



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Simalyte

**Respondents:** Kentucky Fried Chicken (Great Britain) Limited

**Heard at:** Cardiff **On:** 16<sup>th</sup> to 19<sup>th</sup> September 2019  
and 6<sup>th</sup> January 2020

**Before:** Employment Judge R Powell

**Members:** Mr A Fryer  
Ms K George

**Representation:**  
Claimant: Mr N Henry, representative  
Respondent: Mr S Hoyle, representative

## RESERVED JUDGMENT

The unanimous judgment of the tribunal is:

1. The claim of a continuing course of harassment between October 2016 and the 17<sup>th</sup> August 2017, contrary to section 26 (3) of the Equality Act 2010 is well founded.
2. The claim of harassment by the respondent's failure to address the claimant's complaints is not well founded and dismissed
3. The claims of direct discrimination are not well founded and are dismissed.
4. The respondent unfairly dismissed the claimant.
5. The claim for breach of contract by reason of the respondent's failure to pay three weeks' notice pay is well founded.
6. The claim for breach of contract, by the failure to pay accrued holiday pay is well founded and the respondent is ordered to pay to the claimant the net sum of £801.00.

## REASONS

### Introduction

1. Ms Simalyte was employed by the respondent to work in one of its takeaway food restaurants in Newport between October 2014 and the 29<sup>th</sup> September 2017. The first two years of her employment were uneventful but in October 2016 her relationship with a colleague, to whom we shall refer as “H”, deteriorated and remained very poor.
2. On the 18<sup>th</sup> August 2017 a dispute between the claimant and H culminated in a physical altercation in the food preparation area of the restaurant. Both participants left the store, never to return. H promptly resigned, the claimant was subsequently absent due to ill health and, after a delayed reply to her written grievance, she resigned without notice on the 29<sup>th</sup> September 2017.
3. Arising out of the events briefly summarised above, the claimant presented a claim to the employment tribunal alleging that:
  - a) She was subject to a course of sexual harassment by her colleague H between October 2016 and August 2017.
  - b) She was subject to harassment by her managers through their failure to prevent H’s behaviour in the same period.
  - c) She was subject to direct discrimination by H on the 18<sup>th</sup> August 2017.
  - d) She was subject to direct discrimination by the respondent’s decision to dismiss her grievance.
  - e) That the cumulative conduct of H and the claimant’s managers amounted to a repudiatory breach of the implied term of trust and confidence and her resignation was thereby a dismissal and unfair.
  - f) That the respondent failed to pay her contractual notice pay consequent to her dismissal.
4. The claimant also alleged that the respondent had failed to pay accrued holiday pay, which the respondent had admitted, in the sum of £801.00.
5. The respondent denies the claims of discrimination, unfair dismissal or the failure to pay notice pay. In its preparation of its defence it has not had the benefit of

instructions from H and does not have direct evidence from H to rebut the claimant's evidence on much of the conduct she states took place between them.

### The Evidence

6. The Claimant gave evidence on her own behalf in accordance with her witness statement and was cross examined.
7. The respondent called the following witnesses:
8. Jennifer O'Connell, assistant manager of the Newport Store, gave evidence concerning the aftermath of the 18<sup>th</sup> August 2017 incident and the absence of any record of the incident on the respondent's CCTV system. She expressed the view that H was a pleasant and placid employee whereas the claimant could be difficult and a bit aggressive.
9. Sharon Hill, the restaurant's general manager describing H as a popular employee and denying that she did not receive an oral complaint from the claimant but, due to her understanding that the claimant and H did not get on, she had spoken to the claimant and had been told that "there were no issues". She explained the delay in responding to the claimant's grievance of the 15<sup>th</sup> September 2017.
10. Felecity Stanell, district manager, gave evidence of her conduct of, and decision making on, the claimant's 15<sup>th</sup> September 2017 grievance.
11. Sania Nusrullah, shift runner at the Newport store, gave evidence of working in the store with the claimant and H. She described H as a long-term employee of the respondent who was well regarded and with whom there had been "no issues". She stated she was aware that H and the claimant were not talking to each other in November 2016 and spoke to the claimant because it was important that the staff worked as a team and it was imperative that they talked to each other in order to provide the required level of service.
12. Ms Sania Nasrullah was the only witness the respondent called who had witnessed the 18<sup>th</sup> August 2017 physical conflict and her account described the claimant as the aggressor.
13. The parties presented an agreed bundle of documents, which with several late additions, amounted some 160 pages.
14. Both representatives submitted written submissions and made supplemental oral submissions. Neither party cited any case law or made significant reference to the statutes. The tribunal outlined the cases by which it would direct itself and allowed the parties to make any additional comment before deliberations commenced.

