Case No: 2302345/19

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Ms H Bharadia**
Mrs JC Saunders

BETWEEN:

Miss L Nzinga

Claimant

And

Straight Talking Peer Education

Respondent

ON: **28 – 30 September 2020**
In Chambers – 2 October 2020

Appearances:

For the Claimant: Ms B Zietar, Counsel
For the Respondent: Mr N Henry, Legal Consultant

RESERVED JUDGMENT

1. The victimisation claim in relation to allegations 85(viii) and (ix) of the list of issues succeeds. All remaining victimisation complaints are dismissed.

2. The constructive dismissal claim fails and is dismissed.

3. The claims of race and sex discrimination and harassment are struck out.

4. The matter will be listed for a remedy hearing on a date to be advised.

REASONS

1. By a claim form presented on 17 June 2019, the claimant complained of constructive dismissal and victimisation pursuant to section 27 of the Equality Act 2010 (EqA). Claims of racial and sexual harassment and of direct race and sex discrimination were struck out at the start of the hearing as they were out of time.

2. We heard evidence from the claimant and her former colleagues, Emily Reed and Mollie Caswell on her behalf. The respondent gave evidence through John Botterill (JB) Trustee and Company Secretary, and Brian Van Du (BVD) Chief Operating Officer. The parties provided a joint bundle and a separate bundle containing disputed documents. References in square brackets in the judgment are to pages in the joint bundle, unless prefixed with the letter D, in which case they are from the disputed bundle.

The Issues

3. The issues are set out at paragraphs 85 and 90 of the claimant's Amended Particulars of Claim, to the extent that they have not been withdrawn, and are more specifically dealt with in our conclusions below.

The Law

4. Section 27 EqA provides that 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.

5. The protected acts in question are listed at section 27(2).

Burden of Proof

6. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

7. In determining whether treatment is by reason that the person has done a protected act, the relevant question is to ask why the discriminator acted as they did. In other words, what consciously or unconsciously was their reason? Chief Constable of West Yorkshire v Khan [2001] IRLR 830. The protected act does not need to be the only reason for the unfavourable treatment; it just has to have had a significant influence on the decision-maker. Significant for these purposes means more than trivial.

8. It is not sufficient for the claimant simply to show that she has done a protected act and that she has suffered a detriment at the hands of the respondent. She must also show that there is evidence from which a tribunal could infer a causal link. Where such evidence is found, it will then fall to the employer to prove that the protected act was not the reason for the treatment.

Constructive dismissal

9. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides that an employee shall be taken to be dismissed by his employer where the employee terminates the contract, with

or without notice, in circumstances in which he is entitled to do so by reason of the employer's conduct.

10. The case; Western Excavating Limited v Sharp 1978 IRLR 27 provides that an employer is entitled to treat him or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach of the contract or which shows that the employer no longer intends to be bound by one or more of its essential terms. The breach or breaches must be the effective cause of a resignation and the employee must not affirm the contract.

11. The case: Malik v Bank of Credit and Commerce International SA 1997 IRLR 462 provides that the implied term of trust and confidence is breached where an employer, without reasonable or proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

12. In London Borough of Waltham Forest v Omilaju [2005] ICR 481, the Court of Appeal stated that a final straw should be an act in a series whose cumulative effect amounts to a breach of trust and confidence and it must contribute to the breach. An entirely innocuous act on the part of an employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective.

13. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal adopted a similar approach but took the opportunity to summarise the correct approach to 'last straw' cases, based on the implied term of trust and confidence. In essence:-

"Where an employee claims to have been constructively dismissed, the tribunal should ask the following questions:

1. *What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation:*

2. *Has he or she affirmed the contract since that act?*

3. *If not, was that act (or omission) of itself a repudiatory breach of contract (i.e entitling the employee to treat the contract as at an end);*

4. *If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of [the implied term of trust and confidence]? If it was, there is no need for any separate consideration of a possible previous affirmation;*

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

Findings of Fact

14. The claimant commenced her employment with the respondent on 16 April 2016 on a temporary contract as a Peer Educator, Stage One. As well as conducting workshops in secondary schools to reduce teenage pregnancy, the claimant was also responsible for overseeing the coordination of the respondent's Prevention Project and Peer Education Scheme. This included 3 key functions: school bookings, Recruitment of Peer Educators; and new projects supporting the growth of the respondent [49]. Her contract of employment was extended in September 2016 and she was required to work 24 hours per week.

