



EMPLOYMENT TRIBUNALS

Claimant:
Mrs D Viljoen

v

Respondent:
Slough Borough Council

Heard at: Reading **On:** 9, 10, 11, 12 October 2017
(hearing)
13 October 2017 (in chambers)

Before: Employment Judge Hawksworth
Members: Mrs CM Baggs and Mrs J Smith

Appearances

For the Claimant: In person (assisted by Mrs C Clegg, McKenzie Friend)

For the Respondent: Ms P Leonard (Counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the tribunal that:

1. the claimant resigned and was not dismissed;
2. the claimant's complaint of unfair dismissal fails and is dismissed;
3. the claimant's complaint of sex discrimination fails and is dismissed.

REASONS

1. By a claim form presented on 30 October 2016, the claimant brought complaints of unfair dismissal, direct sex discrimination, pregnancy discrimination and victimisation. In essence, the complaints arise out of events during the claimant's employment and the circumstances leading up to the termination of the claimant's employment which she alleges was a constructive dismissal. The respondent defended the claims.
2. Preliminary hearings took place on 19 January 2017 and 12 July 2017. The complaints of pregnancy discrimination and victimisation were not pursued. An application by the claimant at the hearing on 12 July 2017 to amend her claim to include an equal pay complaint was not granted.

The issues

3. The issues between the parties to be determined by the tribunal were recorded in the case management summary following the preliminary hearing on 19 January 2017. In accordance with an order made at the preliminary hearing, the claimant then provided further particulars of her sex discrimination claim. At the start of the hearing before us, the parties agreed that the list of issues should be amended to specify the four acts which the claimant says amount to direct sex discrimination.
4. The respondent said that it had been agreed at the preliminary hearing that the claimant's case on constructive unfair dismissal would be limited to these same four acts. The claimant said she was seeking to rely on other acts/omissions in her constructive unfair dismissal complaint. We concluded that it had not been ordered or agreed that the constructive dismissal claim should be limited to the acts which were also alleged to be sex discrimination. We based our conclusion on the way in which the issues had been set out separately for the two different complaints, and the fact that the order for further particulars related to the sex discrimination complaint only. In order to identify the other acts/omissions which were said by the claimant to amount to breaches of contract giving rise to constructive dismissal, the claimant provided the tribunal and the respondent with a copy of her ET1 with those acts/omissions which she said to be breaches of her contract of employment highlighted.
5. The parties also agreed at the tribunal's suggestion to amend paragraph 5.3 of the list of issues as set out in the summary of the preliminary hearing dated 19 January 2017, concerning the shifting burden of proof in the sex discrimination claim, so that it was expressed in a more neutral way (from 'has the claimant proved primary facts from which' to 'are there primary facts from which'). The amended version is paragraph 7.7 below.
6. During the hearing the claimant indicated that she felt she had been victimised by the respondent because she had supported her friend (Mrs Clegg) in a whistleblowing detriment claim. We explained that victimisation did not form part of her claim and that this would not in any event amount to victimisation under the Equality Act. The allegation that the claimant was treated differently because of her support of Mrs Clegg was however considered as part of the claimant's constructive dismissal claim.
7. The issues between the parties which fall to be determined are therefore as follows.

Unfair dismissal claim

- 7.1. Was the claimant dismissed or did she resign?

7.2. If the claimant resigned in response to any breach by the respondent, did the claimant affirm the contract?

7.3. If the claimant was dismissed, what was the reason for the dismissal? Was there a potentially fair reason for the dismissal?

7.4. If the claimant was dismissed, was the dismissal fair?

Section 13 – Direct discrimination because of sex

7.5. Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act 2010, namely:-

7.5.1. First act: she was not offered a secondment as Head of Housing;

7.5.2. Second act: her substantive post was graded at the wrong level, Grade 9, instead of Grade 10;

7.5.3. Third act: because she is female, she was expected to perform at a level equivalent to or higher than Grade 10;

7.5.4. Fourth act: part of her role was taken over by Trevor Costello who was paid at a higher rate than her;

7.5.5. Constructive dismissal due to the acts of discrimination named above.

7.6. Has the respondent treated the claimant less favourably than it treated or would have treated the comparators?

7.7. If so, are there primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

7.8. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Time/Limitation issues

7.9. The claim form was presented on 30 October 2016 (after Acas early conciliation). Does the tribunal have jurisdiction to consider any act or omission which took place before 30 June 2016?

Preliminary matters

Disclosure

8. At the preliminary hearing on 12 July 2017 the claimant sought disclosure of a 2014 report by Jennifer McNeil, an external consultant. The parties disagreed as to the relevance of this report. It was agreed at the

preliminary hearing that an appropriately redacted copy of the 2014 report would be available for the parties and the tribunal on the first day of the full merits hearing.

