be reconvened a few days later and for directly related purposes. The 'final straw' meeting began on 29 February and came to an end on 5 April, part way through that 5 April meeting, in evidential terms. His complaints are therefore in time and the Tribunal has jurisdiction to consider them.

Constructive Unfair Dismissal:

40 The Claimant alleges fundamental breach of the implied term of trust and confidence by a series of acts of the Respondent culminating in the meetings of 29 February and 5 April 2016. It is for the Claimant to satisfy the Tribunal, on a balance of probabilities, in objective terms, that the Respondent conducted itself, without reasonable and proper cause, in a manner calculated or likely to destroy or to seriously damage the relationship of trust and confidence between employer and employee. He alleges the series of acts set out in paragraph 1 a) (i) to (xi) of these reasons. Taking each in turn:

40.1 The Disciplinary process and warnings: The Claimant now accepts that he had an issue with timekeeping. The Tribunal found that he was not singled out in any way, that the monitoring of lateness and absences was uniformly applied to all staff and that the disciplinary processes were conducted at all times in accordance with proper and fair process. The Claimant did not appeal any of the warnings which he was given. The Respondent had reasonable and proper cause to discipline the Claimant as it did and there was no evidence that he was singled out because of his sexual orientation or for any other reason. There was no breach of contract in the Respondent's conduct in this regard.

40.2 The unsent email: The Tribunal concluded that the Respondent conducted a legitimate investigation into the non-sending of a delivery note email, as it was entitled to do. When asked for his input, the Claimant did not forward the original email which he believed and asserted that he had sent, but instead sent a copy of the word document text of the email, which in itself did not put beyond doubt that the email had indeed been sent. Nevertheless, the Respondent believed that the Claimant was genuine in his assertion, accepted the potential vicissitudes of the IT system and decided to take no further action. It may have been said at some stage during the investigation that the issue could constitute gross misconduct but the Claimant did not satisfy the Tribunal that he had been directly accused of gross misconduct. The Respondent had reasonable and proper cause to investigate the matter as it did and decide, as it did, to take no further action. This episode does not constitute a breach of contract on the Respondent's part.

40.3 Change of role: The departure of Helen Davey was outwith the Respondent's control and indeed came as an unpleasant shock. The transfer of substantial work to the USA office by Mr Ginsbury in the wake of her departure was understandable, since he had lost her inside knowledge. These events had considerable impact on the Claimant's work quality and workload. They were not, however, deliberate acts of the Respondent against the Claimant. The Respondent tried to find replacement tasks and eventually the Claimant filled the role of Sales Coordinator for Ms Gee when it became vacant. He was recruited, as his written contract states, as a sales coordinator and this role was not formally amended during his employment although he had found himself

doing much more stimulating and interesting work generally whilst assisting Ms Davey and Mr O'Connor (who also left 6 months after Ms Davey). This change in his circumstances greatly upset the Claimant and dashed his hopes for his anticipated creative career development along the existing lines. He felt that his fortunes had been reversed and that he had been reduced to some extent to packing boxes, which he had been doing 2 years previously. However, Ms Davey's departure was not the fault of the Respondent and the Tribunal found that it did its best to retain the Claimant rather than seek to make him redundant. The changing tasks and roles which they found for him did not breach his contract.

40.4 The conduct of Ms Gee: As set out in paragraphs 15 to 18 of these Reasons, the Tribunal concluded that Ms Gee's management style in relation to the Claimant was frequently inappropriate, characterised as it was by mocking, sarcastic or snide personal comments, loud questions both in the Claimants presence and behind his back, including 2 discriminatory comments overtly referring to his sexual orientation. It was contended on the Respondent's behalf that the pink jumper event, should it have occurred, should be seen as a light hearted joke in the context of the preparations for the office Christmas party and therefore not offensive. However, the Tribunal accepted that in fact it caused the Claimant to feel upset and humiliated in front of all his colleagues, that at least one of his colleagues was also shocked and upset and that, objectively viewed, this was capable of being offensive and humiliating in all the circumstances and manner of Ms Gee's management of the Claimant generally. The Tribunal did not accept that this was a light-hearted Christmas jollity. Consistent with her other behaviour and comments, it was in all likelihood barbed with mockery, belittling and, at the very least, crassly insensitive. The Tribunal also accepted that the Claimant heard Ms Gee's muttered comment "king of fags", although this was probably not overheard by anyone else.