Findings of Fact

15. The following findings are the unanimous judgment of the tribunal. The tribunal applied the civil standard of proof and in particular bore in mind the burden of proof which lay upon the claimant for the purposes of section 136 of the Equality Act 2010 and section 95(1)(c) of the Employment Rights Act 1996.
16. As will be apparent, the absence of evidence, in any form, from H has been a significant factor in parts of the following findings.
17. The Respondent's Newport store is formed into four pertinent parts; fridge and storage facilities, next to that is a small room with a table and two chairs and a discrete toilet room. Here staff can leave their coats and other belongings, change into uniform and take their breaks. The third area is for food preparation which also has a hatch for "drive through" sales and an office and lastly there is the area for serving customers. We have been provided with photographs and a floor plan of the premises [139-52].
18. The majority of the staff are employed to prepare and serve food to the customers and it is the respondent's preference for staff to be able to undertake all aspects of the work undertaken in the store albeit, achieving that aim is dependent on the training provided and individual's aptitude.
19. H was a long-term employee with a good record of work and a person of good standing amongst his colleagues who, in the past, had elected him to be their employee representative during a transfer of the business. He was also in training with an eye to promotion. He was competent in all of the employee functions of the store.
20. The claimant joined the store on 1<sup>st</sup> October 2014. She did not work "front of house". The claimant is Lithuanian in origin and whilst she had the benefit of an interpreter during the hearing, her conversational English was sufficient to enable her to work satisfactorily and, to understand written English to a reasonable level.<sup>1</sup>
21. The claimant, on the evidence before us, including her own answers in cross examination was a person who "came to work, to work"; not for social interaction. She and H had no difficulties between October 2014 and October 2016.
22. On the claimant's evidence, which is not contradicted by any witness or document, in October 2016 H approached her when she was in the staff room and, whilst standing at the door, told her he had feelings for her and invited her out for a drink after work.

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<sup>1</sup> She confirmed in cross examination that she had been able to approve her witness statement, written in English, without assistance.

23. There are inconsistencies in the claimant's account, for instance in her grievance she wrote [72]:

*"He led me to the stock room and told me he had feelings for me and questioned me on my private life and relationship. I told him that I was not interested and already had a boyfriend".*

The ET1, in shorter form, gave a similar account [13]: "H led the claimant into the stock room at work to profess his attraction to her. The approach was rebuffed by the claimant which led to a series of actions on his part.."

24. However, her witness statement said:

*"I was alone in the staff room having just changed to go home. [H] came to the door and blocked my way out. He said that he had feelings for me and he wanted me to meet him outside work. He seemed pushy and I felt threatened. I was about to explain I had a boyfriend. At that moment my daughter called and this seemed to break the tension, as I said I had to go and rushed out".*

25. The alleged "leading", "blocking" and the discussion, or lack of discussion, about her personal life are clear discrepancies.
26. Nevertheless, in the absence of any contrary evidence, we find that H did ask the claimant if she would meet him outside of work because he was attracted to her and that she refused to do so. When he did so he was standing in the doorway of the staff room but do not find that he was blocking the claimant or that he questioned her about her private life.
27. In cross examination the claimant stated that "there was nothing wrong" in the request itself but she was already in a relationship and so was offended.
28. The claimant gave evidence that subsequent to her rejection of his invitation H's attitude to her changed and that he stopped talking to her and that she did not want to talk to him except for work matters. The assertion was corroborated by the account Ms Nasrullah gave to the October 2017 grievance investigation:
- "I keep asking Simona {the claimant} what was wrong with her because they were not talking to each other for a long time, probably more than one year, the only thing Simona told me was that once a time H told her that he liked her but that was it." [96].*
29. Other witnesses interviewed during the grievance investigation gave a similar account [95], [100].

30. We do not have H's account as to when he stopped talking to the claimant or why. On the evidence before us, it is probable that the claimant's rejection of H's October 2016 invitation was the reason he stopped talking to her.
31. The claimant gave evidence that she subsequently spoke to person called "Abi" about the October 2016 incident. Abi did not suggest what the claimant could do about it and so the claimant spoke to Jen O'Connell in some detail.
32. Ms O'Connell accepted that the claimant did make "*a passing comment that she did not like H*" and that she was aware that; "it was known that they did not get on or speak to each other". After considering her evidence in cross examination we prefer Ms O'Connell's evidence on this point.
33. The claimant gave evidence that she spoke to Ms Nasrullah. Her account states that Ms Nasrullah tried to mitigate the difficulties between the claimant and H which entailed a meeting where H reluctantly shook hands with the claimant. Ms Nasrullah denied that she had done so although her statement confirmed she had spoken to the claimant because she was aware that the claimant and H were not speaking to her.
34. We noted the claimant's grievance, addressed to Ms Hil [72] attributes the aforesaid meeting with H, and the handshake, to Ms Hill, not Ms Nasrullah. Similarly, the claimant's resignation letter of the 29<sup>th</sup> September 2017 [74, 4.b], addressed to Ms Hill, states; "I have raised his harassing behaviour towards me, with you on a number of occasions over the past year. Unfortunately, you did not take my concerns seriously..."
35. On the evidence before us we prefer M Nasrullah's account, set out in paragraph 3 of her witness statement; it was Ms Nasrullah who, being aware that H and the claimant were not speaking, asked if; "*everything was okay as they were not talking to each other...The claimant made mention that once H had told her that he liked her but that was it. The claimant did not say anything else to me.*"
36. The claimant's evidence stated that H continued to harass her:
  - a) Following her around all the time [w/s 8].
  - b) "on one occasion, H was again interfering with what I was doing. I told him to "leave me alone" and "I don't need your help", which he would not accept. He started arguing with me." [w/s 9].
  - c) "Over the next few weeks H was very awkward and clumsy at work. He seemed to be making a point of not speaking to me, but was still paying a lot of attention in doing that. If we passed close, he would make a point of barging me or elbowing me out of the way [w/s 12].