9. As agreed, the respondent produced a redacted copy of the report at the start of the hearing before us. Those aspects of the report which the respondent considered to have relevance to the matters in dispute between the parties were un-redacted, but there were heavy redactions to the report. There remained a dispute as to whether all relevant aspects had been disclosed. The respondent agreed to provide an un-redacted copy to the judge who considered the report after the conclusion of the hearing on the first day and invited the respondent to consider whether there were other aspects of the report which were relevant to the issues in the claim, particularly in relation to the constructive unfair dismissal complaint as it had been clarified during discussions on the first day about the issues.
10. On the third day of the hearing, the respondent produced another copy of the McNeil report with fewer redactions which was agreed.
11. Another issue raised at the hearing on 12 July 2017 related to emails to and from Mr Neil Aves which the claimant had requested but the respondent was unable to obtain because Mr Aves is no longer employed by the respondent. At the hearing before us, the respondent confirmed that it was still unable to obtain copies of those emails. We explained to the claimant that the respondent cannot be required to disclose emails which it does not have and is unable to obtain.

Application to strike out response

12. The claimant made an application at the start of the hearing to strike out the respondent's response on the ground that there had been lengthy delays by the respondent in complying with directions.
13. We considered whether the failure to comply with the tribunal's orders and/or the conduct of the respondent was such that we should strike out the response under rule 37 of the Employment Tribunals Rules of Procedure. Of particular concern was delay in exchanging witness statements. The original timetable provided for exchange of witness statements on 30 June 2017 but exchange of statements was delayed and did not take place until 29 September 2017. We were concerned that exchange had taken place so much later than ordered. The claimant had however had a week to review the respondent's statements. We asked the claimant whether she was seeking a postponement to allow her more time to prepare. She confirmed that she was not. We considered the application carefully and concluded that it would not be in line with the overriding objective to strike out the respondent's response.
14. After the preliminary matters had been dealt with, the tribunal took some reading time.

Evidence

15. The respondent provided a bundle of 619 pages. The claimant had additional disclosure which she said should be included in the bundle. After discussion, it was agreed that the claimant's additional documents would be added at the end of the bundle, these were numbered S1 to S91.
16. The tribunal began hearing evidence at 2.00 pm on Monday 9 October.
17. We heard from the following witnesses, all of whom had produced witness statements:

For the claimant:

- The claimant;
- Mrs Carol Clegg;
- Mr Martin Brown;
- Mrs Anne May.

For the respondent:

- Mr John Griffiths;
- Ms Kamal Lallian;
- Ms Sarah Ricketts.

18. At the request of the claimant, and with the agreement of the respondent, we heard Mrs May's evidence via a laptop using Facetime, a video phone service, as Mrs May was travelling and unable to attend the hearing in person.
19. We made the following findings of fact from the evidence we heard and read. In this case we heard evidence about a wide range of issues, some of them in detail. Where we make no finding about an issue of which we heard (or where we make a finding which goes into less detail than the evidence we heard) this is not because of oversight or omission, but is indicative of the extent to which the point was of assistance to us in determining the issues we had to decide.

Findings of fact

20. The claimant started employment with the respondent on 18 April 2011.
21. The respondent is a borough council. The claimant worked in the Housing and Neighbourhood Services Department. Her role was initially called the Leasehold and Right to Buy Manager or Leasehold Services and Right to Buy Manager. It was graded as a Grade 9 post in July 2012. The claimant managed a team of three direct reports.
22. The claimant's line manager was John Griffiths whose post was initially Head of Housing Management. He became Head of Neighbourhoods from January 2014. Mr Griffiths' line manager and the Assistant Director for the

respondent with responsibility for Housing and Neighbourhood Services was Neil Aves.

The June 2013 restructure

23. There was a consultation about a restructure in June 2013 which came into effect in January 2014. It resulted in a change to the claimant's job title from January 2014 when her job title became Leasehold Services Manager. The post remained Grade 9. The claimant was given details of the change and invited to comment as part of the consultation. She made no comment.
24. The differences between the claimant's job description prior to January 2014 and post January 2014 were minor. One of the 'Main Accountabilities' in the 2012 job description (to manage revenue and capital budgets for the service area) moved to a new section of the job description in 2014 headed "Financial Responsibilities". The evidence of the claimant's line manager, Mr Griffiths, and the HR business partner, Sarah Ricketts, was that because they were minor, these changes did not require a re-evaluation or re-grading of the claimant's post. We accept that evidence.
25. In the same consultation process which began in June 2013, the respondent proposed to introduce three new posts of Neighbourhood Manager at Grade 10. Their function was to provide a complete neighbourhood management service across six functions including Housing, Caretaking, Tenancy, Neighbourhood Enforcement, and Community. They were to manage teams of 19 staff made up of four direct reports and 15 indirect reports.
26. At the time the new posts were created, Mr Griffiths asked the claimant if she was interested in applying for one of the Neighbourhood Manager posts. The claimant said she was not interested as she had done a similar job in the past.
27. The respondent filled the Neighbourhood Manager posts by its normal recruitment procedures. Three employees whose posts were proposed to be redundant in the consultation were considered for the Neighbourhood Manager posts but they were unsuccessful. The posts were then advertised. The claimant did not apply. The posts were offered to two males and one female, Rebecca Brown. Ms Brown declined to accept the position on a permanent basis but agreed to cover it on an interim basis.

