EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M El Kachtoul	**v**	**Alaraby Television Network Ltd**

Heard at: Watford **On**: 7 and 8 October 2019

Before: Employment Judge Milner-Moore

Appearances

For the Claimant: Mr Paul Livingstone, Counsel
For the Respondent: Ms P Hall, Consultant

RESERVED JUDGMENT

1. The claimant was constructively and unfairly dismissed by the respondent.

2. Pursuant to section 123(1) of the Employment Rights Act 1996, the compensatory award will be reduced by 50% to reflect the likelihood that the claimant would have resigned from his employment had he not been constructively dismissed.

3. Pursuant to sections 122(2) and 123(6) of the Employment Rights Act 1996, the basic and compensatory awards will be reduced by 50% in light of the claimant's contributory conduct.

4. The claim of wrongful dismissal is dismissed upon withdrawal.

REASONS

Claims and Issues

1. The claimant alleges that he was constructively and unfairly dismissed by the respondent. A claim of wrongful dismissal has since been withdrawn (it is accepted that the claimant was paid notice pay on his resignation). The following issues arise for determination:

1.1 Was there an act, or series of acts which caused the claimant's resignation?

1.2 Were these acts a fundamental repudiatory breach of contract entitling the claimant to resign? The claimant relies on a number of matters which are said cumulatively to amount to a breach of the implied term of trust and confidence and so the question is whether or not there was reasonable and proper cause for the conduct in question and whether the conduct was likely to seriously damage the relationship of trust and confidence. He complains of the manner in which the disciplinary proceedings were conducted, including: failures in relation to the investigation, a blurring of boundaries regarding the proper role of investigator and decision maker, delays in the processes, the decision to suspend him, the convening of the disciplinary hearing at short notice and in breach of the respondent's disciplinary policy, a failure to address in full grievances raised by the claimant during the process, the reaching of the decision to dismiss the claimant and the subsequent decision on appeal to reinstate the claimant but to give a final written warning lasting for two years. The final written warning is relied upon as a last straw.

1.3 Did the claimant resign in response these matters?

1.4 Had the claimant affirmed the contract of employment before resigning?

1.5 If dismissal is established, was there a potentially fair reason for dismissal?

1.6 If so, did the respondent act reasonably in all circumstances?

1.7 What is the likelihood that the claimant would have been fairly dismissed or resigned following a fair process?

1.8 Did the claimant contribute to his own dismissal by blameworthy conduct such that any compensation paid to him should be reduced?

Evidence

2. I received an agreed bundle of documents to which some additional pages from Ms Parihar's notebook were added on day two. I heard evidence from the claimant and, for the respondent, from Ruti Parihar (HR Manager), Mohammed Aboulenein (respondent's Head of Programs and Development and the dismissing officer); and Mr Abdurrahman Elshayyal, (a Director of the respondent and the person who heard the claimant's appeal).

Facts

3. The claimant's employment with the respondent began on 1 December 2014. At the time of his dismissal he was employed as a senior broadcast journalist, having moved into that position following a reorganisation in late

December 2017/early January 2018. The respondent is an Arab language television network based in London with around 270 employees.

4. The claimant's contract of employment provided that the respondent's disciplinary policy was not contractual and stated :

> "we may suspend you for however long we consider appropriate to investigate any aspect of your performance or conduct or to follow disciplinary proceedings".

5. The respondent's disciplinary policy appeared at page 39 of the bundle. It dealt with suspension in the following terms:

> "If there are concerns about your conduct or performance and we decide to carry out an investigation or hold a hearing under this procedure, we may suspend you. We will only do this if we think it appropriate in the circumstances, for example, where the concern relates to misconduct of a serious nature. Suspension not does not imply we believe a concern is justified and is not a disciplinary action under the procedure".

6. In relation to disciplinary hearings, the policy states:

> "If we decide to hold a hearing under this procedure we will give you reasonable opportunity to consider your response to our concerns before the date of the hearing. In practice, we try to tell you at least three working days before the date of the hearing. There are circumstances in which we might hold a hearing with less than three working days' notice. For example, we might do this if you agree to us doing so or if it is clear that there is no dispute about whether or not a concern is justified".

7. Paragraph 7 of the policy dealt with the role of Human Resources:

> "HR is likely to be involved throughout the process possibly as an investigator but more usually to advise and support the investigator and decision makers. He/she is also responsible for ensuring that the appropriate procedure is followed."

8. Paragraph 12 of the policy defined gross misconduct and stated that bullying, harassment or victimisation of staff or others would be regarded as gross misconduct. Paragraph 11 dealt with written warnings and provided that a first written warning would normally last for 12 months, and a final written warning for 18 months.

