



EMPLOYMENT TRIBUNALS

Claimant: Ms S Bvuure
Respondent: Saffron Care Homes Limited

Heard at: East London Hearing Centre

On: 4, 6, 7 April 2017 and 11 April 2017(in chambers)

Before: Employment Judge Moor

Members: Ms M Long
Mrs S Taylor

Representation

Claimant: In person, assisted by Mr W Spring, Mr Patrick (TU representatives)
Respondent: Ms B Budesha (solicitor)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of unfair dismissal is not well-founded and does not succeed.
2. The claim of wrongful dismissal does not succeed.
3. The claim of sex discrimination does not succeed.
4. The claim of harassment relating to sex does not succeed.
5. The claim of victimisation does not succeed.

REASONS

1 This claim arises out of the Claimant's employment as Deputy Manager of a small care home owned and operated by the Respondent.

2 The Tribunal clarified the issues with the parties as follows:

Constructive unfair dismissal

3 Did the Respondent breach the implied term of trust and confidence and/or the duty to provide a safe working environment and/or the implied term to reasonably and promptly afford a reasonable opportunity to obtain redress in respect of her grievance. The Claimant relies on the following matters as cumulatively a campaign to undermine/bully/force her to resign:

- 3.1 the nature of the disciplinary proceedings against her which commenced on 7 January 2017 and the flaws identified by Abbey HR;
- 3.2 cumulatively the matters set out at para 14 – 29 of the Claimant's ET1. We summarise them here as:
 - 3.2.1 wages paid in error every month (compared to male staff paid correctly) (para 15);
 - 3.2.2 told she would need to accrue holiday whenever she asked to take holiday in 2015 (compared to Paul Yirbie and Randall Mariano) and told the holiday year was January to December when it was April to March (para 16);
 - 3.2.3 Mrs Singh asking Mr Gaynor, line manager, to dismiss the Claimant and when he refused he was forced him to resign (para 17);
 - 3.2.4 Mrs Singh telling Mr Gaynor that the Claimant was a thief (para 17);
 - 3.2.5 On 15 October sending a text message to all staff but not the claimant about Mr Gaynor's resignation (para18);
 - 3.2.6 On 20 October 2015 removing all the computers and changing the passwords so that the Claimant was unable to gain access to client files rendering her unable to carry out duties (para 19);
 - 3.2.7 telling her that she was no longer allowed to carry out supervisions or appraisals, despite it being part of her duties (para 19);
 - 3.2.8 3 November 2015 during supervision Mrs Koomson, her new line manager, raising allegations that she ate breakfast at work and left work early. (In comparison to male colleagues who did this.) (para 20);
 - 3.2.9 on 19 November 2015 told by Mrs Koomson to change her parking space (in comparison to male colleagues) (para 21);
 - 3.2.10 on 3 December 2015 being told to hand over all keys to the house and cabinets by Mrs Koomson (para 22);

3.2.11 on 4 December 2015 failing to investigate her complaint that she had not taken all her leave (in comparison with male staff) and that she was paid short (in comparison to male staff) (para 24);

3.2.12 while off sick, receiving unnecessary phone calls from Mrs Koomson regarding service user's medication (para 25);

3.2.13 informing the Claimant that she was only entitled to statutory maternity allowance because of her lengthy sickness absence (para 29).

3.3 whether the Respondent failed properly and adequately to address the Claimant's grievance submitted in December 2015 and failed to provide her with adequate redress and/or failing to uphold the grievance (para 26-29).

3.4 whether the claims at para 14-23 ET1 amounted to the Respondent subjecting her to an unsafe working environment.

4 If any of the matters above is found to amount to a fundamental breach of contract, did the Claimant affirm the contract after the 'last straw'.

5 If so, did the Claimant resign in response to the breach on 20 April 2016.

Wrongful Dismissal (notice pay)

6 If the Claimant was dismissed, she claims 3 weeks' notice pay.

Sex Discrimination

7 Was the Claimant subject to a dismissal and/or a detriment at work contrary to section 39 of the Equality Act 2015 by reason of the acts relied upon above.

8 And if so, was the Claimant treated less favourably because she was female.

9 The Claimant refers to 3 male comparators Mr Mariano, Mr Alarin and Mr Yirbie and/or a hypothetical male comparator in the same material circumstances. She alleges:

9.1 2 male comparators were paid holiday;

9.2 Mr Mariano and Mr Alarin are alleged to have had a physical altercation at work which did not result in disciplinary action;

9.3 male comparators were not disciplined for using the Respondent's mobile phone;

9.4 male comparators were permitted to take paid holidays before they had accrued;

- 9.5 allegations that the Claimant had eaten breakfast at work and left work early were not advanced against male staff;
- 9.6 male staff wages were not kept short;
- 9.7 the parking space request did not apply to male staff;
- 9.8 male staff were not constructively dismissed.

Harassment

10 The Claimant relies on the same acts (at paras 4-29 of her ET1) as in her constructive dismissal claim and sex discrimination claim. Were they unwanted acts relating to sex.

11 If so, did they have the effect or purpose of either violating her dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Victimisation

12 Was the grievance a protected act?

13 If so, was the constructive dismissal because of the protected act?

Time limits

14 Were the Claimant's sex discrimination claims (apart from in relation to alleged dismissal) brought in time? If not, is it just and equitable to extend time?

Remedies

15 The Claimant seeks an uplift to any award of compensation on the basis that the Respondent failed to comply with the ACAS Code of Practice on Discipline and Grievance.

16 At the Preliminary Hearing the Claimant was asked to provide further particulars of the 'other payments' she claimed in her ET1. She has not done so and Mr Spring confirmed there was now no issue about other payments before us.

Claimant's Application to Strike Out

17 At the outset of the hearing, the Claimant made an application to strike out the Respondent's response. After clarifying the issues, we heard this application. It was based on two grounds:

- 17.1 First, what Mr Spring described as a 'violent attack ... so outrageous I do not believe the Tribunal should consider the response';

17.2 Second, and what Mr Spring described as a less important ground, on a failure to prepare the bundles properly by the Respondent.