Claimant's role deputising for more senior managers

28. Acting with delegated authority and otherwise representing Mr Griffiths at times of his absence were expressly provided for in the claimant's job descriptions (both the 2012 and 2014 versions).
29. In January 2014, the claimant's line manager, Mr Griffiths, was absent on sick leave for a period of around three weeks. During this time and during

other absences, the claimant deputised for Mr Griffiths, carrying out his day-to-day operational work in his place. Mr Griffiths chose the claimant to deputise for him because he was confident in her skills and ability to do a good job in his absence. We do not find that because of this (or otherwise) there was any expectation on the claimant to perform at a level above her grade (grade 9).

30. In March 2015, Mr Aves wrote to the claimant with formal notice that she had delegated authority to act on his behalf in relation to a number of powers under the Housing Act 1985. Other staff, both male and female, also had delegated authority for Mr Aves.

The service charge and recharge project

31. One function performed by the claimant and her team was the calculation of service charge fees for the Council's housing, and the process for re-charging those fees back to householders.
32. This was done by collating and recording on spreadsheets the various data required for calculating the service charges, and then calculating recharges by apportioning costs on a uniform basis across the households. This was a fairly 'rough and ready' process, and led to some unfairness. A project was started to improve this process and to make it fairer. It was intended that a computerised system would be brought in which would be easier, more transparent and would permit a fairer apportionment of the various charges.
33. In December 2013 Trevor Costello joined the claimant's team as an interim appointment. He was interviewed by the claimant and his appointment was supported by Mr Griffiths. Mr Costello's role was Service Charge and Recharge Project Manager, he had the objective of reviewing the service charge and recharge process, and implementing a new service charge process. As an interim staff member working through a recruitment agency he was paid more than the claimant.
34. In July 2014, Mr Costello was moved to a different team and became line managed by Kamal Lallian, the Business Delivery and Contract Clienting Officer. In August 2014, the claimant queried with Mr Griffiths what Mr Costello's role was after his change of line manager. Mr Griffiths confirmed that although Mr Costello's role was now extended, his focus would remain the Service Charge and Recharge project.
35. We find that the responsibility for supervising the Service Charge and Recharge project which was being carried out by Mr Costello was moved from the claimant to Ms Lallian in July 2014. However, the claimant retained responsibility for the operational aspects of service charging and recharging which she had always had prior to the Service Charge and Recharge project and prior to Mr Costello being engaged.
36. We find that Mr Aves made the decision to move Mr Costello from the claimant's line management to Ms Lallian's line management and that the

move was because Mr Costello's role was expanding to include wider functions. There was a need for him to co-ordinate with other project work which was being done and this fitted better under the line management of Ms Lallian who was at the time Business Development and Contract Clienting Officer. We do not find that Mr Costello was moved from the claimant's team because she had complained that he had made errors in his work.

37. Also in July 2014, the reporting line of the Garage Officer, Mr Khan, who reported to the claimant, was changed so that he reported to Mr Costello, under the line management of Ms Lallian.
38. The claimant complained that Ms Lallian, Mr Costello and another colleague Mr Grant were favoured by Mr Griffiths because they had visited him at home whilst he was on sick leave and that afterwards they obtained better paid roles. Mr Griffiths accepted that some of his colleagues had visited him at home to deal with work issues but we find that this did not give rise to any favourable treatment of them. Ms Ricketts, the HR business partner, said that the respondent had no difficulty with colleagues visiting each other at home for work or social reasons. We do not find that Ms Lallian, Mr Costello or Mr Grant were given pay increases or new contracts as a result of visiting Mr Griffiths at home during sick leave.

The September 2014 restructure

39. In September 2014, the respondent began a consultation process about another restructure within Neighbourhood Services. Mr Aves, the Assistant Director, led the consultation process. Mr Griffiths was heavily involved in the plans for the restructure and in drafting detailed proposals but he did not draft the job descriptions. These were prepared by HR.
40. During the consultation process, the claimant wrote to Mr Aves on 18 September 2014 and asked whether she could be considered for voluntary redundancy. Her request was declined because Mr Aves considered it necessary to retain her role in order to maintain service standards.
41. As part of the September 2014 consultation, the introduction of a fourth grade 10 Neighbourhood Manager role was proposed, to be called Neighbourhood Manager (Resilience and Enforcement). Ian Blake was appointed to the role of Neighbourhood Manager (Resilience and Enforcement) following an interview. He did not attend an assessment centre. The claimant did not apply for this role.
42. It was also proposed that a neighbourhood business services team would be created to work under a Neighbourhood Business Services Manager. Ms Lallian was appointed to the role of Neighbourhood Business Services Manager having been interviewed by Mr Griffiths and two others. She did not attend an assessment centre. The claimant did not apply for this role and Ms Lallian was the only applicant for the post. Ms Lallian became a grade 9 on taking up this post, but she was paid less than the claimant as she was at a lower point on the grade 9 scale than the claimant.

