



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms A Ellis

v

Henley Media Group Limited

Heard at: London Central

On: 21 - 25 April 2017 and Chambers 13 May - 1 June 2017

Before: Employment Judge Hodgson
Mr J Nobleman
Ms K Church

Representation

For the Claimant: in person

For the Respondents: Mr R Scuplak, consultant

JUDGMENT

- 1. The claim of direct discrimination fails and is dismissed**
- 2. The claim of victimisation fails and is dismissed.**
- 3. The claim of unfair dismissal fails and is dismissed.**

REASONS

Introduction

- 1.1 By a claim presented to the London Central Employment Tribunal on 24 October 2016 the claimant brought claims direct discrimination, victimisation, and unfair dismissal.

The Issues

- 2.1 The issues to be determined were defined during the course of the hearing. A written record of the issues was given to both parties on the

morning of the third day of the hearing. Parties were invited to make any comments including any corrections. No party asked for any correction or amendment.

Constructive dismissal

- 2.2 Did the claimant's resignation amount to a dismissal? The tribunal will need to decide if the respondent breach the claimant's contract of employment. The breach of contract is said to be breach of the implied term of mutual trust and confidence. The claimant relies on the following:
- 2.2.1 all acts of alleged discrimination as set out in these issues;
 - 2.2.2 the rejection of the claimant's grievance from 10 June 2016 on 15 August 2016;
 - 2.2.3 the rejection of the claimant's appeal against the decision of 15 August 2016 on 30 September 2016; and
 - 2.2.4 the delay in dealing with the 10 June 2016 grievance until 15 August 2016 and the further delay in dealing with the subsequent appeal until 30 September 2016.
- 2.3 The claimant states that she relies on a final straw incident. The final straw was the rejection of the appeal on 30 September 2016.
- 2.4 Did the claimant resign as a result of the alleged breach?
- 2.5 Did the claimant affirm the contract by reason of delay or otherwise?
- 2.6 The respondent does not accept it dismissed the claimant and it advances no potentially fair reason.
- 2.7 What are the chances that the claimant would have been dismissed in an event?
- 2.8 Did the claimant contribute to the dismissal?

Direct discrimination - section 13 Equality Act 2010

- 2.9 Did the respondent treat the claimant less favourably than it treats or would treat others?
- 2.10 If so, was such treatment because of a protected characteristic?
- 2.11 The protected characteristics relied on are age, race, and sex.
- 2.12 The allegations of detriment relied on are as follows:

- 2.12.1 Allegation 1: by Ms Sarah Wright and Ms Katrina Frost from September 2013 to June 2016 on unspecified dates recording the late arrival of the claimant.
 - 2.12.2 Allegation 2: by Mr Kawaldeep Singh Marwa over a period from September 2013 to June 2016 on unspecified individual dates emailing the claimant to seek confirmation of whether the reports from Ms Sarah Wright and Ms Katrina Frost were accurate and asked the claimant for her explanation for lateness. The claimant relies on no specific date or email.
 - 2.12.3 Allegation 3: on 23 July 2014, by Mr Kawaldeep Singh Marwa requiring the claimant, by email, to go to the boardroom to answer certain charges.
 - 2.12.4 Allegation 4: by Mr Nick Henry alleging in July 2014 that the claimant had been dismissive to him when he asked for petty cash.
 - 2.12.5 Allegation 5: by Mr Nick Henry at the meeting in July 2014 shouting at the claimant, "If Nigel heard you saying that you wouldn't have a job to come back to! You're lucky he isn't here!"
 - 2.12.6 Allegation 6: by Mr Kawaldeep Singh Marwa refusing the claimant's request to reduce her hours, made originally in November 2015. It is alleged that the refusal occurred in June 2016. [During the course of the second day the claimant clarified there was no refusal at any meeting in June 2016, including the meeting of 16 June 2016, and that she wished to rely on the decision made in May 2016. The claimant did not seek to amend the claim.]
 - 2.12.7 Allegation 7: by Mr Kawaldeep Singh Marwa requiring the claimant to attend the boardroom on 9 June 2016 following complaints from staff, including Ms Raluca Istratescu.
 - 2.12.8 Allegation 8: by Mr Kawaldeep Singh Marwa at the same meeting adopting an aggressive manner and using the words "pissed-off."
 - 2.12.9 Allegation 9: by the respondent rejecting the written grievance of 10 June 2016, by letter of 15 August 2016.
 - 2.12.10 Allegation 10: by the respondent rejecting the claimant's appeal of 22 August 2016, by letter of 30 September 2016.
 - 2.12.11 Allegation 11: by dismissing the claimant. [It was clarified on day 2 that the claimant alleges the constructive dismissal amounted to an act of discrimination. The respondent accepted that the claim could proceed without amendment.]
- 2.13 The respondent did not allege that any treatment was a proportionate means of achieving a legitimate aim.

Victimisation - section 27 Equality Act 2010

- 2.14 Did the respondent victimise the claimant by subjecting the claimant to a detriment?
- 2.15 If so, was such treatment because of a protected act? The claimant relied on two protected acts: first, the claimant's grievance letter of 10 June 2016 and second, her grievance letter of 15 August 2016.
- 2.16 The specific detriments relied on are as follows:
- 2.17 Allegation 1: by not upholding the grievance on 15 August 2016.
- 2.18 Allegation 2: by not upholding the grievance appeal by letter of 30 September 2016.
- 2.19 Allegation 3: by dismissing the claimant.

Other

- 2.20 The claimant specifically confirmed that there was no allegation of disability or disability discrimination.

Evidence

- 3.1 We heard from the claimant, C1.
- 3.2 For the respondent we heard from Mr Kawaldeep Singh Marwa, R2; Mr Thomas Backer, R3; Mr Nick Henry, R4; Mr Nigel Barklem, R5; and Mr Alexander Halpin, R6.
- 3.3 We received a bundle, R1.
- 3.4 Both parties gave oral submissions.

