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THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms H Ali **v London Borough of Camden**

Heard at: London Central **On**: 15, 16, 17, 20 February 2017
(Chambers: 21 February 2017)

Before: Employment Judge Glennie

Members: Mr G W Bishop
Mrs E Ali

Representation:

Claimant: In Person
Respondent: Mr S Sudra, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that all of the complaints under the Equality Act 2010 and of constructive unfair dismissal are dismissed.

REASONS

1 By her claim to the Tribunal the Claimant, Ms Ali, makes the following complaints:0

1.1 Breach of the sex equality clause under the Equal Pay Legislation.

1.2 Harassment related to religion and/or race.

1.3 Direct discrimination because of religion and/or race.

1.4 Victimisation.

1.5 By way of amendment of the claim, constructive unfair dismissal.

2 The Respondent, the London Borough of Camden, resists those complaints.

3 The Tribunal is unanimous in the reasons that follow.

The Issues

4 The complaints, save for constructive unfair dismissal which had not been added to the claim at that point, were identified in Schedule A to the case management orders made by Employment Judge Snelson on 8 November 2016. A copy of Schedule A is attached to these reasons as an annexe.

5 In relation to the complaint of constructive unfair dismissal, the Tribunal identified the issues on liability as being as follows:-

5.1 Did the Respondents breach the implied term of trust and confidence in the employment contract. The Claimant relied on effectively all of the matters relied upon in relation to the other complaints and the following:

5.1.1 The failure of the appeal against the grievance decision to correct the injustice of the original decision.

5.1.2 On 18 October 2016, Mr Mascarenhas telephoning the Claimant asking her what was going on in terms of the appeal and asking why she had not returned to work as the work was building up and there was no one to pick it up. He also said that, should the Claimant not return to work, then he would be informing members of the department the reason why she was off work.

5.1.3 On 29 November 2016, the Respondent's in house legal representative Mr Sudra sent an email accusing the Claimant of breaching confidentiality and the Data Protection Act by asking for disclosure of relevant documents and threatening disciplinary action. This was the "last straw" relied upon by the Claimant.

5.1.4 Although this point was not pleaded or raised in her witness statement, in submissions the Claimant also relied on the Respondent's failure or refusal to undertake judicial mediation following the preliminary hearing on 8 November 2016.

5.2 If there was a breach of contract, did the Claimant resign in response to it.

5.3 Had the Claimant lost the right to rely on any such breach, e.g. by reason of waiver.

5.4 If there was a dismissal, was it fair or unfair.

6 It was agreed that in first instance the Tribunal would hear and determine the issues as to liability. The evidence and submissions were concluded at around 1pm on the fourth day of the hearing. The Tribunal then reserved its judgment and deliberated on the afternoon of the fourth day and during the fifth day.

The Evidence and Findings of Fact

7 The Tribunal heard evidence from the following witnesses:-

1. The Claimant Ms Ali, on her own behalf (the remaining witnesses were called on behalf of the Respondent).

2. Ms Atlanta Taguiang, who fulfilled various junior roles during the material time.

3. Mr Beniam Amanuel-Equbalidet, a Purchase to Pay Payments Control Officer.

4. Ms Naz Sabur, a Purchase to Pay Officer.

5. Mr Nigel Mascarenhas, Head of Treasury and Financial Transactions.

6. Mr Howard Hinds, a Transaction Accountant.

7. Ms Mary McGowan, Director of Housing Management Supporting Communities.

8. Ms Deirdre Deats, Senior HR Business Advisor.

8 There was an agreed bundle of documents and page numbers that follow in these reasons refer to that bundle.

9 The Claimant started work for the Respondents on 27 October 2014 as an Insurance Claims Handler. Broadly this job involved receiving and investigating claims of various sorts against the Respondents. The Claimant had some previous experience of claims handling, as she worked for the Motor Insurers' Bureau for around 4½ years and thereafter for solicitors or insurance companies. Before joining the Respondents she had not worked for a local authority and, immediately before taking up her post, she had not been working for a period which she estimated at about 6 months.

10 There were three insurance claims handler roles available when the Claimant applied. The selection process involved a written test intended to determine the candidate's technical knowledge, and an interview. It was common ground that of the candidates who applied, the Claimant achieved the top score in the written test (there was some debate as to whether this was 90% or 98%, but nothing turns on that). The Respondents made three initial offers of employment, one was to the Claimant, another to Mr Wall who was subsequently named as her comparator in respect of the equal pay complaint and who had been working for some time on a temporary basis for the Respondents, and the third to a candidate who had applied from the London Borough of Barnet. The last named turned down the offer and so the third person to be appointed was a Ms Delo, who like Mr Wall had been working for the Respondents on a temporary basis.

11 In round figures, the three appointees started on the following salaries:-

Mr Wall - £30,000 per annum;

Ms Delo - £28,500 per annum;

The Claimant - £27,185 per annum.

12 The explanation that Mr Mascarenhas gave to the Tribunal for the disparity in salary between the Claimant and the other two appointees was that the latter two had greater experience than she did in local authority insurance claims. The Claimant in fact had no such experience, since her previous experience as explained above was in the private sector. Mr Wall had five years experience in local authority insurance and Ms Delo three and a half years.

13 On 20 May 2016 the Claimant had raised a grievance at pages 136-7 in respect of her Equal Pay complaint. In this she said that Mr Mascarenhas' justification for Mr Wall's higher salary was that the latter was older than she was. At page 138 there was an email from Mr Mascarenhas to Ms Deats and Ms Lovegrove (the Claimant's line manager) in which he said that he had not referred to age but to Mr Wall's greater experience. Given Mr Mascarenhas' evidence, the Tribunal concluded that the reference to age (rather than experience) must have been a misunderstanding on the Claimant's part. It was inherently unlikely that an employer would refer to the (apparently discriminatory) factor of age as justifying a difference in salary.

14 When questioned by the Claimant about this aspect, Mr Mascarenhas agreed that if claims reached the point of litigation they would be dealt with through what is known as the portal and that the procedure involved would be the same whether the claim arose in the private or the public sector. He said that previous local authority experience was relevant at the earlier stage of gathering evidence, and that previous experience of dealing with the types of claim that might be brought against local authorities could be important. He was asked for examples and he cited claims in respect of highway

disrepair, which were particular to local authorities and could not ordinarily arise in the private sector. Mr Mascarenhas also stated that the Respondents had many claims arising from the effects of tree roots and he commented that within the Borough there were many tree-lined roads with expensive houses on them. He also cited water damage claims as another type that would be common in the public sector. He added that candidates who from time to time joined the Respondents from other public sector bodies, such as housing associations, generally did not have the range of experience that could be gained by working in a local authority as such.

15 Mr Mascarenhas conceded that his knowledge of the insurance claims aspect was somewhat limited as he was a head of division, but he also added that previous local authority experience could be useful in giving rise to knowledge of how local authorities were organised and in the particular techniques of taking calls from individuals who were asserting potential claims. He denied that sex was a factor in setting the salaries to be paid to the employees.

16 The Tribunal accepted Mr Mascarenhas' evidence on this aspect. It was plausible that a local authority might value previous experience in this particular field of work, and the salaries agreed with each of the three appointees appeared to reflect their respective levels of experience. Mr Wall had the most experience and had the highest salary; Ms Delo had previous experience, albeit not as much as Mr Wall, and the Claimant had no previous experience. The Tribunal found that Mr Mascarenhas had given a cogent explanation of why it might be of benefit to a claims handler in the local authority field to have had previous experience in that area.

17 The equal pay complaint stands separately from the complaints related to race and/or religion and constructive dismissal. The Tribunal can therefore express its conclusions about this complaint at this stage. We were satisfied that the Respondents had shown that the difference between the Claimant's terms (i.e. her salary) and Mr Wall's terms was because of the difference in previous local authority claims experience and that this was a material factor. This factor did not involve treating the Claimant less favourably than Mr Wall because of her sex. The comparison between Mr Wall, Ms Delo and the Claimant showed that sex was irrelevant to the operation of this factor.