18 Mr Spring developed his application as follows:

18.1 He clarified that the 'violent attack' was not literal but based on the Respondent's inclusion in the documents three photographs of the Claimant: two at a party and one close up with a man, Mr Gaynor her line manager, where they appear to be in bed. The photograph was of heads and shoulders only. Mr Spring said these photographs had been included so that the Respondent could imply that if the Claimant did not 'back down' there would be 'serious consequences'.

18.2 He alleged also that the Respondent had 'threatened, blackmailed and intimidated' the Claimant. For this allegation he relied on some without prejudice correspondence.

18.3 The Claimant also relied on the bundle containing a document that had been 'tampered with/rubbed out'. This was page 410, an email that included a sentence redacted.

18.4 Finally, Mr Spring argued that the bundle had been received late. He did not say he had been unable to prepare but did allege that there were documents missing from it. When asked what these were neither he nor the Claimant could identify any document or class of document missing upon which they wished to rely. Nor had they brought any document in their possession not in the bundle for inclusion into it.

19 In reply, Ms Budesha for the Respondent argued that:

19.1 The photographs were relevant to the Respondent's defence to one of the allegations of discrimination, namely that the Respondent had informed all members of staff except the Claimant about Mr Gaynor's resignation. The contention was that the Respondent thought that the Claimant was in a relationship with Mr Gaynor, so would know. The photographs found on the Respondent's computer, after the Claimant resigned, supported its understanding.

19.2 The Respondent waived privilege over the without prejudice correspondence relied upon for the 'blackmail' allegation. It showed nothing more than normal efforts to settle the case. For example, Ms Budesha had sought to explain why Mr Spring on behalf of the Claimant had miscalculated the basic award in her schedule of loss (as he evidently had).

19.3 The redacted sentence at 410 referred to settlement and was therefore privileged and appropriate to redact.

19.4 The Respondent had not sought to threaten or intimidate or blackmail the Claimant in any way.

20 After retiring to consider its decision, the Tribunal did not allow the application to strike out for the following reasons:

20.1 Rule 37 gives the Tribunal power to strike out if the manner in which proceedings have been conducted by or on behalf of a party has been 'scandalous, unreasonable or vexatious'.

20.2 The inclusion of the photographs does not meet this test because they are logically relevant to an issue in the case namely the reason why the Claimant was not informed of Mr Gaynor's resignation. While it understood the Claimant's sensitivity over the photographs, it was possible to have fair trial of the issues by the removal of the photographs from the bundles but allowing Mrs Singh to give evidence about them.

20.3 The Respondent had not threatened, blackmailed or intimidated the Claimant: the without prejudice correspondence relied upon merely showed a reasonable approach to settlement negotiation.

20.4 It was proper for the Respondent to redact document 410 to remove reference to negotiation.

20.5 The Claimant had not identified any particular document or class of document missing from the bundle.

20.6 Overall a fair trial was still possible in this case.

21 On the second day of the hearing, Mr Spring attended to explain that, due to illness, he was handing over representation to Mr Patrick of the same trade union. He sought the Tribunal's permission to do so. The Tribunal made it clear that it was for the Claimant who represented her. The Claimant said she was happy for Mr Patrick to take over. As it turned out, the Claimant was better prepared to cross-examine and chose to do so. Contrary to the Tribunal's usual approach, which is only to allow one person to speak for a party, on the second day of the hearing we allowed Mr Patrick to contribute when he wished during the second day. By the third day of evidence, Mr Patrick and the Claimant had divided the work between them and the Claimant spoke on her own behalf, cross-examined all witnesses except Ms McGibney whom Mr Patrick cross-examined.

22 On the second day of the hearing, the Tribunal felt it necessary to draw to the attention of the Claimant the errors in her Schedule of Loss. We gave her guidance as to the principles, so that she could produce a corrected schedule of her losses, which she did on the third day. We gave the Claimant this guidance in accordance with the overriding objective to ensure the parties were on an equal footing. We also asked the Respondent to complete a counter-schedule.

Findings of Fact

23 Having heard the Claimant, Mrs Ahmed, Mrs Singh, Mrs Koomson, Ms McGibney and Ms Jenner and having read the witness statement of Mr Cheong (giving it less weight in any area of dispute because he was not available for cross-examination) and the

documents referred to us in the evidence, the Tribunal makes the following findings of facts.

24 The Claimant commenced employment on 7 January 2013 as a Support Worker at 1 Arlington Gardens, Ilford, a care home run by the Respondent.

25 The Respondent runs 4 small homes providing social care for adults with learning difficulties and autistic spectrum conditions in Newham and Ilford. It employs 23 permanent staff (15 women and 8 men). We know of one manager employed by the Respondent, Mrs Koomson, who had taken and returned from maternity leave.

26 Mrs Pretim Singh was the owner of the Respondent. The Claimant's line manager was first, Mr Ismail, and in 2014, Mr Gaynor, and after his resignation on 15 October 2015, Mrs Koomson acted as line manager, until Mr Cheong took over on 7 December 2015. The manager at the home had to be registered with the CQC, the regulator.

27 At the outset of her employment, Mrs Singh agreed with the Claimant that she could work Monday to Friday day shifts starting at 8am because of child care. At this time, she was a single parent. The other 5 male support workers at the home were all required to work flexibly, including weekends. At some point the Claimant's son went to boarding school and there came a time when the Claimant worked occasional late shifts until 10pm.

28 At Arlington Gardens there was one resident, then two, known as 'service users', in the home. They had learning difficulties and autism and the staffing ratio requirement for them was 1:1. At any one time there would be at least 3 members of staff present at the home.

29 In about February 2014 the Claimant was promoted to Deputy Manager, this was ahead of the other male support workers who worked at the home at the time. Upon her promotion, the Respondent agreed to pay for the Claimant to undertake QCF Level 5 course in Leadership for Health and Social Care, at a cost of £849.00 (60). It paid these fees in full (464). The Claimant did not complete the course, 465.