Concessions/Applications

- 4.1 On the first day of the hearing, the claimant made an application to amend her claim. The application was refused and full oral reasons were given. There was no request for written reasons.
- 4.2 We should summarise the application and the reason for refusal. The claimant stated that she wanted to "include the meeting of 16 June 2016 as an act of victimisation." She stated that the meeting "felt like a disciplinary meeting." She stated that the treatment was "bullying, harassment, aggressive, and discriminatory." She went on to say that none of the grievances raised were resolved or addressed properly. The claimant failed to give any example of any specific factual allegation in support.

- 4.3 The respondent objected, whilst the respondent had given some evidence on the meeting of 16 June, it was confirmed that the application was unclear and to that extent, prejudicial.
- 4.4 The claimant gave no adequate reason for delaying the application. Allowing the application would have introduced multiple uncertain allegations which themselves would have required clarification. The further time engaged in undertaking this would have inevitably led to the case being adjourned. Moreover, it is likely it would have been necessary for the respondent to obtain further information. We found there was significant hardship for the respondent in dealing with the allegations. First, the allegations were unclear and could not be properly responded to. Second, it was likely that further evidence would be needed leading to an adjournment of the hearing and an increase in costs. Denying the application to amend did not prevent the claimant pursuing all the remainder of her claims including the most valuable claim, dismissal. Further, the claimant did not need to amend in order to rely on any evidential matters arising out of the hearing on 16 June 2016. The balance of hardship was against allowing the amendment and it was refused.
- 4.5 On the first day of the hearing, we also considered the issues in this case. We noted that the issues had been set out by Employment Judge Goodman in her case management discussion of 31 January 2017. Unfortunately, the record of the issues did not accurately reflect the claim to be decided. For example, the issues recorded there was a claim of constructive unfair dismissal. It identified the breach as the “handling of the claimant’s grievance, including delay handling the grievance.”
- 4.6 The breach identified in the claim form included reference to the rejection of her grievance, the subsequent appeal, and to the discrimination the claimant had suffered. There was no explanation in the issues as recorded by Employment Judge Goodman for why she made no reference to the discrimination and the appeal. It was clear that there had been some oversight. Further, the claim form made no reference to the delay in handling the grievance and it was unclear why that had been included.
- 4.7 We also considered the allegations of discrimination and the record of those was vague and incomplete. In the circumstances, we rejected those issues in their entirety, as they were materially inaccurate, and confirmed that we would start the process again. The issues as agreed are set out above.
- 4.8 On day 2 we ordered the claimant to provide her email of 9 June 2016, applying for a job. The response was given on 10 June 20-16 at 08:26. No further action was needed.

The Facts

- 5.1 The respondent is a media business with offices in Central London. It provides a range of services to clients, including conferences, exhibitions, award dinners, magazines, and reference books.
- 5.2 The respondent employed the claimant as a finance assistant from 26 September 2011 until her employment ended on 28 October 2016.
- 5.3 The detail of the specific factual matters relied on will be considered in our conclusions. However, it is appropriate to set out the basic relevant chronology, particularly the matters that relate to the claimant's grievances. On 10 June 2016, the claimant raised a written grievance. That grievance concerned how the claimant had been feeling for over a year. That led to an initial informal meeting on 15 June 2016 and then a formal grievance hearing on 16 June 2016. The claimant attended at the meeting on 16 June 2016, but thereafter attended no further meeting and provided no further material clarification.
- 5.4 The claimant illicitly recorded the grievance meeting of 16 June 2016. The respondent produced bullet point minutes. The claimant took issue with them in her email of 16 June 2016. She stated that the altered hours had not been discussed. This was misleading. Her hours had been discussed, albeit in a meeting with her manager, immediately after the formal grievance meeting. She reiterated the same points in her email 20 June 2015.
- 5.5 By email of 21 June 2016. The claimant requested postponement of the follow-up meeting due to take place on 22 June 2016.
- 5.6 On 21 June 2016, the claimant raised the second grievance. The detail is difficult to identify or summarise. The claimant specifically referred to the "Equalities Act 2010" and stated she had suffered "unfair treatment, an act of discrimination, bullying and harassment." She stated that she felt stressed, and was suffering from anxiety whilst at work.
- 5.7 The claimant provided a sick note from her doctor stating she had "stress work-related." She did not return to work thereafter.
- 5.8 On 22 June 2016, Mr Barklem, the chairman, wrote to the claimant and stated that her issues would be addressed on her return.
- 5.9 She was signed off again on 6 July 2016.
- 5.10 On 11 July 2016, Mr Barklem wrote to ask the claimant what should be "the next steps going forward." He asked whether she would prefer to meet face-to-face or have a telephone conversation.
- 5.11 On 29 July 2016, the claimant wrote to the chairman and stated:

As previously mentioned I have been signed off sick by my doctor and therefore I am unable to attend the proposed meeting on Tuesday, 2 August

2016. Please proceed with grievance procedure in my absence and forward on to me your outcome via email or letter.

- 5.12 In the same letter she stated she had been subject to bullying, harassment and discrimination based on age and sex. She stated:

When my work had not been completed to the standard expected I was singled out and disciplined in a boardroom meeting on the day of my return from holiday without an opportunity to defend myself.

- 5.13 On 18 July 2016, the claimant filed a further sickness note. The chairman wrote to the claimant and said:

The final line of your last grievance says that you don't have any trust and confidence in the company. Therefore please can you let me know what you intend to get out of the grievance process? We are open to a Without Prejudice discussion if this is your intention.

- 5.14 On 27 July 2016, the chairman invited the claimant, again, to a grievance investigation meeting set for 2 August 2016. He asked her to bring any evidence of her grievances.