- d) At one point in December [2016] he deliberately shouldered me out of the way” [w/s12].
37. The tribunal notes that two of the respondent’s confirm the claimant’s case that she and H did not get on and did not speak to each other. The tribunal also notes that the respondent’s witnesses, from those who worked in the same restaurant, did not address other aspects of the claimant’s allegations concerning H’s conduct set out in her particulars of claim [14, 4a – 5].
38. In the absence of any evidence to the contrary we find that H did act as set out by the claimant in her evidence and noted in paragraph 34 above.
39. The ET1, paragraph 4.c. and 4.d. pleaded two further incidents of conduct by H which were absent from the claimant’s statement but were raised by the respondent in cross examination.
40. We considered the evidence from the witnesses that there was a window in the door to the staff room which could be covered by coats [140 & 144] and the questions to the claimant that staff, including H might reasonably look into the staff room whilst approaching or entering and exiting from the fridge area [139]. All of which we accept are possible. However, the evidence of the claimant stated that she had been changing her top in the room and she had seen H looking at her through the window. She did not accept it was a fleeting glimpse, she denied that, at the time, there were coats hanging on the door and thereby obscuring H’s vision.
41. On the evidence the claimant gave in cross examination, and in the absence of any contrary evidence of the circumstances at the relevant time, we accept the claimant’s evidence and conclude that H did stare at the claimant through the window in the staff room door whilst she was changing her top.
42. Similarly, the claimant, when challenged about paragraph 4.d. of her particulars of claim gave evidence that H had blocked her path in the corridor. Again, in the absence of any contrary evidence we find that action did take place.
43. Following the “shouldering” incident cited above, the claimant stated that she approached Ms Hill [w/s12] who promised to speak to H and move him to work on the front of house. Ms Hill denied this discussion took place.
44. The respondent asserts that the claimant is unreliable generally but more specifically that her account of raising matters with management is thrice contradicted (Ms O’Connell, Ms Nasrullah and Ms Hill).
45. We have found that there was discussion with Ms Nasrullah, but we prefer the respondent’s account. We find that there was a brief discussion with Mrs O’Connell,

but again we preferred her account. One reason for our decision was the absence of any reference to such discussions in the grievance or resignation letters, the second was a degree of concern over the claimant's reliability and third is the burden of proof which lies upon the claimant to prove the primary facts upon which she relies.

46. We noted that, on review of the chronology the more serious physical incident appears to have occurred after the claimant spoke with Ms Nasrullah but prior to her alleged discussion with Ms Hill.
47. We have also taken into account that the claimant's grievance letter expressly refers to complaints made to Ms Hill upon which Ms Hill had not acted. We noted Ms Hill's statement; "I can categorically state that the Claimant did not come to me in December 2016 concerning H—'s behaviour or at any other time."
48. We have noted the evidence from Ms Nasrullah that, after she had spoken to the claimant in November 2016, she informed Ms Hill about the claimant and H's behaviour (not speaking to each other). This was absent from Ms Hill's statement and in cross examination she accepted Ms Nasrullah had spoken to her but denied that Ms Nasrullah had made any mention of the character of the problem. Ms Hill stated that she pressed Ms Nasrullah who responded that the claimant and she had spoken in confidence and; "you just need to ask Simona".
49. There is a conflict in the evidence on this point which we resolve by preferring the evidence of Ms Nasrullah as the more reliable account.
50. We have also concluded that it is highly unlikely that the claimant would have failed to mention the "shouldering barge" to Ms Hill during the discussion, which in Ms Hill's oral evidence she described as; "just a five-minute conversation". A five-minute conversation in which, according to Ms Hill, the claimant replied to two questions:  
  
"Is everything okay? Yes."  
"Is there anything you want to mention? No."
51. On the balance of probabilities, we think it is more likely that Ms Hill has down played the level of information she received from Ms Nasrullah and the claimant. We find it more likely than not that Ms Hill was informed that H had "shouldered" the claimant.
52. The claimant's account is that the conduct of H continued in the subsequent months [w/s 13] prior to the incident of the 18<sup>th</sup> August 2017. That was challenged in cross examination but the claimant was robust in her responses and we find that her account is more likely than not to be true.
53. It is common ground that on the 18<sup>th</sup> August 2017 there was an altercation between the claimant and H in food preparation area. It is common ground that there was a



degree of shouting and physical contact. The claimant's case is that H's conduct was harassment when "assaulted and beat the claimant three or four times in the chest with the heel of both fists, putting her in fear and causing her to leave work in a state of distress." [14, paragraph 7].