18 Returning to the chronology of events, in April 2015 the Claimant's initial probationary period in her position was extended for a period of one month. The record of this is at pages 93 to 94. The Claimant did not consider that this was justified, although in the Tribunal's judgment this particular point was not of great significance to the issues to be decided. In May 2015, at page 97, Ms Lovegrove in an email to Mr Mascarenhas said that there had been an improvement in the Claimant's work and that she had "really progressed" since March. Following this the Claimant was confirmed in her employment as a claims handler.

19 Shortly after this, also in May 2015, there began to occur problems in the relationship between the Claimant and Miss Taguiang. The Respondents' office at the Crowndale Centre was organised on an open plan basis with hot desking, which meant that members of different teams within the organisation would sit at any desk that was available, using telephones and/or computers as required. There was therefore the opportunity for interaction between the members of the various different teams.

20 On 11 May 2015, at page 95, the Claimant sent to Ms Lovegrove an email in which she said that Miss Taguiang's behaviour in the office was affecting her concentration at work. It is apparent from the email that the Claimant had previously mentioned this particular issue. In the email she complained of matters such as singing, humming and sniffing, making personal calls on her mobile telephone and calling Mr Hinds over for assistance from time to time, saying that it would have been easier if Ms Taguiang had sat next to him or near him. The Claimant said that she did not believe that Miss Taguiang was doing these things intentionally but that she seemed to be unaware that this behaviour was affecting other people around her. Ms Lovegrove replied that she would address these matters with Miss Taguiang but would pick her timing carefully.

21 On 29 May 2015, at page 99, the Claimant sent an email to Miss Taguiang, copied to Ms Lovegrove, in which she said "Hi Atlanta, please can I politely ask you to blow your nose as its distracting my concentration of work, many thanks". Miss Taguiang took exception to this and it appears that she copied other colleagues into the email. It is evident that there followed a certain amount of discussion about this among those working in the office because on 24 June 2015 there took place a meeting, a note of which appears at pages 111 – 112, attended by the Claimant by telephone, Miss Taguiang, Mr Avery Duesbury (Miss Taguiang's manager), and Ms Lovegrove.

22 Before this meeting took place, there was another incident involving the Claimant and Ms Taguiang. On 5 and 15 June 2015 there was an email exchange at page 100 in which the Claimant asked Ms Taguiang to action a particular matter and the latter replied that she was unable to do so. The details of this were not canvassed in the hearing before the Tribunal, but it appeared from a lengthy email of 17 June 2015 from the Claimant to Ms Lovegrove (pages 102-3) that this had given rise to a perception on the Claimant's part that Ms Taguiang felt antagonistic towards her. On the other hand, Ms Taguiang said in her witness statement that she thought that the Claimant had taken this matter personally. In the light of all the other evidence about the relationship between the Claimant and Ms Taguiang, the Tribunal found it likely that they both did.

23 The note of the meeting on 24 June 2015 records that Ms Lovegrove reminded both the Claimant and Miss Taguiang that it was not acceptable to talk about members of staff behind their backs to other colleagues. She said, in summary, that if there was a problem it should be raised with the relevant Line Manager. She referred to the Respondent's code of conduct

setting out the expectations for behaviour in the workplace. Ms Lovegrove and Mr Duesbury said that if the two concerned could not be professional and treat each other with dignity, then they should keep their distance from each other. They worked in different sections and had little need to interact. They strongly suggested that both should apologise to each other, move on and find a way to work together in the future. The note of the meeting ends by recording that the two managers recommended that for the immediate future the Claimant and Miss Taguiang should sit on separate banks of desks, but that over time they would need to find a way to be able to sit near each other without antagonising each other.

24 The first allegation of harassment in the List of Issues referred to 17 December 2015. In her witness statement, the Claimant said that following the July meeting, Miss Taguiang would try to shoulder barge into her when she found an opportunity. She continued that on 17 December, as she was leaving the office, Miss Taguiang knocked into her right shoulder and walked off smiling to herself. Miss Taguiang in her evidence denied that any such event took place.

25 Given what had gone before, and the evidence to which we will refer in due course about subsequent events, the Tribunal found that after the July meeting there continued to be a degree of ill will between the Claimant and Miss Taguiang. There was no obvious solution to the issue as to whether this had involved a physical element, whether this be of shoulder barging, obstructing, or bumping into one another, since the only evidence available to the Tribunal was the Claimant's assertion that it did, and Miss Taguiang's assertion that it did not. The Claimant did not say that there were any witnesses to the incidents that she complained of, nor would one realistically expect there to be if these things did indeed happen.

26 That said, the Tribunal concluded that it was not, in the final analysis, necessary to decide precisely what occurred as between the Claimant and Miss Taguiang in this particular respect. This was because, whether or not there was some physical element to the antagonism between them, there was nothing in the evidence about this conflict between the Claimant and Miss Taguiang to suggest that the former's race or religion was a relevant factor. The obvious explanation, and the Tribunal found, the true one, for the deterioration in the relationship was that each had taken exception to something that the other had done. Miss Taguiang was upset by the Claimant's emails about her distracting behaviour and the Claimant was displeased by Miss Taguiang's reaction to her request to the financial controls team. Indeed, the Claimant in her own evidence at paragraph 20 of her witness statement gave an explanation for Miss Taguiang's behaviour which was unconnected with her own race and religion, namely that "she was not happy with the decision made by Susan and Avery to sit separately with their own teams and bared a grudge as a result".

27 In chronological terms, the second incident of harassment relied upon by the Claimant was that on 4 March 2016 and described in the issues recorded by

Employment Judge Snelson as "Howard Hinds shouting at her to take her headscarf off", this being a reference to the Hijab that the Claimant wears for religious reasons.

28 On the day in question, 4 March, the Claimant sent an email to Ms Lovegrove at page 124 which began with the observation "this is not a complaint but I would appreciate if you can have a quiet word with Howard [i.e. Mr Hinds]". The email continued that when the Claimant arrived she found the office stuffy and she decided to open a window to let in some fresh air. She continued "only to be told by Howard across the room that I was wearing a headscarf and that is why I was feeling hot and probably taking it off would cool me down, which I found insulting …" The Claimant continued that she later saw Mr Hinds and Mr Amanuel-Equbalidet whispering and sniggering about the incident. The Claimant concluded her email with the following words, "although I don't mind discussing my religion certain things like the above situation can come across as offensive, although I don't think he may have meant it maliciously, he also didn't think there was anything wrong with the comment. I really don't want to make a big deal out of the situation but would like it if you can have a word with him and remind him comments like this can come across as offensive".

29 Ms Lovegrove responded to the Claimant on 7 March 2016 in an email at page 122. She said this: "I have spoken to Howard this morning and although he thought he said something different he did recall mentioning your headscarf and he was really apologetic that you found his comment insulting. He was apologetic and did not mean to insult you and he hopes this does not affect your working relationship, I have advised him that such comments should not be said in the future and he assures me they will not".

30 These matters became the subject of a formal grievance raised by the Claimant on 2 June 2016. When interviewed in connection with this, Mr Hinds disputed agreeing that he had made reference to the Claimant's headscarf and he said that Ms Lovegrove's assertion was incorrect in this respect, a position that he maintained in his evidence to the Tribunal.

31 The Claimant's grievance dated the 2 June 2016 commences at page 155. On page 156 the Claimant referred to the events of 4 March 2016, saying at one point: "Howard for an unknown reason decided to shout across the office stating "take your headscarf off if you are feeling hot", he found the comment quite amusing and had a laugh with his friend Beniam after he had made the comment (both ended up laughing like schoolboys which I found extremely humiliating). Howard did not believe the comment was insulting as he did not apologise for the comment he had made despite informing him that I had found it quite insulting".