- 5.15 The respondent provided a grievance outcome by letter of 12 August 2016 which was sent to the claimant on 15 August 2016. The letter sought to identify the specific grievances made by the claimant. It indicated a number were upheld, a number appear to be closed, and further information was requested for a number of others.

- 5.16 On 15 August 2016, the claimant provided a further sickness note. The claimant appealed by letter of 22 August 2016. By letter of 7 September 2016 the claimant was invited to attend an appeal meeting. She failed to attend any meeting. The grievance appeal outcome was sent by letter of 30 September 2016.

- 5.17 On 7 September 2016, Mr Barklem wrote to the claimant. He acknowledged there had been some delay. He confirmed that the appeal letter failed to provide appropriate information and invited the claimant to an appeal meeting to discuss the matter. He acknowledged the claimant was concerned about being bullied, but reassured her this would not happen. He had prepared a lengthy document which set out, in tabular form, what were understood to be the allegations constituting the grievance. In relation to each allegation, he identified the allegation, the investigation point, the grievance outcome, the point of appeal, and any request for further information.

- 5.18 On 8 September 2016 the claimant responded and stated:

Given the way I was victimised, singled out and verbally attacked in the last meeting held I do not feel confident that bullying will not take place again. As previously mentioned I have been signed off sick by my doctor and therefore I am unable to attend the proposed meeting on Thursday, 15 September 2016.

- 5.19 The claimant then went on to say that she had already elaborated on the various points and asked for the outcome to be forwarded by email.

5.20 By letter of 12 September, the chairman wrote again and invited the claimant to a rescheduled appeal meeting on 19 September 2016. He said he would find an appropriate person to chair the meeting and would have an independent HR consultant present to ensure objectivity and to provide her with support. He reiterated there was a significant portion of information which remained unknown and asked the claimant to attend the appeal meeting to discuss it. He reiterated that a letter could not be a substitute for a two-way conversation. He confirmed that he would investigate, following the grievance, any matter raised. He noted the claimant had a right to be accompanied by a work colleague or her choice or a trade union representative. He gave her the option of seeking a different date if her chosen companion were not available.

5.21 On 28 September 2016, the claimant prepared a letter of resignation as follows.

Having consulted with my GP about being signed off for work-related stress and anxiety for over 3 months due to the unfair treatment, discrimination, bullying and harassment I have received; I hereby resign effective from Wednesday, 28 September 2016 and serve my notice period of 4 weeks respectively.

5.22 On 30 September 2016, Thomas Backer, company secretary, sent to the claimant a letter detailing the outcome of the appeal. The letter is fifteen pages long. It identifies all the areas of alleged grievance, as understood by the respondent. It identifies the nature of the appeal, as far as practicable. It then gave conclusions.

5.23 On 30 September 2016 the claimant resigned by letter. She stated:

In relation to my grievance and the points I raised, they were not all investigated and an outcome was not given in a timely manner despite me raising more than one grievance.

5.24 By email of 1 October 2016, the claimant stated, "Please find attached my resignation letter." In the attached letter she said, "I disagree with your decision to disregard my grievance appeal as your grievance appeal conclusions are not accurate." The claimant then selected a single line from this fifteen page letter: "You were comfortable enough with him to raise an informal grievance to him on 9 June 2016." This is a reference to raising a grievance with Mr Henry, she had complained about one of his actions in 2014. The claimant's representations were to the effect that Mr Barklem had no basis for saying that she was comfortable with Mr Henry. She went on to say, "I believe it is unfair to expect me to adhere to the company grievance policy and procedures and then when I do, you penalise me in the grievance appeal outcome and make the assumption that I felt comfortable?" She continued, "the grievance investigation outcome is indicative of the treatment received in terms of unfair treatment, discrimination, bullying and harassment."

5.25 In the respondent's letter of 6 October 2016, Mr Barklem records that the letter of 30 September was received on 3 October and the letter of 28

September was also received on 3 October. It follows that the resignation letter itself was the draft from 28 September 2016. The claimant's resignation was accepted by letter of 6 October 2016.

The law

6.1 Direct discrimination is defined by section 13 Equality Act 2010.

Section 13 - Direct discrimination

(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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

...

6.2 The burden of proof is found at section 136 Equality Act 2010

Section 136 Equality Act 2010 - Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to--

(a) an employment tribunal;

(b) ...

6.3 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258**. We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246**. The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Annex

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the

tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent

evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

6.4 Victimization is defined by section 27 Equality Act 2010.

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

6.5 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.6 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in our view necessary to consider the second question as posed in **Derbyshire** below which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason the treatment.

6.7 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental... Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal*

Ulster Constabulary [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.

40. The second question focuses upon how the employer treats other people...

41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan's* case [2001] IRLR 830, 833, paragraph 29, this

'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'

- 6.8 Detriment can take many forms. It could be simply general hostility. It may be dismissal or some other detriment. Omissions to act may constitute unfavourable treatment. It is, however, not enough for the employee to say he or she has suffered a disadvantage. We note an unjustified sense of grievance is not a detriment.
- 6.9 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law. In **Derbyshire**, Lord Neuberger confirmed the detriment should be viewed from the point of view of the alleged victim. Rather than considering the 'honest and reasonable test as suggested in *Khan*' the focus should be on what constitutes a detriment. It is arguable therefore that whether an action amounts to victimisation will depend at least partly on the perception of the employee provided that perception is reasonable. It is this reasonable perception that the employer must have regard to when taking action and when considering whether that action could be construed as victimisation. Detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. The detriment cannot be made out simply by an individual exhibiting mental distress, it would also have to be objectively reasonable in all the circumstances. The stress and worry induced by the employer's honest and reasonable conduct in the course of his defence cannot, except in the most unusual circumstances, constitute a detriment. The focus should be on the question of detriment.
- 6.10 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