54. The claimant's evidence is at paragraph 14 of her statement. Other accounts are given by Ms Nasrullah and recorded in statements of employees who were present at the time and interviewed as part of the grievance process. In particular; Musarat Ali [94], Chantel Hannan [105] and Anum Ruqsar [105b] all of whom describe seeing the commencement of the incident and each describes the claimant approaching H, who had gone to the claimant's work station to cook a burger, the claimant approached him shouting that H should leave her work station and she pushed H. This was followed by resistance from H, then mutual pushing and raised voices, at least by the claimant.
55. The claimant attended the police station and made a complaint against H the same day. On the respondent's account the police attended to view CCTV evidence and took some statements. None of the evidence provided to the police is before us and, so far as we are aware, no prosecution was pursued.
56. On consideration of Ms Nasrullah's evidence and the corroboration of that evidence in employee interviews, and the absence of equivalent corroboration of the claimant's account and our concerns about the claimant's reliability, we have concluded that Ms Nasrullah's evidence is more likely to be the correct account.
57. In our judgment the claimant's frustration at H's continuous conduct (as set out in paragraph 35.c above) reached a breaking point on this day.
58. We have concluded that it most likely that the incident was caused by the claimant's initial physical contact with H when she was angry that he was cooking at the burger station to which she had been allocated and he refused to leave because he was cooking a burger intended for a waiting customer. The claimant viewed this as another incident of H's interference with her role; she could just as easily have finished cooking the burger and passed to H.
59. This led to both the claimant and H pushing each other but we reject the evidence that H punched the claimant with the heels of his hands.
60. The incident ended when Ms Nasrullah, intervened. The claimant was upset and went to the staff room and then left work around 2 pm. Ms Nasrullah took H to the office where he started to cry and said he could not tolerate the claimant's behaviour anymore. He left work around 2pm and later resigned.
61. The claimant did not attend work again.

62. On the 22<sup>nd</sup> August she attended her GP who certified that she was unfit to attend work from the 18<sup>th</sup> to the 12<sup>th</sup> September 2017 [65] due to work related stress which exacerbated her existing heart condition. The claimant remained absent, due to ill health, for the remainder of her employment.
63. On Friday the 15<sup>th</sup> September the claimant wrote and sent a formal grievance which complained of the conduct of H and of Ms Hill's inaction [72-3]. The respondent's grievance procedure states that a grievance hearing will usually be held within 10 days of the grievance being received [58]. Allowing for postal delivery, the letter would likely have arrived on Monday the 18<sup>th</sup> or Tuesday 19<sup>th</sup> September.
64. The claimant had received no acknowledgment of the grievance, still less a date for a hearing, or attended a hearing by the 29<sup>th</sup> September; the tenth day after the respondent's receipt of the grievance. She submitted her resignation, without notice, on that day. In that letter, at paragraph 4, the claimant set out three specific reasons for her resignation:
- a) "I been subjected to a campaign of harassment and/or sexual harassment perpetrated by a co-worker named [H] culminating in a serious physical attack at the Maesglas KFC premises on 18<sup>th</sup> August 2017."
  - b) "I have raised his harassing behaviour towards me, with you on a number of occasions over the past year. Unfortunately, you did not take my concerns seriously and he seriously assaulted me on the 18<sup>th</sup> August 2017 by striking me on the chest a number of times...." I do not believe that had I been a British woman, I would have been treated in the same way. Secondly, I do not believe that had I been a man I would have been treated in the same way...You have provided me with no support whatsoever since the assault except for sick pay".
  - c) "I sent in a written grievance to you on the 15<sup>th</sup> September 2017 and I have not received the courtesy of a reply."
65. On the 2<sup>nd</sup> October 2017 the claimant commenced Early Conciliation [18].
66. The respondent replied by a letter dated the 3<sup>rd</sup> October [76] explaining the delay in responding was caused by Ms Hill's absence on annual leave. By that time the claimant's employment had terminated.
67. In October 2017 an investigation into the grievance was undertaken [88a – 105c] and the grievance outcome was communicated to the claimant in a letter dated the 8<sup>th</sup> November 2017 [106 -107].
68. On the 14<sup>th</sup> November 2017 ACAS issued an early conciliation certificate

69. The claimant presented her claim to the Employment Tribunal on the 11<sup>th</sup> December 2017.
70. There are some additional findings of fact recorded in the context of the following discussion and conclusions.

### **The Relevant Legal Principles**

71. Starting with the claim of direct race discrimination, the statutory definition is found at section 13 **Equality Act 2010** (“EqA”):

“(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.”

