EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms Carolina Gomes **v** **1. Henworth Limited t/a Winkworth Estate Agents**
2. Mr Graham Gold

Heard at: Watford **On**: 13 to 15 February 2017
12 April 2017 (in chambers)

Before: Employment Judge Bedeau
Members: Mrs S Boot
Mr D Bean

Appearances

For the Claimant: Mr J Braier, Counsel
For the Respondent: Mr A Line, Counsel

RESERVED JUDGMENT

1. The claimant's discrimination claim because of age is well-founded.

2. The claimant's claim of harassment related to age is well-founded.

3. The claimant's constructive unfair dismissal claim is well-founded.

4. The case is listed for a remedy hearing on Tuesday 20 June 2017 at 10.00am for one day.

REASONS

1. By a claim form presented to the tribunal on 20 June 2016, the claimant brought claims of constructive unfair dismissal, direct discrimination because of age and harassment related to age.

2. In the response presented to the tribunal on 20 July 2016, it is averred by the respondents that the Second Respondent, Mr Graham Gold, had not behaved in such a way entitling the claimant to resign and her resignation

was not in response with the alleged breach of mutual trust and confidence. If there was a dismissal, there was a potentially fair reason, namely the claimant's poor performance. The discrimination claims were also denied.

The issues

3. At the preliminary hearing held on 16 August 2016, Employment Judge Henry with the assistance of the parties, clarified the claims and issues. They are as follows:

4. Direct discrimination on the protected characteristic of age

   4.1 Has the respondents subjected the claimant to the following treatment falling within s.39 of the Equality Act, namely the second respondent at a meeting on the 3 March stating:

      4.1.1 "This marriage isn't working" – showing her a letter which she had recently typed.

      4.1.2 The second respondent's suggestion that the claimant would be "better suited to a traditional estate agency" and

      4.1.3 That the claimant should "sleep on it and decide what she wants to do". The claimant being told that they would discuss the matter further the following week.

   4.2 Had the respondents treated the claimant, as alleged, less favourably than they treated or would have treated a comparator?

   4.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of age?

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

   4.5 Alternatively, does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the claimant's performance in her role.

5. Harassment

   5.1 What is the unwanted conduct complained of?

      5.1.1 Do the comments of the second respondent to the claimant at the meeting on the 3 March 2016, whether on his own behalf or on behalf of the first respondent, amount to unwanted conduct relating to the claimant's age?

5.1.1.1. Did these comments have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.1.1.2. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offence environment for the claimant?

5.1.1.3. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5.1.2 The treatment of the claimant's grievance, following the second respondent's comments, being

5.1.2.1. an acceptance of the second respondent's reference to age to permitting the second respondent to attend the grievance hearing;

5.1.3 Allowing the second respondent to conduct himself in an overbearing manner at the grievance hearing.

6. Constructive Dismissal

6.1 What are the breaches alleged?

6.1.1 The claimant relies on the treatment of the grievance process and the grievance hearing;

6.1.2 Comments of the second respondent;

6.1.3 The presence of the second respondent at the grievance hearing and the claimant's complaints being dismissed out of hand during the grievance hearing.

6.2 Were the breach(es) a breach of the implied term of mutual trust and confidence?

6.3 Were the breach(es) of a fundamental nature going to the root of the employment relationship so as to entitle the claimant to treat the employment relationship as at an end?

6.4 If so, did the claimant resign in response to this fundamental breach of her contract of employment?

6.5 Did the claimant waive the alleged breach by delay or otherwise?

6.6 If the claimant was constructively dismissed, has the respondent shown a potentially fair reason for dismissal? The respondent relies on capability.

6.7 If so, did the respondents act reasonably in treating that reason as the reason for the claimant's dismissal?

6.8 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

6.9 If the claimant was unfairly dismissed, was there a probability that she would have been dismissed fairly in any event, and/or to what extent and when?

6.10 If so, should there be a reduction in the compensatory award to reflect this?

7. Unreasonable failure to follow the ACAS Code of Practice

7.1 Is this a case to which the ACAS Code of Practice applies?

7.2 Was there a failure to follow the ACAS Code by any party?

7.3 If so, was this failure unreasonable?

7.4 If so, is it just and equitable in the circumstances, for any award to be uplifted/decreased by up to 25%?

7.5 If so, what is the uplift/decrease?

8. Remedy

8.1 If the claimant succeeds, in whole or in part, the Tribunal will be concerned with issues of remedy, being:

8.1.1 Compensation on a finding of unfair dismissal, being a basic award and a compensatory award.

8.1.2 In respect of any proven unlawful discrimination, the Tribunal will be concerned to issue a declaration and compensation to include an award for injury to feelings

The evidence

9. The tribunal heard evidence from the claimant who did not call any witnesses. On behalf of the respondents, evidence was given by Mr Graham Gold, Director and the Second Respondent; Mrs Fiona Mendel, Human Resources Adviser; and by Mr Sean Doherty, Lettings Director.

10. In addition to the oral evidence the parties adduced a joint bundle of documents comprising of 127 pages. References will be made to the documents as numbered in the bundle.