30 During the Claimant's employment the support workers in the home were Mr Paul Yirbie, Mr Randal Mariano, Mr Carlos Barbosa and Mr Bola Alarin. Ms Muna Busuri commenced employment as a support worker in August 2016.

31 A company mobile phone was provided for use by members of staff in relation to their work, for example, if a resident was out with a support worker, they would take the phone.

32 The holiday year ran from April to March for all staff including the Claimant.

33 The holiday procedure, in essence, was to seek management approval for requested leave. There was special provision for Christmas leave as it was recognised this was sometimes difficult to cover. There was no express provision for 'emergency' or 'compassionate leave', which was at the discretion of management.

34 On 21 December 2014, the Claimant texted Mr Gaynor informing him her mother-

in-law had taken a turn for the worse and she had to fly out to Zimbabwe to support her husband (150, 86). Mr Gaynor told her he could not authorise this leave and she had to call Mrs Singh. She did so and requested annual leave. Mrs Singh told the Claimant that she did not give permission because she was short-staffed over Christmas and not able to cover the rota.

35 Nevertheless the Claimant did not come to work. During the subsequent investigation into this unauthorised leave the Claimant led the Respondent to believe that she had travelled to be at her mother-in-law's funeral in Zimbabwe. In fact, we now know from her evidence to us, she was unable to obtain the relevant travel permissions and did not go.

36 At one point Mr Yirbie had to go to Africa for compassionate reasons. He sought permission beforehand from Mrs Singh and was granted it.

37 As a result of the unauthorised holiday and, because it was thought the Claimant had taken the company mobile phone with her, Mrs Singh looked into the company mobile phone records, which it was also her practice to do. This led to an investigation into phone usage. Statements were taken from Mr Gaynor, Mr Barbosa and Mr Mariano (86, 98, 149), in which they also made allegations that the Claimant left early when she worked a late shift.

38 On 7 January 2014 the Respondent invited the Claimant to attend a disciplinary hearing. Initially the letter of invitation did not contain the grounds, this was rectified on the same day and a fresh letter supplied (148) stating the allegations as absent without consent; misuse of company phone and leaving work before completing of a shift.

39 Pending investigation the Claimant was asked to return the company phone and her keys.

40 The Claimant agreed in her evidence that the Respondent was entitled to investigate the allegations. The 7 January letter gave the Claimant 6 days to prepare for the investigation. It was not 'sprung' on her as she alleged in her evidence.

41 On 13 January 2015 the Claimant attended an investigation meeting with Mrs Singh and Mrs Koomson (150). She admitted some personal use of the company mobile phone (calls to Germany and Dover), apologised and offered to pay back the money. The Claimant denied leaving early. The Claimant said she felt she had no option but to travel to Zimbabwe and said she had flown out later in the day and thought she had followed procedure. This was her opportunity to apologise and say she didn't go, instead she chose to mislead the Respondent about the leave.

42 By letter of 20 January 2015 the Claimant was invited to a disciplinary hearing to deal with 'improper use of phone' and 'leaving shift before it had ended' (152). Mrs Singh told us the unauthorised leave allegation was dropped for compassionate reasons because of the Claimant's reference to the funeral.

43 The hearing, on 27 January 2015, was held by Mr Gaynor. The Claimant had trade union representation from Mr Spring.

43.1 The Claimant admitted making calls to Dover and Germany (156);

43.2 She denied leaving early.

44 By letter of 2 February 2015, Mr Gaynor decided the Claimant was guilty of gross misconduct for 'repeated and persistent abuse of the Company phone' and leaving early. As an alternative to dismissal she was given a final written warning and demoted to support worker with reduction in pay and relocated. He summarised his concern at her lack of consistency in her responses at the investigation and disciplinary.

45 The Claimant appealed (161). The appeal was held by Ms McGibney from an HR consultancy company, Abbey HR. This was because Mrs Singh and Mr Gaynor had been already involved.

46 Ms McGibney interviewed Mrs Singh and Mrs Koomson (166-173); heard from the Claimant at a hearing on 12 February 2015 with her TU representative Mr Spring and also interviewed Mr Mariano, Mr Barbosa, and Mr Gaynor (174-185). In relation to phone bills she looked only at recent ones to exclude any possibility that the bills covered a period before the Claimant had started.

47 Ms McGibney decided that there was sufficient evidence to warrant the findings but that they amounted to serious misconduct and the penalty of demotion was not allowed for in the Respondent's procedure (199). She recommended a Final Written Warning for 12 months (195-200) and that the Claimant be paid all outstanding wages for the period of (disputed) leave and keys returned to her. The Claimant did not want to take back the company mobile phone.

48 Ms McGibney decided that the Respondent had committed several procedural defects but none were so sufficiently serious to render the outcome unsafe. She did not think the first letter on 7 January was a concern because a second letter was provided on the same day. She found that it was 'not ideal' that Mrs Singh investigated and this should have been delegated. She agreed with the Claimant that Mr Gaynor should not have heard the disciplinary having also provided a statement. After having spoken to the witnesses, Ms McGibney did not accept the Claimant's contention that employees had been forced to give statements.

49 We find that Ms McGibney was independent in the sense of being impartial. She by no means rubber-stamped the process. She upheld the appeal in part removing the sanction of demotion and relocation and downgrading the outcome to serious misconduct. We find she had evidence for both allegations (in the form of staff statements and the Claimant's admissions) and her decision that both allegations could be described as serious misconduct was correct. She was concerned that the personal phone calls at work were not a problem just of cost but because they suggested time spent away from the care of adults with challenging care needs.

50 The Claimant continued to object to the final written warning. By the time the Claimant resigned the warning had lapsed.

51 The Claimant was paid for one week of the disputed Christmas leave in January

and paid for the other week in March after Ms McGibney had recommended the Respondent pay the whole amount.

52 The Claimant decided to record conversations with her fellow employees because she was unhappy about the outcome. One transcript of such conversation with Mr Mariano has been provided. It shows little except that male staff also had complaints about pay errors (423).