- 6.11 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.
- 6.12 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.
- 6.13 Lord Nicholls found in **Najarajan v London Regional Transport 1999 ICR 877**, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.
- 6.14 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.
- 6.15 The leading authority is **Western Excavating ECC Ltd -v- Sharp [1978] ICR 221**. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:
- If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed.**
- 6.16 In summary, there must be established, first, that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract as evidenced by delay or express action.
- 6.17 In so called last straw dismissals, there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course

of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

- 6.18 The question of waiver has to be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.
- 6.19 **Omilaju v London Borough of Waltham Forrest 2005 ICR 481 CA** is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable, but yet satisfies the last straw test.
- 6.20 We must consider causation, the employee must show that he has accepted the breach, the resignation must have been caused by the breach and if there is a different reason causing the employee to resign in any event irrespective of the employer's conduct there can be no constructive dismissal.
- 6.21 We note the case of **Bournemouth University v Buckland 2010 IRLR 445 CA**. the head note reads:
- (1) In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.
- The following stages apply to the analysis of a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applied; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.
- It is nevertheless arguable that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement...
- 6.22 In **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

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.

- 6.23 We would note that it is generally accepted that it is not necessary that the employer's actions should be calculated *and* likely to destroy the relationship of confidence and trust, either requirement is sufficient.

Conclusions

- 7.1 We first consider the allegations of direct discrimination. We will take each of the allegations in turn, but we have regard to the totality of the evidence when considering each individual allegation. It is first necessary to ascertain whether the alleged events occurred at all. If they did occur, it is then necessary to consider whether there is any fact from which we could decide, in the absence of any other explanation, that there has been a contravention of the act. That is to say we must ask whether there is any fact from which we could conclude there was discrimination in the absence of explanation. If that is the case, we must then decide whether the respondent has proved, on the balance of probability, an explanation which in no sense whatsoever is in contravention of the act.

Allegation 1: by Ms Sarah Wright and Ms Katrina Frost from September 2013 to June 2016 on unspecified dates recording the late arrival of the claimant.

- 7.2 The respondent accepts that the two individuals were receptionists. The receptionists were required to record the time individual employees arrived, and to report to the managers any lateness.
- 7.3 During the course of the claimant's employment, the respondent occupied three different premises. The respondent moved from Old Street to Prescott Street in the Autumn of 2013. In the summer of 2015, the respondent moved to the current premises in America Square. At that time, a formal procedure was adopted whereby the attendance of employees was monitored. Emails were generated to alert the managers. The manager then had discretion whether or not to question the employee. We have seen the reports generated in America House. It is clear that other employees were also reported for late attendance.
- 7.4 The claimant accepts that the reports of her lateness were accurate. She relies on the fact that her colleague, Mr Alex Halpin was treated differently. It is the claimant's case that he was an employee who should have started at 9:00am, but was frequently late. It is her case that he was neither reported by the two receptionists, nor disciplined by her manager, Mr Marwa.
- 7.5 The claimant relies on no other comparator. She does not suggest that any other individual in the respondent company when late was treated differently to her.

- 7.6 The claimant was managed directly by Mr Marwa. At the time he was also responsible for line management of Mr Halpin. However, Mr Halpin was not in the same position as the claimant. At all material times he was a contractor. He did not become an employee until 1 June 2016. Thereafter, there is ample evidence that his lateness was monitored, and was referred to Mr Marwa on the two or so occasions that he was late during the remainder of that year.
- 7.7 Prior to 1 June 2016, Mr Halpin was not required to attend at 9:00. Mr Halpin had worked for the respondent, as a contractor, on and off, from 2003. His role expanded over a number of years to include human resources work and paralegal work. In 2006 he dedicated himself to renovating his house. The following year he returned as a contractor and assisted in finance and paralegal. In 2011 he chose a full-time role in operations. The claimant was recruited as a full-time credit controller on 26 September 2011. In 2013 he worked for the company primarily on the financial side chasing up payments particularly on the annual solar energy exhibition. He generally dealt with the more difficult clients and those who were abroad. He reported to Mr Marwa for his finance work and to Mr Nigel Barklem for his paralegal work, which included contractual matters.
- 7.8 In order to reduce his travel costs, he would often come in at 10:30 or 11:00 to avoid expensive peak-time travel. He frequently worked to 19:00 or beyond. Those hours were arranged with, and agreed by, his managers. As he often attended at around 11:00, he would make coffee for Mr Marwa. There was an ongoing joke between the two of them where Mr Halpin would occasionally joke that he was sorry it was late. On occasions, as a matter of courtesy, if he had not been able to attend when he said he would attend, he would apologise for his lateness. As he was a contractor, it was a matter for him when he attended. He was not treated as an employee for these purposes.
- 7.9 Mr Halpin was, prior to June 2016, in a materially different position to the claimant. He was a contractor. He was not required to attend at a specific time in the morning. He was not required to attend at either 9:00 or 9:30 as the claimant suggested. It is true that he was not reported as being late during that time by either of the receptionists. That is because he was a contractor and had no set time to attend.
- 7.10 There is no suggestion at all that other employees were not reported in the same way as the claimant. There is no evidence that the claimant was treated differently to any other comparable employee.
- 7.11 We accept that the claimant was reported by the receptionists, on a number of occasions from September 2013 to June 2016, as arriving late; however, the explanation for this is clear: they were required to report as part of the management's general monitoring provisions. They reported her actual lateness. They reported other individuals' late attendance, as they were required to do. The claimant was not treated differently to anybody else in the same material circumstances.

- 7.12 The respondent has established its reason. The claimant was reported late because there was a standing instruction to the receptionists to report the late attendance of employees, and they did so accurately. This claim of discrimination fails.

Allegation 2: by Mr Kawaldeep Singh Marwa over a period from September 2013 to June 2016 on unspecified individual date emailing the claimant to seek confirmation of whether the reports from Ms Sarah Wright and Ms Katrina Frost were accurate and asked the claimant for her explanation for lateness. The claimant relies on no specific date or email.

