



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Joshi
Respondent: Ocado Central Services Ltd

Heard at: Watford
On: 21 to 23 May, 18 July 2024 (and panel only on 19 July and 23 August 2024)

Before: Employment Judge Dick
Mr D Wharton
Mr D Sagar

Representation

Claimant: In person
Respondent: Mr O Lawrence (counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of direct age discrimination is not well-founded and is dismissed.
2. The complaint of harassment related to age is not well-founded and is dismissed.
3. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.
4. The claim for unauthorised deductions from wages is dismissed upon withdrawal.

The majority judgment of the Tribunal (Mr Sagar dissenting) is as follows:

5. The complaint of unfair dismissal is not well-founded and is dismissed. The claimant was not unfairly dismissed.

REASONS

Key to references:

[x] = page of agreed bundle.

{y} = paragraph number in the statement of the witness being referred to

INTRODUCTION; CLAIMS AND ISSUES

1. At the material times the claimant worked for the respondent, a technology company, as a project manager. There was little or no dispute that the claimant had a somewhat fraught relationship with her colleague Mrs Tirumalasetti, who became her line manager in 2020. It was the claimant's case that from that time Mrs Tirumalasetti did not provide her with enough work, blocked her efforts for promotion and engaged in other unacceptable behaviour towards her; all of this was denied by the respondent. In January 2023 Mrs Tirumalasetti required the claimant to attend the office, which the claimant said was a breach of an earlier agreement permitting her to work from home; the respondent accepted the claimant had been so required, but denied that amounted to a breach of the agreement. On 31 January 2023 a meeting took place between the claimant and Mrs Tirumalasetti during which Mrs Tirumalasetti criticised the claimant's conduct towards her colleagues and provided the claimant with ratings in respect of the respondent's "core values" for "behaviours". For each behaviour Mrs Tirumalasetti had rated the claimant "bar" (i.e. low). The claimant considered this a demotion or at least the prelude to demotion; the respondent's case was that it was no such thing. On 21 February 2023 the claimant raised a grievance. She resigned on 3 March 2023. It was her case that she had been constructively dismissed; the respondent denied this. It was also the claimant's case that the failure/refusal to allocate her sufficient work was an act of age discrimination; she further said that she had been subjected to discriminatory conduct/remarks by another colleague, Mrs Sujatha Turlapati, before and after the 31 January meeting, which the respondent denied had been done/said. The basis for the complaint for age discrimination was that older colleagues had been favoured over the claimant.
2. It was not in dispute, taking into account the dates of the ACAS conciliation process, that the claim for unfair dismissal was in time and that any discrimination complaints relating to events on or after 3 December 2022 were in time. Complaints relating to events before that date could be considered by the Tribunal either (i) if they were part of "conduct extending over a period" within the meaning of s 123(3)(a) of the Equality Act 2010 ("EqA" or "the Act") or (ii) if the Tribunal considered it "just and equitable" to extend time under s 123(2)(b) EqA.
3. The factual and legal issues for us to decide were, as the parties agreed, unchanged from the list of issues set out in the Case Management Summary prepared by Employment Judge ("EJ") Young following a preliminary hearing on 24 October 2023 with the following exceptions:

- a. The claim form and particulars mentioned a claim for unauthorised deductions from wages which was not contained in the list of issues. For the avoidance of doubt we raised this with the claimant during the course of the hearing. She confirmed that she wished to withdraw the claim and we dismissed it on that basis.
 - b. The dates for the events listed at 2.1.1.7 to 2.1.1.10 should have been, the parties agreed, 31 (rather than 20) January 2023.
4. The list of issues is reproduced in the Appendix below. (The numbers in the sub-headings which follow are the numbers of particular points in the list.) In summary the Tribunal had to consider the following claims:
- a. Constructive unfair dismissal, on the basis of: breach of the flexible working agreement, failure to provide sufficient work, Mrs Tirumalasetti's behaviour towards the claimant and the 31 January meeting.
 - b. Wrongful dismissal (failure to pay notice pay).
 - c. Direct age discrimination on the basis of Mrs Tirumalasetti failing to allocate sufficient work and on the basis of Mrs Turlapati's conduct towards the claimant.
 - d. Harassment related to age on the basis of a comment made by Mrs Turlapati on 10 February 2023.

PROCEDURE, EVIDENCE etc.

5. Before the evidence was called we explained to the parties that we would read the witness statements but they should be sure to refer us to any documents of relevance in the agreed bundle during the course of the evidence or submissions. The parties helpfully suggested a number of pages which we might read in advance as they would be dealt with during the course of the evidence. We also discussed the issues with the parties (see paragraph 3 above). We indicated that we would not need to hear evidence about remedy at this stage.
6. In this case the usual course of action would have been for the claimant to present her evidence first. However Mr Lawrence for the respondent suggested to us that it would be preferable to hear from the respondent's witnesses first for a number of reasons. We gave the claimant time to consider the matter. The claimant did not object and we were satisfied that the claimant would not be disadvantaged as she was ready to begin cross-examining the witness to be heard that afternoon. We therefore heard the case for the respondent first.
7. After taking time to read the statements, we heard evidence from the witnesses. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. With the consent of both parties we allowed some witnesses' evidence to be "interposed", i.e. heard in the middle of other witnesses' evidence.
8. During the first three days we heard from the following witnesses for the respondent:

- a. Ms Rebecca Merrett – “People Advisor” (i.e. HR) to the respondent.
 - b. Mrs Bala Tirumalasetti – Senior Project Manager (line manager of the claimant, Mrs Turlapati and Mr Dempsey at the material time).
 - c. Mr Paul Dempsey – Technical Project Manager.
 - d. Ms Sujatha Turlapati – Project Manager.
 - e. Mr Cyrus New – Head of Engineering for Data Services & eCommerce (Mrs Tirumalasetti’s manager).
9. During the course of the case it became clear that the claimant needed more time than had been timetabled to complete her cross-examination of the respondent’s witnesses. With some hesitation we were prepared to allow that, which meant that the rest of the case, originally listed for three days, went part-heard. In the event the claimant’s evidence (the claimant not calling any other witnesses) and submissions were concluded on the fourth day. (At the conclusion of the evidence we heard oral submissions from Mr Lawrence and then from the claimant, both supplemented by written submissions, for which we were grateful.) We decided to give a reserved judgment and do so now having deliberated on what became the fifth and sixth days of the case.

FACT FINDINGS

10. We find the following facts on the balance of probabilities. Where we have needed to resolve disputed facts we make that clear. We have not made findings on every fact presented to us, but merely on those which assist us to come to a decision bearing in mind the list of issues. Unless otherwise stated, our findings are unanimous. Some undisputed facts are set out at paragraph 1 above; we do not repeat them here.