53 The Claimant witnessed an altercation between Mr Mariano and Mr Alarin in 2014. One grabbed the other's collar. The Claimant didn't report it. No action was taken about it because Mrs Singh did not know about it. We accept that if she had known about it she would have taken disciplinary action.

54 The Claimant alleges now that other staff left early. She did not allege this during the disciplinary process. Mrs Singh says and we accept that if she knew the identity of other staff leaving early, they too would have been disciplined. We accept this because it could amount to neglect of service users which is a serious matter that might have gone to the home's registration. Furthermore, on 23 October 2015 at a staff meeting at Arlington House, Mrs Singh gave staff a general warning about arriving late or going home early. She stated her intention to install a clocking in/out system and CCTV. (A clocking-in system was later introduced.) She encouraged staff to report their concerns about others. This evidence supports that she was not able to identify particular offenders (other than the Claimant against whom particular allegations had been made) but was encouraging staff to come forward.

55 The Claimant had every opportunity to show us on the evidence that her wages were paid short 'every month' as she alleged. The payslips and her time sheets were in the bundle. She was unable to do so. We find therefore that on balance the Claimant was not paid in error or late every month.

56 The Claimant alleges that Mrs Singh called her a thief and liar to Mr Mariano and Mr Gaynor. Mrs Singh clearly denies this. We have not heard from either man. The allegation is therefore one of hearsay. While hearsay evidence is admissible in Tribunals, it is of less weight because those said to have heard the statement have not been present to be cross-examined. We have taken into account that the disciplinary in 2015 was, in effect, an allegation of dishonesty (using the company phone for personal use and leaving early but claiming full hours). These allegations were upheld. We find that it is likely therefore that Mrs Singh thought that the Claimant was dishonest. The Claimant felt aggrieved about this disciplinary. This was unjustified, given that she had misled the Respondent about her Christmas leave. As a result relationships were strained. We do not, however, on the balance of probabilities find that Mrs Singh aired her views about the Claimant to other members of staff. Mrs Singh was a 'hands-off' manager and we accept her clear denial under oath about this matter.

57 We do not find that the Respondent required the Claimant to accrue holiday before she took it in 2015. This is disproved by the fact that the Claimant took 6 days holiday in April, when she would not have accrued 6 days (364). The annual leave comparison shows that the Claimant and male staff were allowed leave.

58 We do not find that Mrs Singh told Mr Gaynor to dismiss the Claimant. Mr Gaynor

resigned after he was invited to a 'dismissal meeting'. In his resignation letter Mr Gaynor states he left because he did not feel supported by management. Either way, his resignation was not because he was put under pressure to dismiss the Claimant. Mr Gaynor resigned with immediate effect on 13 October 2015.

59 Mr Gaynor sent his own text message informing staff of his resignation. Mrs Singh sent a text message to staff informing of Mr Gaynor's resignation. At this point the Claimant's mobile phone was broken. Mrs Singh did not send a text to the Claimant because she did not have a number for her. We find, on balance, that this omission was not in order to undermine the Claimant. We accept that Mrs Koomson did not send a text about this.

60 On about 20 October 2015 Mrs Singh temporarily removed the desktop computer (used by the home manager) and laptop (used by the Claimant) in order to change the passwords because Mr Gaynor had left. We do not consider this was done to prevent Claimant from carrying out her duties. It was done in order to keep the Respondent's data secure. The laptop that she used for work was returned within a week and the Claimant was able to continue using it to carry out her duties.

61 On 3 November 2015 in formal supervision Mrs Koomson expressed concerns about quality of the Claimant's formal supervision notes with support workers and the fact that she had found them lying around the office which was a breach of confidentiality. Mrs Koomson told the Claimant in this supervision that she was not to do formal supervisions, 265. It was Mrs Koomson's intention to give the Claimant training on supervision but we find she didn't inform the Claimant of this at the time because the notes she typed up contemporaneously do not record this.

62 The Claimant's job description (57) describes her as being required to 'assist' in formal supervisions/appraisals and to 'supervise' junior members of staff.

63 At this same supervision meeting, Mrs Koomson raised concerns with the Claimant about her conduct at work: eating breakfast, and leaving work early. We find she did so because staff had raised these concerns with her. We consider supervision was the appropriate place to raise these matters. The Claimant had an opportunity to respond. There is no evidence that Mrs Koomson had these concerns about other named staff (male or female).

64 On about 19 November 2015 in our view there was a misunderstanding between Mrs Koomson and the Claimant over Mr Gaynor's car which had been parked outside the home. Mrs Koomson asked the Claimant about the car but did not ask the Claimant to move the car or change her parking space.

65 On 3 December 2015 Mrs Koomson asked the Claimant to give her the keys to the house and staffing cabinet because Mrs Singh needed them for audit. The Claimant continued to have access to the house because always staff on duty.

66 On 4 December 2015 Mrs Koomson asked the Claimant for annual leave sheets and this gave the Claimant the opportunity to say she still had some leave remaining. She did not complain to Mrs Koomson about leave or wages.

67 The Claimant started a sickness absence on 6 December 2015, which was initially for a tummy upset and from 8 December for 'stress'.

68 Mrs Koomson texted the Claimant on 6 December concerning a service user's medication. We find that Mrs Koomson genuinely needed to find medication for the service user and asked the Claimant where it was. At this time she did not know the Claimant was off work for a 'stress-related' matter. We find it unwise of Mrs Koomson to suggest to the Claimant, as she did, that the matter needed investigating. This did not assist in the immediate enquiry and could have been regarded as pressure.

69 On 16 December 2015, through solicitors, the Claimant raised a grievance (279). She complained about all of the issues she has complained about in her ET1 including the allegation of sex discrimination.

70 The Claimant informed the Respondent she was pregnant in about December or January. She provided her Mat1B form signed on 11 February 2016 stating the expected week of confinement was 15 June 2016.