9. On 14 January 2018, one of the claimant's colleagues, Ms Assem informed Ms Parihar that approximately a year ago the claimant had, on two occasions, touched her leg whilst they were both standing in the Kitchen area. She did not wish to make any formal complaint but drew it to Ms Parihar's attention because there was a corporate reorganisation going on and she wanted assurances that the claimant would not be working in her team. It was agreed that the claimant would not work in Ms Assem's team.

10. On 23 February 2018, Ms Parihar received an e-mail from another of the claimant's colleagues, Ms Barakat, complaining about the claimant's behaviour. The email stated that she had received a message from the claimant via LinkedIn. Her email attached a screen shot and stated:

> "prior to sending his message, Mr El Kachtoul followed me to the canteen and asked me why I had changed lately in reference to me ignoring and avoiding him. I pretended that I didn't hear him and thought that was the end of it but later on that day he sent me the message on LinkedIn that I attached to my e-mail. I tried so hard to avoid him as he keeps staring at me inappropriately whenever he sees me. I really didn't want to make a big fuss about this and thought it would stop it if I ignored it but I have had enough"

11. The screen shot showed two messages, both under a date heading 24/4/2017. Message 1 read:

> "thanks for being around".

Message 2 read:

> "the crimson/ruby/pinky red shapes on shirts are wholeHEARTedly appreciated!"

12. Message 2 was a reference to a shirt that Ms Barakat had recently worn in the office. In fact, the screen shot provided by Ms Barakat gave a misleading impression. Message 1 had been sent in February 2017 after the claimant had received an invitation from Ms Barakat via LinkedIn, and message 2 had been sent in February 2018.

13. On 2 March 2018, Ms Parihar met Ms Barakat who explained her concerns and said that some other women (Ms Hapal and Ms Abdullah) had also complained about the claimant's behaviour.

14. On 2 March 2018, the claimant sent a third message to Ms Barakat via Linked in in the following terms:

> "it's hard not to believe in numerology when faced with the blessed number 99".

This was a reference to a jumper Ms Barakat had worn that day with a '99' on the front.

15. On 9 March 2018, Ms Parihar asked Elaine Bailey to instigate an investigation into these matters. On 15 March 2018, Ms Barakat sent a further e-mail to Ms Parihar:

> "I was a bit hesitant about contacting you but I feel it is important that you know what just happened a few minutes ago. I was in the canteen washing my cup and Mr El Kachtoul followed me less than five minutes after I got there. He then moved towards me and said "Good Evening Tamara". I then left the canteen and saw a colleague of mine outside, was chatting with him briefly and Mr El Kachtoul saw me and then opened the door as I and my colleague were outside. I feel so uncomfortable with him doing that, especially that the staring and the leering didn't stop either. Could you please advise me and tell me what to do?"

16. On 16 March the claimant was informed by Ms Parihar that his conduct towards a female colleague had been considered intimidating. He was encouraged to take annual leave whilst the matter was investigated. There were then some exchanges between the claimant and the respondent about

how he should book leave, but it appears that the claimant eventually decided that he would not.

17. On 21 March 2018, Ms Bailey saw Ms Assem as part of the investigation. She told her that about a year previously she had been in the kitchen and a person standing behind her had touched her on the thigh. She turned and it was the claimant. That conduct had been repeated approximately two weeks later and after that she had stopped speaking to the claimant. Ms Assem said that she had not spoken to anyone at the time because "*there was no one talk to and the place was full of predators and perverts*". She explained that she had raised a concern subsequently so that the claimant would not be put working in her section of the business and that she wanted the complaint to be kept confidential.

18. Ms Assem had told Ms Parihar that she had informed her line manager of the incidents with the claimant when they occurred in 2017. However, Ms Parihar did not inform Ms Bailey of this or ensure that the line manager was interviewed. Nor were any steps taken to investigate Ms Assem's assertion that the place was full of predators and perverts.

19. On 21 March, the claimant was suspended by the respondent. He was handed a letter that told him that he was being suspended in relation to allegations of possible sexual harassment and that the purpose of this suspension was to enable an effective investigation. He was told that there would be a disciplinary hearing in due course so that he could respond to the allegations. The claimant was suspended because the respondent wanted to protect the complainants and because the claimant would not commit to taking annual leave whilst the investigation proceeded.

20. On 22 March, Ms Bailey saw the other three potential complainants. Ms Barakat stated that the claimant had initially been friendly to her but that, over time, she had felt uncomfortable about him because of the way he stared at her. She referred to him staring and leering at her and said that he failed to respect her personal space. As a result of this she began to ignore him and changed the way that she dressed. After a while he had approached her and asked why she was treating him like this and later that day he had sent the first two messages to her via LinkedIn. (In fact, this was incorrect because the first message had been sent a year earlier). She had not responded to those messages. He had then sent a further message to her on 2 March, again commenting on her clothing. He then approached her in the kitchen to speak to her but she had ignored him. She said that his presence at work made her uncomfortable and she would prefer it if he were not there. Failing that, she wanted to see some action taken, this could be in the form of a written warning.