Start of employment and move into Ocean team

11. The claimant began work for the respondent in 2013, taking up the role as a project manager in June 2018. Mrs Tirumalasetti began working for the respondent, also as a project manager, in December 2018. As part of a reorganisation in early 2020 the claimant was one of a number of project managers reassigned to the respondent’s Ocean team/department, which was a group of employees working on the technology that underpinned Ocado Retail’s UK eCommerce businesses. It was the claimant’s case, and we accept, that she was moved into this team without being consulted; Mr New (who later became Mrs Tirumalasetti’s line manager) accepted in his evidence that the move “could have been handled a bit better”.
12. At the time of the reorganisation, the claimant had been given the impression that she would be working under a Mr Kornas, the head of the e-commerce department. In fact it eventually became clear to her that she would be reporting to Mrs Tirumalasetti, who in turn reported to Mr Kornas. Mrs Tirumalasetti was formally appointed as Lead (later Senior) Project Manager of the Ocean team

in April 2020, though it was clear to the claimant by 11 February 2020 [183] that she would be working under Mrs Tirumalasetti.

13. On 18 February, 2 March and 5 March 2020 the claimant sent emails asking to be moved out of the Ocean department. In the first of those she explained that she was very busy with her current projects and would remain so for the next 18 months or more. While ultimately the respondent agreed to let her continue with some of that work, it was clear to the claimant, we find, that the decision to make Mrs Tirumalasetti her line manager stood. We find as a fact that the claimant's objection to working in Ocean was not simply, as the claimant said, to do with being moved into that team, but was also significantly based upon her objection to working under Mrs Tirumalasetti. We did not find it necessary to make factual findings about whether the claimant's objection to working under Mrs Tirumalasetti was based on resentment at Mrs Tirumalasetti's promotion, although we accept the claimant's evidence that she had had no interest in the role into which Mrs Tirumalasetti had been promoted. The point is that, for whatever reason, the claimant did not want to work for Mrs Tirumalasetti; we accept Mrs Tirumalasetti's evidence that their relationship changed when her promotion was announced. We also find as a fact that, contrary to the claimant's position, having not responded to Mrs Tirumalasetti's efforts to contact her for the three weeks following the 11 February announcement, the claimant told Mrs Tirumalasetti that she would never join her team or come to her meetings. This finding was supported by near-contemporaneous records made by Mrs Tirumalasetti [199, 204].
14. By 16 March 2020 Mrs Tirumalasetti was so frustrated with what we find to be the claimant's deliberate refusal to be managed by Mrs Tirumalasetti, that she (i.e. Mrs Tirumalasetti) raised a grievance with the respondent. It is, we note, unusual for a manager to raise a grievance against someone they are managing; it is reflective, we find, of Mrs Tirumalasetti's non-confrontational style of management (i.e. she did not wish to confront the claimant directly). The basis of the grievance was that the claimant did not recognise Mrs Tirumalasetti as her line manager. We note that the claimant essentially agreed with that when she was interviewed by Mr New during his investigation of the grievance [237] – the claimant decided that as she was asking to be moved out of the Ocean team she would not work with Mrs Tirumalasetti, despite knowing that Mrs Tirumalasetti was her line manager. Although the claimant made some complaint before us about the procedure that was followed in dealing with the grievance, since procedural failings were not identified as an issue in the case, we do not consider it necessary to decide whether any procedures were breached. Suffice it to say that Mr New dealt with the matter in a semi-informal way, conducting minuted interviews with the claimant and Mrs Tirumalasetti. Mr New produced a written recommendation, to the effect that the claimant should continue in her role, cooperating with Mrs Tirumalasetti, and that Mrs Tirumalasetti should provide the claimant with clear expectations of what she required to avoid any doubt. Mr New also suggested that the claimant should be allowed to seek an alternative role.

The claimant's work from March 2020 (including allocation of work; 2.1.1.6 and 5.2.2)

15. It was the claimant's case that from March 2020 Mrs Tirumalasetti did not give her enough work and that despite her asking for work new team members were recruited. We accept that the claimant may have felt somewhat underemployed or underutilised, but we also accept that Mrs Tirumalasetti genuinely held the view that the claimant could have made more of the work she was given. Beyond the impressions of various witnesses, we were not presented with any figures or analysis about how much work went to each person. Having considered those witnesses' impressions, we conclude the claimant was not treated differently to any of the other team members regarding work allocation. We accept what Mrs Tirumalasetti said – that she allocated projects as they came along by taking into account the experience of the relevant team member and that, if anything, at times others had less work than the claimant. Mrs Turlapati's recollection, which we accept, was that she asked Mrs Tirumalasetti for more work on occasions and that Mrs Tirumalasetti did what she could to share work within the team. Whoever was free, she would give work to based on their capacity. This had been discussed in meetings and when people had that capacity they would say so; Mrs Turlapati did not recall the claimant ever putting herself forward in that way. Mr Dempsey also recalled, and we accept, that Mrs Tirumalasetti tried to share work out evenly based on capacity.
16. Around February 2021 the respondent implemented a new "craft competency matrix". Each project manager was allocated a level, PJM1 being the lowest. Each level had its own "growth initiatives" and once those were met the project manager could move to the next level. Though, as Mr Dempsey told us, the Ocean team operated "within a flat team structure, as opposed to being hierarchical", it is clear that a move up from one level to the next was considered a promotion. We note for example that Mrs Tirumalasetti described moving from PJM2 to 3 as a promotion, which would result in being paid more. For the Ocean team the levels were allocated as follows. Mrs Tirumalasetti and Mr Dempsey were allocated PJM3 and the claimant was allocated PJM2. The claimant made no complaint to us about that initial allocation, but it was her case that Mrs Tirumalasetti ignored or thwarted her attempts to gain promotion from PJM2 to PJM3. Mrs Tirumalasetti recalled that the claimant had been "working towards PJM3" as she wanted to earn more money and in that context she provided a feedback form to the claimant. As they discussed the process over time the claimant decided that she did not want to have to fill in the forms. The process therefore came to an end. We accept that evidence. While clearly the claimant believed that she should have been promoted, the claimant did not show that she formally sought promotion, let alone that those efforts were ignored or thwarted. We were shown for example the emails/chats from December 2021 and April 2022 [254, 386] which showed some discussion between the claimant, Mrs Tirumalasetti and Mr Dempsey about the claimant's career development and feedback, with some mention of the PJM levels. This was evidence at best of the claimant's potential for promotion being discussed, but no more. Mr New identified an agenda item in a meeting between him and Mrs Tirumalasetti referring to the claimant's promotion, but he had little to no recollection of that. Essentially the claimant's efforts at promotion fizzled out, it

not being particularly clear to us why that had happened beyond her unwillingness to fill in the necessary forms. We do conclude that this was not due to any particular effort on Mrs Tirumalasetti's part to thwart the claimant's promotion.