- 7.13 This allegation is not materially different from the first allegation. Managers were required to monitor the employees' attendance and lateness. There is no evidence at all that other managers were not monitoring other employees. The claimant accepts that Mr Marwa did not email her each and every time she was absent. There were a number of occasions when he asked for an explanation for her lateness, and she provided one by email. She was not disciplined. She was given no warning.

- 7.14 The claimant's complaint is that Mr Halpin was treated differently, despite the fact, as she alleges, that he was frequently late and was an employee.

- 7.15 It is difficult to understand why the claimant believed that Mr Halpin was an employee. They worked together closely. They got on well. We accept his evidence that on a number of occasions he referred to the fact that he would not be paid whilst on holiday, or whilst off sick. Given that information, it is difficult to understand how the claimant could have continued to believe he was an employee. As employees received holiday pay, the fact that Mr Halpin did not was an obvious indication of his different status.

- 7.16 Whether the claimant did, or did not realise that Mr Halpin was not an employee is, ultimately, irrelevant. He was not an employee. That is why he was not subject to the same time scrutiny as the claimant. The claimant was treated differently to him. However, he was in a different material circumstance: he did not have set work times because he was not an employee; he was not subject to the same monitoring and accountability.

- 7.17 There is no suggestion at all that the other individuals reported for lateness were not monitored by their managers or asked for explanations. The respondent has established its explanation. The claimant was required, on occasions, to explain her lateness because that was required by the policy of the respondent, as applied equally to other employees. This allegation of discrimination fails.

Allegation 3: on 23 July 2014, by Mr Kawaldeep Singh Marwa requiring the claimant, by email, to go to the boardroom to answer certain charges.

Allegation 4: by Mr Nick Henry alleging in July 2014 that the claimant been dismissive to him when he asked for petty cash.

Allegation 5: by Mr Nick Henry at the meeting in July 2014 shouting at the claimant, "If Nigel heard you saying that you wouldn't have a job to come back to! You're lucky he isn't here!"

- 7.18 Allegation 3, 4, and 5, arise out of the same incident. On 23 July 2014, there was an incident involving the claimant and the managing director of the respondent, Mr Nick Henry. The claimant dealt with petty cash. Various managers and other members of staff would ask the claimant to let them have petty cash payment of various expenses. It is the claimant's case that on 23 July 2014, Mr Henry behaved inappropriately to her, while she behaved reasonably and appropriately at all times. It is her case, therefore, that as she had done nothing wrong, it was inappropriate to ask her to attend the boardroom to explain her alleged rudeness.
- 7.19 We have heard from the claimant and Mr Henry. The incident was also witnessed by Mr Halpin. As there is a direct conflict of evidence about what occurred, we need to make some findings of fact.
- 7.20 It is the claimant's case that she was not wearing headphones, despite the fact that it was her lunch hour and she accepts she would often wear them when not working. She alleged Mr Henry approached her from behind and then hovered until she broke the silence and asked if he needed any help. She said that Mr Henry was then abrupt and appeared frustrated when he demanded petty cash. She states, "I confidently advised him that there was no cash available." She then said he put his hands on his hips and glared at her, but he made no further comment. She said he maintained the posture and she felt threatened. It is her case that shortly thereafter he stormed into his glass office and thereafter she was called to the meeting.
- 7.21 Mr Henry's account differs. He said he could not approach from behind because there was not enough room. Instead, he approached from the side. The claimant was wearing headphones. He said he needed petty cash, but she initially ignored him or failed to observe his presence. He states that she removed the headphones when he mimed taking headphones off. She asked what he wanted and he describes her manner as surly. Mr Henry stated he needed some petty cash urgently. He alleges she then said she could not help him because she was on her lunch break. He describes himself as appalled by her behaviour and accepts that he then returned to his own office before contacting the claimant's manager, Mr Marwa.
- 7.22 Mr Halpin was sitting next to the claimant and he remembered the incident. He confirms that the claimant was wearing her headphones. He confirms the claimant did not initially respond to Mr Henry and thereafter Mr Henry signalled the claimant to take off her headphones. He confirms that the claimant simply said she could not help because she was on her lunch break. He states, "I couldn't believe that she had spoken to the managing director in such terms." He described Mr Henry as being taken aback and said he appeared to be standing there trying to register what

had just happened. Mr Halpin also confirms that the claimant frequently used her headphones during work time, even when she was not supposed to.

- 7.23 The claimant's account has difficulties. It is difficult to understand how Mr Henry approached her from behind, when there was a wall directly behind the claimant's desk. It would have been more natural to approach from the side. The claimant's denial of that is inherently improbable. Moreover, Mr Henry's account is entirely corroborated by Mr Halpin. We have no reason to doubt Mr Halpin's evidence. We find that he has been truthful in relation to his assertion that he was a contractor. He was friendly with the claimant and we can see no reason why he would now lie about an incident in 2014. We find that the claimant's recollection is flawed and defective. The incident occurred as described by Mr Henry and Mr Halpin.
- 7.24 The claimant's response to Mr Henry was rude and unprofessional. Mr Henry was taken aback. Mr Halpin was deeply shocked. Mr Henry, who is the managing director, reported the matter to the claimant's line manager. The claimant was asked to attend the meeting. It would have been possible for the respondent to treat this as a disciplinary matter, but there can be no criticism of the respondent for dealing with the matter informally. The claimant had behaved rudely. The respondent was entitled to ask the claimant to attend a meeting to explain her conduct. There is no basis for believing that an individual of a different race, sex or age would have been treated materially different when behaving in the same way as the claimant.
- 7.25 Allegation 3 and allegation 4 fail; there is a clear non-discriminatory explanation for why the claimant was asked to attend the boardroom for a discussion about her behaviour on 23 July 2014. The explanation is the claimant's behaviour was inappropriate and rude. Allegation 4 fails because it is clear that Mr Henry alleged the claimant had been rude and dismissive because she had been rude and dismissive. There is no basis at all for believing that the claimant would have been treated differently had she been of a different race, sex or age.
- 7.26 Allegation 5 arises out of the same incident. Mr Henry accepts that he made reference to the chairman, Mr Nigel Barklem, to the effect that he may have dismissed the claimant if she had behaved to him in a similar manner. The claimant suggests that the comment was made as some form of retaliation when she suggested that she felt intimidated. We find the claimant is mistaken. Mr Henry was referring to the incident of the claimant's general rudeness. Had the claimant not been rude, it may be necessary to look to see whether there was any other explanation for the comment made by Mr Henry. However, the claimant was rude, that is why he made the comment, and Mr Henry establishes an explanation, free from discrimination, on the balance of probability.