The Claimant continued that at that stage she did not wish to make a big issue of the matter and she referred her email to Ms Lovegrove asking for her to have a word with Mr Hinds.

32 The Tribunal noted that in the grievance the Claimant's complaint was that Mr Hinds had shouted the words concerned across the office. The Claimant set out the allegation in substantially the same terms in her ET1 at page 16 and in paragraph 23 of her witness statement. When cross examined about the difference between her email, in which she said that Mr Hinds *said* the words concerned and the later complaint that he *shouted* them, the Claimant said that he spoke in a shouty voice.

33 Returning to the grievance investigation, the notes of Ms Lovegrove's interview at page 197 record that she told the investigator, Ms Cooper, that Mr Hinds' point "was he mentioned the headscarf to say that might be why you are hot but not meant maliciously" and she said that he was really apologetic. When Mr Amanuel-Equbalidet was interviewed he said at page 204 that Mr Hinds "said something along the lines of you may not feel the cold as you have your headscarf on". Mr Hinds himself said at page 217 that he said "at least your head is covered, did not use the term headscarf as a man do not know the correct term." He said that the Claimant immediately said that she was offended by that and that he responded that he had not said anything offensive and that he looked to Mr Amanuel-Equbalidet for confirmation of this, which he gave. He said that the reaction of the two of them was a nervous reaction and that they were not laughing at the Claimant.

34 In his evidence to the Tribunal, Mr Hinds maintained that he did not use the word "headscarf" when speaking to the Claimant on this occasion, and that so far as the question of anyone's head being covered was concerned, this was intended as a joke against himself as he is bald. He said that when he spoke to the Claimant he indicated his own head with his hands. In response to a request from the Tribunal Mr Hinds demonstrated the gesture that he said that he made. This involved moving both of his hands above and around his own head in a way that the Tribunal considered could be interpreted by someone seeing it either as indicating his own lack of hair, or a head-covering such as a headscarf.

35 There was, in the event, a fair amount of common ground between the Claimant and Mr Hinds as to this incident. It was triggered by the issue of having the window open or closed. Mr Hinds made reference to the Claimant's head being covered and his not, although there was a dispute about whether he actually used the word "headscarf". The Claimant immediately said that she was offended by what he had said and Mr Hinds and Mr Amanuel-Equbalidet reacted in a way that Mr Hinds said was betraying their nerves but which the Claimant understood as them laughing at her. Mr Hinds did not there and then apologise to the Claimant; when asked by the Tribunal why he did not do so, given that she had said that she was offended, he said that apologising would have been admitting that he had said something negative and he did not feel that he had anything to say sorry for.

36 The Tribunal considered that in reality it made little difference to how this incident should be regarded, whether Mr Hinds did or did not use the particular word "headscarf". The Tribunal concluded on balance that he probably did use that word since the Claimant and Mr Amanuel-Equbalidet both recall that he did, and Ms Lovegrove, whether rightly or wrongly, had gained the impression that Mr Hinds agreed that he did at the time. That said, however, the Tribunal concluded that whatever the particular words used, Mr Hinds had referred to the Claimant's headscarf in connection with their difference of opinion about the temperature, and the Claimant had found this offensive. It was also to be noted that when she first contacted Ms Lovegrove about the incident, the Claimant herself did not wish to make a great deal of it and was of the opinion that Mr Hinds had not acted maliciously.

37 Following the incident on 7 March 2016, Ms Lovegrove spoke to Mr Hinds as we have already noted. It was apparent from Mr Hinds' evidence that he was not pleased by being spoken to about the matter, and he said that after this he kept his distance from the Claimant.

38 The third incident relied on by the Claimant as amounting to harassment was on 11 March 2016 when she was attending an Excel training event along with a number of colleagues including Mr Hinds and Miss Taguiang. The complaint was "Mr Hinds directing a comment at her about "rag head" and other members of staff laughing."

39 We have already referred above to the allegation against Miss Taguiang of barging into the Claimant during the lunch break on this date. The Claimant's allegation against Mr Hinds was that she was a couple of minutes late back to the afternoon session after lunch, and that as she entered the room she heard Mr Hinds saying the words "rag head", causing Miss Taguiang to giggle. The Claimant said that as everyone was talking aloud, she was the only person (presumably the only other person) who heard the comment. There was then an exchange between her and the trainer about the reason why she was late, which involved reference to a Cartier ring and the fact that the trainer had blonde hair.

40 When asked about this incident, Mr Hinds said that he had not spoken to the Claimant at all on 11 March and that he had never heard the expression "rag head" before. He said that when it was put to him in the course of investigation, he had to ask someone what it meant. He stated that he could not think of anything that happened on that occasion that could have been interpreted as a comment about the Claimant. Miss Taguiang supported Mr Hinds' account. Ms Sabur agreed that she was also sitting alongside Mr Hinds and said that she did not hear him use the word "rag head", although when cross-examined she agreed it was possible that he had said something that she had not heard.

41 Again, the Tribunal was presented with a conflict of evidence between the Claimant and Mr Hinds. We found, as a matter of probability, that Mr Hinds

did not use the words "rag head" or say anything derogatory about the Claimant on this occasion. It may be that the Claimant overheard him say something which she thought was the words "rag head" and was directed at her, although it is impossible to reach any firm conclusion of this nature. However, the reasons why the Tribunal concluded that the comment was not made were as follows:-

41.1 The Claimant made no immediate complaint about the matter. This was in contrast to her raising the 4th March incident with Ms Lovegrove. The Tribunal considered that, had the Claimant felt confident that Mr Hinds had made this remark to her so soon after she had complained about the previous incident, she would have complained about this matter as well.

41.2 In her grievance at page 161 the Claimant referred to the excel training and her complaint that Miss Taguiang had collided with her on two occasions, and then added seemingly as a subsidiary matter "there was also a few other near misses on the day and Hijab jokes with Howard which I ignored". When asked in cross examination why she had not quoted Mr Hinds and used the words "rag head", the Claimant replied that the investigator did not ask her what she meant by Hijab jokes and added that the first occasion on which she had been asked the question was at the Preliminary Hearing when Employment Judge Snelson asked what words she said had been used. Again, the Tribunal considered that if the Claimant had been confident about the use of the words "rag head" she would have specified these in her grievance.

41.3 The Tribunal considered it inherently unlikely that, having been warned on the 7 March that he should not make references to the Claimant's headscarf, Mr Hinds would then on 11 March have made what must be regarded as a much more inflammatory reference to it. The Tribunal accepted, as did the Claimant at the time, that what happened on 4 March was not meant maliciously. The Tribunal also accepted that following the discussion with Ms Lovegrove on 7 March Mr Hinds decided to keep his distance from the Claimant. Although he was not pleased about being spoken to by Ms Lovegrove, we found no reason to believe that Mr Hinds then decided to insult the Claimant on a later occasion and to do so in a way that he knew would cause her to take offence.

42 The fourth allegation of harassment related to the 27th April 2016 and was put in terms of Miss Taguiang pulling faces at the Claimant and Mr Hinds making a gesture as if to remove her headscarf.

43 It was common ground between the Claimant and Mr Hinds that there was some form of altercation on this occasion. On 27 April at page 126 Mr Hinds sent an email to his line manager Ms Ranjini Strong saying that he had been at work when the Claimant arrived and sat at a desk near him. He said that

she slammed her possessions onto the table and stood on his bag and kicked it. Later she opened the window beside him. He closed it again, saying that he was cold, and she said "I don't care I am opening it for a little while". Mr Hinds continued that about 15 minutes later the Claimant put on her coat, at which point he was on the telephone and the conversation was such as to make him feel hot, and so he turned on a fan, which the Claimant took away and turned off.