17. The claimant complained about negative feedback given to her by Mrs Tirumalasetti, pointing out that others had given her positive feedback. In particular we were shown a document headed "PJM3 Feedback Review" dated 12 January 2022 [257]. A box headed "Reviewed by – Self/Manager" contains the name of a Mr Liu. Various "core competencies" are given a level, one of: bar, great, excellent or outstanding. Where they are recorded they are all "excellent" for the claimant. In the comments and evidence, "PJM2+" appears a number of times. There was some dispute about how much of the document was a pro forma, but parts clearly have been filled in about the claimant specifically. Columns in the middle appear to record the "behaviours" required for PJM2+, with the next column containing examples of the behaviour which relate specifically to the claimant. Not all parts of the form appear to be completed. What was recorded was undoubtedly positive. Although we did not hear evidence from Mr Liu there seems no reason to doubt that the document records his and the claimant's combined view at that time. We also note positive feedback provided about the claimant by a Mr Dyachuk on 22 January 2021 [376].
18. Mr Dempsey gave evidence more generally about the claimant. He said that he worked with the claimant on projects more than anyone else in the team. He told us, and we accept, that it appeared to him the claimant felt frustrated as she felt she should have been at a higher level. He said that he would not have acted the way the claimant acted in meetings if he had wanted to get ahead. Her constant expression of frustration, he said, made people feel uncomfortable. He did not think the claimant acted with the intention of offending people, but she appeared not to understand the repercussions of her actions and there was a lack of self-awareness. Sometimes the way she articulated things in meetings would cause offence. We accept all of that, and make clear that Mr Dempsey did not have an entirely negative view of the claimant – he said they got on well and he described her as capable, for example, albeit lacking in-depth knowledge around project management methodologies. He had other complimentary things to say about the claimant.

The November Meeting – 14 November 2022

19. On 14 November 2022 there was a "PMO Way of Working" remote meeting in which, Mr Dempsey told us, the team were challenging each other about work done and talking about methodology. We refer to this below as the November meeting. There was some dispute about whether Mrs Tirumalasetti was present in the meeting; she herself could not remember. Other witnesses assumed she might have been there but without being able to say. We consider there was insufficient evidence to enable us to make a finding either way. Mrs Turlapati's evidence was that the claimant spoke over colleagues and asked irrelevant questions. When the claimant kept interrupting Mr Dempsey, Mrs

Turlapati asked her to let him speak and the claimant disconnected herself from the meeting in anger. Mr Dempsey's evidence was materially identical to Mrs Turlapati's on this point. The claimant denied interrupting people and disconnecting herself in anger and said that nobody could have got the impression that that was what had happened. Both Mrs Turlapati and Mr Dempsey however clearly did get that impression, and we find that they were right – we accept their account of the meeting.

20. Though the claimant's conduct in this meeting was later to be raised with her by Mrs Tirumalasetti, we accept that nobody formally took it up with the claimant at the time. We do however accept Mrs Turlapati's evidence that she did raise it with Mrs Tirumalasetti around the time it happened. This was not a formal complaint against the claimant and it was not treated as such.

Flexible working (July 2022, January 2023; 2.1.1.1 and 2.1.1.2)

21. During the Covid-19 pandemic, when the respondent's employees were of course all working from home, the claimant had moved to an address over 100 miles away from her place of work in Hatfield. In 2022 the claimant made a flexible working request to be allowed to work from home all the time. The respondent did not agree to the request in full, but there was an agreement signed by the claimant and Mrs Tirumalasetti and dated 4 July 2022. Despite Ms Merrett's characterisation of this as an offer of an agreement but not a contractual change, we find that the document was a change to the claimant's contractual conditions. Although parts of the document read as a counter offer by the respondent, the foot of the document clearly says "agreed and accepted" where the claimant signed it. Specifically, the change is recorded as follows: "For the 40% of time in the office to be accommodated flexibly e.g. one block spent in the office each month, as opposed to two days per week." To put that in context, at the relevant time the Ocean team members came into the office on Monday and Tuesday and worked from home the rest of the time, i.e. there was a 40/60 split between office and home working. The claimant, then, was to be allowed to do the split over the long term. While she would still spend 60% overall of her time working from home, it did not have to be 60% each week. This would be done by her working blocks of consecutive days in the office, the idea being that this would substantially reduce the time she had to spend travelling, which for reasons we need not record were having an impact upon the claimant. It is important to note that the agreement only uses a block over a month as an example – the agreement is simply to achieve the 40/60 split over an unspecified period rather than over any particular week or month. Unfortunately the parties do not appear to have given much thought to the practical implications of that, for example the claimant working long blocks of time alone in the office (given that the other team members would not have been there from Wednesday to Friday).
22. Although in the discussions which led to the agreement the claimant had asked for the agreement to be for a year, the agreement itself does not record how long it was to last for. We infer that the intention must have been that it would be in place until there was a good reason for it to change. In practice, as Mrs

Tirumalasetti told us, after the agreement came into force the claimant tended to work from home more than 60% of the time, without any complaint from Mrs Tirumalasetti. The claimant agreed, although she did recall having worked in the office for five days in a row on occasion, which the respondent did not dispute. In our judgment this did not affect the fact that the agreement was still in place – the claimant was entitled to work from home for 60% of the time, at least over an unspecified period. Of most relevance, we find that the agreement was still in force in January 2023, when the claimant says that Mrs Tirumalasetti did not honour the agreement. The context of this complaint is as follows. It was not in dispute that in January 2023 Mrs Tirumalasetti assigned the claimant to an audit project which before then had been led by Mr Dempsey. Some form of handover was required. Mrs Tirumalasetti asked the claimant to begin attending the office for two days a week in January, for around three months, in order to facilitate that handover. While the claimant believed that there was no need for her to come into the office (or at least to come into the office that much) to facilitate the transfer, she did agree, and she did come in for three weeks. We note that the claimant did so without protest, only raising the issue as part of her later grievance. We accept that it was a reasonable management decision for Mrs Tirumalasetti to have considered that it was necessary for the claimant to be in the office during that time. Most importantly, there was no breach of the agreement. The agreement was simply that the required 40% in the office would be implemented flexibly – given that the claimant agreed to come in twice a week for three months, that is what happened. To put it another way, the agreement was so vague that it did not prohibit the claimant from coming in two days per week; it simply permitted her to do something different, but in January 2022 she agreed not to do something different.