21. Ms Hapal said that she had no complaint to make about the claimant but he did make her feel uncomfortable because he didn't respect personal space. However, she thought him harmless; someone who tried to be friendly but was silly and uncomfortable to be around. She said that on one occasion he had offered to help her brush her hair. Ms Hapal felt that he should be spoken to about his conduct "as he could be unaware of it".

22. Ms Abdullah said that the claimant displayed interest in some female staff and that he tended to invade people's personal space. She said that a few staff had complained to her but no one had been prepared to take it to HR. She said that she personally found his behaviour creepy and disgusting but gave no specifics about what the disgusting behaviours were. However, it did not appear that she had any complaint to make herself.

23. Ms Bailey recorded the information volunteered by the women but did not seek to elicit further detail where matters were unclear. She did not ask any of the women that she had interviewed if anyone else had witnessed any of the incidents that the individuals reported although the incidents appear to have occurred in the office. Nor did she attempt to establish whether the failure to respect "personal space" was something that was only a feature of the claimant's interactions with female colleagues or whether he behaved in the same way with male colleagues. She did not attempt to interview the claimant to obtain his side of the story or to establish whether there were witnesses that he would wish her to interview.

24. On 6 April, the claimant wrote seeking an update and asking various questions. At this point he was still not aware of the specifics of the allegations against him. He asked why it was necessary for him to continue to be suspended and why he could not work from home. Ms Bailey replied later that day addressing some of the points but not addressing the suggestion that the suspension could be lifted and the claimant could be permitted to work from home. Nor did she provide him with any further details of the allegations. The claimant replied to her e-mail on 9 April 2018, again protesting at the respondent's conduct and saying that he was concerned that he still didn't know the detail of the allegations and that the information provided seemed to suggest that the allegations were shifting. He also said that he felt that suspension was unduly protracted. Ms Bailey replied indicating that "*once we have completed this stage of the investigation process you will be sent further details of the allegation*" but she did not address the detail of his complaints.

25. Ms Bailey then produced her investigation report. It was very brief and the conclusion was stated as follows:

> "The e-mails provided substantive evidence that ME had sent e-mails to Tamara. From the interviews conducted and the e-mail from ME to Tamara it would appear that ME's conduct could be seen as inappropriate and could amount to sexual harassment. The e-mail to Tamara is quite suggestive and implied that she was wearing the t-shirt for his gratification. There seems to be a general view by staff interviewed that there is no respect for personal space. One staff said that on two occasions he had touched her leg. RH said he suggested to her that he would brush her hair, FA says that she noticed that he displayed a lot of interest in particular female staff. FA also stated that there was a tendency for him during conversation to get close to her and invade her personal space."

She recommended that a disciplinary hearing take place.

26. On 11 April a letter was sent to the claimant inviting him to a disciplinary hearing on the morning of 13 April, just over one working days' notice. There was no reason for the failure to comply with the expectation in the disciplinary policy that at least three working days' notice would be given had been breached. The letter inviting the claimant to a disciplinary hearing said that it would consider "*the following allegations of conduct that could amount to sexual harassmen*t". However, the specific allegations were not listed. The claimant was therefore left to discern what the misconduct allegations must be from the investigation report and supporting statements.

27. The disciplinary hearing took place on 13 April before Mr Aboulenein. The claimant was represented by his trade union official. Ms Bailey was in attendance and she explained that she was there because she had carried out the investigation and in order to assist Mr Aboulenein. The claimant denied touching Ms Assem. He suggested that she had been motivated to make this allegation by his failure to assist her friend to get a job. He denied allegations of failing to respect personal space or offering to brush Mr Hapal's hair. He then commented that Ms Hapal was "*inviting remarks in relation to brushing her hair*" when asked to explain what he meant by this his Union representative attempted to intervened to prevent his answering. The claimant then explained that he meant that Ms Hapal "*was inviting someone to tell her that it was not an appropriate place to brush her hair*". He suggested that Ms Abdullah was erratic and had once shouted "*I love you Professor*" at him and had initiated sending invites to him on LinkedIn. He accepted that he had been friendly to Ms Barakat and said that she had sent him a LinkedIn invitation which he had accepted. He considered that the messages that he had sent to her on LinkedIn were no more than friendly and pointed out that she had not disconnected him on LinkedIn or asked him to stop messaging her at any point. When asked if he now understood that the messages had made Ms Barakat uncomfortable and that it was not ok to send such messages, he said that he did think the messages were ok. After intervention from his trade union representative he eventually said that "*after the hassle*" he would not send such messages in future. However, he also agreed that he would be more mindful when speaking to women in future. He said that he had not sent comparable messages to other colleagues. He also pointed out that the way in which the messages to Ms Barakat had been presented obscured the chronology, which was that the second of the two had been sent a year after the first. He later tried to argue that the messages were merely a friendly reminder of what was appropriate work dress. He accepted that initially Ms Barakat had been talkative but that this had not been the case more recently as, although she was still amiable, they did not have occasion to talk.The claimant also made reference to the fact that he had ADHD but did not explain how he considered this to impact on any of the matters under consideration.