71 The grievance meeting was delayed first because letters were sent in error to the Claimant's old address. A meeting was arranged with Mr Cheong for 12 February 2016.

72 Prior to the meeting Mr Cheong made a list of the issues (327-328), which he went through with the Claimant at the meeting (329-334). We find his was a detailed, careful approach to the complaint.

73 By letter of 22 February 2016 Mr Cheong did not uphold the grievance and sent the Claimant his detailed written response. The Claimant knew there would be a short delay in his reply because of his annual leave.

74 Mr Cheong's conclusions for the most part mirror our own. On the issue of the removal of supervision duties he decided and informed the Claimant that more training was required.

75 Mr Cheong also addressed carefully each allegation of different treatment between male and female staff. He found that no distinctions were made between male and female staff in relation to holiday; that management were not aware of other staff leaving early; and that Mrs Singh was not aware of the altercation between male staff.

76 The Claimant appealed on 4 March 2016. Ms Jenner, a manager employed by Beechwood Homes, partly owned by Mrs Singh, conducted the appeal. They met on 21 March 2016 (359) to discuss the grievance. Ms Jenner allowed the Claimant a full opportunity to explain her concerns. She sought to reassure the Claimant that after her maternity leave she would be returning to a fresh start with a new manager. She listened to the recordings the Claimant had made of other staff and was concerned about them having been made covertly. She addressed the Claimant's allegation of sex discrimination by referring to the ways in which the Claimant had been treated more favourably than her male colleagues by promotion and the funding of her level 5 course. She was unable to establish with the Claimant what she wanted by way of resolution (see 362). Overall we consider that Ms Jenner addressed the grievance reasonably and fairly. By letter of 24

March 2016, the Claimant was informed her appeal was not upheld.

77 It is our firm view that Mr Cheong and Ms Jenner were not influenced against the Claimant because of her sex discrimination allegation. There is nothing to suggest this and they both took care to look at the sex discrimination allegations and deal with them.

78 On 2 March 2016 the Claimant had sent an email stating how she wanted to deal with her maternity leave: at the expiry of her sick certificate she would take 11 days' annual leave from 18 March 2016 and then commence her maternity leave on 5 April 2016. The Respondent confirmed that she could do so (338). During her sick leave the Claimant had been paid statutory sick pay from 4 December 2015. The Respondent sent these details to its bookkeepers 'A Way With Tax Limited' who confirmed that having spoken to HMRC, her earnings were too low to qualify for statutory maternity pay ('SMP') and therefore she would be given an SMP1 form in order to be assessed for statutory maternity allowance ('SMA'). By letter of 15 March 2016 the Respondent sent this letter to the Claimant.

79 By email of 20 April 2016 the Claimant resigned, alleging a fundamental breach of the implied term of trust and confidence and stating that 'the handling of my grievance was the final straw' (367).

Legal Principles

Constructive Unfair Dismissal

80 Section 95(1)(c) of the Employment Rights Act 1996 ('the ERA') provides that there is a dismissal where the employee terminates the contract in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct. This is known as a 'constructive dismissal'.

81 The employer must be guilty of a 'repudiatory' (really serious/fundamental) breach of contract, Western Excavating (ECC) Ltd v Sharp [1978] ICR 221. Here the Claimant relies on the implied term existing in all employment contracts (as formulated by Browne-Wilkinson P in Woods v WM Car Services (Peterborough) Ltd [1982] IRLR 413): '*the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*'. A breach of this implied term is always 'repudiatory'. But the test of whether there is a breach of it is objective, and not dependent on the Claimant's subjective view.

82 The Claimant also relies on the duty to keep her safe at work. And the implied term to reasonably and promptly afford a reasonable opportunity to obtain redress, WA Gould v McConnell [1995] IRLR 516.

83 Where individual acts are not in themselves sufficiently serious, an employee can argue that, taken together, they amount to a fundamental breach. The last act, the 'last straw', which causes the Claimant to leave, does not need to be serious (a breach in and of itself), Lewis v Motorworld Garages Ltd [1986] ICR 157 CA. But it must be more than trivial and must contribute to the breach though what it adds may be relatively

insignificant, Omilaju v Waltham Forest LBC [2005] ICR 481 CA. This is also an objective test: even if the Claimant finds it hurtful, if the last act is entirely innocuous it is insufficient.

84 The Claimant must show that she resigned in response to the breach. That an employee also objects to actions not amounting to a breach of contract does not matter if she left, at least in part, in response to the breach: Nottinghamshire County Council v Meikle [2004] IRLR 703 CA.

85 Finally, the Claimant must show that she has not 'affirmed' the contract. After a fundamental breach, the 'innocent' party has two choices: either to accept the breach and treat the contract as terminated (i.e. an employee resigning and treating herself as dismissed) or to 'affirm' the contract and insist on its further performance. Evidence of affirmation includes, for example, '*acts [by the employee] which are only consistent with the continued existence of the contract*' W E Cox Toner (International) Ltd v Crook [1981] ICR 823 (828H).

86 If the Claimant establishes a constructive dismissal it will be unfair under the ERA because the Respondent does not argue before us that it had a potentially fair reason for any constructive dismissal we find.

Sex Discrimination

87 Section 13(1) of the Equality Act 2010 ('EA') provides that '*a person (A) discriminates against another (B) if, because of [sex], A treats B less favourably than A treats or would treat others*'.

88 Section 23(1) of the EA provides that '*on a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case*'.

89 So far as is relevant: section 39 of the EA provides that an employer must not discriminate against an employee as to the way it affords '*access to a benefit*'; and/or '*by dismissing her and/or by subjecting her to any other detriment*'.

90 To find a 'detriment' under section 39, a Tribunal '*must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work*' Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL. An unjustified sense of grievance cannot amount to 'detriment' but nor is it necessary to demonstrate some physical or economic consequence.

91 The upper courts have provided guidance to Tribunals as to how best to approach the question of what amounts to less favourable treatment because of a protected characteristic, in this case sex.

92 The less favourable treatment should be judged against a comparator (real or hypothetical) whose circumstances are materially similar.