Findings of fact

11. The claimant was born on 28 July 1956. She commenced employment with Bron and Morley LLP, an estate agency, trading as Winkworth, on 11 February 2009 as an Administrative Assistant and was based at the Hendon Office, part of the Winkworth Plc franchise. Her employment was transferred to the First Respondent in February 2015. Having regard to her contract of employment, signed on 27 May 2009, as Administration Assistant, she was responsible for all aspects of administration in relation to sales and lettings (page 55 of the bundle). At the date of her resignation she described her job title as Branch Administrator.

12. When the claimant worked at Bron and Morley, she focussed on the sales management side of the business with some work in lettings management when the Lettings team required extra support.

13. The First Respondent also has offices in Golders Green, Finchley and Colindale. Colindale is a sub-office of the Hendon office. Mr Graham Gold is a Director of the First Respondent Company and he, along with his Co-Director, Mr Howard Greenfield, own the business.

14. Mr Josh Tenenblat, was the Branch Manager at the Hendon office and the claimant's direct line manager. The Branch Administrator at the Golders Green office is Miss Courtney Murphy and the Lettings Director there is Mr Sean Doherty.

15. This case concerns the alleged treatment of the claimant on 3 March 2016 by Mr Gold during which the claimant stated that she was discriminated because of her age and that her concerns at the grievance meeting were not seriously considered. As a consequence, she resigned. We shall now deal with the events leading up to and including her resignation.

16. In January 2016, the respondents contend that there was an appraisal meeting with the claimant and Mr Tenenblat. They referred to a note in the joint bundle which is not signed but states the following:

> "Salary increased to £26,000
> Share of 5% split if achieved over £700k
> Subject to review because of Colindale
> Understands the nature of the challenge and how different things are under the new regime. She has been given plenty of opportunity to ask for assistance and Courtney now has Team Viewer on her computer.
> If she is not going to cope with the workload it will cause serious issues as she will also be responsible for much of the work at Colindale.
> JT must supervise and monitor the situation."
>
> (Page 64)

17. The respondents have referred to this as evidence of concerns about the claimant's performance. We, however, are satisfied that this document was not shown to the claimant. The claimant gave evidence to the effect that she had a meeting with Mr Tenenblat in January 2016 to discuss her salary as, at the time, all staff members were due a salary increase. She was unaware of any issues being raised about her performance. We have accepted her account.

18. We find that the above note was to Mr Tenenblat and was not in the nature of a record of an appraisal meeting with the claimant. Had it been such we would have expected the claimant to have been given the opportunity to read the document and to make comments.

19. We find that Mr Doherty, the First Respondent's Lettings Director, whose responsibility is to oversee the lettings side of the business for all of the offices, spent some time explaining to the claimant how the lettings business work. This involved him checking her correspondence and documents, such as, tenancy renewals, before they were sent out. He would send her documents to prepare, such as, memoranda and letters. Upon checking her work, he became concerned that the documents contained simple errors, such as, incorrect names and addresses. When these were pointed out to her she corrected them but some would be returned by Mr Doherty as they contained further errors.

20. Ms Courtney Murphy, Sales and Lettings Administrator at the Golders Green office, provided for the benefit of the claimant, a step-by-step lettings guide, for her to follow. Ms Murphy also had several training sessions with the claimant guiding her through the lettings process. A programme called, Team Viewer, was installed on the claimant's computer to enable her to call Ms Murphy, if she had any problems. Ms Murphy was then able to access her computer to see what the problem was and give advice to the claimant.

21. We find that the lettings work carried out at the Hendon office was much less than at the Golders Green office. Ms Murphy and Ms Marina Unsworth, Sales and Lettings Administrator at the Finchley office, had much heavier workloads than the claimant.

<u>Meeting on 15 February 2016</u>

22. On or around 11 February 2016, Mr Doherty had a meeting with the claimant to discuss her work. He told her that she needed to take more care as he could not continue to check her paperwork to the same extent as he had been doing. This caused the claimant some upset. She spoke to Mr Tenenblat, who in turn spoke to Mr Gold. Mr Gold then suggested that there should be a meeting to resolve any issues which was held on 15 February 2016. Mr Doherty, Ms Murphy, Mr Gold, the claimant and Mr Tenenblat were present. Mr Doherty apologised to the claimant for having upset her and explained that he had not intended to do so. Notes were taken of the meeting by Mr Gold but not shown to the claimant. In the notes it records

that the claimant was focussed on Reapit, an old software package not used much by the respondents. It also stated that the claimant was not paying attention to the new way of working set up by Ms Murphy to make her life easier. Mr Tenenblat agreed that it was his responsibility to manage the claimant and he would check twice a day, including at 4pm, her work.

23. In relation to the renewals process, Ms Murphy agreed to send the claimant a new spreadsheet which she could fill in using hard copy files to put a comprehensive list of the renewals together. The claimant was required to physically check the file copies at the end of the week (Page 65).