Mrs Tirumalasetti's body language (January 2023; 2.1.1.3)

23. The evidence given by the claimant about Mrs Tirumalasetti behaving strangely towards her through her body language was vague and unsupported. Mrs Tirumalasetti denied that this had happened and noted that some of the alleged occasions were on days she had not met the claimant in person. We prefer Mrs Tirumalasetti's evidence on this point.

The self-help book (30 January 2023; 2.1.1.4)

24. It was not in dispute that on 30 January 2023 the claimant borrowed a self-help book which belonged to Mrs Tirumalasetti and that Mrs Tirumalasetti told her she should not have done so. In our judgment Mrs Tirumalasetti was entitled to do this and did not do so inappropriately. We regard the incident as so trivial that it can have had no bearing on any of the real issues in this case.

The meeting of 31 January 2023 (2.1.1.5, 2.1.1.7 to 2.1.1.10)

25. A particular area of dispute in this case was around an in-person meeting between the claimant and Mrs Tirumalasetti on 31 January 2023. It was not in dispute that at this meeting Mrs Tirumalasetti provided the claimant with some particularly negative "feedback". Before we turn to what happened at the meeting, we consider what prompted Mrs Tirumalasetti to provide the negative feedback and how she prepared for the meeting.

26. Mrs Tirumalasetti's evidence was that in one-to-one meetings with her around December 2022, both Mrs Turlapati and Mr Dempsey had raised with her the issue of the claimant's behaviour at the November meeting. As we have said, so far as Mrs Turlapati is concerned, we all accept that. The Tribunal were unable to agree as regards Mr Dempsey. Mr Sagar did not accept that Mr Dempsey had raised the issue with Mrs Tirumalasetti around that time. When asked specifically about it in the hearing he could not remember whether or not he had and his statement made no mention of him having done so. He had clearly not done so in writing, whereas the way Mrs Tirumalasetti's statement was phrased implied he had done so. When he dealt with the issue in an email of 31 January 2022 ([279D], to which we will come) he did not refer to any earlier conversation on the subject. EJ Dick and Mr Wharton took the view that although Mrs Tirumalasetti's statement might be taken to have implied that Mr Dempsey had *written* to Mrs Tirumalasetti before 31 January about his concerns, it did not actually say that. EJ Dick and Mr Wharton accepted Mrs Tirumalasetti's oral evidence on the point, i.e. that Mr Dempsey had expressed his concerns orally around December, considering it more likely than not that, given Mr Dempsey's evidence in general about his concerns about the claimant, there would have been such a conversation even if Mr Dempsey could not specifically remember it now. Mr Sagar also did not accept Mrs Tirumalasetti's recollection that around December 2022 she had "fed-back" to the claimant that she needed to be more professional when working in a team. Mr Sagar did not accept this because the part of Mrs Tirumalasetti's statement dealing with it appeared to refer to an email that was in fact sent in December 2021. EJ Dick and Mr Wharton considered that it was likely that Mrs Tirumalasetti had said something along those lines to the claimant in December 2022, though we should add that none of the three panel members considered this last point to be significant, and it did not influence our decisions.
27. Returning to findings we make unanimously, by December 2022 the claimant had not *perceived* Mrs Tirumalasetti to have offered her any negative feedback and, whether or not she had expressed it orally, Mrs Tirumalasetti *had not* given the claimant any written or formal feedback that was negative (with the exception of course of what had happened leading up to and during the period in 2020 when Mrs Tirumalasetti lodged her grievance). However by 16 January 2023 Mrs Tirumalasetti had decided to take action, and spoke to someone in the respondent's human resources department. We accept that the possibility of putting the claimant on a performance improvement plan was discussed, though clearly no formal plan was ever initiated.
28. The 31 January meeting was what Mrs Tirumalasetti called an informal end of year review (to which all staff were subject) in which the claimant would be given end of year feedback from her personal development plan ("PDP"). (The PDP, which was in the bundle at [331], had been drafted in February 2022.) We consider it reasonable to infer that the claimant would have been expecting this to be the topic of their conversation at the 31 January meeting, though that is not to say that she was expecting *negative* feedback.
29. On 30 January 2023, i.e. the day before the meeting, Mrs Tirumalasetti sent an email to Mrs Turlapati. It read:

With regards to the recent few months in team meetings where you were collaborating on our team's ways of working, I need you to list out the following with regards to behaviour exhibited by [the claimant]. Please list as many as you can.

Fact –

Feeling –

30. Mrs Turlapati responded in some detail, though not until 7 February, i.e. well after the meeting. Mrs Turlapati detailed three particular incidents (including the November meeting) in which she complained about the claimant's tone and manner in meetings making people feel uncomfortable.

31. Mrs Tirumalasetti had evidently sent the same email of 30 January 2023 to Mr Dempsey. Mr Dempsey replied, in the suggested format, at 7.56 a.m. on 31 January:

Bala please see my thoughts below on the behaviours from [the claimant] whilst we were collaborating on the teams ways of working

Fact -

- Disengaged
- Dismissive
- Detached
- Apathetic
- Uninterested

Feeling -

- Irritated
- Frustrated
- Argumentative
- Intolerant

32. In his evidence, Mr Dempsey was careful to point out that the above feedback referred only to the November meeting.

33. Mrs Tirumalasetti's email of 30 January was clearly an effort to gather evidence, independent from her own recollections or opinions, in support of the feedback which she was intending to give the claimant. We accept that the reason Mrs Tirumalasetti sought this evidence from Mrs Turlapati was because of what we unanimously found Mrs Turlapati told her previously about the claimant. We do not accept that Mrs Tirumalasetti had discussed the matter recently (i.e. shortly before 31 January) with Mr Dempsey, though see our findings above on what they had spoken about in December. EJ Dick and Mr Wharton accept that it was reasonable for Mrs Tirumalasetti to have sought the evidence from Mr Dempsey, on the basis of the earlier finding that they had discussed the point in December. Mr Sagar, however, on the basis of his earlier findings, considered there was no reason for Mrs Tirumalasetti to have sought evidence from Mr Dempsey. On either set of findings, by the time of the 31 January

meeting, the only *written* complaint from any of the claimant's colleagues which Mrs Tirumalasetti had was the above email from Mr Dempsey.