28. After the disciplinary hearing Mr Aboulenein asked for some further investigations to be conducted by Ms Parihar. She looked into Ms Barakat's LinkedIn history and established that Ms Barakat had indeed sent the invitation to the claimant via LinkedIn and she established the position regarding the chronology of the messages. She also established that Ms

Abdullah had sent invites to the claimant via LinkedIn but Ms Abdullah suggested that she had not realised that this had occurred, it had been done automatically by the LinkedIn program. Ms Abdullah was asked about and denied making the "I love you professor" comment.

29. On 23 May 2018, the claimant was dismissed for gross misconduct. The dismissal letter referred to allegations of sexual harassment from four individuals and it found that the claimant was guilty of sexual harassment and unwanted conduct of a sexual nature, in particular, in relation to the allegation he had touched Ms Assem and in relation to the messages that he had sent to Ms Barakat. Mr Aboulenein considered that the claimant's refusal to accept that his behaviour was sexual harassment was concerning, he had little awareness of the impact of his behaviour or his need to change.

30. The claimant appealed on 25 May 2018. On 12 June 2018 an appeal hearing took place before Mr Elshayyal again in Ms Bailey's presence. The claimant put in a lengthy written statement after the appeal which challenged the adequacy of the investigation and the fairness of the processes. He also argued that there was no evidence of misconduct.

31. Thereafter there was then a lengthy period of delay despite chasing from the claimant. Mr Elshayyal explained that this was due to his heavy workload. Giving evidence, he stated that he assumed that the claimant would not have been disadvantaged by delay because he was still in receipt of pay. However, that was incorrect. The claimant had been dismissed and so was not in receipt of pay.

32. On 2 July 2018, Ms Barakat approached Ms Parihar saying that, whilst she wished the Claimant to be held accountable for his actions she did not want to have his dismissal on her conscience, because of her religion. Ms Parihar informed Mr Elshayyal of the conversation.

33. It was not until 16 July that the appeal decision was sent to the claimant. Mr Elshayyal overturned the decision to dismiss but concluded that the claimant should receive a final written warning which was to remain on file for two years. He took the decision on the basis that, although he considered that the claimant had expressed no contrition, he felt that it would be possible to reduce the likelihood of repetition of similar behaviour by the Claimant by ensuring that he undertook training etc, and he also had regard to Ms Barakat's view that she did not wish the claimant to be dismissed. However he considered that a longer period of warning was appropriate given the gravity of the charges and his lack of remorse. It was not entirely clear which of the original disciplinary charges had been upheld in the appeal decision. Mr Eshayyal's witness statement to the Tribunal makes reference to the allegations of Ms Barakat The letter asked the claimant to contact Ms Bailey to attend a meeting on 20 July with a view to arranging his return to work on 23 July 2018.

34. On 24 July 2018, the claimant resigned. I find that the claimant resigned in response to the appeal outcome.His e-mail of resignation noted that, whilst the dismissal had been revoked, he considered that in substance it had been

upheld and that the company had acted in bad faith and had failed to address the injustices that he had suffered or to mend the damaged employer/employee relationship. In evidence at the hearing, the claimant's position was that, whilst he could have accepted a written warning, he could not accept a final written warning, particularly one of increased duration, as he would have felt as though his employment was constantly at risk.

35. In his evidence at the hearing the claimant continued to maintain that he had done nothing wrong. He explained the second message to Ms Barakat as an attempt at irony " *I found the large fuschia coloured shape on the White T-shirt, which was worn with a certain exhibitionism while chatting with her colleague facing my desk for some 30 minutes, both distracting and embarrassing. It was certainly not appreciated".* He explained his last message in similar terms as a further attempt at irony and said "*I found what was on the jumper and her behaviour [chatting with a colleague] distracting and embarrassing*."