15. The management team at the time comprised Hilary Pannack (HP) Chief Operating Officer; BVD, and Alistair McKenzie (AM), Finance Manager; plus the Board of 5 Trustees. In the academic year 2017/18, the respondent employed 64 young parents, six of whom were employed as stage 2 staff working 16 hours per week and one at stage 3 – the claimant.

16. The majority, well over 50%, of the parents that the respondent has supported, employed and mentored since 1996 have been of black ethnic origin.

17. Between 28 June and 31 August 2018, the respondent received multiple complaints from stage 2, 3 and 4 staff about HP.

18. In June 2018, the claimant and Precious Jackson-Stewart (PJS) Scheme Manager, raised grievances against HP. The complaints were that HP had made various comments that they considered to be racially offensive.

19. The board of trustees discussed the complaints and concluded that disciplinary proceedings should be instigated against HP. A disciplinary hearing took place on 28 June 2018 as a result of which HP received a written warning and was required to undertake diversity coaching. To that end, on 13 August 2018, the respondent engaged the services of a diversity coach. HP attended an introductory meeting with the coach but declined to continue thereafter as she felt she had sufficient experience and did not need diversity coaching.

20. Matters escalated thereafter and the Trustees received a number of emails from PJS on behalf of staff about HP, including allegations that HP had made remarks that could be viewed as racist. On 14 August 2018, PJS led staff on unofficial industrial action. As a result, staff were written to and advised that the action amounted to unauthorised absence and that they would not be paid. The claimant was not present at work on the day but also received the same letter, dated 17 August 2018, which stated:

    "It was not clear from the team email who was taking this action, and I have heard that some people were not aware of it. If you are not, in fact. involved. and intend to come to work. or are off work for another reason. I would be grateful if you would confirm that by email or letter to me at the above addresses. If you are involved in this unofficial action. I must inform you that the trustees take the View that you are absent from work without authorisation. This is a breach of your employment contract. I should make you aware that in these circumstances, WE CANNOT PAY YOU FOR DAYS WHEN YOU ARE ABSENT. [108-109]

21. On 20 August 2018, the claimant wrote to the respondent in reply stating that she had been signed off work from 14-24 August due to stress. [110]. The matter went no further.

22. On 31 August 18, there was a meeting with junior staff, including the claimant, to listen to their complaints. They were then asked to submit written statements about matters that had occurred since HP's written warning on 28 June 2018 [D9]

23. HP was suspended from work between 2 September 2018 and 20 January 2019.

24. The trustees met separately with HP, who provided a written account of events [114].

25. On 5 September 2018, the claimant emailed a written statement to Lewis Brown (LB) Chair of the Board of Trustees, setting out events since the 28 June 2018. This document is the grievance of 5 September 2018 referred to in the list of issues as one of the protected acts for the purposes of the victimisation complaint. In the document, the claimant raises 3 issues. The first and second relate to a meeting she attended on 20 July 2018 with HP and AM to discuss her request for a company loan. The claimant complained that during the meeting, HP and AM made critical comments about her partner and his contribution to her finances, which made her feel uncomfortable. The third issue was an allegation that on 6 August 2018, HP had said on noticing her presence in the room: "*oh I didn't see you there! You're so dark you just sort of blended in. Your shirt is black, the chair is black and you've just sort of blended in*". [117]

26. On 20 September 2018, the claimant attended a meeting with Amy Reid (AR), Trustee and Christine Tulson (CT), external HR Consultant, to discuss her grievance. [121-123]

27. On 26 October 2018, the claimant received the outcome to her grievance. The claimant's grievance had been identified as 3 specific complaints, which were:

    1. *On 20 July, Hilary gave you unsolicited advice about your relationship with your partner, which you felt was motivated by prejudice against working-class people.*

    2. *In the same meeting, both Alistair and Hilary were patronising to you and Hilary colluded with Alistair's derogatory remarks about your partner based on his occupation as a labourer*

    3. *On 6 August, Hilary made remarks which you felt referred to your "dark" skin several times in one conversation, making you feel uncomfortable.*

28. Allegation 1 was not upheld, allegation 2 was partially upheld, in that it was found that the remarks were made by AM and that they breached the respondent's Equality and Diversity policy. Allegation 3 was fully upheld, in that it was found that HP made the remarks alleged or very similar ones and that this was a breach of the Equality and Diversity policy. The claimant was told that AM had been told that his remarks were offensive to her and had accepted this. She was also told that the Board were considering what action to take against HP. [124-125].