40.4.1 The Tribunal concluded that this behaviour by Ms Gee as the Claimant's line manager was disrespectful, offensive and unacceptable. Although understandably frustrated and irritated by the Claimant's apparent work-reluctance and disengagement, long breaks and poor timekeeping, Ms Gee clearly allowed these feelings to get the better of her judgement as a manager. However, it may be that this reflects Ms Gee's customary management style when irritated, whatever her staffs' sexual orientation, since the Claimant stated that before he started working for her, he was very aware that she had an awful reputation as being difficult to work for, a history of bullying her staff, whom he had seen in tears, and that 'the whole atmosphere around her was toxic'. There was also some evidence that her working methods were 'chaotic'. The Tribunal noted that the "Caribbean" comment (paragraph 15 of these Reasons) occurred as far back as June 2013, well before the Claimant's diminution of workload, and before the Claimant was working directly for Ms Gee, although even at that time, his lateness/absences were an existing issue in the office.

40.4.2 The Tribunal concluded that Ms Gee's conduct was likely to seriously damage the relationship of trust between herself and the Claimant. Whatever the frustrations caused by the Claimant's apparent disengagement, long breaks and lateness, this cannot amount to a reasonable and proper cause for a line manager making offensive, humiliating or discriminatory remarks to an employee. The Claimant was disaffected and unhappy. In October 2015 the Claimant complained to Mr Greaves, following having been told that Ms Gee had criticised his work performance in front of all the staff while he was off sick. However, the Tribunal accepted Mr Greaves' evidence that the Claimant refused to give him any details of what was said and by whom, so that he

could not meaningfully investigate. The Claimant did not state that he had given Mr Greaves such detail.

40.5 Ms Gee's denial that the Claimant was a project manager: The Tribunal concluded that this event very probably occurred in December 2015 rather that in March 2016 as initially stated by the Claimant, on the occasion when staff roles were being checked and defined. Ms Gee's denial was, however, no more than the truth, since the Claimant's role had always formally been Sales Coordinator. Ms Gee's manner of making the denial, although loud, disparaging and in a tone very probably informed by anger and frustration, in the open office, does not amount to a breach of contract.

40.6 The meeting of 29 February and first part of the meeting of 5 April 2016: As set out in paragraphs 23, 24 and 25 of these Reasons, the Tribunal concluded that these meetings were genuinely intended by Mr Lyons, to address what he regarded as the Claimant's dysfunctional behaviour; disaffection with the company and his role, lateness/long breaks/absenteeism, which was negatively affecting morale and relationships in the small and tightly knit team. The Tribunal found that Mr Lyons wanted the Claimant to make a choice of pro-active re-commitment to his work or, if unhappy, to decide whether he would prefer to work elsewhere and, in his rather paternalistic way, to assist him to leave smoothly and on good terms, should he so decide. The Tribunal accepted that Mr Lyon's frustration levels had risen between 29 February and 5 April, since matters had not improved in the meantime and the Claimant had not come forward himself with a positive initiative for productive change. The Tribunal found that Mr Lyons' expectations that the Claimant approach him had not been made sufficiently explicit to the Claimant at the February part of the meeting and there had been some misunderstanding in this regard. However, both parties understood that something had to change as the current situation could not continue indefinitely. The Claimant was in fact unhappy, disaffected and increasingly frustrated and each looked to the other for a solution to the impasse. The Tribunal's findings regarding Mr Lyons' general manner and that of Mr Greaves are set out in paragraph 27 of these Reasons. The Tribunal concluded unanimously that, whatever the Claimant's perceptions in his rather vulnerable position at these meetings, Mr Lyons, despite his frustrations with the status quo, did not behave in a bullying or aggressive manner during these meetings, did not say that things would get unpleasant for the Claimant if he stayed and that Mr Greaves' conducted himself with his customary calm and professionalism.

40.6.1 The Tribunal's unanimous conclusion was that the Respondent did not conduct itself during these meetings, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the Claimant. There was no evidence that the Claimant's sexual orientation had any bearing on either the convening or the conduct of these meetings and there was reasonable and proper cause for addressing the issues of the Claimant's unhappiness, disengagement, lateness, extended breaks and absences which were impacting staff relationships and morale. There was nothing inherent in these meetings which constituted a breach of the Claimant's contract. The Respondent could perhaps have explicitly explained to the Claimant that 'without prejudice' meant that the meeting could not be used in evidence in Tribunal and could have offered him the right to be accompanied. However, the Claimant said at the time that he understood the meaning of the phrase and the Respondent took him at his word. Absent any other misconduct of the meetings, this does not constitute a breach of the Claimant's contract.

40.7 The 5 week delay: The Claimant contends that he was kept in suspense from 29 February until the reconvened meeting on 5 April, causing him heightened levels of stress and anxiety. The Tribunal found that the Respondent had intended a delay of only a few days but that circumstances, including Mr Lyons being ill and then away and then diary issues intervened. In addition, Mr Lyons expected the Claimant to take the initiative and approach him, whilst the Claimant waited to be summoned. There is no evidence that the delay was deliberate and allowed either party to act to alter the situation or end the delay. This did not constitute a breach of the Claimant's contract.