36. The claimant has submitted an expert's report dated 19 February 2019 which confirms a diagnosis of ADHD. There is nothing in the report relating to ADHD which would be of relevance in relation to the alleged misconduct though it is suggested that the claimant is sometimes impulsive. There is also a brief reference to the claimant reporting " *ASD traits such as difficulty understanding social cues and some rigidity in behaviour. He would like to be assessed for the condition*". There was no evidence of such an assessment having taken place.The claimant's evidence at the hearing was that he considers himself to be socially awkward and that he needs structure to help him focus and reduce his anxiety. He described people chatting and socialising at work or engaging in activities such as applying make up or brushing hair as things that cause him anxiety because they represented a departure from proper workplace conduct.

The law

37. The onus is on the claimant to show that the employer has engaged in conduct, whether a single act or omission or a series of acts or omissions, which amounts to a fundamental breach of contract. Not all unreasonable conduct will amount to a fundamental breach of contract. The contractual term said to be breached here is the implied term of mutual trust and confidence. The test is that set out in **Malik v BCCI**, has the employer without reasonable and proper cause engaged in conduct which is likely to destroy or seriously damage the relationship of trust and confidence? Any breach of the implied term of trust and confidence will amount to a repudiation of the contract **Woods v WM Car Services Peterborough** [1981] ICR 666. The test of whether or not the implied term has been breached is an objective one.

38. In this case it is said that the breach results from the cumulative effect of a series of matters culminating in a final straw: the decision on appeal to substitute the dismissal with a final written warning of two years' duration. It is not necessary for any final straw to be a breach of contract or a blameworthy act on the part of the employer provided it is a matter that is

not wholly innocuous or trivial, and that is capable of contributing to the cumulative breach of the implied term. In **London Borough of Waltham Forest v Omilaju** [2005] ICR 481, Dyson LJ described the quality of a final straw in the following terms

"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 why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however, slightly to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

If the final straw is nor 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 have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign his employment. Instead he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act which he seeks to rely on is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

39. An employee must resign promptly following breach it or may be found that the contract has been affirmed. In **Kaur v London Hospitals NHS Trust** 2019 ICR1, Underhill LJ suggests that a Tribunal dealing with a constructive dismissal case involving a last straw should ask itself

1. "What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation
2. Has he or she affirmed the contract since that act?
3. If not was that act or omission by itself a repudiatory breach of contract?
4. If not was it nevertheless a part, applying the approach explained in ***Omilaju*** *of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a breach of the* ***Malik*** *term. (If it was there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above).*
5. *Did the employee resign in response (or partly in response to the breach)*"

40. Even where there is a contractual power to suspend, the employer must still exercise that power in a manner which is consistent with the implied term of trust and confidence. Suspension should not therefore be a knee jerk reaction to an allegation and there must be reasonable and proper cause for suspension. An employer should undertake sufficient preliminary enquiries to suggest that there may be a real disciplinary case to answer and there should be proper grounds for considering that suspension is appropriate, for example, concern that there might be interference with an investigation or that other staff cannot be expected to work alongside the individual e.g. where there is danger of repetition of the misconduct. As part of the implied duty of trust and confidence the employer should endeavour to follow a fair disciplinary process. This will require compliance with its' own disciplinary policies and an approach that is compliant with the ACAS code of conduct unless the employer has reasonable cause not to do so.

41. Where an employee establishes that dismissal has occurred, the usual questions under section 98(4) Employment Rights Act 1996 will then arise, in short was there a potentially fair reason for the dismissal and has the employer acted reasonably in all the circumstances in treating it as a sufficient reason for dismissal?

42. Where an individual is found to have been unfairly dismissed, the compensatory award is to be set "*at such amount as it considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal so far as that loss is attributed to action taken by the employer*". (Section 123(1) Employment Rights Act 1996).

43. It may be just and equitable to reduce the award to reflect the chance that the individual's employment would have terminated even had there been a fair process (**Polkey v AE Dayton Services Ltd** 1987 IRLR 503). In considering the "Polkey" reduction it is necessary to have regard to all the evidence and try to assess what the chances are that the individual would have remained employed had a fair process taken place and/or for how long their employment would have continued. This may involve a degree of speculation. However, there may be cases where the degree of uncertainty is such that no sensible prediction can be made. **Software 2000 Ltd v Andrews** UKEAT/0533/06 summarises the position as follows

> "*The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it is whether it can make an assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice*"

44. Section 123(6) Employment Rights Act provides:

> *"where the tribunal finds that the dismissal was to any extent caused or contributed to by the action of the complainant, it shall reduce the amount of the compensatory award by such a proportion as it considers just and equitable having regard to that finding"*

In the case of the basic award a reduction may be made where the claimant's conduct before dismissal was such that it would be just and equitable to do so and there is no requirement of a causal link between conduct and dismissal (section 122(2) Employment Rights Act 1996). Reductions for contributory conduct may be made in cases in which a constructive dismissal has occurred, although such reductions are unusual, **Polentarutti v Autokraft Ltd** 1991 ICR 757. In **Hollier v Plysu Ltd** 1983 260 the EAT suggested as a broad approach to the assessment of contributory fault reductions that cases are likely to fall into one of four bands, 100% reduction being appropriate where the employee is wholly to blame, 75% where the employee is largely to blame, 50% when blame is to be shared equally between employer and employ and 25% where the employee has a lesser degree of blame.