93 The reverse burden of proof was enacted in order to assist Claimants. Section

136(2) of the EA provides: '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.' Section 136(2) does not apply if A shows that A did not contravene the provision.

94 The first stage is for the Claimant to show a 'prima facie' case for discrimination. The second stage is for the Respondent to show a reason wholly unrelated to sex. If the Tribunal is satisfied that the Respondent has shown such a reason for any unfavourable treatment, it can go straight to the 'reason why' question in giving its decision. If there is more of a question mark over the reason for treatment, it is appropriate for the Tribunal to follow the two stage test as set out in the guidance in Igen v Wong [2005] IRLR 258 CA.

95 Here, for reasons we will explain below, we have determined this claim either by finding that the acts complained of did not occur; or that there is no evidence of detrimental or different treatment; or that the Respondent has shown a wholly non-sex related reason for the conduct complained of.

Application of facts and law to issues

Allegation of Unfair Dismissal

96 We treat the claim for unfair dismissal as an argument that all of acts taken together amounted to a fundamental breach with the final straw being the handling of the grievance and/or the denial of SMP.

97 First, we look at each of the alleged acts and ask whether it occurred and why.

98 Then we stand back and consider, for each of those we found to have occurred, whether taken together they are sufficiently serious to amount to a breach of the implied term that the Respondent 'without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.

Disciplinary allegations, procedural flaws and outcome

99 We find that it was appropriate for the Respondent to subject the Claimant to disciplinary proceedings in 2015.

99.1 The allegations arose from the Claimant taking unauthorised leave and developed after evidence was discovered of her leaving work early and using the company phone for personal calls. The Claimant agreed it was appropriate to investigate.

99.2 The procedural problems identified by Abbey HR were cured by Ms McGibney's approach to and decision on appeal. She was an impartial person who looked at the whole matter again. She removed the penalty of demotion and downgraded the outcome to serious misconduct.

99.3 There was sufficient evidence in the form of statements from other staff and/or the Claimant's own partial admissions to warrant discipline for personal use of the phone and leaving early. We agree that this amounts to serious misconduct in the form misuse of a company asset and leaving early but claiming for full hours, as well as the concern over potential service user neglect. A final written warning was appropriate. The dropping of the leave issue on compassionate grounds was to the benefit of the Claimant who knew, unlike the Respondent, that she had not actually been able to go to Zimbabwe.

99.4 Thus, in respect of discipline overall, the Respondent had reasonable and proper cause to raise disciplinary allegations and give a warning. We do not find that the process was engineered to make the Claimant resign.

Wages

100 The allegation that wages were paid in error every month is not made out on the facts.

101 The disputed unauthorised leave was paid to the Claimant after the allegations about it were dropped for compassionate reasons.

Thief/liar allegation

102 The allegation that Mrs Singh called the Claimant a thief and a liar to others is not made out on the facts.

Requirement to accrue holiday

103 The allegation that the Claimant was told she was required to accrue holiday before she was allowed to take it is not made out on the facts.

Pressure on Mr Gaynor to dismiss

104 The allegation that Mrs Singh put pressure on Mr Gaynor to dismiss the Claimant is not made out on the facts. Nor did Mr Gaynor resign for this reason.

Text

105 We have found that the Claimant was not sent a text to inform her that Mr Gaynor had resigned because Mrs Singh did not have her number. This was not done to undermine her. This allegation is not made out on the facts.

Computers

106 We have found that while both computers were removed from the home for a week. This did not prevent the Claimant from undertaking her duties and was in order to

ensure security following Mr Gaynor's resignation.

Removal of Supervisory Duty

107 Assisting in formal supervision was part of the Claimant's Deputy Manager role and removal of it without training was inappropriate. While Mrs Koomson's concerns about the quality and confidentiality of supervision were genuine and appropriate, she ought to have informed the Claimant of her intention that training would be given. We note that this matter was clarified by Mr Cheong in the grievance when he informed the Claimant that training would be given.

Concerns during supervision

108 It was appropriate for Mrs Koomson to raise concerns with the Claimant in supervision because those concerns had been particularly raised by staff. Mrs Koomson was exploring genuine concerns that could have had an impact on service user care. Mrs Koomson could not raise these concerns with other staff (male or female) then working in the home because she did not have the evidence. The whole staff body knew that leaving early was a concern, however, because Mrs Singh had informed them about it at the October staff meeting. Had Mrs Koomson or the Respondent wished to force a resignation they might have escalated these concerns straight away to a disciplinary allegation. They did not do so.

Parking

109 We do not consider there to be anything in the allegation concerning the parking space. There was a misunderstanding. Mrs Koomson did not ask the Claimant to move her car.

Keys

110 The Claimant was asked to give back her keys but this was because of a forthcoming audit. The Claimant was still able to undertake her duties. This request was an appropriate part of management of the home. We do not consider that it undermined the Claimant.

Annual leave complaint not investigated

111 The allegation that Mrs Koomson did not investigate a complaint is not made out on the facts.

Text Query about Medication While Off Sick

112 While we do not consider it wise for employees to be asked operational questions while they are off sick, Mrs Koomson was faced with an exceptional case: the need to find a service user's medication. We find that it was necessary for her, in this exceptional case to text the Claimant a query about it. Mrs Koomson did not know that the Claimant was off with 'stress' when she sent these texts.

113 We do consider it inappropriate for Mrs Koomson to have told the Claimant that the matter would have to be investigated. This went beyond enquiry and should have been left until the Claimant's return.

Grievance handling and outcome

114 We do not find that there was any unreasonable delay in handling the grievance: it was caused by a mistake over addresses and Mr Cheong's leave.

115 We consider that the grievance was handled appropriately by both Mr Cheong and Ms Jenner. Mr Cheong looked at each issue with care and reached findings open to him on the evidence. Likewise, Ms Jenner acted appropriately in her handling of the grievance. They each made specific decisions about the sex discrimination allegations. We consider that the Respondent gave the Claimant a reasonably prompt opportunity to obtain redress. This does not mean that the Claimant's grievance has to be upheld. It means that it must be listened to, considered and conclusions reached in accordance with the material available. The Respondent did this.