34. We now turn to our findings about what happened at the meeting on 31 January. The meeting was not formally minuted, but our findings are informed by two emails. The first, dated 17 February 2023, was sent by the claimant to Mrs Tirumalasetti and sets out her account of the 31 January meeting. The second, dated 20 February 2023 was sent by Mrs Tirumalasetti to Mr New. It contains the text of the first email, in black text, with Mrs Tirumalasetti's own comments in red text. The emails therefore contain near-contemporaneous accounts of the meeting by both the claimant and Mrs Tirumalasetti. Mrs Tirumalasetti's account has her telling the claimant that "the team" had written to her saying the claimant's style of communication was not right. This however cannot have been correct, since at the time of the meeting Mrs Tirumalasetti had only received a written response from Mr Dempsey (though by the time she sent the email she would have received a second response, that of Mrs Turlapati). We accept that what Mrs Tirumalasetti set out in her written statement was correct: "I explained to the Claimant how some of her behaviours did not align with Ocado's core values, she was not working effectively as a team player, and it was making others in the team uncomfortable." At [333] was a note that Mrs Tirumalasetti appears to have been working from during the meeting and which appears also to have been provided to the claimant. We set it out in full:

Feed back

Values level to be a PjM 2

Trust - Great

Collaboration - Excellent

Autonomy - Great

Learn Fast - Great

Your level of values as taken from [here](#) [*this appears to be a hyperlink*]

Trust - Bar

Collaboration - Bar

Autonomy - Bar

Learn Fast - Bar

Feedback provided by the team

Fact -

- Disengaged
- Dismissive
- Detached
- Apathetic
- Uninterested

Feeling -

- Irritated
- Frustrated
- Argumentative
- Intolerant

35. Though the claimant's and Mrs Tirumalasetti's precise recollections of some aspects of the meeting differed, we find the following, which was not really in dispute. Mrs Tirumalasetti told the claimant that she had not been behaving professionally, was not working effectively as a team player and it was making others in the team uncomfortable. Mrs Tirumalasetti rated the claimant on four "values": trust, collaboration, autonomy and learn fast. The rating required of a PJM2 (i.e. someone in the claimant's position) was "great" for three of the values and excellent for the other. Mrs Tirumalasetti in fact scored the claimant "bar", the lowest available rating, for all four values. (Bar refers to the hiring bar, in other words nobody who did not meet this bar would be employed by the respondent.) The feedback as set out above was provided to the claimant by Mrs Tirumalasetti. Though the feedback was said to have been provided by "the team" it was in fact provided only by Mr Dempsey, though on the basis of EJ Dick's and Mr Wharton's findings it also broadly accorded with what Mrs Turlapati had previously told Mrs Tirumalasetti. On the basis of Mr Sagar's findings, the comment was rather more misleading.
36. Returning to our unanimous findings, the claimant made clear during the course of the meeting that she did not agree with Mrs Tirumalasetti's assessments. We do not accept the claimant's contention that Mrs Tirumalasetti used documents that had been meant for a training exercise during the course of the meeting – there appears to us to be no basis for that suggestion. The meeting ran over its allotted time and the two had to leave the room to allow the next meeting scheduled in the room to take place. We accept that their conversation continued in the corridor, although we do not accept that the claimant is correct when she says that Mrs Tirumalasetti continued criticising her in the corridor in front of others. We find that whatever conversation took place in the corridor was innocuous.
37. As is evident from a conversation which followed on the Slack platform [279E], the meeting did not finish as the claimant did not want to carry it on in the breakout area (i.e. in public). At the time that Slack conversation started, Mrs Tirumalasetti messaged the claimant with a list of actions from the meeting, one of which was: "Read through Values and come up with ideas where you can get from Bar to Great by 14 February." The claimant concluded that Mrs Tirumalasetti was telling her she needed to get to Great by 14 February. Mr Sagar considered that the claimant was entitled to come to this conclusion in the context of all that had happened before. EJ Dick and Mr Wharton found that the claimant unreasonably jumped to this conclusion, considering that the natural meaning of what Mrs Tirumalasetti said was that 14 February was the date by which the claimant should provide suggestions for how she might come up to Great. EJ Dick and Mr Wharton found support for this conclusion in an email written by Mrs Tirumalasetti to the claimant on 7 February 2023 suggesting that an informal meeting should take place relating to the claimant's

behaviour performance and future development where they would discuss the values required for a PJM2.

38. It was the claimant's contention that this meeting amounted to a demotion or at least the start of one. Mr Sagar, in the context of what was on his findings essentially an unachievable ultimatum for the claimant to come up to PJM2 standards in such a short time, considered that the claimant might well have considered that the reality was that she was being demoted. EJ Dick and Mr Wharton found that the claimant could not reasonably have believed in the circumstances that this was a demotion. Mrs Tirumalasetti telling the claimant that she was not meeting the requirements to be a PJM2 was not the same as her telling the claimant she was no longer a PJM2. Even if that had not been clear in the meeting (though it was clear) it would have been made even clearer by the email of 7 February 2023 to which we refer above.
39. Was the criticism Mrs Tirumalasetti made of the claimant in the 31 January meeting fair? EJ Dick and Mr Wharton were of the view that overall it was and that, more significantly, holding and expressing her view was a reasonable exercise of Mrs Tirumalasetti's discretion as the claimant's line manager. Though other members of staff may have praised the claimant in the past, what was relevant was her behaviour at that time. Mrs Tirumalasetti was entitled to rely upon her own observations, which were in the main supported both by Mrs Turlapati and by Mr Dempsey, both in what they said or wrote to Mrs Tirumalasetti at the time and in what they said in their written and oral evidence to this Tribunal. Though Mr Dempsey made clear that his written feedback related only to one incident specifically, it was clear from his written evidence that his concerns about the claimant were wider than that. While the ratings will have come as a shock to the claimant, they were delivered at a meeting convened for the purpose of discussing them and EJ Dick and Mr Wharton accept that they represented Mrs Tirumalasetti's genuine opinion. Mrs Tirumalasetti spent about half an hour in the meeting explaining the basis for her opinion and discussing it with the claimant. The suggestion that Mrs Tirumalasetti had written feedback from more than one member of staff was unfortunate but did not, in the view of EJ Dick and Mr Wharton, taint the whole process. It should also be noted that the process was an informal appraisal, and even that process was not complete – it is clear from the evidence that Mrs Tirumalasetti attempted to continue discussions on another day but that the claimant did not wish to engage with Mrs Tirumalasetti (see below). In his evidence Mr Dempsey said that he had seen the feedback given to the claimant by Mrs Tirumalasetti [331] and he considered it fair and measured. Having found Mr Dempsey to be a credible and reliable witness, and taking into account his knowledge of the claimant, EJ Dick and Mr Wharton accepted that that was a fair assessment. EJ Dick and Mr Wharton were also of the view that the emails Mrs Tirumalasetti sent out on 30 January 2023 were an effort in good faith to secure evidence beyond her own personal observations and feelings, albeit that having spoken already to Mrs Turlapati and Mr Dempsey, she knew that it was evidence which would support her views.
40. Mr Sagar took a different view. He considered that the criticism itself was not fair – despite the way she put it in her evidence, Mrs Tirumalasetti had

undoubtedly given the claimant the lowest possible ratings, and Mrs Tirumalasetti had unreasonably gone looking for negative feedback from others. Mr Sagar also considered that confronting the claimant with the criticism in the circumstances, particularly in light of the misleading information given about negative feedback from other employees, was also unfair. The only written feedback that Mrs Tirumalasetti in fact had at the time dealt only with one particular incident some months ago. In the light of what happened at the meeting the claimant reasonably believed, in Mr Sagar's view, that it would not be possible to mend her now-broken working relationship with Mrs Tirumalasetti – there was essentially no way back. Any further meeting therefore would have served little purpose.