29. The claimant was given the right to appeal against the outcome but she did not do so. She told us that this was because she was pleased that allegation 3 had been upheld. However, she believed that the outcome of the collective complaint was still outstanding, in particular, her complaint that she had heard HP say in relation to a colleague Selaha: "*well she looks bloody ethnic today*" [27]

30. On 20 November 2018, HP received a final written warning in relation to a number of complaints raised by staff, including the claimant, which were said to breach the Equality and Diversity policy. [D131-132]. One of the factors taken into account in issuing this warning was the fact that the incidents occurred only 6 weeks after HP received a written warning in respect of the June 2018 complaints. The claimant says that the outcome of disciplinary action against HP was not communicated to her. We accept that evidence as the respondent was unable to provide evidence to the contrary.

31. On 3 September 2018, Brian Van Du (BVD) joined the respondent as Project Coordinator. However, in light of HP's suspension, by default he was the most senior member of staff on site so effectively deputised in the CEO role. TIt quickly became clear to BVD that there was considerable friction between HP and some of the staff and he heard repeated references to her being a racist.

32. On 30 November 2018, the claimant, along with other members of staff, was suspended on full pay. The claimant's suspension letter, dated 2 December 2018, stated that the suspension was pending an investigation into an allegation that she may have breached the respondent's Bullying and Harassment policy [139]. This related to an impromptu meeting organised by PJS with BVD and staff on 30 November 2018 during which it was alleged that the staff, led by PJS, had conspired to seriously bully and harass BDV during that meeting.

33. On 6 December 2018, the claimant was told that she would shortly be invited to a disciplinary hearing [140]. On 12 December, she was advised that Sally Cowen (SC) of B3sixty had been appointed to carry out the investigation [144]

34. On 11 January 2019, the claimant lodged a "counter-grievance against BVD and LB for bullying and harassment in relation to her suspension. The claimant relies on this as a protected act [145-146]

35. On 30 January 2019, the claimant attended an investigatory meeting with SC. The meeting was recorded by the claimant (without consent) and a copy of the transcript is in the bundle [148-174]

36. On 9 February 2019, HP sent an email to the board, with the subject heading: "Our remaining difficulty". This was a reference to the claimant and her colleagues, Emily Reed and Savannah. In reference to the disciplinary investigation being carried out by SC, HP wrote:

"Sally has now interviewed all of them and was going to speak to Savannah again but on the phone, to ask one more question, yesterday. This was in relation to the statement given by Karen, that she was bullied. In essence, Sally from B3Sixty, stated that Lewis and Amy thought that she would be able to provide enough for us to dismiss the girls. She says that as an independent, that's not her job. She has come to the conclusion at the end of this investigation that it is a "misunderstanding on both sides". There's a lot of detail which I I won't bore you with but essentially, this investigation has done nothing that can help us, although, I have not yet had the report". [277]

37. On 21 February 2019, HP notified the Board that she would be retiring from her role on Friday, 8th May 2020 [D171]

38. On 24 February 2019, the respondent received SC's report, which concluded that there was insufficient evidence to support the disciplinary allegations [193]

39. On the day the report was received by the Board, John Botterell (JB), Trustee and Company Secretary, wrote to the Board expressing the view that, notwithstanding that the claimant and her colleagues have been exonerated, they should be dismissed straightaway because of an irretrievable breakdown of the working relationship. In the email, JB indicated that his concern regarding the claimant (and Savannah) was her not being prepared to work with HP. In our view, the reason for that sentiment clearly relates back to the complaints the claimant made about racially offensive comments by HP. [269]. Our view is strengthened by an email from JB to the Board on 19 March 2019 where he wrote, in relation to the claimant: *"My vote for her remains, I still stand by my proposal as being our optimum action. If she gets compensation as a result of a Tribunal it will be money well spent.*" [296]

40. On 27 February 2019, another Board member, Guy Swindle (GS) replied agreeing with JB view stating: "*My gut reaction is that we should dismiss the three. However my considered view is that this would be too risky given the 360 report and apparent lack of evidence*". [270]. There is therefore an acknowledgment that there is no basis for dismissing them.

41. On 9 March 2019, JB wrote to the claimant and the other suspended employees lifting the suspension and instructing them to return to work. The claimant was told that HP had returned to work, though not the fact that she had served notice of resignation. In addition, the letter states that her demeanour and performance at work would be monitored and that if she did not return without acceptable justification, she would be taken as effectively having resigned [283]. The claimant relies on this correspondence as a detriment for the purposes of her victimisation claim. Interestingly, in the bundle is an earlier draft of this letter dated 2 March 2019 which appears to have been sent to the Board for comment. There are tracked comments in the right-hand column. In relation to demeanour and performance at work being monitored, another board member comments: "*I think we need to take this out as it almost sounds threatening*". She suggests instead: "*Your managers will be reviewing your performance over the next few months in spirit of repairing the relationships*". That suggested amendment did not find its way into the letter that was sent, an indication perhaps that repairing the relationship was not what JB had in mind. [279]