Allegation 6: by Mr Kawaldeep Singh Marwa refusing the claimant's request to reduce her hours, made originally in November 2015. It is alleged that the refusal occurred in June 2016. [During the course of the second day the claimant clarified there was no refusal at any meeting in June 2016, including the meeting

of 16 June 2016, and that she wished to rely on the decision made in May 2016. The claimant did not seek to amend the claim.]

- 7.27 This allegation developed during the course of the hearing. The claimant was unclear as to the detail of and the nature of her application for different hours. It became clear during the evidence that the claimant made no written application. She indicated orally in November that she may want reduced hours. However, she made no formal proposals. There was nothing for Mr Marwa to consider.
- 7.28 The possibility of working reduced hours was raised during the consideration of the claimant's grievance on 16 June 2016. This meeting subdivided into two parts. There was the formal consideration of the grievance and then a brief discussion afterwards between the claimant and her line manager. There may be a technical difference between the two meetings, but there is no practical difference. Mr Marwa was sympathetic to the claimant's wish to reduce her hours. He said he would need to look into it. It was agreed they would meet again to discuss it further. There can be no doubt that the claimant was left with a clear understanding that Mr Marwa viewed the claimant's request in a favourable light. In no sense whatsoever was this a refusal.
- 7.29 The claimant suggested during the course of evidence that the refusal occurred in May. However, there is no credible evidence for that and, in any event, it is not the claim before the tribunal.
- 7.30 The allegation as framed is simply wrong: there was no refusal. The allegation fails as there is no refusal to explain. In any event, the general explanation that the matter was raised and considered at the meeting on June 2016 is clearly established. There is no basis for suggesting that any treatment of the claimant in relation to requests for variation of hours had anything to do with her sex, race or age.
- 7.31 We would also observe that the respondent had varied the claimant's hours previously. In particular when she returned to work in November 2015, following an episode of vertigo, her hours were varied to allow a phased return to work, and she was not required to work full-time, until she said she was ready to return.

Allegation 7: by Mr Kawaldeep Singh Marwa requiring the claimant to attend the boardroom on 9 June 2016 following complaints from staff, including Ms Raluca Istratescu.

Allegation 8: by Mr Kawaldeep Singh Marwa at the same meeting adopting an aggressive manner and using the words "pissed-off."

- 7.32 We can deal with allegations 7 and 8 together. The claimant was required to attend the boardroom on 9 June 2016. The reason that she was required to attend the boardroom is clear. There had been difficulty with the claimant's performance, particularly during April and May 2016 before she took holiday. She was required to attend the boardroom on the day she returned from holiday.

- 7.33 In the lead up to the holiday she was frequently late in April and May. She accepts that she was late at least 50% of the time. Moreover, she was required to keep a spreadsheet. The spreadsheet detailed all current clients with outstanding payments due and specified the action taken. The claimant had failed to update that spreadsheet before going on holiday. This resulted in difficulty for Mr Marwa. Other managers and sales staff chased him to find out the current position in relation to various invoices. As the spreadsheet had not been updated, he was not able to assist. There was a degree of annoyance and anger, which was directed primarily at Mr Marwa.
- 7.34 In the months leading up to the claimant's holiday, Mr Marwa perceived her work as deteriorating. A number of clients were not contacted and a number of accounts were not dealt with at all. The claimant did focus on target clients as agreed with Mr Marwa, but this did not mean that she could ignore other clients.
- 7.35 It is clear that one of the sales managers who complained was Ms Raluka Istrasecu.
- 7.36 Mr Marwa's requiring the claimant to attend the meeting the day she returned and before he had greeted her properly could be argued as insensitive, but there is nothing at all to suggest that he would have treated anyone else, who had behaved in the same material way as the claimant, differently. She was asked to attend the meeting because she had failed to update the spreadsheet before leaving on holiday, and that failure caused material difficulties and a number of complaints.
- 7.37 The claimant accepts that she was at fault for not updating the spreadsheet. She accepts she was at fault for not chasing all relevant accounts. During her evidence, the claimant did accept that it remained her responsibility to chase all relevant accounts on the spreadsheet which were designated to her, regardless of whether they appeared in any particular bonus list.
- 7.38 It follows that the respondent establishes an explanation for requiring her to attend the boardroom in order to explain material failings on her part. This is an explanation free of any taint of discrimination. Allegation 7 fails.
- 7.39 During the course of the meeting on 9 June 2016, Mr Marwa did say that a number of managers were "pissed off." We have no doubt that he also shared their sentiment. The language adopted may have been offensive to the claimant. However, it was no more than a graphic description. There is no basis for concluding that the words were chosen by Mr Marwa because of the claimant's race, sex or age. He chose those words because those were the words used by the managers. There is no suggestion that the claimant, at the time, took issue with the use of the words or suggested that she was particularly sensitive to them. This was not language that Mr Marwa commonly used and it may have been language the claimant found offensive; however, it was not an example of discrimination of any form. The words used described the feelings of a

number of managers and the feelings of Mr Marwa. The use of those words was not because of the claimant's race, sex or age.