41 The Tribunal's unanimous conclusion was that only Ms Gee's behaviour constituted conduct, without reasonable and proper cause, likely to seriously damage the relationship of trust and confidence which should exist between employer and employee. However the Tribunal found no evidence that Ms Gee's behaviour was part of a campaign by higher management to oust the Claimant and concluded that it was a product of Ms Gee's own personality and management style and not the outworkings of any form of collusion or conspiracy between herself and Mr Lyons, Mr Grieve or any other member of management or staff at the Respondent. When the Claimant complained to Mr Grieve in October 2015, he did not identify Ms Gee or any specific conduct so as to enable Mr Grieve to take any action. The Tribunal concluded that Ms Gee's breach of contract was not connected in any way to Mr Lyons' and Mr Grieves' legitimate activity in conducting disciplinary process, changing the Claimant's working role and convening the meetings of February and April 2016. These were acts with reasonable and proper cause, without ulterior motive, and did not constitute breaches of the Claimant's contract.

42 Ms Gee's treatment of the Claimant, as set out above in these Reasons cumulatively amounted to fundamental breach of the implied term of trust and confidence entitling him to resign and claim that he was constructively dismissed. However, the Claimant had worked for Ms Gee from February 2015 until his resignation on 7 April 2016, without having made a complaint to management which identified Ms Gee, however unhappy he was feeling generally. Further, he stated in his letter of resignation (paragraph 28 of these Reasons) that the last straw was the conversation of 5 April, two days before. The Tribunal accepted that this final meeting was not entirely innocuous, although not a breach of contract in itself, so as to allow it to constitute 'the last straw' in the Claimant's complaint. However, it was not factually connected to Ms Gee's behaviour in any way and, in the absence of any evidence of a campaign or conspiracy connecting Mr Lyons or Mr Grieve to Ms Gee's behaviour, did not cumulate with Ms Gee's fundamental breach of contract in relation to the Claimant. There was no connection between Ms Gee's behaviour and Mr Lyons' and Mr Grieve's legitimate conduct in relation to the Claimant's disengagement and lateness.

43 The Tribunal concluded on all the evidence before it that, although not specifically mentioned in his letter of resignation, the substantive operative reason for the Claimant's unhappiness, disengagement and disenchantment at work, from the end of 2014 onwards, was the loss of the stimulating and interesting work he had enjoyed prior to Miss Davey leaving the Respondent. When asked during this Hearing why he had not resigned before, the Claimant said that he had no job to go to, that the market was not great and that his role had kept changing so that he did not know where he was, that there was a downturn when Miss Davey left and his job was stripped away to nothing of any importance so that he didn't know what he could say to any prospective employer at an interview. He felt that he had been demoted and reduced to packing

boxes. The Tribunal concluded that the final straw causing his resignation was the series of meetings where Mr Lyons called upon him to make a choice between recommitment to the company and his role and a smooth facilitated exit. However, neither the original cause of his unhappiness nor the meetings were breach of contract on the Respondent's part. Only Ms Gee's conduct towards the Claimant was a fundamental breach of his contract.

44 The last specific act of Ms Gee's of which the Claimant complains in these proceedings, was in mid December 2015, the 'pink jumper' discriminatory event. The Tribunal concluded that he did not resign in response to Ms Gee's behaviour, which he asserted went on throughout his working for her. Further, given that the last breach of contract was in mid-December 2015, he must be taken to have affirmed his contract by continuing to work thereafter until the meeting of 5 April 2016.

45 Accordingly, his complaint of constructive unfair dismissal fails. He resigned in response to events which were not breaches of contract, two days after the final straw meeting of 5 April, and not in response to Ms Gee's conduct which was breach of contract.

Sexual Orientation Discrimination:

46 The Tribunal found the following facts from which it could decide, in the absence of any other explanation, that the Respondent had committed acts of sexual orientation discrimination:
(i) Ms Gee's overt actions/comments regarding the pink jumper in December 2015;
(ii) Ms Gee's muttered comment "king of fags"; both inherently discriminatory in their terms.
(iii) The absence of any staff training in equality and diversity awareness.

47 As to the Respondent's explanations: the Tribunal was unanimously satisfied, on the basis of all of its factual findings as set out above in these Reasons, that the Claimant's treatment by Mr Lyons and Mr Grieve in their conduct of disciplinary hearings and sanctions relating to his lateness, their investigation of the unsent email, the alterations in his duties following the departure of Miss Davey and Mr McShane and the meetings of 29 February and 5 April 2016 and the time lag between had nothing whatever to do with the Claimant's sexual orientation. They would have treated an hypothetical comparator – a heterosexual man with the same history and conduct record as the Claimant - in exactly the same way as the Claimant was treated. He was not singled out in any way and their treatment of him was entirely explicable by the other circumstances and events which had occurred.