72. The requirement of *less favourable* treatment imports the notion of a comparison, although this may be with an actual (“treats”) or hypothetical (“would treat”) comparator. In constructing a hypothetical comparator (and determining how they *would* have been treated), evidence that comes from how individuals were in fact treated is likely to be crucial, and - of course - the closer the circumstances of those individuals are to those of the complainant, the more relevant their treatment. Such individuals are often described as “evidential comparators”; they are part of the evidential process of drawing a comparison and are to be contrasted with the actual, or “statutory”, comparators (see, on this point, the speech of Lord Hoffmann at paragraph 36 in **Ahsan v Watt** [2007] UKHL 51, [2008] IRLR 243 HL; set out below in the citation from **London Borough of Islington v Ladele** [2009] IRLR 154).

73. Whether considering the case of the actual or hypothetical comparator, however, there must be no material difference between the circumstances relating to their case and that of the complainant (section 23(1) EqA).

74. Although direct discrimination thus requires a (real or hypothetical) comparison, the existence of less favourable treatment will not be determinative of the existence of direct discrimination; it still needs to be *because of* the relevant protected characteristic, albeit the two issues will often be intertwined. The point was made clear in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337, per Lord Nicholls of Birkenhead:

“7. ... When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the “less favourable treatment” issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the “reason why” issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.

No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment

than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.”

75. Our determination of these questions must now also demonstrate proper application of the burden of proof, as laid down by section 136 **EqA**, so that:

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

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

76. Although guidance as to how to approach the burden of proof has been provided by this and higher appellate courts, all judicial authority agrees that the wording of the statute remains the touchstone. That was made clear by the Court of Appeal (see the Judgment of Peter Gibson LJ) in **Igen Ltd v Wong** [2005] ICR 931, where guidelines were set out in an annexe to the Judgment, with the express caveat that this was not a substitute for the statutory language.

77. In **Laing v Manchester City Council** [2006] ICR 1519, the EAT noted that the Court of Appeal in **Igen** had ruled that:

“17. The statutory amendments clearly require the employment tribunal to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.”

78. The EAT in **Laing** then went on itself to provide the following guidance:

65. ... if one considers the burden of proof provision in the context of what a claimant needs to establish in a discrimination claim, what it envisages is that the onus lies on the employee to show potentially less favourable treatment from which an inference of discrimination could properly be drawn. Typically this will involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. That involves a consideration of all material facts (as opposed to any explanation).

79. It is only if the claimant succeeds in establishing the less favourable treatment that the onus switches to the employer to show an adequate, in the sense of non-discriminatory, reason for the difference in treatment. That requires a consideration of the subjective reasons which caused the employer to act as he did: see *Shamoon* ... para 7, per Lord Nicholls of Birkenhead.

#### Harassment contrary to section 26 of the Equality Act 2010

80. The relevant statutory provisions states:

- (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 an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2)–
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.
- (5).

81. The proper interpretation of the relevant statutory provisions on harassment is explained in the following authorities:

- (1) **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336
- (2) **Grant v HM Land Registry & anor** [2011] IRLR 748

82. The relevant principles derived from these authorities are as follows.

83. The prescribed elements of unlawful harassment are

- (3) unwanted conduct;
- (4) having the purpose or effect of either:
- (5) violating the claimant's dignity.

84. Although many cases will involve considerable overlap between those elements of harassment, it would normally be a 'healthy discipline' for tribunals to address each element separately and to ensure that factual findings are made in each regard (Dhaliwal).

85. When considering whether the conduct had the prescribed effect on the claimant, although the tribunal must consider objectively whether it was reasonable of the claimant to consider that the conduct had that requisite effect, the claimant's subjective perception of the conduct in question must also be considered.

86. In **Dhaliwal**, the EAT (Underhill P) said that:

"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that

employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

87. The Court of Appeal echoed these sentiments in **Grant v HM Land Registry & anor** [2011] IRLR 748 when it stated in relation to whether an effect could ‘amount to a violation of dignity’ or properly be described as ‘creating an intimidating, hostile, degrading, humiliating or offensive environment’ that:

‘Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment’.

88. Further, on consideration of the respondent’s motivation, we have been guided by the dicta in **Unite the Union v Nailard** [2018] EWCA Civ 1203, in particular paragraphs 79, 80 and the relevant conclusion in 104.

### Discussion and Conclusions

89. We have had the benefit of considering the written submissions on behalf of both parties. Both submissions focused largely on the reliability of the evidence put before us. We have been careful not to entertain assertions of fact or generalisations which were not supported by the evidence.

### The Allegation of Harassment by the conduct of H

90. The merits of the claimant’s case depend upon her relative reliability as a witness before us. The respondent has not relied on the evidence of H and accordingly there is no direct evidence to contradict the claimant’s account.
91. We have clearly found that the claimant was less reliable than Ms Nasrullah and Ms O’Connell.
92. The respondent asserts that the claimant, as a witness, is so incredible that, even in the absence of evidence to contradict her account of H’s behaviour, her evidence cannot discharge the civil standard. The summary of that argument is set out at paragraph 56 to 61 in respect of the allegations of harassment by H.
93. Apart from the above the respondent asserted that the claimant representative had lied about her being unwell to attend a grievance hearing on the 9<sup>th</sup> October 2017 when she was well enough to start work on the 11<sup>th</sup> October [paragraph 22 of the claimant’s witness statement]. The tribunal notes the claimant statement at paragraph 20, which was not challenged, that the thought of returning to the respondent for the grievance hearing made her panic and for that reason she did not attend.