SMA

116 The Respondent was correct to conclude that the Claimant was only entitled to SMA during her maternity leave. Average pay, for the purposes of SMP, is calculated taking the 8 weeks ending 15 weeks before the expected week of confinement. Thus, the 8 weeks for calculation of average pay ends on 29 March 2016 and falls squarely within the period the Claimant was only receiving Statutory Sick Pay, which is below the SMP threshold.

Overall

117 On our analysis therefore we are therefore concerned about two aspects of the Respondent's conduct: the removal of supervision duties by Mrs Koomson without offering training; and the comment by Mrs Koomson in the text of 6 December that the medication issue would have to be investigated. The first aspect was resolved during the Claimant's grievance: Mr Cheong made it clear that training in supervision would be offered. Thus by the time the Claimant resigned the only matter we consider she could properly complain of was the comment in Mrs Koomson's text. Standing back, we do not find that this alone can amount to a breach of the term as to trust and confidence, even bearing in mind that the relationship between the Claimant and Mrs Singh was not a happy one. It is insufficiently serious, it does not go to the root of the relationship and does not amount, on its own, to conduct likely to destroy the relationship of trust and confidence: it was unwise but should be read in the context of Mrs Koomson's concern about the medication of a service user. Also, by the time of resignation, the Claimant knew that Mr Cheong would be managing her and she had been reassured by Ms Jenner that this would be a fresh start. Against that context, the text is simply not enough to amount to a fundamental breach.

118 We consider that overall, for the reasons we have given, the Respondent had reasonable and proper cause for the way in which it conducted itself towards the Claimant. Furthermore, we do not consider, as we set out below, that the treatment amounted to different treatment on grounds of sex or indeed inconsistent treatment. For

this reason also, we find there to have been no fundamental breach of the term as to trust and confidence. While the Claimant may have had a perception that she was being treated unfairly we consider the fact of unfair treatment is not made out.

119 We do not find that the claims at para 14-23 of the ET1 amounted to the Respondent subjecting the Claimant to an unsafe working environment. We refer to our reasoning above. There is nothing in the outstanding matters of concern that create a lack of safety at work.

120 Likewise, given our findings above concerning the grievance, the Claimant has not succeeded in proving a breach of the implied term to reasonably and promptly afford a reasonable opportunity to obtain redress.

121 We do not therefore need to make findings on affirmation or causation.

122 For all of those reasons the Claimant was not dismissed and therefore her claim for unfair dismissal is not well-founded and does not succeed.

Wrongful Dismissal

123 It follows from our decision that the Claimant was not dismissed that her claim for wrongful dismissal (notice pay) also fails.

Sex Discrimination

124 The Claimant was not dismissed. Her remaining claim under s39 of the EA is whether she was discriminated against by being subject to a detriment because of sex.

125 We therefore consider whether each matter complained of subject the Claimant to a detriment and ask whether it was less favourable treatment on grounds of sex. As part of our enquiry we will consider evidence of actual and/or hypothetical comparators. Finally, we will ask whether the Respondent has shown reasons wholly unrelated to sex in respect of the detriments we find.

126 We remind ourselves that the Shamoon test of detriment ('a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work') does not establish a high threshold.

Refusing annual leave Christmas 2014

127 The Claimant argues that not being allowed to go on leave over Christmas was a detriment. She compares herself to Mr Yiribe whose leave to go to Africa for compassionate reasons was authorised.

128 We accept that not being allowed a requested leave is a detriment and we accept that Mr Yiribe was a male comparator in materially similar circumstances (requesting compassionate leave at short notice); however, the Respondent has shown a reason for the difference in treatment between the Claimant and Mr Yiribe wholly unrelated to the

difference in sex, namely that the short-staffing over Christmas prevented Mrs Singh releasing the Claimant from the Christmas rota. Compassionate leave was within the discretion of management and we have found that Mrs Singh had a sound operational reason for refusing the leave. This was not, therefore an act of sex discrimination.

Delay in payment of leave

129 We find that the delay in being paid for the 2 weeks' leave the Claimant took over Christmas 2014 was not a detriment. We have found on the facts that this leave was not authorised by the Respondent. The failure to pay for unauthorised leave is not a detriment.

130 After hearing the Claimant's account at the time (that she had flown to Zimbabwe for a funeral), the Respondent decided to pay for the leave on compassionate grounds. It thereafter paid the leave. The delay was accounted for by the time it took to investigate, receive advice from Abbey HR and decide. In our view the delay in payment did not subject the Claimant to a detriment: a reasonable employee, knowing the true circumstances, would not have regarded themselves to have been disadvantaged. To the contrary, they would have regarded themselves fortunate to be paid leave initially unauthorised and then allowed on compassionate grounds that were not in fact true.

Removal of phone/keys during disciplinary investigation

131 The removal of the phone and keys in January 2015 was pending investigation. The Tribunal does not consider that this subject the Claimant to a detriment: it was for a short period, she was able to access work and did not ultimately wish to have the phone. If we are wrong about this, there was a reason wholly unrelated to sex for the removal, namely the pending disciplinary investigation.

Disciplinary proceedings and outcome

132 The disciplinary proceedings and final written warning subjected the Claimant to a detriment because a reasonable employee might regard themselves as disadvantaged by such acts.

133 However, we find that the Respondent had non-sex related reasons for the disciplinary proceedings and outcome.

133.1 The Claimant accepted it was appropriate for the Respondent to investigate the disciplinary allegations.

133.2 We have found that the disciplinary proceedings and penalty were given for the reasons alleged by the Respondent, namely that it considered the Claimant guilty of serious misconduct.

133.3 The procedural failings identified by Abbey HR were cured on appeal. The Respondent got it right in the end by appointing Abbey HR. We were impressed with Ms McGibney's impartial and even-handed approach. We are satisfied that the recommendations she made, followed by the

Respondent, were for reasons wholly unrelated to sex, namely that she thought there was sufficient evidence for the allegations of leaving early and personal use of the phone to have been proved.