Meeting between the claimant and Mr Gold on 3 March 2016

24. The meeting on Friday 3 March 2016 and what followed, forms the nub of the claimant's case against the respondents. Late in the afternoon on 3 March 2016, Mr Gold arrived at the Hendon office and asked the claimant to speak to him in a private room. She had not been given prior notice of the meeting. When he entered the room, he waved a piece of paper at her and said, "This marriage isn't working". She asked him what he meant. He explained that a letter had been typed to Mr Nick Green, a solicitor and a friend of Mr Gold, which contained typographical errors and that a note would be placed on her performance record. The claimant explained that the letter had been created while under a lot of time pressure and that Mr Tenenblat had given her very vague instructions in relation to it and had checked it twice before it was sent out but had not pointed out to her any errors. She also explained that the errors were produced by the computer because incorrect information had been put in the property files. She felt that it was unfair on the part of Mr Gold to have placed all responsibility for the letter being sent out with errors, on her as it had been checked by Mr Tenenblat. Mr Gold then said to her that she would be, "Better suited to a traditional estate agency". The claimant immediately took this to mean that Mr Gold considered her to be too old to continue to work at a modern Winkworth office and asked him what he meant by the statement but he did not give her an explanation. He then said, "Sleep on it and decide what you want to do". The claimant believed that he was telling her that she should leave the business but she had planned on working for the first respondent until her retirement at the age of 65 years. At the time, she was 59 years of age. She said that the statements by Mr Gold knocked her confidence and she was particularly concerned and worried as they were made by the co-owner of the business. She felt as though the company no longer valued her as an employee because she was being asked to leave. She told us that she had made every effort to understand the lettings process but had been ignored by those who were in a position to help her.

25. The following day she became unwell and took sick leave. As she knew that Saturday would be very busy, she came in to work but only in the afternoon. She did not work the following Monday and Tuesday due to sickness.

The Nick Green letter

26. The letter discussed by Mr Gold with the claimant was drawn to his attention by Mr Tenenblat as it was a probate letter sent out by her to Mr Nick Green, solicitor, who was a client of the First Respondent and someone who Mr Gold knew quite well on a personal level. Mr Green was dealing with the estate of Mr Cyril Saper, deceased. Mistakes in the letter were pointed out to the claimant by Mr Tenenblat. The claimant produced an amended version but did not rectify all the errors. Mr Gold felt that the letter reflected very badly on the company and was completely unacceptable. He informed Mr Tenenblat that he considered him partly responsible for the errors as he had given instructions to the claimant that the letter should be sent to the solicitor and blind-copied to the vendor. Mr Gold was of the view that Mr Tenenblat had signed the letter without checking it.

27. The original letter mistakenly referred to the solicitor, Mr Green, as the deceased property owner's son and included an erroneous reference to the owner being "Mrs Saper". The letter was copied to Mr Paul Saper, we believed to be the deceased's son. The claimant, who was instructed to correct the errors and resend the letter, sent an email attaching the same letter. She then sent an amended letter which included grammatical errors with "condolences for your loss" which Mr Gold felt was completely inappropriate and should have been removed (Pages 97-104).

28. Mr Paul Saper emailed Mr Tenenblat on 29 February 2016, shortly after receiving the first letter, stating the following:

> "Dear Josh,
>
> Please withdraw the letter without delay. Mr Saper was not Mr Green's father. The valuation sought was at Mr Saper's passing, not Mrs Saper.
>
> It will confuse the executor and be unhelpful all round. You took notes at our meeting!,"
>
> (Page 99)

29. The claimant was signed off work from 9 March for work related stress (Pages 124-126).

30. In the joint bundle of documents is a typed note of the meeting on 3 March 2016 by Mr Gold. He told the tribunal that they were his own personal notes entered in a day book. He made the notes by hand and had typed them up some time later but were not verbatim. The words "Traditional", "Marriage is not working" and "Sleep on it" were not in his notes.

31. Mr Gold was cross-examined on whether he meant that the claimant should be looking for work elsewhere, focussing on sales not rentals. He responded by saying that he did not know whether he had used those words but what he was alluding to was that she was more suited to sales. He did

not disclose the notes to her for her comments nor to either Ms Mendel or Ms Kenney, who were later involved in the grievance process.

32. As Mr Gold's notes did not refer to the specific statements which caused the claimant some upset and to take sick leave, namely "This marriage isn't working"; "better suited to a traditional estate agency"; and "sleep on it", we placed little reliance on them. (Page 660).

The claimant's grievance dated 8 March 2016

33. Following the claimant's absence due to sickness on Monday 7 and Tuesday 8 March for work related stress, she emailed Mr Gold, copying Mr Greenfield, her grievance on 8 March. She referred to the meeting on 3 March and to the contentious statements allegedly made by Mr Gold. She stated that her ability to manage her workload effectively had been hindered by recurring IT problems with T-Tech and Reapit. She also wrote that the telephones were not working across the company's system since the recent office move; that she did not receive any structured formal training on her new lettings responsibilities and that two separate managers allocated work to her in an uncoordinated manner. She further stated that she had raised these issues previously and believed that they were the responsibility of management to resolve them to enable her to work more efficiently. Her problems made it impossible for her to fit all her tasks into her daily work schedule. With reference to the letter referred to by Mr Gold, she wrote that she was caught off guard and found the experience surprising and humiliating. She wrote that she required to write the letter under time pressure at the end of the day with Mr Tenenblat repeatedly telling her how urgent it was. She then wrote that under normal circumstances the letter template would have been in the Reapit software. She had colour coded all the amendments/additions on the template ready for her to tailor each letter without missing anything. As she was under pressure at the time, she had to copy and paste a previous letter to speed matters up and was left with little time to check the contents carefully. Mr Tenenblat then signed it without noticing the typographical errors. She referred to the statements made by Mr Gold, namely "This marriage isn't working" which she interpreted as an indirect way of saying that she no longer belonged in the team and the statement, "traditional estate agency", made her feel that she was too old to fit into a modern estate agency. Having worked in that sector for 26 years, she had learned to adapt and evolve to a changing modern environment but it was clear that she had already been "written off". She concluded by writing the following:

> "Ordinarily I would speak to you in person about such things, but I would prefer if we communicate via email so I am not caught off guard again, as I was last week when what I thought was an informal catch up, turned out to be much more serious and uncomfortable situation for me. I would also like to see what the mark on my record says and would appreciate if you could email it to me. Please treat this email as a grievance."
>
> (Pages 68-69)

34. Mr Gold responded to the claimant's email on 9 March 2016, expressing his disappointment after having read the content. He stated that he had spoken to the First Respondent's human resources advisers and that they would be setting up a grievance hearing following her return to work. He requested that she should send him a self-certification form.

35. By letter dated 14 March 2016, the claimant was invited by Mr Gold to a grievance meeting scheduled to take place either on either 22 or 23 March 2016. He wrote that the meeting would be chaired by the First Respondent's external human resources adviser, Ms Fiona Mendel, from DHOR Limited. He would be present to take notes and respond to any queries the claimant may have. He also informed her of her statutory right to be accompanied at the meeting. Exceptionally, he would allow a family member to be present (Page 70).

36. Ms Mendel recorded telephone discussions with various individuals in connection with the claimant's grievance. In her notes, she recorded that on 9 March 2016, Ms Donna Obsfield, an employee of DOHR, spoke to Mr Gold regarding the claimant's employment and performance issues. It was noted that the claimant was absent due to sickness from Friday 4 March. Reference was made in the notes to a conversation about "grievance, sickness, performance – disciplinary process, settlement agreement".

37. What was recorded in the entry of 9 March 2016, portrayed a very negative image of the claimant's performance by Mr Gold. We bear in mind that during the meeting he had with the claimant on 3 March 2016, he referred to her being better engaged in sales work with another estate agency. In his discussion with Ms Obsfield they referred to her performance, the disciplinary process and a potential settlement agreement, which conveyed to the tribunal that Mr Gold was still of the view that the First Respondent and the claimant should part company.

38. On 14 March 2016, Ms Mendel had a conversation with Mr Gold with regard to the format of the grievance meeting and they agreed that she should send the claimant an invitation letter and that she should chair the meeting with Mr Gold being present but only to take notes and to assist with any queries she may have relating to the business and/or to the claimant's role. Other than those matters, Mr Gold would not be participating in the meeting unless the claimant specifically questioned him or Ms Mendel required clarification on anything.

39. From the notes, we find that Mr Gold had an involvement in how the grievance meeting should be conducted.

40. In relation to the note made by Ms Mendel on 16 March 2016, she stated that she would send the grievance meeting agenda to the claimant ahead of time and that Mr Gold should not be present where the issues in the grievance concerned him but could be present for the rest of it. The meeting would be held on 23 March at 3pm at the White Swan with a family member of the claimant being present.

The grievance meeting on 23 March 2016

41. On 23 March 2016, Ms Mendel agreed to meet with Mr Gold at the Golders Green office prior to the grievance meeting and from there they would travel to the venue together. He recorded in relation to the 23 March that she had a meeting with Mr Gold regarding the claimant and conduct of the grievance meeting. In her oral evidence before us she said that she had arranged to meet with Mr Gold on 23 March simply to pick him up and for them to travel to the White Swan together which was what she did. (Page 69b)

42. Thus far the Tribunal finds that Ms Mendel, by her conduct and the conduct of her company, had compromised her independence. She arranged for a pre-grievance meeting with Mr Gold; they met at the Golders Green office for the meeting; they then travelled from that office to the venue together in her car; and they agreed that Mr Gold should be present at the meeting despite being the subject of the grievance. These acts, in the tribunal's view, are not consistent with someone who is supposed to be independent and who was to consider the grievance impartially. What is even more concerning, in our view, is the fact that Ms Mendel is a qualified solicitor and ought to have been aware of the need to distance herself from Mr Gold, the subject matter of the claimant's grievance.

43. The claimant attended the meeting with Mr Sidharth Mehta, her son-in-law. Mr Gold and Ms Mendel were also present. With the approval of Ms Mendel, Mr Mehta tape recorded the meeting and provided a transcript which was accepted by the respondents as being an accurate record. That document has been included in the joint bundle. We, therefore, refer to the salient parts of it.