94. Having taken all of the points set out in the respondent's argument (save those concerning expressions of medical opinion which were not given in evidence) we have concluded that, on the balance of probabilities, the claimant's evidence, although flawed, was sufficient to prove her case against the respondent in respect of the behaviour between H and herself between October 2016 and the 17<sup>th</sup> August 2017.
95. We therefore find that H engaged in a course of conduct of ignoring the claimant, interfering with her work and making unwanted physical contact throughout that period.
96. We have no doubt that such conduct was subjectively unwanted and in our own objective assessment we find that the claimant's perception was clearly reasonable.
97. We find that the conduct had the purpose and the effect of violating the claimant's dignity.
98. We have considered whether the initial conduct of H, as described by the claimant amounted to sexual harassment under subsections 26(2)&(3) by reference to the ECHR technical guidance on harassment, in particular paragraph 2.20 which lists some examples of conduct which would typically amount to sexual harassment.
99. On our findings of fact we have concluded that the H's expression of attraction and invitation to go out after work did not amount to sexual harassment for the purpose of subsections 26(2). Our judgment may well have been different if we had concluded that H had blocked the doorway or pressed the claimant for details of her personal life.
100. We have nevertheless concluded that the subsequent conduct of H stemmed from the claimant's rejection of his invitation, and implicitly a rejection of his affection. We have reached that conclusion because the claimant's evidence established that H's unwanted behaviour had not occurred in during the first two years of her employment and commenced after her refusal.
101. In our judgment H's conduct was clearly related to the claimant's sex; he had expressed a romantic affection for the claimant as woman and his unwanted conduct commenced as a consequence of the rejection of his affection.
102. For the above reasons the claim of harassment related to the claimant's sex is well founded for the period between October 2016 and 17<sup>th</sup> August 2017 is well founded and succeeds.

The allegation of harassment by the inaction of the respondent's staff in response to the claimant's complaints about H.

103. We have made findings of fact that the claimant's descriptions of the amount of detail she provided to her managers was overstated. We have also found that two of her managers made some enquiry of the parties to the dispute prior to the incident of the 18<sup>th</sup> August 2017.
104. With respect to the claimant's complaints and responses prior to December 2016 we consider the respondent's conduct was proportionate to its degree of knowledge of the claimant's circumstances.
105. All three have given evidence and have, where it was put in cross examination, denied any discriminatory motivation. We have found two of the relevant witnesses entirely credible and save for the one point of importance, the third largely so.
106. We considered the evidence in light of *Unite the Union v Nailard*. On the claimant's submission [paragraph 28] "the respondent has provided no alternative reason for repeatedly dismissing the claimant's concerns". With respect to two of the managers they provided a wholly convincing explanation; the claimant's account of events to them was more reticent than her account to the Tribunal. We have accepted their evidence entirely on this issue.
107. With respect to Ms Hill, the rejection of one point in her evidence might amount to the "something else" for the purposes of section 136 but it does not automatically do so.
108. The submission on the part of the respondent [41 to 48] focused on the gender of the respondent's female witnesses and asserted that for "any or all of them to consciously or subconsciously set out to discriminate against another woman flies in the face of properly formed logic". We considered this submission with the benefit of section 24 of the Equality Act 2010.
109. Taking all of the above into account we were still persuaded that Ms Hill's inaction was not motivated by the claimant's gender. We have concluded that she perceived that the difficulties between the two junior staff were ones which did not impact on their work or the work of their colleagues and, wrongly perhaps did not consider it an issue of significance.
110. For the above reasons the claim of harassment by the inaction of the respondent's managers is not well founded and dismissed.

Direct Discrimination by H on the 18<sup>th</sup> August 2017

111. The claimant's case is that H treated her less favourably than a hypothetical male comparator when he started an altercation by pushing her and then punching her with the heels of his hands.



112. We have found that it was the claimant who started the altercation, the subsequent pushing was mutual and that H did not punch the claimant as alleged.
113. We conclude that the conduct which is alleged to have been less favourable treatment either did not occur or was a response to the claimant's conduct.
114. We are unanimous in our conclusion that H, would have responded in like manner if a hypothetical male colleague had acted as the claimant did on the 18<sup>th</sup> August 2018. For these reasons the claim of direction discrimination is not well founded and dismissed.