45. Under section 26(1) of the Equality Act 2010, harassment is defined as unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive work environment for them. In considering the effect of conduct it is necessary to consider the perception of the person subjected to the conduct, all relevant circumstances and whether it was reasonable for the conduct to have had that effect. Sexual harassment is defined at section 26(2) Equality Act 2010 as unwanted conduct of a sexual nature. In this context, unwanted means "unwelcome" or "uninvited". It is not necessary for any objection to the conduct to have been raised for it to be "unwanted".

Conclusions

What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation ? Has he or she affirmed the contract since that act? If not was that act or omission by itself a repudiatory breach of contract?

46. The claimant's resignation was triggered by the respondent's decision of 16 July to uphold the disciplinary charges against him but to reduce the disciplinary penalty to a final written warning of extended duration. The claimant resigned a week after being informed of that decision and did not take any positive steps to affirm his contract of employment in that period. I consider that he resigned sufficiently quickly that, absent such positive steps, he cannot be said to have affirmed the contract of employment. I do not however consider that the decision to reduce the disciplinary penalty to a final written warning, albeit one that was for a longer period than provided for in the respondent's policy, could be said to amount to a repudiatory breach of contract in and of itself.

If not, was it nevertheless a part, applying the approach explained in Omilaju of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a breach of the Malik term?

47. Whilst it was incumbent on the respondent to take seriously complaints of harassment made by its female staff, the respondent was also obliged to ensure that it was fair to the claimant in the way in which dealt with complaints regarding his behaviour. The claimant relies on a number of matters, including the appeal outcome, which are cumulatively said to amount to a breach of the implied term of trust and confidence. The question is whether or not there was reasonable and proper cause for the conduct in question and, if not, whether it was likely to seriously damage the relationship of trust and confidence.

48. I have concluded that the manner in which the disciplinary process was conducted was deficient in a number of aspects and that there was no reasonable and proper cause for the deficiencies. Whilst I consider that there was reasonable and proper ground for the decision on appeal to substitute a final written warning for dismissal, I consider that the failure in the appeal decision to acknowledge any of the concerns raised by the claimant about the fairness of the disciplinary processes was unreasonable. The appeal decision was therefore a final straw contributing to a series of events, the cumulative effect of which was of a character such as to seriously damage the relationship of trust and confidence.

48.1 The investigation was insufficiently thorough. Although the complainants were interviewed, they were not asked to provide further detail where matters were unclear, nor did the investigator attempt to explore whether there were other relevant witnesses nor whether there might be evidence which might exonerate the claimant.

48.2 Ms Assem provided little detail regarding the incidents in 2017 and was not asked whether it was possible that any contact might have been inadvertent nor asked any questions which might have shed light on this point. Although Ms Assem stated that the workplace was full of predators and perverts, no steps were taken to establish what she meant by this. It was a very serious allegation which appears to have been completely ignored. If true, the respondent was remiss in failing to investigate and, if untrue, it is a matter that could potentially have cast doubt on Ms Assem's credibility.

48.3 Witnesses who were available and could have either corroborated, or contradicted, the evidence given by the complainants were not interviewed. Ms Parihar was aware that Ms Assem claimed to have reported her concerns regarding unwanted touching by the claimant to a line manager at the time but no effort was ever made to interview the line manager to see whether he corroborated this account. A colleague was present on one of the occasions when Ms Barakat encountered the claimant. The claimant's behaviour as described by Ms Barakat on that occasion was unremarkable, save for the allegation that he was staring and leering at her. No attempt was made to identify the colleague to establish whether they too considered that the claimant had behaved inappropriately

by staring. No effort was made to interview anyone else to verify allegations that the claimant engaged in staring or failed to observe personal space, or to establish whether any such behaviour was focussed on female staff, although colleagues of the claimant, for example his manager, may have had relevant evidence to give.

48.4 The claimant was not interviewed as part of the investigation and so was never afforded an opportunity to put forward his side of the story at an early stage or to suggest additional witnesses who could give evidence as to his conduct in the workplace. Whilst this was not required under the respondent's policy, it would have been good practice to do so, in order to ensure that the investigation was fair and balanced and not focussed solely on the accounts of the complainants. As a result of this failure, matters that should have been uncovered by a competent investigation were not brought to light until later on in the process. For example, the chronology of the messages sent via LinkedIn to Ms Barakat and the fact that contact on LinkedIn had been initiated by Ms Barakat and Ms Abdullah did not come to light until after the disciplinary hearing had been conducted.