42. In response, the claimant sent an email on 9 March 2019 querying why her demeanour and performance were to be monitored when she had been found not to have done anything wrong. She also requested that she be allowed to return to work at the beginning of April so that she could sort out childcare arrangements [285]

43. On the same day, the claimant received an email from JB stating that her grievance of the 11 January 219 had not been upheld by B3sixty [284]. After receiving JB's email with the supposed grievance outcome, the claimant wrote back the same day querying how an outcome could have been reached when she had not been interviewed by b3Sixty about her complaint. She then asked for her grievance to be dealt with correctly [286].

44. It is part of the claimant's case before the tribunal that her 11 January 2019 grievance was not dealt with by the respondent. The respondent, through JB, responded to the allegation. When asked during cross examination who dealt with this grievance, JB said the Board of Trustees. However, at paragraph 29 of his witness statement he says that the claimant grievance was emailed to B3sixty to include in their investigation. When asked which was

the correct account, he said "*I can't answer that*". When asked directly whether the grievance had been passed onto B3Sixty his response was again "*I can't answer that*".

45. There is no evidence before us to indicate that the grievance was passed to or dealt with by B3Sixty, indeed the opposite is the case. The terms of reference of SC make clear that the matters to be investigated are alleged misconduct by the claimant and others. Those terms were not updated to incorporate the claimant's 11 January grievance. [181] Further, during the investigatory meeting on 30 January, the claimant sought clarification from SC as to the purpose of the meeting and SC confirmed that it was a disciplinary process not a grievance process [150]

46. We therefore find that the 11 January 2019 grievance was not dealt with by the respondent. We go further than that. We do not consider this to be a simple oversight, it was in our view deliberate. We say this for a number of reasons: Firstly, JB was reluctant to even acknowledge before us that this was a grievance and when asked whether it was a formal grievance he said "*Technically it is*" suggesting that it was in form but not in substance. Secondly, in relation to the claimant's 9 March email querying the grievance outcome, JB says at paragraph 31 of his statement that the "*Trustees considered this to again be kneejerk protracted correspondence and felt no obligation to keep on corresponding*". So, even though the Trustees were on notice that the grievance had not been dealt with, they appear to have made a positive decision to do nothing.

47. On 15 March 2019, the claimant chases a reply to her email of 9 March requesting a delay to her return to work [293] She chases again on the 18 March [298].

48. On 19 March 19, the respondent wrote to the claimant rejecting her request for a delayed return. She was advised that her absence was unauthorised, that she would be put on unpaid leave and that on her return, she will be subject to the disciplinary process [304]. In response, the claimant says that she will return the following day, which she does. [304]

49. On 21 March 2019 at 10:52, HP sent an email to the Board members attaching a copy of the outcome to the claimant's September 2018 grievance. HP was concerned about this and wrote:

"*Apparently, Lewis, without telling me, told Bambii (*the Claimant*)that he had found me guilty of racism and she hasn't been told anything further. I think at the very least, you need to send Bambii an email to say that on appeal you found me not guilty of breaching the charity's Equality & Diversity policy and that you disagreed with Lewis' conclusion. Bambii did ask me yesterday, very pointedly what the trustees ha done as a result of the initial investigation so she obviously has a tribunal against me, in mind. I think we need to deal with this before we attempt to pay her off as she could get a huge amount of money."* [339]

50. On the same day, at 11:04, JB responded to HP stating:

"My vote is to keep both Bambii and Emily working in a separate office, accumulating evidence of irretrievable breakdown……with a firm expectation to go through with that." [340].

51. The claimant alleges that when she returned to work her role had completely changed and she relies on this as a detriment. She says that prior to suspension she was in charge of school bookings and would do limited recruitment. However, on her return, she did not do

any bookings and was required to do recruitment. At the return to work meeting with HP and BVD on 20 March, the claimant asked whether her role would be the same as before and was told by HP that it was a bit fluid now due to having very few staff. [319] That is consistent with the evidence of BVD, who told us that since the suspension, staff numbers had reduced from 12 to 4 and as a result, there needed to be a shift in how people worked. We accept that evidence. One of the issues that the claimant relies on is that she was required to go to Hastings, which she had not been required to do prior to the suspension. However that is explained by the fact that Hastings was a new project and so the need to go there had not previously arisen. During the return to work meeting the claimant was asked if she was prepared to go down to Hastings to help with orientation of new starters. Although she was initially reluctant because of childcare issues, she agreed that she would be prepared to do so provided she could get there and back between 9am and 5pm, which the respondent agreed [318].