43. The respondent used assessment centres run by an external company called Pantir Talent Solutions for some recruitment within their Housing and Neighbourhood Services Department. However, the practice of using Pantir stopped at some point in the second half of 2014 (and had certainly stopped by January 2015) because it was not felt to be value for money.
44. It was also proposed as part of the September 2014 consultation process that Mr Costello's role of Service Charge and Recharge Project Manager would be replaced by the role of Estate Services Manager. Mr Costello took on this Estate Services Manager role, again as an interim appointment, after these changes were brought in in November 2014.

External report

45. In about September 2014, the respondent commissioned an external consultant, Ms McNeill. The stated objective of the report was to carry out a review of how people worked within the Housing Neighbourhood Services Department to get an insight into the perception of the workforce, how it was led and managed, and to gain an understanding of the culture. An executive summary of the report was published to staff dated 14 October 2014. Those aspects of the redacted report which we read were relevant by way of background and context only. It was clear that at the time of the report there were aspects of the working environment in Housing and Neighbourhood Services that were difficult, and the report made recommendations to address this.

Additional administrative support

46. On 13 May 2015, the claimant asked Mr Griffiths for an additional post of Business Support Officer to be appointed to work directly with her team. The Housing and Neighbourhood Services Department had a central customer and business team to provide administrative support to all operational areas. This team was managed by Ms Lallian and a team leader who reported to her. The claimant's request was passed to the team leader for the business support team.
47. On 25 June 2015, the claimant spoke to Ms Lallian about her request for an additional business support officer to work directly with her team. Ms Lallian said that she could not see that a stand-alone admin officer for the Leasehold Services team could be justified. Ms Lallian's evidence was that in any event it would not be efficient to appoint one person to work directly with that team, as they would require cover if absent.
48. However, it was agreed that Ms Lallian or the business support team leader would attend the claimant's next team meeting to discuss their areas of work so that their peaks in activity could be understood and the business support team could see how they could provide more help. The business support team leader did attend a meeting with the leasehold

services team to discuss their needs, and a business support officer began to support the team with administrative tasks after that.

Claimant's annual appraisal

49. On 29 May 2015, the claimant had her annual appraisal meeting with Mr Griffiths. At the meeting, Mr Griffiths referred to some garage improvement works which had taken place at Winvale. The claimant had previously had line management responsibility for the garage officer and Mr Griffiths wanted to know what had happened with the Winvale garage works. The claimant emailed Mr Griffiths on 2 June 2015 to provide Mr Griffiths with information about the works. The written report of the appraisal does not mention the discussion around the garage works. The claimant said that Mr Griffiths was inappropriately seeking to attach blame to her for the garage works. We find that whilst he felt that she had to bear some accountability, he was not blaming her but was rather seeking information from her about what happened.

Areas of responsibility

50. In August 2015, the claimant raised with Mr Griffiths her perception that Ms Lallian's job description included areas of responsibility (particularly relating to the service charge) which were actually the claimant's responsibility. Mr Griffiths replied by email on 19 August to say that in his opinion the two job descriptions were not contradictory. He suggested the claimant should meet with Ms Lallian to discuss any concerns. The claimant did not meet with Ms Lallian as she felt it was inappropriate to talk to Ms Lallian about issues with her job description. She felt this was for senior managers to resolve. The claimant felt that Mr Griffiths' attitude towards her changed at around this time. We found no evidence of that.
51. In September 2015, the claimant felt she was struggling to receive information from Ms Lallian's team, including Mr Costello, to enable her to prepare the service charge accounts. She said that Mr Costello and Ms Lallian were deliberately delaying providing information to compromise her ability to prepare the reports and to meet the respondent's statutory obligations. Calculations about caretaking works had been sent to the claimant by Mr Costello on 8 July 2015. On 8 September 2015, the claimant asked Mr Costello to check the figures again as they appeared to have been based on an incorrect total number of leasehold units. Mr Griffiths was copied in to the claimant's email. Mr Griffiths emailed the claimant and Ms Lallian and suggested they should meet to discuss the day-to-day working of their two teams to avoid potential duplication. He asked them to provide him with a joint briefing. Ms Lallian emailed the claimant to suggest a time to meet. The claimant said she was too busy and did not have time to meet.
52. On about 9 September 2015, the claimant and Ms Lallian met accidentally by the photocopier. Ms Lallian asked when they should meet. The claimant asked why they should. The claimant said that, in this discussion, Ms

Lallian was aggressive. We find that although Ms Lallian may have been assertive, she was not aggressive in this conversation. We found no evidence of bullying or harassment of the claimant by Ms Lallian or Mr Griffiths.

53. The information required from Mr Costello was sent to the claimant on 11 September. We do not find that any delay on the part of Mr Costello or Ms Lallian was deliberate or intended to affect the claimant's ability to do her job.