48.5 The investigation report itself was very brief and was vague about precisely which matters were considered to amount to misconduct and which matters were recorded as background. This vagueness and the failure to interview the claimant had another unfortunate consequence. He did not know the specifics of the misconduct allegations until the disciplinary hearing, which was then convened at short notice. Whilst the claimant didn't object to this and managed to secure representation, he was suspended at this time and naturally wished to get on with matters. There was no good reason for the decision to convene the disciplinary hearing at short notice and in breach of the respondent's policy of giving at least three days' notice.

48.6 Ms Bailey acted as investigator and then "assisted with" both the disciplinary and the appeal hearings. This was despite the fact that the fairness of her investigation was under challenge by the claimant. She was not in a position to give impartial advice as to the deficiencies of her own investigation and her engagement with these processes undermined the fairness of the disciplinary process and the impartiality of the appeal.

48.7 There was no reasonable and proper cause for suspending the claimant. Whilst it was evident that there was a matter which required investigation, there were no apparent grounds for concern that the claimant would have repeated his misconduct, or interfered with the investigation, if given a clear instruction not to engage with the complainants. Nor was it suggested that either Ms Assem or Mr Barakat would have found it impossible to work with the claimant were he given such an instruction. Alternatively the claimant could have been permitted to work from home The respondent provided no specific evidence as to why this would have been impossible. Subsequent delays in the process meant that the claimant was suspended for a lengthy period which made his re-integration in to the workplace more difficult than would otherwise have been the case.

48.8 In reaching the decision to dismiss, the respondent continued to assert that there were four complaints of sexual harassment, even after the disciplinary hearing, by which time it was clear that there were no specific complaints being advanced by either Ms Hapal or Ms Abdullah and that this was a case involving two complaints of harassment.

48.9 There were unreasonable delays at various points during the process. Delays following the disciplinary and appeal hearings of approximately six weeks before the respective decisions were issued have not been explained by anything beyond a generalised assertion of "pressure of other work" but the claimant was placed at particular disadvantage by the delay given his suspension.

48.10 In relation to the appeal, whilst the claimant was reinstated and given a final written warning, the appeal did not engage with any of the concerns that the claimant had raised about the way in which the process had been conducted. The appeal decision stated that the disciplinary process was fair and robust when there were, in fact, substantial grounds for concern as to the adequacy of the investigation and criticisms to be made of the fairness of the disciplinary process.

48.11 However, despite these deficiencies, I consider that there was reasonable cause for the respondent to uphold the complaint of harassment related to sex brought by Ms Barakat. There was evidence that the claimant had sent Ms Barakat two messages on LinkedIn commenting on her personal appearance and that this had made her feel intimidated in the workplace. There was no evidence to suggest that the relationship between the two was such that these types of messages were likely to be welcomed by Ms Barakat. The claimant had received no reply to his first message commenting on her appearance and so had received no encouragement to send a second such message. Ms Barakat felt that the messages were indicative of an inappropriate personal interest in her and this made her feel uncomfortable and intimidated in her work place. That was not an unreasonable perception on her part, given the contents of the messages and the fact that the claimant had chosen to email them to her on a personal account The claimant would not have sent such messages to a male colleague and so the messages were related to Ms Barakat's sex.

Did the claimant resign in response to these matters?

49. I have found that the claimant did resign in response to these matters. It was not suggested by the respondent that he had any other motive. It is not any event necessary for these matters to be the sole cause for the claimant's decision to resign provided that they formed part of the decision.

Fair reason for dismissal and reasonableness of dismissal

50. The respondent did not advance a potentially fair reason for dismissal and, even if I were to treat the reason for dismissal as misconduct, it is clear from my conclusions that that the respondent failed to follow a fair disciplinary process and so cannot be help to have acted reasonably within the meaning of section 98(4) Employment Rights Act 1996.

Polkey

51. I have considered whether it is likely either that the claimant would have resigned in circumstances not amounting to a constructive dismissal, or that he would have been fairly dismissed, had a fair disciplinary process been followed.

52. I consider that had a fair disciplinary process been followed it is likely that the claimant would still have been found to have harassed Ms Barakat. Had the respondent properly investigated matters in relation to Ms Assem's complaint, I consider it likely that, even if her account was not corroborated by her manager and even if it were found that her comment regarding predators and perverts was unsubstantiated, the respondent would have concluded that the claimant did harass Ms Assem, given his conduct towards Ms Barakat and given the broader evidence regarding a failure to respect "personal space".