52. The claimant alleges that on 29 March 2019, while having lunch with colleagues at Pizza Express, BVD stood on the opposite side of the road looking directly at them. She contends this was done deliberately to intimidate them. BDV said that he had ridden his bike to the repair shop and then ordered a takeaway from the Pizza Hut, opposite the Pizza Express. While waiting for his order he went outside and made a few phone calls. He said that he was unaware of the claimant and her colleagues across the road because he did not see them. From the photographs we have seen, BDV is on the phone and is wearing glasses. We accept his evidence. It seems to us that it is the claimant who is focusing her attention on DBV rather than the other way round, to the extent that she took photographs of him, which appears to us more invasive than simply being observed.

53. On 2 April 2019, BVD emailed the claimant asking her to go down to Hastings on 12 April between 12pm and 3pm [347]. The claimant's response to that was that she felt rusty because of her time away and suggested that they find someone else to go [351]. In response, BVD said that she would be able to refresh herself with materials. He then asks that she confirm her attendance. [352]. The claimant replied that she would let him know by the end of the week whether she would go [353]. So even though the request to go to Hastings was within the parameters agreed, the claimant felt able to decline the request.

54. In or around early April 2019, the claimant wanted to become involved in an art project known as the Departure Lounge Project. This was independent from the respondent and could be done part-time on weekends or full-time.

55. On 8 April 2019 at 9:17 the claimant told the respondent that she would be away from the office for 10 days on dates between May-June, working on the Departure Lounge Project The claimant requested that the time off be treated as holiday as she had 80 hours of annual leave left [350]

56. There was then an exchange of emails between the claimant and DVB on this day. DVB informed the claimant that her outstanding holiday hours were 58.4 (later corrected to 30hr) He provided a breakdown of the holiday hours taken. The claimant's calculation did not take into account the Christmas shutdown, which accounted for 94 hours. [354, 355]. The claimant queried this as she believed that because she was suspended during the winter shutdown, her holiday remained intact. DBV explained that being on suspension had no bearing on holiday accrual and therefore annual leave was deducted for the shutdown period in the same way as everyone else. He ended the email with "*This case is now closed, I do not wish to dispute this any longer as it is taking time away from my regular*

duties." [356]. On the same day at 14:16, BVD sent a further email to the claimant asking her whether she would like to re-submit her holiday request on the basis of the 30 hours she had accrued [357]. The claimant did not respond to this. When asked by the Tribunal why she did not apply for unpaid leave, she said that she did not think of that.

57. The claimant says that the respondent's action in relation to her holiday request amounted to the last straw. At paragraph 90 of her statement she says that BVD calculated her holiday entitlement incorrectly and that fact that he failed to discuss the matter further was unreasonable.

58. On 9 April, the claimant went to the doctor and was signed off with work related stress between 8 April and 3 May 2019 [358]

59. The claimant signed a new contract with The Departure Lounge while she was off sick. She does not say when she signed it but the contract is dated the 15 April 2019.

60. On 2 May 2019, the claimant wrote to the Trustees resigning with immediate effect. In her letter she states:

"*Dear John Botterill*

I have tried to get in contact with you a countless amount of times regarding the Harassment and Bullying claim I made against Brian Van-Du and Lewis Brown with no reply as well as my issues regarding Hillary's return to work. It is with a heavy heart that I have to inform you that I will be resigning from Straight Talking Peer Education effective immediately, due to poor management of the way I am treated by the CEO, C00, and trustees.

My time at STPE has caused an enormous amount of stress, anxiety and contributed to a lot of issues in my life, I see no other choice but to leave. I came to STPE to gain skills and to be empowered as a young parent but that is not the lesson I am leaving with.

Regards
Lubamba Nzinga (Bambii)"

61. The resignation was accepted the following day [362]

Submissions

62. We heard oral submissions from the claimant and respondent and were referred to a number of authorities. These have been taken into account.

Conclusions

63. Having considered our findings of fact, the submissions and the relevant law, we have reached the following conclusions on the issues:

Victimisation

Protected Acts

64. Although the respondent conceded at a case management hearing on 25 February 2020 that all the matters relied on by the claimant were protected acts, ultimately it is a matter of law for the Tribunal to decide. Looking at each of the matters relied on in turn:

65. ***Collective grievance – June 2018*** – This is referred to at paragraph 18 above. We are satisfied that this was a protected act as it was a complaint about alleged racially offensive comments.