44. Ms Mendel informed the claimant that Mr Gold was present purely to take notes and that his notetaking may not be that important as the meeting would be recorded by Mr Mehta. Shortly after the meeting commenced, Mr Gold began to question the claimant in relation to their meeting on 3 March 2016. The claimant gave an account of what Mr Gold had said to her and that she was caught off guard. She interpreted his statements as meaning that she was no longer considered a member of his team and felt that she was being steered towards resignation. Up until that point she had no idea that her job was at risk as she wanted to work for the First Respondent until she retired. She said that because of what was said to her by Mr Gold, she was unable to erase it from her mind and could not sit there thinking that it had never happened. She felt a loss of dignity, very uncomfortable and humiliated. It is recorded that Ms Mendel said the following:

> "OK. I am sorry to hear that you feel that way and I appreciate that it's very difficult for you to even discuss with me as well as a stranger to you, so thank you very much for being so forthcoming in how you feel in that. I have discussed this with Graham but will obviously want to discuss in more detail with him afterwards. But my understanding, correct me if I'm wrong Graham, is your job certainly isn't at risk, you're very much a member of the team at Winkworth and that it wasn't a situation where you were being

> asked to perhaps tender your resignation or that your role was at risk of redundancy or anything else. Is that correct Graham?"

45. It seems to the tribunal that this passage demonstrates that Ms Mendel had had an earlier discussion with Mr Gold about the claimant's grievance and that she had taken the view that the claimant's job was not at risk. She then proceeded to ask Mr Gold what could only be described as a leading question in relation to the claimant's job not being at risk, further betraying her lack of independence. Even that statement does not sit comfortably with the conversation Mr Gold had with Ms Obsfield when they discussed the disciplinary process and settlement.

46. The claimant said that she was unsure of what her intentions were in relation to returning to work for the First Respondent. Ms Mendel asked her whether there was anything the First respondent could do to make her feel more comfortable about returning to her role. The claimant replied by saying that she did not know what the solution was. She asked Mr Gold whether he had anything to ask and continued by saying, "Obviously we are not going to talk about all of these issues today?". This statement rather suggests that Ms Mendel and Mr Gold would be discussing other issues after the meeting but in the absence of the claimant.

47. Mr Gold then replied to Ms Mendel's invitation by saying that it was not his intention to cause the claimant any upset and at no point during the conversation on 3 March was he trying to make her feel unloved or unsupported. It was purely that there were some serious consequences as a matter had come to light. He then referred to the support the claimant had been given to assist her in carrying out her work and that the last thing he wanted was for her to feel ill or get ill over the situation as the company did not conduct its affairs in that way.

48. The claimant responded by saying that she felt humiliated, afraid and unfairly treated. At that point, Mr Gold asked her to tell him what the sense of humiliation was as he did not,

> "quite get the humiliation, if you don't mind me asking, because you know for a start there were only two of us in the room so humiliation to me can often be if you did something in front of a group of people".

49. The claimant replied that it was when he had told her that she was better suited to a traditional estate agency she felt that he was saying that she was too old for the office. Mr Gold replied by asking for her interpretation of "traditional" and whether it was to do with age? She responded by saying it was to do with age and it meant "old fashioned, old pace-wise". He, however, disagreed and said that traditional for him was about "good values". A traditional agency for him was,

> "good agency that has core values, a very high standard of performance, and if anything the only thing that I would have thought maybe some traditional agents do more than others is they may be or are more focussed on sales rather than on lettings and in the main a lot of the issues that we

had were to do with the lettings side of things than on the sales side of things."

50. He denied that traditional had anything to do with age. Towards the end of the meeting Ms Mendel said,

> "OK fine, well I think it's clear from what Graham said obviously he didn't have the intentions of obviously making you feel that way and when he was referring to "traditional" it wasn't in respect of your age in any respect. But in any event if it made you feel that way then of course for that we, you know, obviously apologise and would not have intended that to have happened. I would like to speak to Graham about this further, if there is anything you feel after the meeting that you would like to bring to our attention that you haven't today then by all means either contact me or Graham directly. If there is nothing else that you would like to add - is there anything else you would like to discuss? I mean I know that you have, obviously, discussed various things in the past relating to how to do the role, but I don't think at the moment that its relevant to sort of go through now at this meeting because its not specifically relating to your grievances."

51. Mr Graham Gold followed by saying:

> "Well I think Caroline has made it clear that that's why she's here, in terms of wanting to discuss those grievances and I don't really think there's very much more to be said."

52. The discussion then continued:

> "FM (Ms Mendel) - Is there anything that you'd like to say further?
>
> SM (Mr Mehta) - I think we've covered everything.
>
> FM – Ok fine. Well I will go away and speak to Graham about this and we will respond to you in writing so you can obviously take that away with you and then if you could come back to us thereafter. Obviously we appreciate that you are still signed off sick and would like to wish you a speedy recovery and hope you can feel better. If there is anything we can do to help in that respect then come back to us. But I will adjourn the meeting and appreciate you coming in to meet with us whist you were off as well and we'll get back to you – we'll discuss this week but no later than the beginning of next week if that's ok with you?
>
> CG – Fine
>
> FM – Ok. Thank you very much for coming in."
>
> (Pages 74 to 80)

53. It is clear to the tribunal that the meeting was conducted by both Ms Mendel and Mr Gold. It was Mr Gold who, in effect, concluded the meeting by

saying that he did not think there was very much more to be said. Ms Mendel accepted, without question, the responses given by him when she made references to him not intending to upset the claimant and that his view of traditional was not in respect of age. She also did not obtain a witness statement from Mr Gold to enable the claimant to comment on his account of events but instead she was required to respond to the director of the company's statements without any prior preparation. Ms Mendel said to the claimant that she would go away and speak to Mr Gold about matters. We were not impressed with Ms Mendel's conduct of the grievance meeting or of her impartiality.