Direct discrimination in the Respondent's decision not to uphold the claimant's Grievance

115. The claimant's submissions on this issue [paragraphs 12 to 15 and 26] set out a combination of two characteristics; the inadequacy of the investigation and the assertion that "the respondent had assumed that the claimant was equally at fault, which ignores the obvious inequality, amounting to direct discrimination because of her sex..."
116. The inequality was a reference to an assertion of physical inequality, one which was not borne out by the oral evidence. We accepted the evidence that H was a lightly built and mild-mannered man.
117. Turning then to the criticisms of the investigation:
118. We first note that the claimant was invited to attend a grievance meeting, or in the alternative to provide full details of "your concerns prior to the 18<sup>th</sup> August 2017 including dates, times and specific details of what took place and any witnesses...". The claimant's representative, Mr Mark Whitcutt replied on the 19<sup>th</sup> October 2017[85] indicating that "I further confirm that she does not wish to add to the contents of per previous letters which are self-explanatory".
119. The claimant's account of events prior to the 18<sup>th</sup> August 2017 was set out in one paragraph of her letter dated the 15<sup>th</sup> September 2018. She did not suggest there were any witnesses to the incidents she set out in that letter save H himself. By the time of the investigation H had left the respondent's employment and we accept the respondent's evidence that efforts to contact him were unsuccessful.
120. The respondent asked employees who worked in the restaurant about the relationship between the claimant and H and none gave evidence that witnessed conduct between the protagonists other than not speaking or ignoring each other.

121. The issue of management failing to respond to the claimant's complaints was investigated and, in the absence of any detailed evidence from the claimant, those three accounts were accepted.
122. We are satisfied that the investigation into the incident of the 18<sup>th</sup> August incident was reasonably thorough; all of the staff were interviewed and the majority of those staff who stated they had witnessed the altercation gave an account which warranted the respondent's conclusion that the claimant was the aggressor on that day.
123. The investigation into the pre 18<sup>th</sup> August 2017 issues was resolved by the respondent's belief in the evidence from Ms Nasrullah and Ms Hill; that the claimant had said words to the effect that "everything was fine between them and there were no issues". In the absence of a detailed contribution from the claimant, the investigation outcome is one which would appear to be logical and rational. It does not raise a prima facie case of discrimination.
124. We found the decision maker, Ms Starnell to be a reliable and honest witness. On the information before her, the conclusions she reached were reasonable and logical. She denied that the claimant's gender had any influence on her conduct or her decision making.
125. In the absence of an actual comparator in circumstances that are not materially different to those of the claimant we considered a hypothetical male comparator who had made the same complaint. That consideration led us to conclude that Ms Starnell, on receipt of the same complaint and the same evidence, would have reached the same conclusions in any event. In short, the reason why Ms Starnell rejected the majority of the claimant's grievance was her objective assessment of the evidence before her.
126. We find that her decision was not in any sense influenced by the claimant's sex and accordingly the claim of direct discrimination is not well founded and is dismissed.

#### Constructive unfair dismissal

127. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA).
128. Section 95 defines the circumstances in which a person is dismissed as including where:  
“(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.”

129. The seminal explanation of when those circumstances arise was given by Lord Denning in *Western Excavating (ECC) Ltd v Sharpe* 1978 ICR 221:

“ 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”

130. The Tribunals function in looking for a breach of contract is to look at the employer’s conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it, (see *Browne – Wilkinson J in Woods v W M Car Services (Peterborough) Ltd* [1981] IRLR 347).

131. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal, but a contractual term frequently relied upon in cases such as this is that which is usually described as the implied term of mutual trust and confidence.

132. The leading authority on this implied term is the House of Lords decision in *Mahmud & Malik v BCCI* [1997] IRLR 462 where Lord Steyn adopted the definition which originated in *Woods v W M Car Services (Peterborough) Ltd* namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

133. The test is objective, from Lord Steyn in the same case:

“The motives of the employer cannot be determinative or even relevant...If conduct objectively considered is likely to destroy or serious damage the relationship between employer and employee, a breach of the implied obligation may arise.”

134. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, “the last straw”, *Lewis v Motorworld Garages Ltd* [1985] IRLR 465).

135. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see *London Borough of Waltham Forrest v Omilaju* [2005] IRLR 35. However, an entirely innocuous act cannot be a final straw, even if the employee

genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

136. A fundamental breach by an employer has to be, “accepted” by the employee, to quote Lord Browne-Wilkinson in the EAT in W.E. Cox Toner (International) Ltd v Crook 1981 IRLR 443 :-

“If one party (the guilty party) commits a repudiatory breach of the contract, the other party (the innocent party) can chose one of two courses: he can affirm the contract and insist on its further performance, or he can accept the repudiation, in which case the contract is at an end...

137. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by an express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation...

138. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contractual obligation, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation...”

139. HHJ Burke QC in Hadji v St Luke’s Plymouth UKEAT 0857/2012 summarised the law as follows:

“The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed.”

140. Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay – see Cox Toner para 13 p 4

141. If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12 July 2011) paras 45/46.

142. There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: *Fereday*, para 44.
143. The employee must prove that an effective cause of her resignation was the employers' fundamental breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach, the breach must have played a part: Nottingham County Council v Miekell [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13).
144. There is also implied in every contract of employment, an obligation to deal with Grievances timeously and reasonably, see WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516.