Head of Housing

54. In September 2015, a vacancy arose for Head of Housing. The claimant spoke to Mr Griffiths and Mr Aves and expressed an interest in being seconded to the role. Mr Griffiths said that if she wanted to go for it, she should. It was not up to Mr Griffiths to recruit for the role or offer a secondment to it, but he discussed her interest with Mr Aves. Mr Aves did not undertake any recruitment process for the role. It remained vacant for some time. The claimant did not make any formal expression of interest or application.
55. In December 2015, the claimant was asked to undertake an investigation within the Neighbourhood Enforcement Team. The claimant asked for the investigation to be reallocated due to her workload and the fact that she was undertaking another investigation at the time. The claimant was appointed as the investigating officer. Acting as investigating officer was part of the claimant's role. Although it was fairly unusual for a manager to be asked to undertake two investigations at once, this was not an unreasonable request.

Office move proposals

56. The respondent's Landmark House lease was coming to an end and the respondent wished to rationalise their office space. On 24 December 2015, Mr Griffiths sent an email to two senior managers which suggested new office locations for the various teams in the Housing and Neighbourhood Services departments. The claimant was unhappy that Mr Griffiths' suggestion was that her team should be located near to Asset Management and Property Services when the suggested location for other team was "town centre location".
57. The claimant read Mr Griffiths' email as a decision regarding location but it is clearly described as setting out "suggestions for discussion". The claimant was involved in these discussions as on 7 January 2016, the email was circulated to other managers, including the claimant, requesting contributions. The claimant read "town centre location" as referring to Landmark House, and therefore that it was being proposed that some teams would not have to move but her team would. We find that 'town centre location' was not referring to Landmark House and it was clear from

the email that moves were being proposed for all teams. In the event, the moves did not go ahead.

58. On 26 January 2016, the claimant had a one-to-one meeting with Mr Griffiths. As was normal practice, the claimant wrote up the notes of that meeting. There was nothing in the notes of the meeting which indicated that the claimant had any concerns at that time about her workload or any other matters relating to her role or line management.

Recruitment to Head of Housing

59. In February 2016, Mr Aves sent an email to the claimant attaching the CV of Mr Thomas, a prospective interim candidate for the vacant role of Head of Housing on a temporary basis. The claimant was disappointed because she felt she should have been considered for secondment to the role. She told Mr Aves that the candidate did not have sufficient experience in some areas and that he should consider internal appointments. She did not however put herself forward at this stage. In her evidence, the claimant suggested that a Grade 10 manager who was at the time absent on sick leave, Jeremy Walters, would have been appropriate for the role.

Communication concerns and role transfer

60. On 5 February 2016, the claimant requested clarification on some caretaking data from Mr Costello's team. She received an email on 9 February from Ms Brown setting out some detailed information and apologising for the lack of communication/clarity regarding the caretaking service. We do not find that any delay in providing the information was deliberate or intended to affect the claimant's ability to do her job.
61. The claimant was very upset and felt that this was further evidence of the difficulties she was suffering in respect of her working relationships and wider concerns about management decisions. On 9 February 2016 she began to compose a draft email to Mr Griffiths and Mr Aves in which she set out her concerns at some length. While she was preparing the email, Mr Aves came to speak to her and he saw the email over her shoulder. She communicated the content of the draft email to Mr Aves. He decided to move the claimant to a new role outside the line management of Mr Griffiths. The draft email was not sent.
62. On 16 February 2016 the claimant was moved to a new role under Mr Aves' line management to cover some of Mr Walters' role while he was on long term sick leave. This was not intended to be a permanent move but it was anticipated that it would last at least until the end of the financial year. Mr Walters was a grade 10 but the claimant's role was not re-graded to Grade 10. Mr Griffiths was not aware of the move until he was informed of it by Mr Aves on his return from a period of annual leave. This change of role was in response to the concerns raised by the claimant and she made no complaint about her transfer to this role. There was no evidence to suggest that the transfer to a new role on 16 February 2016 was a factor in

the claimant's later decision to terminate her employment with the respondent.

Termination of the claimant's employment

63. On 15 March 2016, the claimant resigned giving twelve weeks' notice. She resigned by completing a leavers' form and emailing this to Mr Aves and Ms Ricketts. Neither her leavers' form nor the covering email refer to constructive dismissal or include reasons for leaving or set out any concerns. The form included a section called Leaver Survey which asked for details to enable the respondent "to understand why you are leaving", and gave a number of options which could be ticked including 'job did not meet expectations', 'relationship with manager', 'relationship with colleagues', 'lack of promotion or career opportunities.' The claimant did not tick any reason for leaving.
64. On 16 March 2016 Mr Thomas joined the respondent as interim Head of Housing. In her evidence, the claimant could not recall whether Mr Thomas joined the respondent before or after she resigned. We find that his imminent start date with the respondent was not a factor in the claimant's decision to resign.
65. On 6 June 2016, the claimant left the respondent's employment having worked twelve weeks' notice. She made a grievance complaint on her final day of service. She said that she was afraid that she would suffer retribution if she did so earlier. The respondent's Strategic Director met with the claimant on 20 July 2016 to discuss the concerns she had raised in her grievance.
66. On 7 June 2016, the claimant began new employment as a Housing Officer with Hounslow Borough Council. Her service was treated as continuous for pay and pensions purposes and her pay is higher than at the Respondent. She applied for the post on 21 March 2016.
67. A former colleague and friend of the claimant, Mrs Clegg, brought an employment tribunal complaint against the respondent. The claimant said that she was treated unfavourably because she had supported Mrs Clegg. There was no evidence before us to suggest that the fact that the claimant supported Mrs Clegg in a whistleblowing claim had made any difference to the way the claimant was treated by her managers and/or colleagues. We accept Mr Griffiths' evidence that he found the claimant's input helpful in managing Mrs Clegg.