44 The Claimant denied banging her things on the desk or interfering with Mr Hinds' bag. The account of the matter which she gave in her grievance at pages 156 and 157 was that she asked Mr Hinds whether she could open the window, he made no response and when she proceeded and opened the window he said under his breath quite aggressively "I will close it right back again," and that he did exactly that. She continued that subsequently he turned on the fan as it was hot in the office and that she then overheard him speaking to Ms Strong about her. Earlier in her grievance but referring to chronologically later matters, the Claimant said that at approximately 11 o'clock Miss Taguiang came over to speak to Mr Hinds and that "during this time she asked him a few questions relating to work and then decided to pull faces behind my back in which Howard smirked and suggested to pull it off (referring to my headscarf).

45 In paragraph 33 of her witness statement the Claimant said that Mr Hinds gestured to pull it off, referring to her headscarf, and this was reflected in the issues listed at the Preliminary Hearing. When cross examined about this matter, the Claimant said that although she referred to Miss Taguiang pulling faces behind her back, she could see her and that she was pulling faces like a child would. The Claimant demonstrated the face that she was alleging, which the Tribunal describes as a sneering expression. When asked about Mr Hinds' part in the incident the Claimant said that he said "pull it off" and gestured with one hand towards his own head in a way that was similar to what had happened on the 4th March.

46 When Mr Hinds was interviewed in connection with the Claimant's grievance, he denied pulling faces or saying that the Claimant should remove her headscarf; he said "this is racist and I am not racist". He said that Miss Taguiang did not pull faces and that this was not something that she would do or that anyone in the office would do. Mr Hinds maintained the same account in his evidence to the Tribunal and again was supported by Miss Taguiang, who denied pulling faces at the Claimant.

47 The Tribunal concluded that what occurred on 27 April was similar to what had happened on 4 March. Again, the incident appeared to have been triggered by a difference of opinion about whether the window should be open or closed. On all accounts there was some degree of dispute and antagonism between the Claimant and Mr Hinds. It has to be said that activities such as kicking a bag, opening and shutting a window and turning on and off a fan, all in the context of a previous dispute about opening and closing the window, could appear somewhat childish to an observer. We

accepted that the Claimant could reasonably have perceived Miss Taguiang and Mr Hinds as giggling or pulling faces in those circumstances.

48 However, for the reasons that we have previously given in relation to 11 March, the Tribunal considered it unlikely that Mr Hinds would have made any reference, whether by means of words or a gesture, to the Claimant's headscarf. Although there was clearly a degree of tension, even ill will between them, the Tribunal considered it unlikely that Mr Hinds would have provoked the Claimant in this way, and found as a matter of probability that he did not do so. It may be that, given the similarity between the two incidents, the Claimant has conflated this in her recollection with what occurred on 4 March, although again it is impossible to reach that as a certain conclusion. However, the Tribunal concluded that Mr Hinds did not say anything about the Claimant's headscarf and that if he did make any gesture, whether inadvertently or otherwise, this was not directed at the Claimant's headscarf nor could it objectively be interpreted in that way.

49 Ms Lovegrove was out of the office on 27 April. On her return on the following day she saw Mr Hinds' email to Ms Strong and spoke to the Claimant about the matter. This conversation gave rise to the first allegation of victimisation. The Claimant's account was that Ms Lovegrove took her into a room and began telling her off about the incident the previous day, whereupon the Claimant gave her account of what had happened and about the incident with her headscarf during the excel training, and the shoulder barging incidents by Miss Taguiang in December and March. She said she asked Ms Lovegrove whether she believed what Mr Hinds had written in his email, and the latter said that she did not. She asked for some measures to be put in place to stop what was happening, including training for Mr Hinds and Miss Taguiang and that she said that these matters were affecting her health and work and that she was considering raising a grievance. The Claimant continued that Ms Lovegrove "told me to stop being oversensitive and get a grip". The allegation of victimisation was formulated as Ms Lovegrove telling the Claimant that she was being oversensitive.

50 When interviewed in connection with her grievance, the Claimant said in respect of this aspect at page 242, that when she said she wanted to take formal action Ms Lovegrove responded "do you think you are being to sensitive, he never said it about your headscarf like you think do you really think HR are going to do anything" (the reference to he never said it being in relation to Mr Hinds).

51 Although the words are similar there is a difference in tone and emphasis between a statement "you are being oversensitive" "stop being oversensitive and get a grip" and "do you think you are being too sensitive". The Tribunal found the matter of probability that it was the last of these that Ms Lovegrove said. This was for the following reasons:-

51.1 It is in the Tribunal's view a more plausible response in the circumstances.

51.2 There is an evident progression in the Claimant's accounts from the mildest version given in the first instance in the grievance investigation (do you think you are being too sensitive) to a stronger version is in the Preliminary Hearing (telling her that she was being oversensitive). The strongest version in the Claimant's witness statement (stop being oversensitive and get at grip). The Tribunal considered that all other things being equal, the account given nearest in time to the event was most likely to be accurate and that the others may have become inflated in the Claimant's mind with the passage of time.

52 On 4 May 2016, Ms Lovegrove sent an email to Mr Mascarenhas at page 128 referring to her conversation with the Claimant, saying that the latter was intended to raise a grievance and that she had mentioned other things that had happened which she had not raised with Ms Lovegrove and had not given further information about these. Mr Mascarenhas replied asking Ms Lovegrove to speak to HR in order to see whether it was possible to deal with this in a different way, as he considered that a grievance sounded far too formal.

53 Then on 5 May a conversation took place between Mr Mascarenhas and the Claimant which was the subject matter of the second allegation of victimisation in that the Claimant alleged that Mr Mascarenhas put pressure on her to pursue her grievance informally rather than formally. Mr Mascarenhas' position on this aspect was set out in his interview in the grievance investigation at page 184. He said that he could not remember the date, but that he said that the Claimant could take whatever action she wanted, informal or formal. The note continued "said not trying to pressure you, if you have a grievance everyone will have to be interviewed, she said she did not want that so I said I would have a conversation with them all. The formal route explained, what the formal route would mean in terms of interviews and witnesses and [the Claimant] did not want this."

54 The Tribunal concluded that these words showed that Mr Mascarenhas encouraged the Claimant to pursue an informal route in relation to her grievance and that in doing so he was doing no more than one would expect of any manager in the circumstances. Although the incidents that the Tribunal has described gave rise to offence and distress, they were, we considered, nonetheless the sort of events that would usually lend themselves to resolution via an informal route rather than investigation and a formal grievance. We concluded furthermore that there is no clear borderline between encouraging an individual to take an informal route and pressurising them to do so. These are matters of perception and degree. The matters that Mr Mascarenhas referred to in his interview would tend to indicate to the Claimant that pursuing a formal grievance was a less desirable course and she might interpret that as being pressured, at least to some degree, even if at the same time she was being told that she was of course free to pursue a formal grievance if she chose to do so. Whatever label was put on this however, the Tribunal concluded that this did not amount to a detriment. Mr

Mascarenhas was doing no more than saying that, while the Claimant was free to pursue an informal or formal resolution of her grievance, he was recommending, perhaps quite strongly, the informal route.

55 Following this discussion on 9 May 2016, Mr Mascarenhas conducted meetings with Mr Hinds and Miss Taguiang in which he held informal discussions about their interactions with the Claimant. His evidence, which the Tribunal accepted, was that he made use of scripts which appear at pages 130 and 131. He referred to the Respondent's code of conduct and said that talking negatively about people, gossiping, ganging up on people or any form of discrimination would be breaking the code of conduct. The script continued as follows:-

"I don't want to get into the details of she said this and I said that, I absolutely want this to stop. This means that I would like you to avoid contact with Hafsa [the Claimant] in general. I am now giving you a management instruction that you should sit with your team as evidence suggests hot desking throughout the whole office and interactions have been far from satisfactory."