Conduct of Sujatha Turlapati (September 2022 to January 2023; 5.2.1)

41. It was the claimant's case that on various occasions from September 2022 to January 2023 Mrs Turlapati refused to listen to her and cut her off when she was speaking but allowed other members of staff to speak who were around the same age as Mrs Turlapati. Mrs Turlapati had joined the respondent's Ocean team in June 2022 as a project manager. We accept Mrs Turlapati's evidence that in fact she, the claimant and Mrs Tirumalasetti were all of a similar age (40 to 46) – we were of course able to come to our own conclusions about this having heard from all three in person. We note that in the November meeting we refer to above, Mrs Turlapati's evidence that in fact it was the claimant who would interrupt people was corroborated by Mr Dempsey. We accept Mrs Turlapati's evidence that the claimant did not seem to take any constructive feedback well, taking it as personal criticism which made her difficult to work with. This was evident to us in the claimant's approach to asking for feedback from Mrs Turlapati in February 2023. See below for more detail, but in short the claimant asked Mrs Turlapati for feedback, Mrs Turlapati spent one and half hours giving it to her and, not liking what she had heard, the claimant requested the feedback in writing and then, when she got the feedback in writing, asked for further detail. We also accept Mrs Turlapati's evidence that in another meeting on 18 October the claimant was rude. We accept her evidence that, more generally, although she had to sometimes ask the claimant not to interrupt people and to allow them to finish what they were saying before asking questions, she never ignored the claimant or otherwise prevented her from speaking. Her account of the claimant's behaviour was corroborated by Mrs Tirumalasetti and also to some extent by Mr Dempsey. The claimant has therefore not proven that Mrs Turlapati behaved in the way alleged at 5.2.1 on the list of issues, let alone that that behaviour had anything to do with age. We have no hesitation in finding that the way Mrs Turlapati did treat the claimant had nothing to do with anybody's age – it was simply how she dealt with the claimant's difficult behaviour.

Early February 2023

42. On 1 February 2023 Mrs Tirumalasetti had another conversation with someone in the respondent's HR department. She scheduled another meeting on 7 February 2023 with the claimant, saying in an email that the meeting was to

talk to the claimant about performance which had started last week to provide constructive feedback and to provide “craft models, examples and ideas to address the issues” which were discussed the previous week. The claimant declined to attend, citing “honesty issues”. Before doing so she asked Mrs Tirumalasetti to “document” the feedback she had given the claimant at the 31 January meeting. Mrs Tirumalasetti took the view that she had already provided the feedback in writing (see above) and that in any case there was no need for more documentation as they had not finished the discussion they started on 31 January. EJ Dick and Mr Wharton took the view that the claimant was unreasonably declining to engage in the process – she might not have liked what Mrs Tirumalasetti had to say, but it was her duty to listen. The claimant’s characterisation of the emails (at {38}: “The email shows her using the position as my manager and being bossy and bullying as she wanted to start the process to demote me unfairly”) simply bears no relation to the reality of the emails (at [281]) where Mrs Tirumalasetti politely and reasonably sets out her position. Mr Sagar took the view that the trust in the working relationship was now gone and that the claimant therefore reasonably declined to participate.

Claimant seeking feedback

43. After the 31 January meeting the claimant contacted five colleagues, including Mrs Turlapati and Mr Dempsey, asking for feedback, essentially in order to counter what Mrs Tirumalasetti had said. She documented these efforts in a table at [349]. Mr Dempsey recalled the claimant asking him for feedback in February 2023. He said he told her about the meeting of 14 November 2022, along with others, and explained that the other members of the team had found her behaviour offensive. We accept this evidence. We also accept the claimant’s evidence that none of the colleagues she contacted other than Mrs Turlapati and Mr Dempsey provided negative feedback to her. Mr Sagar was of the view that this was simply because they had no such negative feedback to give. EJ Dick and Mr Wharton considered that it was hardly surprising, given the claimant’s behaviour as relayed by Mrs Tirumalasetti, Mr Dempsey and Mrs Turlapati, that others of her colleagues might not have wished to tell the claimant directly what they thought. The claimant’s unrealistic attitude was that those who did not complain were reasonable whereas those, like Mrs Turlapati, who did, bullied and harassed her, despite them only responding to the claimant’s own request.

Meeting (Slack call) of 10 February 2023 (6.1.1)

44. In early February 2023 the claimant spoke to Mrs Turlapati on a Slack call – this was part of the claimant seeking feedback which we refer to above. The claimant’s recollection was that this happened on 10 February, whereas Mrs Turlapati thought it was 6 February. Nothing turns on this difference in recollection. It was the claimant’s case that in the meeting Mrs Turlapati said to her: “I am older than you and more experienced than you and you should listen to me and do what I am saying” and that this amounted to an act of age discrimination. Mrs Turlapati’s evidence was that she said no such thing. The meeting ran for an hour and a half, during which she provided the claimant with the feedback she had asked for. After the meeting the claimant emailed to thank

her for feedback and asked for feedback in writing, which Mrs Turlapati then provided in a fairly short email. The claimant then asked for more detail in writing. We are of the view that it was quite reasonable of Mrs Turlapati to decline to provide this. We note that during the correspondence the claimant makes no complaint of Mrs Turlapati having made discriminatory comments. We also note that in the claimant's own written record of the meeting (at [351]) she had Mrs Turlapati as saying: "I have 20 years of different industry experience and you should listen to me" rather than referring to her or own or the claimant's age. We further note that the claimant and Mrs Turlapati were no more than a few years in age apart. We prefer Mrs Turlapati's account, and find that Mrs Turlapati made no comment about her age or anyone else's in the meeting.

Grievance etc.

45. On 16 February 2023 or thereabouts the claimant spoke to Mr New, who as we have said was by now Mrs Tirumalasetti's line manager, and related to him her complaints about Mrs Tirumalasetti. The claimant made some criticism of how long Mr New spent dealing with the matter, but since this was not identified as an issue in the list of issues we did not consider that we needed to make detailed findings about that. When Mr New became aware of the claimant's email of 17 February 2023 which we refer to above (which was essentially the claimant's response to Mrs Tirumalasetti's efforts to arrange a further meeting) he asked the claimant whether she wanted to send him anything different to what she had sent Mrs Tirumalasetti. The claimant responded on 20 February 2023 to say that she intended to send something different and the following day she sent Mr New a detailed written grievance. At Mr New's request she sent a more concise version on 1 March 2023. Meanwhile, the claimant had gone off on sick leave from 27 February 2023 (see email at [393]).