66. ***Grievance of 5 Sept 2018*** - see paragraph 25. We are satisfied that this grievance was a protected act as one of the matters complained about was a comment by HP which the claimant said she found racially offensive.

67. ***Email 11 January 2019***. See paragraph 3 above. The reference to bullying and harassment in the email is not in our view a reference to the EqA but is used colloquially in the same way as it is used against the claimant by the respondent in relation to her alleged treatment of BDV. However, further on in the same email the claimant says: "*I do not think it is a coincidence that the people who spoke out against Hilary are now the people sat at home and being prosecuted (*probably means persecuted*) by a nonsense claim*". The reference to speaking out against Hilary would have been understood by the respondent to refer to the collective grievance, which, as has already been found, was a complaint about racial harassment. It would also have been clear to the respondent on reading this letter that the claimant was suggesting that she and her colleagues had been singled out for suspension because of their complaint against HP. That is the essence of a complaint of victimisation. We therefore find that the letter amounts to a protected act pursuant to section 27(2)(d) EqA.

Detriments

68. The detriments relied upon are at paragraphs 85 (iii) to (xi) of the Amended Particulars of Claim and our findings on those are as follows:

85(iii) – Respondent's email of 17.8.18 claiming that her absence amounted to unlawful absence due to unlawful industrial strike action when she was on sick leave

69. See paragraph 20 above. The claimant's allegation is not made out on the facts as the letter in question does not claim that her absence amounted to unlawful absence, only that it would, if she were absent as a result of the unofficial industrial action. That is a statement of fact. The letter was sent to all staff because the respondent was not clear who was present on the day of the unofficial industrial action. When the claimant explained her absence, no further action followed. This detriment is not made out on the facts.

85(iv) – The respondent's failure to deal with her first grievance appropriately or fairly and failing to communicate what (if any action) had been taken in relation to HP

70. This is dealt with at paras 25-28 above. Based on our findings, we are satisfied that the grievance was dealt with appropriately. The claimant was interviewed in relation to the grievance and had an opportunity to put her case. HP and AM were also interviewed. The

matter was not dismissed out of hand, in fact the grievance was partially upheld. If the claimant had been unhappy with how the grievance was dealt with she could have appealed. The allegation is not made out on the facts. On the second part of the alleged detriment, whilst it is true that the claimant was not told what action was taken against HP, we find no evidence of a causal link between that and the protected acts.

85(v) The respondent's unreasonable suspension of the claimant on 30 November 2018

71. See paragraph 32 above. We are satisfied that the reason for suspension was to protect BDV from what was described as a lashing out at him by staff, egged on by PJS. Given that the allegations were of bullying and harassment, suspension was a reasonable step to take. It was consistent with the respondent's disciplinary policy which allows for suspension in the case of serious or gross misconduct [62] It is also consistent with the action taken against HP when staff made similar allegations against her. We find that the suspension was not connected to the claimant's protected acts.

85(vi) The respondent's threat contained in its email of 2 December 2018 that she potentially committed a serious disciplinary offence

72. This is still a reference to the suspension letter and we find that this was a statement about the severity of the allegations contained in the letter and flows from the decision to suspend. We find that the statement was not connected to the protected disclosures.

85(vii) The unreasonable length of the suspension and failure to update the claimant

73. The claimant was suspended from 30 November 2018 to 11 March 2019. The claimant accepted in evidence that the length of the disciplinary investigation was outside the respondent's control as it was conducted by somebody externally. Hence by the end of the hearing, the focus of this detriment had shifted to the period between 24 February 2019, when the respondent obtained the investigation report, and the 9 March 2019 when the claimant was informed of the lifting of her suspension. That is a period of 10 days. We do not consider a 10-day period an excessive delay. The claimant remained on full pay throughout and even though she was told she should return to work on 11 March, she wanted to delay her return until the beginning of April [285] In those circumstances, we do not believe that the additional period amounted to a detriment. However, if we are wrong about that, we find that the detriment was not connected to the protected acts.

74. The other part of this detriment is failure to keep the claimant updated about the investigation. However, we are satisfied that she was updated on 2/12/18 and 6/12/18 [140 & 144]. The claimant does not suggest that she chased the respondent thereafter for a further update, which it ignored. There is no evidence of a causal link with the claimant's protected acts.

85(viii) The respondent's failure to deal with her second grievance of 11 January 2019

75. This is dealt with at paragraphs 34 and 43-46. As is clear from our findings, not only did the respondent not deal with the grievance, a conscious decision was taken not to do so.