Allegation 9: by the respondent rejecting the written grievance of 10 June 2016, by letter of 15 August 2016.

- 7.40 Viewed one way this allegation fails. The allegation is framed as a total rejection of the grievance. That allegation is unsustainable.
- 7.41 This case has not been pursued by the claimant on the basis of any specific rejection of any individual grievance. In those circumstances, it is not appropriate for us to breakdown the grievance by reference to specific allegations when that is not been the approach of the claimant. It was open to the claimant at all times to point to individual allegations and say that they had been rejected. In those circumstances the respondent would have been on notice to explain each and every rejection. That has not been the approach of the parties. We will therefore deal with the matter more generally at the level at which the parties have approached it.
- 7.42 During the course of the claimant's evidence, we did go through the grievance outcome and ask her to indicate which specific findings she viewed as rejections. The claimant accepted some of her allegations were upheld or not rejected.
- 7.43 The respondent accepted that she should have been welcomed back from holiday on 9 June before being asked to attend a meeting to explain her failures. That part of the grievance was upheld.
- 7.44 A number of the allegations made by the claimant appeared to have been agreed or resolved. The respondent stated that those matters were closed. We do not need to go into the detail. The respondent's recording that a number of matters had been resolved is not a rejection the claimant's grievance. The worst that could be said, and this is not alleged, is that the respondent got it wrong.
- 7.45 That leaves a subcategory of allegations. These include allegations relating to "having more visibility with received payments" (a complaint which remains obscure), complaints made about the claimant when she was on holiday, the general content of the meeting on 16 June, and other such matters. The vast majority these allegations were met with a response that more information was needed.
- 7.46 It is very difficult for this tribunal to understand the nature of some of these allegations (e.g. the reference to received payments). The respondent's own grievance procedure provides that decisions will be taken and communicated once the line manager has sufficient information to review the case. Asking for more information, and declining to make any final decision in the absence of information, is entirely consistent with the respondent's own procedure, and with common sense.
- 7.47 The respondent was able to identify a number of grievances and reach a number of conclusions. The claimant alleged there was no plan in place to

cover poor performance. This was rejected. It is clear it was rejected because there was a plan in place. The respondent refused to investigate in any detail the allegations against Mr Henry as they were two years old. This was an old allegation which the claimant had not previously pursued. The reason for refusing to investigate it further is clear.

- 7.48 When we stand back and look at the grievance as a whole, we find that the respondent has established its explanation. Each aspect of the grievance was considered carefully. Where each individual grievance appeared settled, or superseded by events, it was recorded as closed. A number of grievances were upheld. Some grievances were rejected and full reasons were given. Those grievances which could not be properly understood or dealt with in the absence of further information were recorded as such. There is nothing whatsoever which would suggest that the treatment of the grievances and the decisions reached was because of the claimant's race, age or sex.

Allegation 10: by the respondent rejecting the claimant's appeal of 22 August 2016, by letter of 30 September 2016.

- 7.49 This allegation adds nothing to the allegation concerning the original grievance. The reality is the claimant failed to engage with the appeal process in any meaningful way. The claimant's appeal letter was difficult to understand. However, the claimant has failed to set out any basis on which the appeal outcome could be criticised. The claimant chose not to cross-examine Mr Backer. It is clear that he considered all of the allegations carefully. He took into account the claimant's appeal letter to the extent that he could. He reached conclusions which were open to him. There is nothing at all which would suggest that his approach was influenced in any manner by the claimant's age, sex, or race. We accept that he reached the conclusions that he did because he genuinely believed that they were reasonable and justified on the evidence before him. In no sense whatsoever was any decision because of the claimant age sex or race. This allegation fails.

Allegation 11: by dismissing the claimant. [It was clarified on day 2 that the claimant alleges the constructive dismissal amounted to an act of discrimination. The respondent accepted that claim could proceed without amendment.]

- 7.50 For the reasons we will come to when considering constructive dismissal, we reject the allegation that the respondent was in breach of the claimant's contract. It follows that as there was no fundamental breach of contract capable of being accepted, there could be no constructive dismissal. It follows that the claimant was not dismissed. This claim fails.
- 7.51 We now consider the claim of victimisation. The claimant relied on two protected acts: first, the claimant's grievance letter of 10 June 2016 and second, her grievance letter of 15 August 2016.
- 7.52 The claimant's grievance letter of 10 June 2016 referred to a number of matters. She explained that she was unhappy working for the respondent and felt that she was not supported. She complained generally that she

was the only person responsible for chasing all companies and she was critical of her manager Mr Marwa for failing to inform her that the AIDF team would be pushing for payment. Why that was his fault is unclear.

- 7.53 She suggested that she was not fit to return to work after she had had vertigo, hence the need to attend work late to avoid the rush hour. The nature of this grievance is unclear. The claimant went on to say that in summary "coming to work every day makes me feel severely stressed..." However, beyond feeling undervalued, it is difficult to see any clear grievance. There is no specific request for any form of adjustment. There is no allegation of any form of discrimination, or victimisation, or harassment. There is nothing in the letter which would indicate that it was any form of act pursuant to the Equality Act 2010. There is no basis for finding that this letter was a protected act.
- 7.54 The claimant did send a further grievance on 21 June 2016. This letter covered much of the same ground. The claimant appeared to add a complaint that some of her grievances had been ignored at the meeting on 16 June and that the minutes were inaccurate. She stated "According to the Equalities Act 2010 by process this is unfair treatment, an act of discrimination, bullying and harassment." It is difficult to understand the detail of this or the rationale behind it. Whilst this letter was not initially relied as a protected act, it was referred to during the hearing and there is a reference to the Equality Act 2010, and so it could be a protected act.
- 7.55 The second protected act relied on is the grievance of 15 August 2016. The claimant's reference to 15 August 2016 was an error. This was the day she received the grievance outcome, but her complaint was contained in an email of 29 July 2016. This email had a subheading "Examples of Discrimination and Unfair Treatment" it went on to say, "I believe I have been subject to bullying, harassment and discrimination based on age and sex." It suggested that the claimant had been singled out and disciplined when her work had not reached the standard expected. She referred to the petty cash incident from July 2014. She complained about being questioned in the boardroom on her return to work on 9 June 2016. She stated her sickness absence was a direct consequence of how she had been treated in the meeting. It is clear that this is an expansion on her grievance. It is also clear that it is a protected act.
- 7.56 It follows that there was a protected act on 29 July 2016 and, arguably, one on 21 June 2016 (but nothing turns on this, and we need consider it no further).
- 7.57 The claimant has not sought to allege that any action occurred because the respondent believed she would do anything by reference to the Equality Act. She relies only on actual protected acts.
- 7.58 We now consider the allegations of victimisation.