"I would also ask you to refrain from discussion about and interaction with Hafsa. This includes emails as well. I can see there have been allegations and counter allegations on all sides, but the thing that worries me the most is any allegation of racist or anti-Islamic comments, that includes jokey comments and insinuation. If there are any further allegations I will be forced to conduct an investigation and will in all likelihood use disciplinary action."

56 On 26 May 2016, Mr Mascarenhas conducted a similar meeting with the Claimant. This gave rise to the allegation of victimisation that he refused her permission to be accompanied at the meeting and told her to stop gossiping. At the meeting, Mr Mascarenhas was assisted by Ms Deats on behalf of HR. It was accepted by the Respondents that the Claimant asked to be allowed to bring an observer and that this was not permitted. The evidence from Mr Mascarenhas and Ms Deats was that there was no requirement that an observer be allowed as this was not a formal meeting and that the reason why they did not allow this was that they wanted to limit the number of people involved in this whole situation.

57 The Tribunal accepted Mr Mascarenhas' and Ms Deats' evidence on this point. We found that, whatever view one might take about whether any harm would have been done in allowing an observer to attend, the reason why this was not permitted was that relied upon by the Respondents, and was not related to the fact that the Claimant had made a complaint of discrimination. It is apparent from the script for the meetings and it was clear from the evidence that Mr Mascarenhas gave to the Tribunal that he found the situation involving the interactions between Mr Hinds, Miss Taguiang and the Claimant very frustrating. The Tribunal accepted that he did not wish the antipathy between these individuals to spread further within the office and

that this would have been a reason for him to insist on seeing the Claimant unaccompanied.

58 It is also correct that Mr Mascarenhas said something to the effect that there should be no gossiping or that the gossiping should stop. That much is apparent from the script for the meetings. The Tribunal noted that Mr Mascarenhas told all three of Mr Hinds, Miss Taguiang and the Claimant the same things and that these were not limited to an instruction to stop gossiping. That was part of his instruction that they should not talk negatively, gossip, gang up or engage in any form of discrimination.

59 The Tribunal did not therefore find that what Mr Mascarenhas said about gossiping was in any way related to the fact that the Claimant had made a complaint of discrimination. He said what he did about gossiping because he wished to bring to an end the undesirable interactions between the three people concerned.

60 There then followed a period when the Claimant was off work unwell. The fourth complaint of victimisation that she raises was an allegation that on 24 June 2016 she was told to attend an occupational therapy appointment during a period of leave. There was a sequence of emails that relates to this allegation at pages 179-181.

61 On 22 June, Ms Lovegrove wrote to the Claimant saying that she had on that day referred the Claimant to the occupational health team "so they can assess what support and assistance the Council can provide you in your return to work." She said that someone from the team would contact her over the coming days. The Claimant replied asking Ms Lovegrove not to contact her while she was off as this made her condition worse and continued that the Doctor had signed her off work to get better and in order to keep her away from work, which was the cause of the stress.

62 On 24 June Ms Lovegrove responded to that email saying that she had a duty of care to keep in touch with the Claimant while she was off sick. She added that the Claimant was required to attend an appointment with the Occupational Health Service to cooperate in the obtaining of a medical report and that if she failed in this regard her pay might be stopped. The Claimant then responded again on 24 June, saying that she would be on annual leave from 27 June to 8 July and that anything in respect of her grievance or occupational health would have to be put on hold until she returned from leave. She also challenged the point about suspending her pay. The Claimant also sent an email on the same subject to the assistant chief executive of the Respondent.

63 The Claimant's oral evidence was that following this exchange someone from the Occupational Health providers contacted her and offered her an appointment which was during the annual leave period previously mentioned. The Tribunal found that it was not the case, therefore, that anyone on the

Respondent's behalf told the Claimant to attend an Occupational Therapy appointment during the period of leave. There were two separate communications. One was that from Ms Lovegrove saying that the Claimant must cooperate and attend an Occupational Health appointment if offered one, and separately the Occupational Health providers had offered the appointment during the period of leave. It was not correct in the Tribunal's judgment to put these two communications together in order to say that the Respondent had required the Claimant to attend an OH appointment during annual leave. There was no reason to think that it was other than coincidence that the appointment was offered during that period. There was no suggestion that the Respondent insisted that the Claimant attend that particular appointment or even that the date of the appointment was ever drawn to their attention.

64 This allegation therefore failed on the facts. Furthermore, the Tribunal found that there was no reason to link the communications about this appointment to the Claimant's protected act or acts. On the face of the matter the communications were simply about the arranging of an Occupational Health appointment which was in itself a natural response to the Claimant's absence from work. There was nothing in the evidence to suggest that the Respondent's stance over an OH appointment was influenced in any way by the fact that the Claimant had made a complaint of discrimination.

65 The Claimant returned to work from her ill health absence in July 2016. On 15 August Ms Cooper, who had been considering the grievance, sent her outcome to this at page 265; this included the grievance investigation summary at pages 247-264. On page 264, Ms Cooper summarised her findings in the following way:-

"In concluding my summary, I feel there were many allegations which could not be substantiated and counter allegations which could also not be substantiated which has made it difficult to find a firm conclusion in the allegations. However, I do feel that there was a statement made by HH [Mr Hinds] where the intention was not racial or anti-Islamic but where this could have been perceived as such, therefore, I am recommending that HH makes a formal apology to HA [the Claimant] in writing. The apology should state that he understands how his comment may have been perceived by her and that this was not his intention and he apologises. I also find that there is clearly a conflict between HA, HH and AT [Ms Taguiang] and therefore I am strongly recommending mediation between the three of them. For the reasons above, I am partially upholding the grievance. I have not upheld any of the other allegations within the grievance for the reasons outlined above, however, I do feel my decision is substantiated by the fact that HA feels comfortable to go back to the service and work with the individuals concerned. I have taken the decision not to disclose the interview notes I made during this investigation to prevent further impact on relationships within the service."

66 The Claimant then raised an appeal against the grievance outcome on 17 August. On the same day at page 272-273 Mr Mascarenhas sent an email to the Claimant saying that given the continued grievance and grounds for possible appeal "I am happy for you to work from home five days per week in the interim whilst the appeal procedure is under way. This is an interim arrangement and we will need to review this, I would envisage we do this after four weeks" [so 14 September onwards].

67 It appears that the Claimant may have misunderstood the email because she replied saying that she could not work from the office five days per week, and Mr Mascarenhas sent a further email clarifying that the suggestion was working from home five days a week. The Claimant then replied, still on 17 August, that she did not wish to take up this option and that she would stick to working from home three days per week on Mondays, Tuesdays and Fridays, being in the office on Wednesdays and Thursdays.

68 On 24 August 2016, the Claimant wrote again to Mr Mascarenhas saying that she had spoken to her union representative and, although he had reservations about whether she as the victim was being penalised for the situation, they nonetheless thought that it might be a good idea that she worked from home until 14 September as suggested. She wrote: "I can't say I am happy with this but feel I have been left with no choice" and continuing that she would return to the office on 14 September, thereafter working Wednesdays and Thursdays in the office. Mr Mascarenhas replied on page 296 in the following terms:-

"I just think given your comments on working in the office it would be better for some time to pass. Obviously, if you feel better or things change for the better, very happy for you to work from the office. This is not meant as a punishment at all but just a sensible measure if that is how you are feeling."

69 These matters formed the subject matter of the fifth alleged detriment in respect of the claim of victimisation, which was a complaint that from the 17th to 23rd August 2016, the Claimant was required to work at home without facilities. The Tribunal found that in fact the Claimant was not required to work from home during the relevant period. Mr Mascarenhas offered this, as the email correspondence shows. What in fact happened then over the period 17-23 August was that the Claimant used annual leave in respect of Wednesdays and Thursdays when she would otherwise have been in the office and worked from home on the Monday, Tuesday and Friday. Whatever may have been the Claimant's feeling about this arrangement, this was not something that was required of her, and this allegation is therefore not made out on the facts.