133.4 There was no difference in treatment with male comparators because no specific allegations had been made against male members of staff or otherwise brought to Mrs Singh's notice. She was unaware of the physical altercation between Mr Mariano and Mr Alarin and we have accepted that she would have initiated discipline against them if she had been.

133.5 We have had regard to the 'dismissal meeting' that Mrs Singh invited Mr Gaynor to in 2015 without any prior investigation. This was equally procedurally poor because it does not appear that there was any investigation with him. This leads us to the conclusion that the procedural flaws in the Claimant's case were not related to sex, they would equally have occurred had the Claimant been a man.

Alleged wages errors

134 The allegation that the Claimant's wages were paid in error every month is not made out on the facts. She was not therefore subject to a detriment.

135 In any event, the Claimant's transcript of a recording with a colleague shows that male staff also had complaints about wages, 423. If we had found that there was a detriment here, we would not, therefore, have found a difference in treatment because of sex.

Requirement to accrue holiday

136 The allegation the Claimant was required to accrue holiday is not made out on the facts. She was not therefore subject to a detriment.

Allegation thief/liar

137 The allegation Mrs Singh called the Claimant a thief and a liar is not made out on the facts. She was not therefore subject to a detriment.

Allegation that Mrs Singh asked Mr Gaynor to dismiss the Claimant

138 The allegation Mrs Singh required Mr Gaynor to dismiss the Claimant is not made out on the facts. She was not therefore subject to a detriment.

Failing to inform of Mr Gaynor's resignation

139 Mrs Singh did not send a text message to the Claimant about Mr Gaynor's resignation because she did not have the number. If the failure to send the text could be described as a detriment, we consider the Respondent has provided a reason wholly non-

sex-related for this omission.

Computer removal

140 It is probably the case that the removal of the laptop computer for a week subject the Claimant to a detriment because for that week she may have been less able to carry out all of her duties. We consider, however, that the Respondent has provided a reason for it that has nothing to do with sex, in that the passwords required to be changed after Mr Gaynor's resignation.

Concerns in Supervision

141 That Mrs Koomson raised concerns with the Claimant that she had eaten breakfast at work and left work early probably subjected her to a detriment: we can see that a reasonable employee might feel disadvantaged at work if they know their manager has concerns about them.

142 There is no evidence of a difference in treatment and difference in sex here because Mrs Koomson had not had her attention drawn to concerns about any other particular member of staff at the time (male or female).

143 However, Mrs Koomson had very good reason to raise these concerns with the Claimant because they had been drawn to her attention by other staff. It was also entirely proper to raise them with her in supervision. We consider Mrs Koomson's reasons for raising the concerns were operational and wholly unrelated to sex.

Removal of Supervision

144 The removal of supervision by Mrs Koomson without informing the Claimant that she intended to provide training did subject the Claimant to a detriment. A reasonable employee, whose duties included assisting in formal supervision, would regard themselves as disadvantaged by the removal of that duty which was part of their managerial status and role.

145 There is no evidence of any difference of treatment. We consider Mrs Koomson had operational reasons for removing supervisions: namely her genuine opinion about their quality and her correct concern about the breach of confidentiality in them having been left lying around the office. These reasons were wholly unrelated to sex. Nor is there any other evidence from which we could infer sex was the real reason for Mrs Koomson's decision. We find, in the light of the reasons, that she is likely to have adopted the same approach had the Claimant been a man. The removal of supervisions was therefore not sex discrimination.

Parking Space

146 In our view Mrs Koomson's query to the Claimant about Mr Gaynor's car did not subject her to a detriment. We do not think a reasonable employee would have regarded the query as creating any kind of disadvantage at work.

Keys

147 We do not regard the removal of the cabinet key and the house keys as a subjecting the Claimant to a detriment because they did not prevent her from carrying out her duties and she still had access to house keys given there always was a member of staff on duty in the home. If we are wrong about that we consider that the Respondent has shown a reason wholly unrelated to sex for the removal, namely Mrs Singh's need for them prior to audit.

Text while off sick

148 While overall we can understand the Claimant may reasonably have felt subject to a detriment by being texted about work while off sick, we consider there were exceptional reasons for the communication given that the manager could not find the service user's medication and thought that the Claimant would know. Mrs Koomson's comment that we will need to investigate what happened went further than was necessary, but we do not consider that she would have behaved any differently if the Claimant had been a man. Mrs Koomson was taken up with the need to find the medication. This was the reason she made the remarks. It was not related to sex.

Grievance handling and outcome

149 On our findings, we do not consider that the Claimant was subject to a detriment in the grievance handling or outcome. She was listened to. Her complaints were considered in detail and a full, reasoned response given to them. She had the opportunity to appeal. She could not say what outcome she wanted. Ms Jenner reassured that her return would be to a new manager with a fresh start.

150 If we are wrong about that and the detriment amounts to either the time taken to hear the grievance and/or the outcome of it, then the reasons for delay and outcome were plainly not sex-related.

150.1 The delay was caused by sending correspondence to the wrong address and Mr Cheong's annual leave.

150.2 There is no surprise in the grievance not being upheld. We agree with it. There is nothing from it that we can infer was on the ground of sex.

SMA Decision

151 The Respondent informed the Claimant correctly about her eligibility for SMA. This cannot be regarded as a detriment.

Overall

152 For the above reasons, therefore, the complaint of direct sex discrimination does not succeed.

Harassment

153 For the same reasons as we give above, we do not regard any of the Claimant's complaints as unwanted conduct relating to sex. They are not therefore unlawful harassment.

Victimisation

154 The grievance was a protected act because it included an allegation of sex discrimination.

155 We have found as a fact that we do not consider that the handling of the grievance or the outcome was related in any way to the fact of the protected act.

156 We have already found that the Claimant was not dismissed.

157 The victimisation claim therefore fails.

Employment Judge Moor

12 April 2017