Allegation 1: by not upholding the grievance on 15 August 2016.

- 7.59 This allegation is factually incorrect. At least one grievance was upheld. A number were recorded as resolved. In relation to others, further information was requested and no specific rulings were made.
- 7.60 We have considered the nature of this grievance. The respondent has established its reason. Each of the grievances was considered. The grievances which were considered reasonable were upheld. Those which were considered unsupported were rejected. Those that had been resolved were recorded as such. Those needing more information were identified. There is no fact which could suggest that the reason for any action taken in relation to the grievance was any protected act.
- 7.61 In any event, the respondent's approach to the grievance was reasonable and appropriate. The claim of victimisation could not succeed as there was no detriment: no reasonable employee with knowledge of the full circumstances would consider the respondent's approach and decisions detrimental.

Allegation 2: by not upholding the grievance appeal by letter of 30 September 2016.

- 7.62 There has been no attempt by the claimant to pursue this allegation. The claimant chose not to challenge the evidence of Mr Backer. We accept his explanation. He considered the relevant documentation. He reviewed the original decision. He produced a lengthy decision which set out his reasoning. He considered the original decision to be appropriate and reasonable. He received no evidence from the claimant which would lead him to change his view. The claimant did not engage with the process and it was reasonable to come to the conclusions that he did. There is nothing at all which would suggest that any protected act influence the decision in any way. No action was not a detriment. This claim fails.

Allegation 3: by dismissing the claimant.

- 7.63 For the reasons we will come to, there was no dismissal.
- 7.64 We next consider the allegation of constructive dismissal. Our first question is whether there was a breach of contract.
- 7.65 There is no basis for saying that the respondent discriminated against the claimant. It follows that there was no discrimination capable of being a breach of contract.
- 7.66 We have considered whether the respondent rejected the claimant's grievance. Only a very limited aspect of the grievance was rejected. There were valid and appropriate reasons for all of the decisions in relation to the grievance. In no sense whatsoever was this breach of contract.
- 7.67 There were valid and appropriate reasons for rejecting the appeal. The appeal itself was diffuse and unclear. The claimant did not engage with the process. Mr Backer reached a fully justified and reasonable decision.

In no sense whatsoever could his decision be described as a breach of the term of mutual trust and confidence.

- 7.68 To the extent the claimant suggests there was delay in dealing with the 10 June 2016 grievance until 15 August 2016 and the further delay in dealing with the subsequent appeal until 30 September 2016, we reject any suggestion that any such delay could amount to a breach of the implied term of mutual trust and confidence. In order to be a breach, the respondent would have to behave in a way which was designed to, or likely to, fundamentally undermine the mutual trust and confidence. It may be possible to say that some minor criticism can be levelled at the respondent for not dealing with the matter earlier. However, that would be a harsh criticism. The claimant was unwell. It was reasonable to initially delay in order to see if she would be able to return to attend the hearing. Any ongoing delay falls largely at the claimant door. She was asked to clarify her grievance on a number of occasions, but failed to engage with that process and provide the appropriate information.
- 7.69 The respondent's policy was clear, the response was due when the grievance had been clarified. It is clear that reasonable decisions were taken as to the prospect of the claimant giving further information and when it became clear that she was not going to give more information, decisions were made. Those decisions themselves clearly identified the grievances, considered what findings could be made, and identified the inadequacies of the information received. If there had been unreasonable and inordinate delay, it may have amounted to a breach of mutual trust and confidence. However, any delay was marginal, fully explained, and understandable. It was not a breach of contract.
- 7.70 The claimant relies on the final straw being the rejection of her appeal. It is difficult to see how the outcome of the appeal could be seen as blameworthy in any sense. It is difficult to see how it could contribute to any previous alleged breaches. The reality is that the outcome of the appeal was fully justified. It was not in any sense blameworthy. It was neither a breach itself nor the final straw in relation to any earlier conduct.
- 7.71 It follows that as there was no breach of contract, there was no breach which was capable of acceptance therefore the resignation could not operate as a constructive dismissal.
- 7.72 As there was no breach the questions of affirmation and contribution do not arise.
- 7.73 We should consider if the claimant resigned as a result of the alleged breach. The claimant resigned as she no longer considered her position was tenable. Her reaction to her perception of the respondent's conduct led to the resignation. She felt unsupported, but there was no objective basis for that feeling. The claimant had been criticised for failing to undertake her duties, particularly by failing to complete the spreadsheet before she went on holiday. She had been criticised for failing to chase outstanding invoices. Those criticisms were justified and reasonable. The

approach taken to the management of those issues was straightforward, reasonable, and proportionate.

- 7.74 We find that the claimant became so unhappy with the respondent that she lost clear, objective perception. This led her to assert the respondent's reasonable and legitimate attempts to deal with the grievances were oppressive and unsupportive. She did not recognise that the breakdown was caused by her own attitude. She resigned because she could see no way forward.
- 7.75 It follows that there was no dismissal and the claim of constructive unfair dismissal fails.

Employment Judge Hodgson
1 June 2017