The law

Constructive unfair dismissal

68. An employee who wishes to claim unfair dismissal must first show that they have been dismissed within the meaning of section 95 of the Employment Rights Act. In cases where the dismissal is disputed, the burden falls on the employee to show that there has been a dismissal.

69. Section 95(1)(c) of the Employment Rights Act provides that there is a dismissal where the employee terminates the contract with or without notice in circumstances where they are entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal.
70. Weston Excavating v Sharpe sets out the elements which must be established by the employee in constructive dismissal cases. The employee must show
- 70.1. that there was a fundamental breach of contract on the part of the employer;
 - 70.2. that the employer's breach caused the employee to resign; and
 - 70.3. thirdly, that the employee did not delay too long before resigning and affirm the contract.
71. The breach of contract may be of an express term or an implied term, often, as here, the implied term of trust and confidence. This is a term implied into all contracts of employment that employers (and employees) will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.
72. In cases where a breach of the implied term is alleged, 'the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it' - Woods v WM Car Services (Peterborough) Ltd.
73. If a constructive dismissal is established, the tribunal must consider whether the reason for the dismissal is a potentially fair reason, and whether the dismissal is fair in all the circumstances, pursuant to section 98 of the Employment Rights Act 1996.

Direct sex discrimination

74. Section 13 of the Equality Act provides:
- "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."
75. Section 23(1) provides that:
- "On a comparison of cases for the purposes of section 13 [direct discrimination] ... there must be no material difference between the circumstances relating to each case."

76. The question of whether a comparator is appropriate is one of fact and degree, and where a possible comparator's circumstances differ materially from those of the claimant, they may still be useful in constructing a hypothetical comparator.
77. Sections 136(2) and (3) provide for a reverse or shifting burden of proof:

"(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) This does not apply if A shows that A did not contravene the provision."
78. This means that if there are facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent. The respondent must then prove that the treatment was in no sense whatsoever on the grounds of sex. If there is a prima facie case and the explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.
79. In Igen v Wong [2005] ICR 931 the court set out 'revised Barton guidance' on the shifting burden of proof. We bear in mind that the court's guidance is not a substitute for the statutory language and that the statute must be the starting point. Although the requirement in the Igen guidance is for the claimant to prove facts before the burden shifts, in line with section 136(2) and the recent decision of the EAT in Efobi v Royal Mail Group Ltd UKEAT/023/16, we have considered whether, looking at the facts as a whole, there are facts from which we could properly and fairly conclude that the difference in treatment was because of the protected characteristic.
80. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination. "Something more" is needed, although this need not be a great deal: "In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..." (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.)
81. It is necessary for the tribunal to adopt a holistic rather than fragmentary approach: to look not only at the detail of the various individual acts of discrimination but also to step back and look at matters in the round.
82. If the burden shifts to the respondent, it must then provide an "adequate" explanation, which proves on the balance of probabilities that the protected

characteristic was in no sense whatsoever on the grounds of sex. The respondent would normally be required to produce “cogent evidence”.

Conclusions

83. We have considered the issues for determination in the light of our findings of fact and the legal principles set out above.

Constructive unfair dismissal

84. Here, we first need to consider whether the claimant resigned or was constructively dismissed. We need to look at:

84.1. whether there was a fundamental breach of contract on the part of the employer;

84.2. whether the employer’s breach caused the employee to resign; and

84.3. whether there was any delay between the breach and the termination of the employee’s employment such that the claimant affirmed the contract.

85. The claimant did not submit that there had been any breach of an express term. She said that the respondent’s conduct amounted to a breach or breaches of the implied term of trust and confidence. She relied on the detailed background as set out in her ET1. We considered all of the matters relied on by the claimant, and set out here our conclusions on the key points relied on by the claimant in her ET1.

85.1. The claimant complained that she was required to act as designated deputy to Mr Griffiths when she was a grade 9 and there were four grade 10 managers who also reported to Mr Griffiths who were not required to do so. However, acting as deputy and with delegated authority was an express part of the claimant’s job description. Mr Griffiths chose her because he was confident in her skills and abilities to cover in his absence, and she was longer serving than the grade 10 managers.

85.2. The claimant complained that she was not offered the role of or a secondment to the role of Head of Housing. However although she mentioned this informally to Mr Griffiths and Mr Aves, she did not make any formal application for the post.

85.3. The claimant complained that she was not offered voluntary redundancy. However, there is no obligation on an employer to offer voluntary redundancy. The respondent considered the request but the claimant’s skills were too important to lose.

85.4. The claimant said that other colleagues were favoured by Mr Griffiths and obtained better paid roles as a result. We found no evidence that this was the case.