76. We have considered whether there are matters from which we could draw an inference that the protected acts were the reason for this and have taken account of the following matters:

77. It is clear from our findings at paragraphs 39 and 40 above that JB, and at least one other member of the Board of Trustees (GS), was of the firm view that the claimant should be dismissed. There was no basis to dismiss her on conduct grounds as she had been exonerated following the disciplinary investigation. There was also no basis to dismiss her on performance grounds though the possibility of doing so some time in the future was mooted by JB. JB wanted to dismiss on grounds that there had been an irretrievable breakdown of the working relationship and relied on the claimant having said that she would not work with HP. However, we are not convinced that JB genuinely believed that this amounted to an irretrievable breakdown in the relationship with the respondent. JB knew that HP was retiring in a few months so it was entirely feasible to manage the working relationship until then. Further, JB's email to HP of 21 March 2019 refers to the need to accumulate evidence of irretrievable breakdown (see para 50) which suggests that he was aware that there was no evidence to support a dismissal on this basis. The claimant's unwillingness to work with HP was because of the matters raised in the June 2018 and September 2018 complaints (the first and second protected acts). Those are referenced in her subsequent grievance of the 11 January 2019. Unlike the earlier grievances, this one was not dealt with in accordance with the respondent's grievance policy, or at all.

78. HP had been found guilty of inappropriate remarks breaching the company Equality and Diversity policy (and most probably the Equality Act 2010), for which she had received a written warning and final written warning within 6 weeks of each other. Yet despite this, the complainants, which included the claimant, were seen by the respondent as the problem that needed solving, rather than HP. By this time, LB, the former chair of Trustees, had stepped down. He had played a leading role dealing with the grievances and the decision to discipline HP. It is apparent from HPs subsequent correspondence with the Board that she was unhappy with LB's finding against her in the claimant's September 2018 grievance and wanted the board to reverse it. [para 49]. It appears that the Board was sympathetic to that as on 17 July 2019, GS informed the Board that he had reviewed the September 2018 grievance outcome and reversed the finding against HP [D165]. The claimant had by this time left the respondent's employment and was not interviewed by GS or notified that the grievance outcome had been reversed. GS did not give evidence before the Tribunal. JB said in his evidence that the decision was reversed because evidence had come up to suggest that the remarks alleged to have been made by HP were not said. We found JB's evidence on this (and indeed on other matters) unconvincing. When we asked JB what the new evidence was, he was unable to say. We believe that the decision was reversed on HP's request to protect her reputation and potential legal liability and that of the respondent.

79. In light of the above matters, we consider that there is evidence from which we could infer a causal link between the failure to deal with the 11 January 2019 grievance and the claimant's protected acts. The burden therefore shifts to the respondent to prove that there was no such link.

80. No explanation has been given for not dealing with the grievance. As is clear from our findings at paragraphs 44 and 45 above, JB's evidence on this was contradictory and generally unsatisfactory. He initially denied that it was a grievance at all, then claimed that it was dealt with by the Board, then claimed he was unsure whether it was dealt with by the Board or by B3Sixty. What we are left with is a detriment which the respondent has failed to prove is not because of the claimant's protected act. In those circumstances, we must conclude that the reason for the failure to deal with the claimant's grievance of 11 January

2019 was indeed because of her protected act, specifically, the September 2018 grievance (the second protected act)

85(ix) – The respondent's email of 9 March 2019 which unreasonably stated that her demeanour and performance at work will be monitored

81. This is a reference to the matters at paragraph 41 above. For the reasons stated at paras 77 and 78 above, we consider that the burden has shifted to the respondent to explain why the claimant's demeanour and performance was to be monitored on her return to work. This is not dealt with in the statements of either of the respondent's witnesses and they did not provide an explanation in their oral evidence. It was submitted by Mr Henry that the same letter was sent to 2 other suspended staff. However, that does not assist the respondent's case as those 2 individuals were Savannah and Emily, part of the cohort of 3 (along with the claimant) that JB wanted to get rid of [269] Interestingly, Mr Henry did not contend that the other 2 individuals did not have complaints against HP. Mr Henry further submitted that it was likely that it was as a result of the incident on 30 November 2018. Again we disagree as the claimant (and her 2 colleagues) were exonerated and the respondent knew this. We consider that the demeanour and monitoring was part of the plan to get rid of the claimant. At this point, the majority of the Board had voted against dismissing the 3 and in an email exchange, HP and JB discussed alternative ways of achieving this and monitoring performance or behaviour was suggested. The comment is made that there would need to be a least one written warning. [271] This to us seems very calculated and contrived and when considered against the backdrop of the correspondence between the Board members about the claimant and her colleagues you have to question the motive behind the monitoring of demeanour and performance. The respondent has not proved that the statement about monitoring was not because of the claimant's protected act(s) and we therefore find that it was because of her September 2018 grievance.