54. From Ms Mendel's notes of her conversations, she recorded that on 24 March 2016, she advised Mr Gold of her decision, namely that she was not going to uphold the grievance. On 31 March 2016, she had another discussion with Mr Gold during which they discussed placing the claimant at the Colindale office as her contract had a mobility clause. They were of the view that the work there was less stressful and more administrative.

Grievance outcome letter dated 29 March 2016

55. In her letter dated 29 March 2016, sent to the claimant, Ms Mendel set out her outcome of the grievance. In relation to the statement, "This marriage is not working out," she wrote that the conversation was acknowledged by Mr Gold. She, however, was of the view that the meeting should have been structured in a more positive way as it came about because of the mistakes made by the claimant which were of concern to management and created a potential risk to the business. Mr Gold did not intend to make her feel that she was not a valued member of the team and/or that her job was at risk of redundancy.

56. In relation to the statements, "More suited to a traditional estate agency" and "Sleep on it and decide what you would like to do", Ms Mendel acknowledged that the conversation should not have been conducted in that way. She found that Mr Gold associated a traditional estate agency as having good, core values and that his comment was not intended to make the claimant feel that her age was not conducive to working within a modern estate agency. Ms Mendel wrote that the company apologised for the fact that the meeting made her feel humiliated and unwelcomed. She recommended the following action, namely that there should be more regular and structured meetings with the claimant in respect of her performance and that the company would put in place a Performance Management Programme to assist her, particularly in relation to lettings. The claimant should attend at least two training sessions over the following months at the Winkworth Academy. (Pages 81-83)

The claimant's appeal dated 1 April 2016

57. On 1 April 2016, the claimant appealed to Mr Gold, Ms Mendel's grievance outcome. Her grounds of appeal sent to Mr Gold, were:

"1. My initial grievance has not been treated seriously and my concerns were not satisfactorily addressed.

2. I do not believe that it was appropriate for you to participate in the grievance meeting as my grievance concerned you. I further believe that you influenced the outcome to protect your own and the company's position.

3. Your comments; "This marriage is not working ", "Sleep on it and decide what you would like to do" and "More suited to a traditional estate agency" were aimed at destroying the trust and confidence in the employment relationship. I asked the appeal officer to find that this was the case.

5. Your comment, "More suited to a traditional estate agency" related to my age and is therefore unlawful discrimination. I asked the appeal officer to find that this is the case.

I await to hear the outcome of the appeal process." (page 84)

58. On the very day she appealed, she tendered her resignation letter, also sent to Mr Gold, in which she wrote:

"Resignation

I write further to receipt of the letter from Fiona Mendel dated, 29 March 2016.

It is clear from the outcome reached by Ms Mendel that my grievance has not been taken seriously. My concerns have not been satisfactorily addressed.

My reading of the findings in relation to issues 1 and 2 is that it is not denied that the three comments (highlighted in my grievance) were made by you during our discussion on 3 March. However, I do not believe that Ms Mendel has properly turned her mind to what you meant by each comment.

I firmly believe that your aim was to engineer my exit from the business. I also believe that my age paid a prominent role in your decision to do this as evidenced by your comments that I would be "more suited to a traditional estate agency".

I do not feel that it was appropriate for you to have participated in the grievance meeting given that my grievances directly concerned you. This leaves me to believe that you ultimately influenced the outcome of the grievance to protect your own and the company's position. I therefore do not consider that Ms Mendel's proposals around structured meetings and trainings sessions will satisfactorily lessen the upset that your actions have caused me.

For the reasons cited above, I feel that my position has become untenable and I have no option other than to resign from my employment with

> immediate effect. I believe that you have beached the implied term of trust and confidence in the employment relationship.
>
> I will be grateful if you could make arrangements for my final pay."
>
> (Page 85)

59. On 5 April 2016, the claimant was written to by Ms Coleen Kenny, DOHR's Human Resources Adviser, inviting her to attend a grievance appeal hearing but noted that the claimant was reluctant to do so. The claimant asked that the appeal meeting be held via a conference call to avoid any further anxiety on her part. Ms Kenny agreed to this and also agreed that Mr Mehta should be present to record the discussion. (Pages 86-88)

60. The appeal meeting held by telephone conference 8 April 2016 at 11:00 a.m., was comparatively brief as the transcript covers slightly over two pages. The claimant confirmed that the matters she wanted Ms Kenny to consider were all in her grounds of appeal and that she had no further comment to make. We find that Ms Kenny did not question her in relation to her grounds of appeal. (Pages 89-91).

61. In her letter to the claimant dated 12 April 2016, Ms Kenny dismissed the appeal and upheld the decision taken by Ms Mendel. In our view Ms Kenny did not address each of the four points in the claimant's grounds of appeal. It was a very perfunctory appeal without much substance to the process. (Pages 92-93)

62. We find that during the grievance meeting and during the tribunal hearing that Mr Gold acknowledged that the comments were made by him on 3 March 2016.