- 85.5. The claimant said that Ms Lallian was a grade 10, and was appointed without proper procedures. We have found that Ms Lallian was a grade 9 and was appointed after an interview. Although she did not undergo an assessment centre, this was at a time when assessment centres had been or were being discontinued by the respondent.
- 85.6. The claimant said she was not invited to an interview when her job title changed as part of the first consultation and that this was a significant change. However, she was given the opportunity to comment during the consultation and did not do so. We accept that the changes to the claimant's job were minor rather than significant and conclude that there would therefore not have been any need for an interview.
- 85.7. The claimant complained that parts of her role were absorbed into Ms Lallian's. We have found that responsibility for supervising the staff member with conduct of the service charge and re-charge project did transfer from the claimant to Ms Lallian. This was because the project role was expanding to include wider functions and there was a need for better co-ordination with other project work which was being managed by Ms Lallian. Operational responsibility for the service charge and re-charge work remained with the claimant.
- 85.8. The claimant complained that Ms Lallian spoke to her aggressively. We have found that she did not. The claimant complained that Mr Griffiths was less friendly towards her, aggressive and dismissive from around August 2015. We found no evidence of this or of bullying or harassment of the claimant by Mr Griffiths or Ms Lallian.
- 85.9. The claimant said Mr Griffiths' attitude towards her changed because of her support of Mrs Clegg. We have not found any evidence of this and have found that Mr Griffiths welcomed the claimant's assistance with the support of Mrs Clegg.
- 85.10. The claimant complained about not being consulted on the decision regarding a possible office move in December 2015 and that her team was treated differently to others. However, we have found that the claimant was consulted at the proposal stage, before any decision was made, and that moves were being considered for all teams.
- 85.11. The claimant complained that she was not permitted a dedicated administrative support officer when she had a very heavy workload. We have found that when the claimant asked for help, steps were taken to see what assistance could be provided, some assistance was provided and the claimant was given an explanation as to why she could not be provided with a dedicated support officer.
- 85.12. The claimant said she had difficulty obtaining service charge and re-charge information from Mr Costello and Ms Lallian and other members of that team, both in September 2015 and February 2016. We have not found that any delays or difficulties were deliberate or were attempts to prejudice the claimant's ability to do her work.

- 85.13. The claimant complained that she was blamed for the Winvale garage works matter during her appraisal with Mr Griffiths. We have found that she was asked about the garages by Mr Griffiths rather than blamed for them.
- 85.14. The claimant was asked to act as investigating officer when she was already conducting another investigation. Although this was fairly unusual this was part of the claimant's role and not an unreasonable request.
- 85.15. Although she did not refer to it in her ET1, the claimant complained in her evidence about the respondent's consideration of Mr Thomas as a possible interim Head of Housing. The claimant was disappointed because she felt she should have been considered for a secondment to the role and that Mr Thomas did not have sufficient experience in some areas. It was a matter for the respondent to decide whether and how to recruit for this role. Although she had informally expressed an interest earlier, the claimant did not put herself forward at this stage.
86. We have considered each of these complaints, all the matters set out in the ET1 and the respondent's conduct as a whole. We do not find that any of these (either considered separately or together) were calculated or likely to destroy the employment relationship such as to amount to a breach of the implied term of trust and confidence. There were a considerable number of matters in respect of which the claimant disagreed with the opinions or decisions of her managers, or was critical of the performance of colleagues, but they cannot be said to have amounted to a fundamental breach or breaches of the implied term.
87. We have found that neither the decision to move the claimant to a new role on 16 February 2016 nor the imminent arrival of Mr Thomas as interim Head of Housing on 16 March 2016 were factors in the claimant's decision to resign. The last of the matters of which the claimant complains of being a factor in her decision to resign was the email sent to her on 9 February 2016 from Ms Brown, which led to the claimant composing a draft email to set out her concerns.
88. Even if we had found that any of the matters complained of did amount to a breach of the implied term of trust and confidence, we would have found that the claimant waived any breach and affirmed the contract. The last of the matters in respect of which she resigned took place on 9 February 2016 and she did not resign until 15 March 2016, a delay of 5 weeks. She accepted the proposed temporary change of role on 16 February 2016, indicating that she regarded the employment relationship as on-going at that point. Further, although a constructive dismissal does not have to be one without notice, it is relevant that the claimant felt able to remain working for the respondent in her new role covering Mr Walters' absence for the whole of her twelve week notice period. This is inconsistent with her position that the respondent had fundamentally breached the implied term

of trust and confidence or, if there was a breach, suggests a decision by the claimant to affirm the contract.

89. We have concluded therefore that the claimant resigned, and was not constructively dismissed. In the light of this conclusion, the remaining issues on constructive dismissal fall away.

Direct sex discrimination

90. In respect of the complaint of direct sex discrimination, we have first considered the issues for determination in respect of each of the four acts.

91. The first act complained of is that the claimant was not offered a secondment to the vacant Head of Housing post.

91.1. We have found that the claimant was not offered a secondment as Head of Housing. She did not formally apply for any secondment.

91.2. The claimant did not suggest an actual comparator in relation to this complaint and no permanent male colleague was offered a secondment or otherwise given the role. There is therefore no difference in treatment with any permanent male colleague.