70 Furthermore, the Tribunal found nothing in the evidence to suggest that the reason for the suggestion was other than the one that Mr Mascarenhas gave at the time, namely that given the grievance outcome and the appeal process, it might be better for some time to pass without the Claimant attending the office. There was nothing in the evidence to link this suggestion

to the Claimant having made a complaint of discrimination. The Claimant did not at the time suggest this was the case: it is evident from the email exchanges that her real complaint was that she felt that although she was the "victim" in the situation, she was the one being invited to stay away from the office and that this she thought was unfair.

71 There then followed an exchange of emails about the arrangements for hearing the Claimant's appeal. The sixth allegation of detriment in respect of the victimisation claim was that the appeal was conducted in an unfair and unreasonable manner, in particular by:-

71.1 giving short notice;

71.2 failing to complete the hearing; and

71.3 sending out the result anyway.

72 The sequence of events regarding notice of the appeal was as follows. On 24 August 2016 at page 291 Ms McGowan sent an email to the Claimant with an invitation to the grievance appeal meeting to take place on 2 September. The Claimant replied at page 288 stating that she was on annual leave on 1 and 2 September, and asking Ms McGowan not to contact her during her annual leave. Ms McGowan sent a further email, still on 24 August, apologising and explaining that she wanted to arrange the meeting before Ms Cooper went on leave.

73 On 30 August the Claimant emailed again saying that she would be on leave on 1 and 2 September and would be going away for 2 September, so it would be impossible to make 2 September. She said that she could manage 31 August or 1 September, although she would need to check with her Union Representative. Ms McGowan sent an email on 31 August with an invitation for a rearranged hearing on 1 September at 3pm. The Claimant replied on the same day at page 290 asking for the time to be moved to 4pm or alternatively for the hearing to be postponed to a date before 9 September, the latter being mentioned because of concern about the limitation period for any claim expiring.

74 The Tribunal noted that the Respondent's grievance procedure at page 64 provided for five to eight working days' notice of an appeal hearing and that six working days were given in the first instance in this case. Thereafter, the short notice invitation for the hearing on 1 September was not something insisted upon or issued by the Respondent, but was effectively brought about by the Claimant herself. In her witness statement the Claimant said that she and her union representative had cancelled annual leave for 1 September in order to attend the meeting. In her oral evidence she suggested that with hindsight she regretted not having chosen to postpone the meeting to a later date as she could have done, explaining that she had gone ahead in the hope of achieving a quick outcome, but this did not in the event materialise.

75 The Tribunal concluded that it was not factually correct to say that the Claimant had been subjected to a detriment in being given a short notice of the appeal hearing, as she chose to proceed on that basis. Nor was there anything in the evidence to suggest that was done or said in this regard was in any way influenced by the fact that the Claimant had done a protected act. The evidence showed only that Ms McGowan did what she did in relation to the appeal date and notice of it in order to fix a date that the Claimant could attend.

76 The appeal hearing therefore took place on 1 September 2016. In accordance with the Claimant's request, the meeting commenced at 4pm chaired by Ms McGowan. The Claimant's Union Representative Mr McNulty attended with her. Also present were Ms Deats, Ms Cooper Mr Simon Williams and Ms Sue Adlam as note taker. The notes of the meeting are at pages 303-309.

77 The available time for the meeting expired at about 5.30pm. At this point the Claimant had presented her arguments and assertions in support of her appeal, but the process had got no further than that. Ms McGowan therefore asked Ms Cooper to send a written response to the appeal and the note records that the Claimant agreed to this and asked to be copied into the relevant email so that she could come back on anything that Ms Cooper stated. Ms McGowan said that she would reconvene (expressed as re-adjourn) if that appeared necessary, but otherwise would consider Ms Cooper's and the Claimant's further written responses.

78 Ms Cooper sent her written response to the appeal on the evening of 1 September; this was copied to Mr McNulty who forwarded it to the Claimant on 2 September.

79 On 6 September 2016 at page 312a, Ms McGowan wrote to the Claimant and Mr McNulty saying that she did not believe that it was necessary to reconvene the hearing before coming to a decision. She asked whether they were happy to agree to this or whether they had any further questions to put to Ms Cooper.

80 On 7 September at page 315-317, the Claimant sent an email making comments and asking questions of Ms Cooper. Following this on 23 September at page 320a, at which point the Claimant was again unwell and absent from work, Ms McGowan sent an email saying that she was not clear from the Claimant's email of 7 September whether she was asking her to reconvene the meeting or if she wanted her to make her decision based on the meeting held previously and the information sent by Ms Cooper. She concluded "if you would like me to reconvene the meeting, I will of course wait until you have returned to work and are ready to meet with me".

81 It is apparent that there was some delay between the Claimant's email of 7 September and Ms McGowan's of 23 September. Ms McGowan's

explanation for this in her oral evidence, which the Tribunal accepted, was that she had been busy with work and she herself had been off sick for a week during this period.

82 On 26 September 2016 at page 320e Mr McNulty sent an email to Ms McGowan, copied to Ms Deats and to the Claimant, saying that the Claimant did not wish to reconvene the meeting and would like a written outcome sent to Mr McNulty as soon as possible.

83 Ms McGowan's evidence was that she had not made her decision by 23 September, but she then proceeded to do so, communicating this in a letter of 4 October 2016 at page 327. Her decision was to uphold the original decision of Ms Cooper as reasonable and that the appeal was therefore dismissed.

84 Returning to the detriments relied on, points (b) and (c) effectively run together and are a complaint that having failed to complete the hearing, Ms McGowan sent out the result nonetheless. The Tribunal concluded that what occurred in this regard was not a detriment to the Claimant as she agreed to the way in which the grievance appeal proceeded. Although it is true that the hearing itself was not completed on 1 September, the remaining parts of it being Ms Cooper's submissions and the Claimant's response to these, were completed in writing. The Claimant agreed to proceeding in this way and could have chosen to reconvene the appeal hearing if she wished, although Mr McNulty she said that she did not require this. The Tribunal did not consider that it was a detriment to the Claimant to proceed with the appeal in a manner to which the Claimant herself specifically agreed.

85 Additionally, there was nothing in the evidence to suggest that the decisions that Ms McGowan made about the appeal and how it should proceed were in any respect influenced by the fact that the Claimant had made a complaint of discrimination. On the face of the matter, she proceeded in the way that she did in order to bring the appeal to a conclusion and because the Claimant agreed to that particular way of proceeding. None of this suggested that the Claimant's protected act influenced the decision making in any respect.

86 Following this, the Claimant remained absent from work on sick leave. On 18 October 2016, Mr Mascarenhas telephoned her at home; the Claimant's case was that he asked her what was going on in terms of the appeal hearing. Mr Mascarenhas denied that and said that it was not his business to ask about that. The Claimant further maintained that Mr Mascarenhas asked why she had not returned to work and said that the work was building up and there was no one to pick it up. While not agreeing with the exact words, Mr Mascarenhas accepted that he said something along these lines, his account being that he asked whether there was anything that he could do to assist the Claimant to get back to work. He agreed that he made some reference to the work piling up and the department being two people down. He denied saying, as the Claimant maintained, that if she did not return to

work then he would be informing members of the department of the reason why she was off work.