Performance issues

63. We were referred to documents by the respondents purporting to show serious errors made by the claimant which were relevant to her performance. On perusing through them which covered the period from 29 January 12016 to 5 March 2016, 11 documents in all, the concerns were: not putting two postcodes in upper case; two names were spelt incorrectly; the failure to include London, as part of the address; putting the incorrect dates for the start of a tenancy; putting the wrong address in letters dated 5 March 2016; giving the wrong name of a tenant; and writing that the period of the tenancy was for one year less 1 day instead of 12 months. (Pages 105-118)

64. We were not provided with the documents sent out by the claimant which were correct.

Submissions

65. We heard submissions from Mr Braier, counsel on behalf of the claimant, and from Mr Line, counsel on behalf of the respondent. They prepared

written submissions and spoke to those in their they address to us. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunal's (Constitution and Rules of procedure) Regulations 2013, as amended. We have considered the authorities they have referred us to.

The law.

66. Under section 13, Equality Act 2010, direct discrimination is defined:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

67. Section 23, EqA provides for a comparison by reference to circumstances in relation to a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

68. Age is a protected characteristic under the EqA. Section 13(2) provides that the defence to direct age discrimination is justification.

69. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the of any other explanation, that a person (A) contravened the provisions 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."

70. The statutory burden of proof applies in cases of direct and indirect discrimination, victimisation and harassment. It also applies to breaches of an equality clause in an equal pay case.

71. Guidance in applying the statutory burden of proof was given under the old law in the case of Barton v Investec Henderson Crossthwaite Securities Ltd [2003] IRLR 332, EAT. This was approved by the Court of Appeal in the case of Igen Ltd v Wong [2005] IRLR 258. It is applicable to other forms of discrimination where the new burden of proof applies. The Court amended the dicta in Barton. It held, Peter Gibson LJ giving the leading judgment., that:

> "1. Pursuant to Section 63A of the SDA, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful by virtue of Part II or which by virtue of Section 41 or 42 of the SDA is to be treated as having been committed against the Claimant. These are referred to as "such facts".
>
> 2. If the Claimant does not prove such facts he or she will fail.

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

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

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

6. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is adequate explanation for those facts.

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

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

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

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

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

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

13. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

72. We have also considered the cases of: Laing v Manchester City Council [2005] IRLR 748, EAT; and Madarassy v Nomura International plc

[2007IRLR 246, CA. The Court of Appeal in Madarassy approved the dicta in Igen.

73. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal was entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

74. As already stated, in direct discrimination cases involving less favourable treatment, the claimant will need to show that he or she was treated differently when compared with an actual or hypothetical person, the comparator. There must be no material differences in the circumstances of the claimant and the comparator.

75. In the House of Lords case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, it was held that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as he or she was and postponing the less favourable treatment issue until they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground was less favourable.

76. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

77. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not without more , sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

78. The Court then went on to give this helpful guide, “Could conclude” [now “could decide”] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

79. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

80. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, race, sex, religion or belief, sexual orientation, pregnancy and gender reassignment.

81. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent’s case. EB was employed by BA, a worldwide management consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal which accepted her argument that the tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly

found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable to be non-discriminatory.

82. In the case of, B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not to lead to the legal conclusion that the dismissal occurred because she was a woman.

83. The tribunal could bypass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it is not necessary to consider whether the claimant has established a prima facie case particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This approached was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords and by Mr Justice Elias in Laing-v-Manchester City Council [2006] ICR 1519, EAT.

84. In relation to the justification defence, the Supreme Court judgment in the case of Homer v Chief Constable of West Yorkshire Police [2012] UKSC15. In that case, involving age discrimination, the court held that Mr Homer was indirectly discriminated against. The range of aims which could justify indirect discrimination on any ground was wider than for direct discrimination. Further, to be proportionate, a measure had to be both an appropriate means of achieving the legitimate aim and reasonably necessary to do so.

85. In relation to harassment related to disability, section 26 provides:

"26 Harassment

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of-

(i) violating B's dignity, or

(ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B"

86. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race relations Act 1976. The EAT held that the claimant had to show that,

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating the claimant's dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

87. Section 95(1)c Employment Rights Act 1996, provides,

"(1) For the purposes of this Part an employee is dismissed by his employer if …..

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

88. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that an employee is entitled to treat himself as constructively dismissed if the

employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

89. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

90. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the "last straw" doctrine that,

> "…the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?", Glidewell LJ.

91. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be…. .
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.", pages 37 - 38.

92. The test of whether the employee's trust and confidence has been undermined is an objective one, Omilaju.

93. In the case of Tullett Prebon plc v BGC [2011] IRLR 420, on the issue of whether the first instance judge had applied a subjective test rather than an objective one to the actions of the alleged contract breaker, the Court of Appeal held, reading from the headnote,

> "The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a 'question of fact for the tribunal of fact'. It [is] a highly specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract-breaker has clearly shown an intention to abandon and altogether refused to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract breaker towards the employees is of paramount importance.
>
> In the present case, the judge had approached the issue correctly. He had not applied a subjective approach. He had objectively assessed the true intention of Tullett and had reached the conclusions that their intention was not to attack but to strengthen the employment relationship. That was a permissible and correct finding, reached after a careful consideration of all the circumstances which had to be taken into account in so far as they bore on an objective assessment of the intention of the alleged contract breaker."