91.3. Mr Thomas, a male interim appointee, was appointed to the role and started on 16 March 2016. We conclude that his status as an interim rather than permanent employee was a material difference from the claimant's circumstances, and that he is not an appropriate comparator for the claimant. There is no evidence to suggest that there would have been any difference of treatment with a hypothetical comparator.

91.4. Even if a difference in treatment could be identified, there were no primary facts from which we would properly and fairly conclude that any difference in treatment was because of sex.

91.5. In any event, we accept the non-discriminatory reason put forward by the respondent which was that the claimant was not seconded to this role because it was kept vacant and no-one was appointed to it. Mr Thomas was appointed as an interim Head of Housing (he was not seconded to it).

92. The second act complained of is that the failure to grade the claimant's role at Grade 10 amounted to direct sex discrimination and that re-grading should have taken place in July 2012 or in 2013 at the time of the consultation.

92.1. We found that the claimant's role was graded at grade 9 in July 2012 and was not re-graded after that.

92.2. We did not hear any evidence of male comparators whose roles were re-graded from grade 9 to grade 10 (or other grades). The claimant complained about the grading of Neighbourhood Manager roles as grade

10 but these were different roles to hers. They managed larger teams and covered wider functions than the claimant. There was no evidence to suggest that a hypothetical comparator would have been treated differently. There was no evidence of a difference in treatment.

- 92.3. Even if a difference in treatment could be identified, there were no primary facts from which we could properly and fairly conclude that any difference in treatment was because of sex.
- 92.4. In any event, we accept the non-discriminatory reason put forward by the respondent for which was that grades (including the claimant's and the Neighbourhood Managers' grades) were based on job descriptions and an evaluation of job descriptions by Hayes. The changes to the claimant's role in 2013 were minimal and the role did not require re-grading as a result of those changes.
93. The third act complained of is that because she is female, the claimant was expected to perform at a level equivalent to or higher than Grade 10.
- 93.1. We understood this complaint to relate to the requirement on the claimant to deputise for Mr Griffiths and having delegated authority. However, we have found that the claimant was not expected to perform at a level higher than her grade which was grade 9.
- 93.2. The claimant complained about the respondent's expectations of her in comparison to the male Neighbourhood Managers. These were different roles to hers and this material difference means that they are not appropriate comparators. In any event, we cannot identify any difference in treatment between the claimant and a male comparator whether actual or hypothetical. Other officers, both male and female, had delegated authority.
- 93.3. Even if a difference in treatment could be identified such as the requirement on the claimant to deputise for Mr Griffiths which was not a requirement of the male Neighbourhood Managers, there were no primary facts from which we could properly and fairly conclude that any difference in treatment was because of sex.
- 93.4. In any event, we accept the non-discriminatory reason put forward by the respondent which was that the claimant was selected to deputise for Mr Griffiths and to have delegated authority not because of her gender but because she was capable of performing these roles.
94. The fourth act complained of was that part of the claimant's role was taken over by Mr Costello and that he was paid at a higher rate than her.
- 94.1. We have first considered the complaint that part of the claimant's role was taken over by Mr Costello. We found that Mr Costello was appointed by the claimant to undertake a new service charge and re-charge project. This was not part of the claimant's role and so Mr Costello

did not take over part of the claimant's role. The claimant retained the operational elements of the service charge and re-charge work.

- 94.2. The supervision of Mr Costello was part of the claimant's role, and this was transferred to Ms Lallian who is female. There is no difference in treatment in relation to Mr Costello's role between the claimant and a male comparator whether actual or hypothetical. In any event, we have found that there were non-discriminatory reasons for the transfer of Mr Costello to Ms Lallian's team, namely so that he was working more closely with other project teams.
- 94.3. We next considered the complaint that Mr Costello was paid at a higher rate than the Claimant. We have found that Mr Costello was paid more than the claimant. We remind ourselves that the claimant's application to amend her claim to include a complaint of equal pay was not granted.
- 94.4. However, for completeness, we record that there were no facts from which we could conclude that Mr Costello was paid more than the claimant because of sex. We accept that the difference in pay was because Mr Costello was an interim appointment paid through an agency whereas the claimant was a permanent member of staff.
95. Having considered each of the acts complained of individually, we stepped back and considered the treatment in the round. Considered as a whole, we did not find any facts from which we could properly and fairly conclude that any difference in treatment was because of sex and we do not find there to have been any sex discrimination. In the light of our conclusions on the alleged acts of discrimination, we also conclude the claimant was not constructively dismissed due to any acts of discrimination.
96. We also considered the issue of time limit/jurisdiction. We concluded that those matters which occurred before 30 June 2016 were either part of a course of conduct extending over a period which ended after that date, or that it was just and equitable to extend time because most of the events were well documented and there was no prejudice to the Respondent if time was extended. Accordingly, we concluded that we had jurisdiction to consider all the claimant's complaints of sex discrimination.

Employment Judge Hawksworth

Date: 13/11/2017.....

Sent to the parties on:

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For the Tribunals Office