#### Discussion

145. The pleaded case for the claimant cited a diverse range of duties few of which were overtly in evidence. However, the claimant's closing submission [paragraph 23a. to d.] were far more precise and reflected the content of the claimant's resignation letter, dated Friday 29<sup>th</sup> September 2017 [74-5]. The four elements of the respondent's conduct are:
- “ a. Subjected to a campaign of sexual harassment  
b. Failure to address concerns raised,  
c. Physical attack  
d. No prompt response to grievance.”
146. The claimant has not proven the physical attack or the majority of the failure to address concerns raised.
147. The claimant has proven that H, an employee of the respondent was responsible for course of harassment over a period of 10 months, Ms Hill had not adequately addressed the concerns the claimant had raised and that the respondent had not complied with its grievance procedure by, at the very least, acknowledging the claimant's grievance.
148. The claimant must next prove that the respondent's conduct was without reasonable and proper cause.
149. The respondent denied the conduct of H but did not seek to argue such conduct was done with reasonable and proper cause.
150. The respondents' position was the same with respect to Ms Hill's reaction to the information from the claimant.

151. The respondent's closing submissions does not dispute there was delay in responding to the claimant's grievance.
152. The claimant must then establish that the delay was without reasonable and proper cause.
153. At paragraph 38, the respondent argues that the claimant's letter was marked "Only to be opened by the addressee" and this was the cause of the delay; because the addressee was Ms Hill who was on annual leave at the time of receipt.
154. The letter was received by Ms O'Connell, in the absence of Ms Hill, she opened the letter. Ms O'Connell noted that the letter was addressed to Ms Hill and left it for her. The letter bore the word "grievance" in capital letters immediately below the words "Dear Ms Hill". Ms O'Connell left the letter for Ms Hill to attend to upon her return from holiday on the 25<sup>th</sup> September 2017. On her return from holiday Ms Hill sent the letter to a senior manager on the 28<sup>th</sup> September but did not, between the 25<sup>th</sup> and 29<sup>th</sup> September, inform the claimant that the grievance letter had been received and explained the reason for the delay.
155. As noted in our findings of fact the respondent's policy states that a grievance hearing will usually be conducted within ten days of receipt of the grievance letter [58], which we may presume was the 18<sup>th</sup> September 2017. The last date, within 10 days of the 18<sup>th</sup> of September would have been 28<sup>th</sup> September. Regardless of that, the claimant was quite reasonable to conclude that, in the absence of an acknowledgment or an invitation to a grievance hearing by Friday the 29<sup>th</sup> September that the respondent was not acting promptly in response to her grievance
156. The tribunal does not consider that the respondent's conduct, once the letter had been opened was with reasonable and proper cause. A reasonable employer would act promptly to respond to an employee's complaint of sexual harassment. Whilst Ms O'Connell was not sufficiently senior to conduct any investigation or hearing she was, as the assistant manager to Ms Hill, someone who could have acknowledged receipt of the grievance.
157. We find that, on an objective assessment the proven conduct of harassment by H was itself a repudiatory breach of the claimant's contract, exacerbated by Ms Hill and Ms O'Connell's default.
158. In our judgment the last act of harassment occurred on or around 17<sup>th</sup> August 2017. The claimant resigned six weeks later. The respondent argues that the claimant, by her conduct, thereby affirmed the contract.

159. The parties agree that the claimant was certified unfit for work for the period between the 18<sup>th</sup> August and the 29<sup>th</sup> September 2017. There was no contact between the claimant and the respondent in that period save for the grievance letter and the claimant was in receipt of statutory sick pay. The respondent for instance did not contact the claimant following the incident of the 18<sup>th</sup> or upon receipt of the MED3 certificate. The only action of the claimant referable to her work was the submission of a grievance in accordance with the respondent's policy; a step which is a sensible precursor to the commencement of a claim to the employment tribunal in light of the possible effect of section 207A of the Trade Union and Labour Relations (consolidation) Act 1992.
160. In our judgment the claimant's continued employment during her absence due to sickness and the submission of a grievance do not indicate an express or implied affirmation of the contract of employment.
161. In light of our conclusions, as set out above, we have concluded that the respondent's conduct amounted to a repudiatory breach of contract which the claimant did not affirm. We are satisfied that the principle reason for the claimant's resignation was the respondent's repudiatory conduct and for these reasons the claimant's resignation amounted to a dismissal under section 95(1)(c) of the Employment Rights Act 1996.
162. The respondent did not plead a potentially fair reason for dismissal and in any event no evidence was advanced in this respect. The burden lies upon the respondent to establish a potentially fair reason for the purpose of section 98(1)&(2) of the ERA 1996. That burden has not been discharged.
163. For these reasons we find that the claimant was unfairly dismissed.
164. Finally, as the claimant's resignation was without notice and the resignation amounted to a dismissal the claim for wrongful dismissal in respect of the failure to pay the claimant a sum in respect of notice, succeeds.

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Employment Judge R Powell  
Dated: 27<sup>th</sup> March 2020

REASONS SENT TO THE PARTIES ON

.....28 March 2020.....