Conclusions

Direct discrimination because of age

94. We have come to the view that on its own the statement, "This marriage isn't working" is not related to the claimant's age nor the statement "Sleep on it and decide what you want to do". We do, however, conclude that the words, "Better suited to a traditional estate agency", was a reference to the claimant's age. Traditional is in the sense of being around for some time. In the Oxford English Dictionary, it is defined as "long established". It does not refer to core values. In the context in which it was said of the claimant we are of the view that it was a reference to her being old fashioned, set in her ways as a Branch Administrator and unlikely to change. She had adopted old fashioned practices having regard to her length of service in the estate agency industry. At the time, she was 59 years of age with six years left before she hoped to retire. The "traditional" comment would not have been said to a younger Branch Administrator or Assistant. It was not unconscious age discrimination but a clear reference to the claimant's age.

95. We do not accept the respondent's explanation that it was regarding core values as Mr Gold stated during the grievance meeting. Accordingly, we have concluded that the claimant's direct discrimination claim because of age is well-founded.

Harassment related to age

96. Having regard to s.212(1) Equality Act 2010, the claimant must elect, when relying on the same acts, whether her case is either of direct discrimination because of age or harassment related to age. If we are wrong about the direct age discrimination claim being well founded, we do take the view that the comment, "Better suited to a traditional estate agency" was related to the claimant's age. The other two comments were unrelated to her age. Applying the judgment in Richmond Pharmacology v Dhaliwal, the comment was unwanted. The claimant had neither been expecting a

meeting with Mr Gold nor had she thought that it would be about the letter to Nick Green. Although it might not have been Mr Gold's purpose of violating the claimant's dignity, it had that effect. The claimant described to the tribunal that it had the effect of violating her dignity and was humiliating. She no longer felt valued by Mr Gold. It was so upsetting that she took sick leave and could not remove those words from her mind. We have taken into account her circumstances and conclude, objectively, that it was reasonable for such a statement to have the effect of violating her dignity. In the alternative, this claim is well-founded.

97. The conduct complained of is that Mr Gold, the second respondent. He, at all material times, was acting in the course of his employment with the second respondent. The first respondent did not raise the statutory defence under section 109(4) Equality Act 210. Accordingly, both respondents are liable under the Act.

Constructive unfair dismissal

98. In relation to the constructive unfair dismissal claim, we have considered our finding that the claimant had been the subject of discriminatory treatment because of or related to her age. We also bear in mind that the Mr Gold accepted that he had made the comments on 3 March 2016. The other statements, "This marriage is not working out" and "Sleep on it and decide what you would like to do" conveyed to the claimant that the respondents no longer wanted her to continue to work for them. If the marriage is not working one possibility is divorce. In the context of the claimant's case, she should think about leaving as there was no suggestion by Mr Gold on 3 March 2016, of trying to get the claimant to improve on any performance issues. This all added to the claimant's sense of feeling unwanted.

99. Her concerns were compounded by the fact that the grievance meeting was not conducted independently and fairly by Ms Mendel. We have found that Ms Mendel discussed the claimant's grievance with Mr Gold prior to the grievance meeting. They arranged to meet at another venue and travelled together to where the meeting was scheduled to take place. Mr Gold, as the person complained against and a Director of the company, was allowed to remain throughout the meeting. He also asked questions of the claimant. Ms Mendel did not challenge his statements but readily accepted them during the grievance meeting rather than adjourn to make a balanced judgement. After the meeting and in the absence of the claimant, she discussed further matters relating to the grievance with Mr Gold. Although DOHR were not the first respondent's servants, they were its agents. Ms Mendel's and Ms Kenny's conclusions were accepted and adopted by the respondents.

100. The above matters, looked at objectively, demonstrated on the part of the first respondent, a fundamental breach of the implied term of mutual trust and confidence. It was, in the circumstances of the claimant's case, reasonable for her to take the view that trust and confidence had been breached, in a fundamental way, entitling her to resign.

101. We are satisfied that the reason for her resignation was her treatment. She had not delayed in resigning on 1 April 2016, following the outcome of the grievance on 29 March 2016. She was, therefore, constructively dismissed by the respondent and the tribunal do not accept that there were serious performance issues. She had not been formally warned about her performance and had benefitted from an increase in her salary in January 2016. There were also no concerns about her performance in Sales Administration. Accordingly, her dismissal was unfair.

102. In relation to contribution, we do not find that the claimant had contributed to her dismissal. There were concerns in relation to the lettings side of her work in connection with documents she had sent out but she had not been formally warned either by Mr Tenenblat, Mr Gold.

103. With regard to the argument put forward by the respondent that the claimant would have been dismissed in any event because of concerns about her performance, we adopt the submissions made by Mr Braier that to engage in such an approach is to embark on speculation as the Tribunal did not have all of the evidence upon which to conclude that there was the possibility of the claimant being dismissed. What the respondent did was to recommend putting the claimant on a Performance Improvement Plan rather than invoke disciplinary process.

104. This case is set down for a remedy hearing on 20 June 2017 with a time estimate of one day.

_____
Employment Judge Bedeau

Date: 5 June 2017……..

Sent to the parties on: .....

.....
For the Tribunal Office