87 The Tribunal preferred Mr Mascarenhas' evidence on the last element, for two reasons. The first of these was that it was not apparent why Mr Mascarenhas should have threatened to tell other members of the department about why the Claimant was off work, the allegation apparently being that this was because she had a Tribunal claim pending. It was not obvious to the Tribunal why that would be a threat to the Claimant or why Mr Mascarenhas should make it. Secondly, approaching the matter in the way suggested would have been inconsistent with an email of 6 September 2016 at page 313 where Mr Mascarenhas told the Claimant "regarding time off I will tell the team you are on leave and not be specific about what kind of leave, they need to understand that you won't be about for a fortnight, so hopefully this is acceptable." This was a reference to the Claimant being signed off sick with work-related stress. At this point Mr Mascarenhas evidently thought that the correct approach was to not tell other employees why the Claimant was absent, and the Tribunal could see no reason why he might have changed that view by the time of the conversation on 18 October.

88 The Tribunal found therefore that the conversation, as far as it related to the prospects of the Claimant returning to work and the fact that work was building up in the office, was unobjectionable and fell within the terms of the Respondent's sickness absence procedure at page 51 (a) (c). The Tribunal remained of the same view whether or not Mr Mascarenhas asked what was happening about the appeal, although he disputed doing so. We could find nothing objectionable in his asking about the appeal, if that in fact occurred.

89 On 26 October 2016 the Claimant was seen by Dr Prajapati, Specialist in Occupational Medicine, who produced a report at pages 337-338. This report was originally dated 31 October 2016 and amended on 17 November. The Tribunal found that the explanation for the date and the amendment was that the report had first been sent to the Claimant for her approval and, as can be seen from a comparison with the unamended copy at pages 335-336, some small amendments had been made. Thereafter, the report was sent to Mr Mascarenhas after 17 November. The report said that the Claimant's absence from work was due to a work situation and that this did not have a medical answer. Dr Prajapati said that the Claimant remained fit to attend a formal meeting and that her ability to return to work and render reliable service and attendance depended on the outcome of her employment situation. She would be able to return to work if a solution could be reached with which she was comfortable.

90 Meanwhile, the Claimant had presented her claim to the Tribunal and a Preliminary Hearing for case management had taken place on 8 November. One of the Claimant's allegations in respect of her complaint of constructive dismissal was that she had not received any contact from the Respondent regarding her return to work after the Occupational Health appointment. Mr Mascarenhas' explanation for this lack of contact was that he had only

received the Occupational Health Report at some point after 17 November and that as the matter was now before the Tribunal and the claim was proceeding, he considered that it was a matter for HR to deal with rather than for him.

91 On 29 November 2016 the Respondent's senior employment lawyer Mr Sudra sent an email to the solicitor then acting for the Claimant at page 339. This referred to a letter of 24 November, which the Tribunal have not seen because it contained privileged material. However, Mr Sudra said this about one aspect of the letter:-

"In your letter of 24 November 2016, you mention a current employee of LBC and alleged disciplinary action. We ask that you remind your client of her duties of confidentiality regarding information pertaining to colleagues as per her terms and conditions of employment; your client's unauthorised disclosures could also make her employer liable to penalties for breach of the Data Protection Act.

Such conduct is taken very seriously by LBC and any further breaches of confidentiality or the DPA by your client may result in disciplinary proceedings."

92 Two emails followed on the 1st December 2016. The first in time, at 18.07 hours from the Claimant at pages 343-344 to the Respondents, stated that she felt that she had no option but to resign from their employment. She referred to her allegations of discriminatory conduct, to the telephone call from Mr Mascarenhas on 18 October. She continued:-

"Yesterday I received correspondence from Mr Sudra which had been forwarded to my solicitor. That was the final straw. The correspondence alleged that I had breached confidentiality regarding a matter that was relevant to my ongoing proceedings against London Borough of Camden. I strongly refute such an allegation and I am shocked that I am being threatened with disciplinary action. Taking account of recent events and the manner in which I had been singled out by Camden, I believe that Camden's conduct amounts to a repudiatory breach of contract."

93 About 20 minutes later on the same day the Claimant's solicitor sent an email to Mr Sudra at page 341. This denied that the Claimant had made an unauthorised disclosure of information and said that the matter referred to in the without prejudice correspondence would constitute relevant evidence before the Tribunal, as it concerned a comparison with the way in which allegations of harassment had been dealt with in another case.

94 Mr Sudra's email had also raised another matter arising from the Claimant's schedule of loss; it indicated that she was applying for jobs. In respect of this, the Claimant's solicitor wrote the following:-

"In terms of the losses claimed, Ms Ali currently believes that she is unable to return to her workplace at Camden as she is currently unfit for duty and is fearful of returning to a discriminatory place of work. She is applying for jobs elsewhere to mitigate her losses, if she is offered alternative work she may in due course take up work elsewhere, her health permitting. It is therefore entirely appropriate for such losses to appear in her schedule of loss."

95 Finally, although the point was not pleaded or referred to in her evidence, in her submissions the Claimant relied on a further matter in relation to her complaint of constructive dismissal. This was the allegation that at the Preliminary Hearing on 8 November, the Respondents had in answer to the judge's invitation indicated that they were interested in the case being considered for judicial mediation, but had subsequently declined to take part in that.

96 Although Mr Sudra did not give evidence and would not have been expecting to have to do so, given that this matter was not pleaded, he asserted that the Respondents had not agreed to judicial mediation at the Preliminary Hearing. He pointed out that there was nothing in the note of the Preliminary Hearing to suggest that they had done so.

97 The Tribunal found it unnecessary to decide precisely what had been said about judicial mediation at the Preliminary Hearing. Judicial Mediation is an entirely voluntary process and any party is at liberty to decline to take part in it, or to stop taking part in it if the process has begun, without penalty or adverse comment by the Tribunal. Even if a Respondent did indicate an interest in judicial mediation and subsequently changed its mind about that, the Tribunal could see nothing objectionable in that course of events, and concluded that this would not amount to a detriment to the Claimant.

The Applicable Law and Conclusions

98 The Tribunal has already expressed its conclusions regarding the Equal Pay complaint.

99 With regard to the other complaints under the Equality Act, the Tribunal reminded itself of the provisions about the burden of proof in section 136, as follows:

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

100 In **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] IRLR 246** the Court of Appeal identified a two-stage test in the equivalent provisions about the burden of proof in the earlier anti-discrimination legislation. In the first instance the burden is on a Claimant to prove facts from which, in the absence of an explanation from the Respondent, the Tribunal could properly conclude that discrimination occurred. If such facts are proved, the burden is on the Respondent to prove that it did not discriminate against the Claimant. In **Madarassy** the Court of Appeal emphasised that at the first stage, there would have to be something in the evidence to support a proper conclusion that discrimination had occurred: a mere difference in treatment and in protected characteristic would not be enough.

101 In **Hewage v Grampian Health Board [2012] UKSC 37** Lord Hope (with whom the other members of the Supreme Court agreed) stated that it was important not to make too much of the burden of proof provisions, and that these "…have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another." In the main, this is the position that the Tribunal has found to apply in the present case.

102 The Tribunal first considered the complaint of harassment, in respect of which section 26 of the Equality Act 2010 provides as follows:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of –

(i) Violating B's dignity, or

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

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

(a) the perception of B;

(b) the other circumstances of the case;

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

103 Although this authority was not referred to by either party, Mr Sudra alluded in his submissions to an established principle, recently expressed by Simler J in the Employment Appeal Tribunal in **GMB v Henderson [2015] IRLR 451** in the following terms:

"99…….the incidents [concerned] are quite obviously trivial…….although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so".

104 In relation to issue (1) (shoulder barging by Ms Taguiang) the Tribunal has found that the primary facts are not such as to form a basis on which it could properly find that what occurred between her and the Claimant was related to the latter's religion or race. Furthermore, the Tribunal has made the explicit finding that the antagonism between them arose from specific events that had no connection with questions of religion or race.

105 The Tribunal has made detailed findings about the events of 4 March 2016 (issue (2), Mr Hinds referring to the Claimant's headscarf). We will return to our assessment of this point after considering the other two allegations of harassment.