85(x) – The substantial and unreasonable change to her role following her return from suspension

82. This refers to the matters at paragraphs 51 and 52 above. We do not accept that there was a substantial change to the claimant's role. We are satisfied that what the claimant was being asked to do, in going to Hastings, was within her skill set and her job description. To the extent that there was a change, we are satisfied that it was for genuine business reasons and that the respondent was entitled to ask the claimant to do other tasks at a different location. Furthermore, given that the claimant had agreed to go to Hastings, it is difficult to see how the respondent asking her to do so was unreasonable or amounted to a detriment because of her protected acts. This complaint is not made out.

85(xi) – The respondent' failure to deal with her holiday request in April 2019 in a reasonable way and incorrectly denying her holiday entitlement

83. This is a reference to the matters at paras 54-56. It appears to us that this issue arose because of a misunderstanding on the claimant's part of the respondent's policy on the accrual and taking of annual leave. The respondent's position that suspension did not affect holiday accrual or the deduction of leave for the Christmas shutdown was in our view reasonable and logical. Suspension is supposed to be a neutral act so it would be bizarre if being suspended gave a person an advantage over employees who were working normally. That would have been the effect had the claimant got her way as she would have had an extra 94 hours leave to take at a time of her choosing. We therefore do not accept the

premise of this detriment. BDV did not reject the claimant's request in its entirety but invited her to re-submit it based on her correct outstanding holiday entitlement. She did not do so. In the circumstances, we do not accept the premise of this alleged detriment and we find that it is not made out on the facts.

84. Our conclusion is that the victimisation claim in relation to detriments 85(viii) and (ix) are well founded but the remaining victimisation allegations fail.

Constructive Dismissal

85. The claimant relies on the matters relied on as victimisation detriments as well as 3 further matters. Save for detriments viii and ix, and to the extent that unfavourable treatment was found, we are satisfied that there was reasonable and proper cause for the treatment and that the conduct individually did not amount to a repudiatory breach of contract. We return to detriments viii and ix below. The 3 additional matters relied on are:

The respondent's comments about her partner in July 2018

86. This relates to the conduct of AM during a meeting with the claimant and is detailed at paras 25-28. Whilst the comments may have been objectionable, the conduct of the respondent in addressing the matter was in our view reasonable. The claimant's grievance on this point was investigated and upheld and AM was spoken to about his behaviour. There was nothing to indicate to the respondent that the claimant was unhappy with the outcome as she did not appeal the decision. In those circumstances, we find no breach on the respondent's part.

BVD's behaviour on 29 March 2019

87. Based on our findings at para 52, this allegation is not made out

Final Straw - BVD's behaviour on or about 7 April 2019

88. In her particulars of claim, it is stated that "*the claimant claims that BDV's conduct in early April 2019 in effectively denying her the opportunity of participating in an art project amount to the final straw and she resigned in response*" [33-32]. This is the holiday request issue that we deal with at paragraph 83. Based on those conclusions, we find that the alleged conduct did not take place and can therefore not amount to a final straw. In her witness statement, the claimant includes as part of the final straw BVD's failure to discuss the matter further. However, we consider this to be innocuous and therefore insufficient to amount to a final straw.

89. However, if we are wrong about the final straw, we find in any event that the final straw act was not the last in a series of acts which, cumulatively, amount to a repudiatory breach of the implied term of trust and confidence.

90. Returning to detriments viii and ix, based on our conclusions, we find that that there was no reasonable or proper cause for the respondent's actions and that they were calculated and likely to destroy or seriously damage the relationship of trust and confidence. Those actions therefore amounted to a repudiatory breach of the employment contract. However, we find that the claimant affirmed the contract. That is because on 9 March 2019, after querying both matters with the respondent, the claimant indicated her intention to continue to be

bound by her contract by stating her intention to return to work, albeit that she was requesting a delayed return date. The claimant did return and remaining in employment until her resignation on 2 May 2020. In those circumstances, and in the absence of a final straw act, the claimant cannot rely on these breaches as the basis for her constructive dismissal claim.

91. We therefore find that the constructive dismissal claim fails.

Judgment

92. The unanimous judgment of the tribunal is that:

   i. The victimisation claim in relation to allegations 85(ix) and (viii) succeeds

   ii. All other allegations of victimisation fail.

   iii. The constructive dismissal claims fails

93. The matter will be listed for a remedy hearing on a date to be advised.

Employment Judge Balogun
Date: 4 December 2020