48 However, Ms Gee's conduct in making the 'king of fags' comment in about October 2015 and the pink jumper event in mid-December 2015 was overtly discriminatory and harassing relating to the Claimant's protected characteristic of his sexual orientation. It is not clear whether or not Ms Gee's other offensive and inappropriate management of the Claimant, as set out in paragraph 40.4, 40.4.1 and 40.4.2 of these Reasons, was on the grounds of his sexual orientation or was a general venting of her frustrations in her customary management style. The Tribunal accepted that she was frustrated and irritated by his disengagement with his work, his long breaks and absences, and as set out in paragraph 40.4.1 of these Reasons, the Claimant's evidence was that she had a bad reputation as a manager generally, in respect of other, prior members of staff and it was not contended that they were of the

same sexual orientation as the Claimant. It may therefore well be that she would have treated the hypothetical comparator – a heterosexual man who had behaved as the Claimant behaved and had the same work record - in the same inappropriate managerial way, save for the pink jumper event and the 'king of fags' comment. The Claimant first raised a complaint of discrimination in his resignation letter of 7 April 2016.

Jurisdiction:

49 The final specific act of which the Claimant complains in respect of Ms Gee occurred in mid December 2015. The claimant has not satisfied the Tribunal that there was any connection between Ms Gee's conduct and the mind or intentions of Mr Lyons or Mr Grieve or any other of the Respondent management. Therefore there can be no 'conduct extending over a period' between Ms Gee's discriminatory conduct and the meetings conducted by Mr Lyons in February/April 2016 so as to render her earlier discriminatory acts in time within the meaning of **section 123(3)(a),** as the Claimant contends. Ms Gee's person and conduct was distinct and separate from Mr Lyons and Mr Grieve's conduct and intentions in relation to the Claimant, including their last meetings with him. The Tribunal found, as a matter of fact, that there was no campaign and no conspiracy, as set out in paragraphs 32 to 34 of these Reasons.

50 The Claimant presented his complaints to the Tribunal on 2 September 2016. Allowing for a one month suspension of time for the ACAS Early Conciliation process, time expired under **section 123(1) of the Equality Act 2010** for the presentation of his complaints in respect of Ms Gee's discriminatory conduct by mid-April 2016. They were therefore presented some four and a half months out of time. The Respondent contends that all discrimination complaints prior to 5 April 2016 are out of time and that the Tribunal has no jurisdiction to consider them.

50 The Claimant offered no initial evidence regarding the reasons for the delay in presenting his complaints about Ms Gee's acts of discrimination. When pressed by the Tribunal as to his grounds for seeking a possible extension of time on just and equitable grounds within the meaning of **section 123**, it was contended on the Claimant's behalf that he was trying to soldier on and survive working there because jobs were not easy to come by and so he didn't complain about things before; that he had become depressed following his demotion (at the end of 2014), was seeing the doctor and not sleeping and was anxious and that this had contributed to him not having made a complaint before.

51 The Tribunal is mindful that extension of time is not automatic, that there is a presumption against extending time limits and that it is for the Claimant to satisfy the Tribunal that there is good reason for doing so **(Robertson v Bexley Community Service [2003] IRLR 434 CA).** The Tribunal concluded unanimously that the Claimant has failed to satisfy it that there are just and equitable reasons for time extension in this case. The cause of the Claimant becoming depressed, the changes in his role following the departure of Miss Davey and Mr McShane, were not acts of discrimination nor breaches of contract on the Respondent's part and pre-date the acts of discrimination done by Ms Gee. The Claimant soldiering on in the workplace did not preclude him raising a complaint of sexual orientation discrimination against Ms Gee in autumn/winter 2015, either with the Respondent or with the Tribunal. There was a further delay of 3 months following his resignation, in relation to Ms Gee's discriminatory conduct, and no explanation was offered as to why the Claimant could

not have presented a complaint relating to Ms Gee during that time. The Claimant has failed to show a reason why he did not do so which would satisfy the just and equitable grounds for time extension in **section 123 of the Equality Act 2010.**

52 Accordingly, the Tribunal has no jurisdiction to hear the Claimant's complaints against Ms Gee and his other complaints of sexual orientation discrimination fail. His complaint of constructive dismissal is not well-founded and fails. Therefore the provisional Remedy Hearing date fixed for 10 May 2017 is vacated.

Employment Judge A Stewart
17 March 2017