106 The Tribunal has found that the Claimant's case on issue (3) (the "rag head" comment) has not been made out as a matter of fact. On issue (4) (the incident on 27 April 2016) we have again made detailed findings about what occurred. We have therefore considered those findings and those made in respect of issue (2) (the incident of 4 March 2016) in relation to the statutory definition of harassment, and have reached the following conclusions:

106.1 On both occasions Mr Hinds engaged in unwanted conduct, and Ms Taguiang did so on 27 April.

106.2 On 4 March only Mr Hinds' conduct was related to the Claimant's religion (although not to her race) because he made reference to the headscarf that she wears for religious reasons.

106.3 On 27 April the conduct of Mr Hinds and Ms Taguiang was not related to the Claimant's religion or race: it was related to a dispute between the Claimant and Mr Hinds about whether the window should be open or closed.

106.4 The Claimant's perception of Mr Hinds' conduct on 4 March, as expressed in her email sent on the same day, was that although she found the comment offensive, she did not think it was meant maliciously and did not want to make a big deal of it. In the light of this evidence as to the Claimant's perception, and its findings about the nature of the incident, the Tribunal concluded that Mr Hinds' conduct did not have the purpose or effect of violating the Claimant's dignity or creating a harassing environment for her.

106.5 In any event, the incidents of 4 March and 27 April, whether viewed separately or together, did not reach a sufficient degree of seriousness to amount to harassment.

107 The complaint of harassment was therefore unsuccessful.

108 The Tribunal found that the alternative complaint of direct discrimination was also unsuccessful, for essentially the same reasons. Where we have found against the Claimant on the facts, the same findings are relevant here. Where we have found that the acts complained of were not related to the Claimant's religion or race, we also find that they were not done because of her religion or race.

109 In relation to the incident on 4 March 2016, the Tribunal found that, although Mr Hinds' comment about the Claimant's headscarf was related to her religion, this did not amount to less favourable treatment because of her religion. We accepted Mr Sudra's submission to the effect that Mr Hinds made the comment because the Claimant's head was covered and his was not. Bearing in mind the context of a minor dispute about whether the window should be open or closed and whether individuals were feeling hot or cold, we found that Mr Hinds would have made the same sort of comment to someone whose head was covered in some other way that did not relate to a protected characteristic (such by a hat or even by hair).

110 The Tribunal then turned to the complaint of victimisation. It was accepted that the Claimant had done a protected act in raising a complaint of unlawful discrimination. She relied on 6 potential detriments.

111 In relation to the first of these, the Tribunal has found that Ms Lovegrove asked the Claimant: "do you think you are being too sensitive?" We found that this did not amount to a detriment: it was a reasonable question to ask in the circumstances. To the extent that the Claimant took exception to being asked this, the Tribunal considered that this amounted to an unjustified sense of grievance of the sort identified by the Court of Appeal in **Barclays Bank v Kapur [1995] IRLR 87**.

112 The Tribunal reached a similar conclusion regarding Mr Mascarenhas encouraging the Claimant to pursue an informal resolution of her grievance. We found that this was a reasonable approach to take and one which any manager could be expected to follow in the circumstances.

113 There were two elements to the third proposed detriment, the first being a refusal to allow the Claimant to be accompanied to the meeting with Mr Mascarenhas on 26 May 2016. The Tribunal concluded that this could amount to a detriment, given that the Claimant had asked to be allowed to bring a companion and that this had been refused (although, as will be confirmed below, not causally linked to the protected acts). The second element was Mr Mascarenhas saying something to the effect that the gossiping should stop. We found that this did not amount to a detriment: again, it was a reasonable thing for Mr Mascarenhas to say in the circumstances, and he said it to all three people who had been involved in the incidents in the office.

114 The fourth proposed detriment (being told to attend an OH appointment while on leave) and the fifth (being required to work at home without facilities) were not made out on the facts.

115 The sixth proposed detriment concerned the appeal, and has been interpreted by the Tribunal as involving two elements. The Tribunal has found that the neither element (short notice of the hearing and sending the result without completing the hearing) amounted to a detriment as the Claimant agreed to both of these.

116 Further to these findings, the Tribunal has already expressed its conclusions as to whether any of the individuals concerned acted in the ways that they did because the Claimant had done a protected act. We have not made a specific finding regarding Ms Lovegrove as we have heard no evidence from her, but if necessary we would find that the facts as we have found them would not be such as to support a finding of victimisation in the absence of any further explanation. The natural inference is that Ms Lovegrove asked what she did because she wanted the Claimant to reflect on whether she was being over sensitive, and not because she had complained of discrimination. Elsewhere, we have made findings excluding a causal link between the acts concerned and the complaint of discrimination.

117 The complaint of victimisation is therefore unsuccessful.

118 Before turning to the constructive dismissal complaint, the Tribunal considered the complaints of harassment, direct discrimination and victimisation in the round and asked itself whether doing so caused it to take any different view from the one it had reached when considering the individual allegations in turn. We found that our view remained the same.

119 In relation to the complaint of constructive unfair dismissal, the first issue to consider was whether the Respondents had breached the implied term of trust and confidence. This may be defined as a term of the contract that the employer will not, without good reason, act in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

120 The Tribunal found no basis for concluding that the matters relied on in the unamended claim form gave rise to a breach of the implied term for the reasons that have been given in relation to the complaints of harassment, direct discrimination and victimisation. These matters did not provide any basis for a finding of a fundamental breach of contract. Viewed as a whole, these showed the Respondents taking a reasonable approach to a difficult situation of conflict in the workplace.

121 Turning to the matters in the amended claim, the Tribunal made the following findings:-

121.1 Although it is correct that the grievance appeal did not alter the grievance outcome, we have found no grounds for criticism of the way in which the appeal was conducted and this did not therefore amount to or contribute to any breach of contract.

121.2 The Tribunal did not consider that anything about the telephone conversation on 18 October amounted to or contributed to a breach of contract. We found nothing objectionable in what he said about the Claimant's absence or in his asking about her appeal, if he did so.

121.3 The same is true given our findings about why Mr Mascarenhas did not contact the Claimant regarding her return to work after the Occupational Health appointment. The Claimant herself had said that she should not be communicated with while she was off sick and complaining about such a failure was inconsistent with her previous complaint that she was contacted while off sick on 18 October.

122 There remains the question of Mr Sudra's email of 29 November 2016. Whether or not the matters canvassed in that email might have involved any breach of confidentiality etc (which the Tribunal was inclined to doubt as Claimants often give their advisors information about other cases or comparators) we did not consider that this email could amount to or contribute to any breach of contract. This email was sent in the course of correspondence between lawyers and it received a robust reply from the Claimant's solicitor (which incidentally gave no indication that she was intending to resign or had resigned). Presumably the Claimant was aware of the terms of the reply and would have been reassured by her solicitors.

123 In any event, however, the Tribunal did not consider that warning the Claimant about the need to observe obligations of confidentiality (even if the assertion that a breach had already occurred was wrong) was a sufficiently serious matter to amount to a breach of the implied term.

124 In relation to the constructive dismissal complaint also, the Tribunal reflected that it had found no breach of the implied term when considering the individual matters relied upon by the Claimant. We therefore considered the overall picture and asked ourselves whether doing so led us to any different conclusion. We found that it did not: in the main we have found that the Respondents were acting reasonably, and to the extent that the Tribunal had reservations about what occurred (for example, in relation to Mr Sudra's letter) we found that taken as a whole there was no breach of the implied term.

125 The complaint of constructive unfair dismissal was also therefore unsuccessful.

126 Having reached these findings on the merits, the Tribunal did not attempt to determine the issues as to time limits.

127 There will therefore be no remedy hearing, and unless by 7 April 2017 either party indicates (and explains) any need for the hearing listed on 13 April to take place, it will be vacated, and the parties should not attend on that date.

Employment Judge Glennie
3 April 2017