53. I consider that, had a fair disciplinary process been conducted, it is likely that the respondent would have decided to give the claimant a final written warning, as it did at the appeal stage. The allegation of unwanted touching of Ms Assem, if upheld, was serious misconduct and would have warranted a final written warning. However, even if the respondent had not upheld her complaint and had proceeded only on the basis of Ms Barakat's complaint, I think that it is likely that the respondent would have been concerned by the broader picture and by the claimant's lack of insight in to the impact of his behaviour. Although, during the disciplinary hearing, the claimant eventually accepted that he would be more mindful in future, he initially refused to accept that his messages were inappropriate and attempted to suggest that he was justified in reminding female colleagues about appropriate work place dress (Ms Barakat) or behaviour (Ms Hapal). I consider that the respondent would have had a reasonable concern that these explanations were not credible, that the claimant did not accept that his behaviour was wrong, or understand the impact of his behaviour and that it is likely to have regarded a final written warning as necessary to make the point that such behaviour could not be repeated. There would have been reasonable grounds for considering a final written warning in such circumstances and it would not have given rise to a constructive dismissal.

54. The claimant's evidence at the hearing was that he would have accepted a written warning but that he could not accept a final written warning because he would have felt that his employment was constantly at risk. I therefore consider that, had the claimant received a final written warning, even in circumstances where there had been no constructive dismissal, there is a significant chance that he would still have resigned. I do not, however, consider that it is inevitable that he would have done so. In particular, I have borne in mind that the claimant's position might have been different had the disciplinary process been properly conducted and had he not been suspended for a lengthy period. I therefore consider it appropriate for the compensatory award to be reduced by 50% to reflect the chance that the claimant would have received a final written warning following a fair

disciplinary process and that he would then have resigned in response, in circumstances where there was no constructive dismissal.

Contributory conduct

55. The question is whether the claimant's blameworthy conduct to any extent caused or contributed to his constructive dismissal by the respondent. I recognise that reductions for contributory conduct are unusual in constructive dismissal cases. I do not consider that the evidence before me is sufficiently clear to enable me to make any finding as regards contributory conduct in relation to the claimant's behaviour towards Ms Assem. However, I consider that the claimant did contribute to his own dismissal by blameworthy conduct in that he subjected Ms Barakat to harassment on grounds of her sex and that it was as a result of this behaviour that the respondent initiated the disciplinary process which resulted in his constructive dismissal.

55.1 Although Ms Barakat may have initiated the contact via Linked In there was no evidence of her having sent any other messages to the claimant via the site. The claimant messaged Ms Barakat on three occasions but never received a reply. The second and third messages were sent after work and commenting on items of clothing that she had worn in complimentary terms. There was no evidence to suggest that the relationship between the two, in general, was such that these types of messages were likely to have been welcome. Certainly by the time the claimant sent his third message, he had no reason to believe that Ms Barakat welcomed receiving private messages from him complimenting her on her appearance as she had already ignored one such message.

55.2 I consider that the messages themselves, although not overtly offensive, were regarded by Ms Barakat as indicating a degree of personal interest in her which made her feel uncomfortable and intimidated in the workplace. That was not an unreasonable perception on her part, particularly given the broader circumstances, i.e. that she felt that the claimant had been staring at her and that she had, as a result, been attempting to avoid him and limit her interactions with him. (The claimant appeared to recognise that Ms Barakat spoke to him less frequently than she had done at first). In addition, the content of the messages and the fact that the claimant had chosen to write to her, that he did so outside work and on a personal account were unusual and inappropriate.

55.3 The claimant accepts that he did not send such messages to other colleagues. His evidence at the hearing, i.e. that he considered Ms Barakat's clothing to be embarrassing and that his messages were ironically intended to be a reminder of appropriate workplace dress, was not credible. I consider it likely that the claimant admired, and intended to pay a compliment to, Ms Barakat. He may not have recognised this but his compliments were unwelcome and made her feel intimidated. I consider that the claimant would not have sent such messages to a male co-worker and that his behaviour was therefore related to her sex.

56. I consider that a reduction in compensation of 50% to both basic and compensatory awards is appropriate to reflect the claimant's degree of

contributory conduct, applying the approach in the **Hollier** case. The messages to Ms Barakat constituted harassment on grounds of sex. However, I recognise that the messages were not overtly offensive and that the claimant did not intend to cause distress by his behaviour to Ms Barakat. I have also noted that the claimant has ADHD which may give rise to impulsive behaviours. These matters are a mitigating circumstance. The report also records that the claimant may have ASD but he has produced no evidence of this. I did not therefore consider that such matters provided any mitigation for the claimant's conduct.

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Employment Judge Milner-Moore

Date: 04/01/2020……..…..

Sent to the parties on: .....

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For the Tribunal Office