Resignation

46. On 3 March 2023, before her grievance had been dealt with, the claimant resigned. Her resignation letter was in the bundle at [404]. The claimant said that she had been unfairly pushed out and had only tolerated Mrs Tirumalasetti's "unfair and discriminatory behaviour" because she had a mortgage to pay. The claimant indicated that she wanted the grievance process to continue. She said that she was resigning in response to a breach of her "flexible working agreement, contract, trust, discrimination, confidence" and all the other reasons listed in her grievance. She considered herself constructively and unfairly dismissed. The evidence established that, following her resignation, the claimant was in fact paid for her notice period.

47. The claimant made no complaint to the Tribunal about the way her grievance was then handled, so it is sufficient for us to record here simply that the respondent allowed the grievance process to continue, despite the claimant's resignation. The grievance was not upheld, nor was the claimant's appeal against that decision.

LAW

Constructive unfair dismissal

48. Section 94 of the Employment Rights Act 1996 (“ERA”) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under s 111 ERA. The right only applies if there was a dismissal. Generally, then, it will not apply to resignation. However, by s 95 ERA, a resignation is to be construed as a dismissal (and therefore may engage the right not to be unfairly dismissed) if the employee terminates the contract under which they are employed in circumstances in which they are entitled to terminate it without notice by reason of the employer’s conduct. The employer’s conduct here is a “fundamental” or “repudiatory breach”, in other words 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 (*Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221). A resignation which amounts to a dismissal by operation of s 95 is known as a constructive dismissal.

49. In this case, the claimant’s case was that the respondent breached the implied contractual term as to trust and confidence, formulated in *Malik and Mahmud v BCCI* [1997] ICR 606 as an obligation that the employer must not “without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.” A breach of this term will inevitably be fundamental (*Morrow v Safeway Stores plc* 2002 IRLR 9). Merely acting in an unreasonable manner is not sufficient. The strength of the implied term is shown by the fact that it is only breached if the employer demonstrates objectively by its behaviour that it is abandoning and altogether refusing to perform the contract; this is a “demanding test” (*Frenkel Topping Limited v King* UKEAT/0106/15/LA). In practice the Tribunal proceeds by asking: (i) was there reasonable and proper cause for the employer’s action and (ii) if not, when viewed objectively was the conduct calculated or likely to destroy or seriously damage trust and confidence?

50. Simply establishing a breach of contract is not enough. In order to succeed in a claim for constructive dismissal, a claimant must prove that they resigned as a direct result of the respondent’s breach and not for some other reason; there has to have been a causal connection between the breach of contract and the resignation (*Ishaq v Royal Mail Group* [2017] IRLR 208, EAT). If there was a fundamental breach by the employer, it must be a (though not *the only*) reason for the employer’s resignation – see for example *Wright v North Ayrshire Council* [2014] IRLR 4, in which the EAT held that the crucial question, in establishing whether an employee who had more than one reason for resigning had been constructively dismissed was whether a repudiatory breach of contract had played a part in the resignation.

51. There is no constructive dismissal if, after a fundamental breach, the employee affirms the contract, i.e. behaves in a way which shows that he or she intends the contract to continue (*Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221). The issue is one of conduct, not merely the passage of time. Delay in resigning is relevant to whether the breach was affirmed, though it is not determinative of the issue. Delay in resignation whilst an employee is on sick leave is less likely to amount to an affirmation than if the employee is still attending work.
52. A sequence of events may meet the test even if none of its individual components does. An employee may rely on a “last straw” which was not itself a repudiation of the contract; this is so even if the employee affirmed the contract after the earlier matter as long as the last straw adds something new and effectively revives those earlier concerns (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 97). If the last straw is entirely innocuous or trivial, and none of the preceding matters amount to a fundamental breach of contract, the claim of constructive dismissal will fail. In *Meikle v Nottinghamshire County Council* [2005] ICR 1, in considering a “last straw” case, the Court of Appeal held that, in determining whether an employee had accepted the employer's repudiation of the employment contract, the fact that the employee objected not only to the repudiatory conduct but also to other actions of the employer, not amounting to a breach of contract, did not vitiate acceptance of the breach.
53. A constructive dismissal is not necessarily an unfair one (*Savoia v Chiltern Herb Farms Ltd* 1982 IRLR 166). If there was a constructive dismissal, just as with any other form of dismissal, under ERA the Tribunal must consider whether it was fair. S 98 ERA deals with the fairness of dismissals in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within section 98 (1) and (2). Second, if the employer shows that, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason and in particular whether the respondent in all respects acted within the so-called “band of reasonable responses”. In a case of constructive dismissal, the reason the reason for dismissal is the reason for which the employer breached the contract of employment (*Berriman v Delabole Slate Ltd* 1985 ICR 546). However, if an employer does not attempt to show a potentially fair reason at all in a constructive dismissal case but instead simply relies on the argument that there was no dismissal, a Tribunal will be under no obligation to investigate the reason for dismissal (or its reasonableness) for itself — *Derby City Council v Marshall* 1979 ICR 731, EAT.

Wrongful dismissal

54. In the context of this case, the claimant would have been wrongfully dismissed – i.e. in breach of contract – if she was dismissed and not paid for her notice period.

Discrimination Generally

55. The Equality Act 2010 (“EqA”) prohibits discrimination on the grounds of various “protected characteristics”, set out at sections 5 to 18. An employer must not discriminate against (or harass or victimise) an employee by (amongst other things) dismissing them or by subjecting them to any other detriment (sections 39 and 40). There was no dispute here that the claimant was the respondent’s employee within the meaning the Act. Nor was there any dispute that the respondent would be liable under s 109 for any contraventions of the Act done by other employees (e.g. the claimant’s managers).
56. The Equality and Human Rights Commission Employment Code (“the EHRC Code”) provides a detailed explanation of the EqA. The Tribunal must take into account any part it that appears relevant to any questions arising in proceedings (s 15 Equality Act 2006).
57. S 136 of the EqA makes provisions about the burden of proof. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that there was a contravention of the Act, the Tribunal must hold that there was a contravention, unless the respondent proves that that there was not a contravention. S 136 requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but has nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another (*Hewage v Grampian Health Board* [2012] UKSC 37). The burden of proof does not shift where there is no evidence to suggest the possibility of discrimination (*Field v Steve Pye and Co (KL) Ltd* [2022] EAT 68). Guidelines on the application of s 136 were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142 and the importance of these was recently restated by the Employment Appeal Tribunal in *Field v Steve Pye and Co (KL) Ltd* [2022] EAT 68. We do not reproduce the thirteen steps of the guidance here, but we took account of all steps. One important point to note is that the question is whether there are facts from which a Tribunal *could* decide... It is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required (*Madarassy v Nomura International Plc* [2007] EWCA Civ 33). Unfair or unreasonable treatment on its own is not enough (*Glasgow City Council v Zafar* [1998] IRLR 36). If the burden of proof does shift, under the *Igen* guidance the employer must prove that the less favourable treatment was “in no sense whatsoever” because of the protected characteristic. Because the evidence in support of the explanation will usually be in the possession of the employer, tribunals should expect “cogent evidence” for the employer’s burden to be discharged. In this case given the clear factual findings we were able to make we did not need to apply s 136.
58. We remind ourselves that discrimination may be sub-conscious. As Lord Nicholls said, in the context of a case about race discrimination, in *Nagarajan v London Regional Transport* [1999] IRLR 572:

All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated.

An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn.

Direct discrimination because of age

59. Under s 13(1) EqA read with s 5, direct discrimination takes place where because of age a person treats a claimant less favourably than that person treats or would treat others. Under s 13(2) an employer has a defence to a claim of age discrimination if it can show its treatment of the employee to have been a proportionate means of achieving a legitimate aim, but that defence is not raised in this case.
60. By s 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage* (above). In many direct discrimination cases, it is appropriate for a Tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of a protected characteristic (in this case, race). However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the "reason why" the claimant was treated as they were (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285).
61. The protected characteristic need not be the only reason for the treatment, provided it had a significant influence on the outcome (*Nagarajan*, above). As we have said, the case law recognises that very little discrimination today is overt or even deliberate; people can be unconsciously prejudiced. A person's motive is irrelevant, as even a well meaning employer may directly discriminate.

Harassment related to age

62. Under 26(1) EqA read with s 5, harassment related to race takes place where there is unwanted conduct related to age which has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether the conduct has that effect the Tribunal must take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

CONCLUSIONS

63. We now apply our findings above to the particular points in the list of issues.

Unfair dismissal

64. Considering the things the respondent was said to have done, set out from 2.1.1.1 to 10, we unanimously agreed that the events at 2.1.1.1 to 4, 6, 9 and 10 either did not happen or were perfectly reasonable conduct on the part of the respondent, which did not and could not have amounted to unreasonable behaviour, let alone breaches of the implied term of trust and confidence.

65. For the reasons set out above, EJ Dick and Mr Wharton were of the view that the same could be said of the other things the respondent was said to have done at 2.1.1. In answer to point 2.1.2.1, the respondent did not behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. That point alone disposes of the claim for unfair dismissal – there was no repudiatory breach by the respondent and so there was no constructive dismissal. While the claimant was undoubtedly aggrieved by the ratings given (with reasonable cause in our view) to her by Mrs Tirumalasetti, her response was, in the view of EJ Dick and Mr Wharton, totally disproportionate. She could have dealt with the situation by finishing, on another day, the discussion with Mrs Tirumalasetti that started on 31 January. The process that began on 31 January was not a demotion and had little prospect of resulting in a demotion, at least until it had finished. Despite challenging the findings, the claimant did not give the respondent the opportunity to address her challenge before she resigned. There was no good reason for the claimant not giving the respondent that chance. Although the claimant cited reasons in addition to the ratings in her resignation letter, on the basis of EJ Dick and Mr Wharton's findings, none of those reasons amounted to things which the claimant had reasonable cause to be aggrieved about.

66. On the basis (only) of his findings about Mrs Tirumalasetti's conduct in the run-up to and during the meeting of 31 January 2023, Mr Sagar took the view that there had been a breach of the implied term of trust and confidence. Mrs Tirumalasetti's actions were likely to and did destroy or seriously damage the trust and confidence in the employment relationship, and there was no reasonable and proper cause for those actions. Mr Sagar noted that until that point the only documentary feedback on behalf of Mrs Tirumalasetti to the claimant was in January 2022 when her performance was seen as positive and working to get promoted to PJM3. Mr Sagar found Mrs Tirumalasetti's evidence in part not credible (in particular, her evidence about what Mr Depmsey had told her in December 2022 about the claimant). On 19 January 2023 the claimant had asked Mrs Tirumalasetti [376] for feedback and training opportunities but was not told of any concerns; however, Mrs Tirumalasetti said in her evidence that she began planning a performance improvement process for the claimant on 20 January 2023. Then on 31 January 2023 Mrs Tirumalasetti, without any pre-warning, gave the claimant performance ratings that Mr New accepted in his evidence that he had never seen given to anyone.

In addition Mrs Tirumalasetti told the claimant that the “team” – ie, all five colleagues – had complained about her. It was notable that documents showed Mrs Tirumalasetti giving the negative feedback at 10.04 a.m. and required actions at 10.37 a.m., with the claimant asking for more discussion afterwards which did not take place because of lack of agreement about the venue. Mr Sagar thought that the claimant reasonably felt that she was being demoted and in the following week established that just 2 of 5 colleagues had any negative feedback for her. She reasonably concluded that there was no way back from such a situation. Given that trust was lost, it was reasonable for the claimant not to have waited for the grievance process to conclude. Being a breach of the implied term of trust and confidence, the breach was plainly a fundamental one. The claimant clearly resigned in response to the breach, as was clear from her resignation letter and the grievance, even if there were also other reasons for her resignation. There was no question here of the claimant having affirmed the breach given her almost immediate complaint in the grievance and given also how soon after the breach she resigned. The reason for dismissal is the reason for which the employer breached the contract, i.e. Mrs Tirumalasetti’s assessment of the claimant. This was not a potentially fair reason within the meaning of ERA, nor, for the reasons set out above did the respondent act reasonably in treating it as a sufficient reason to dismiss the claimant. The dismissal was therefore, in Mr Sagar’s view, unfair.

Wrongful dismissal/notice pay

67. We found unanimously that the claimant was paid for her notice period. Even had that not been the case, on the basis of EJ Dick’s and Mr Wharton’s findings there was no dismissal and therefore no question of wrongful dismissal.

Direct age discrimination

68. Regarding issue 5.2.1, we have found that Mrs Turlapati did not behave in the manner alleged. She did no more than ask the claimant to allow others to speak and this had nothing to do with the claimant’s or anybody else’s age. Regarding issue 5.2.2, we have found that the claimant was not allocated less work than any other employee, including Mrs Turlapati. The way Mrs Tirumalasetti chose to distribute work had nothing to do with anybody’s age. The claimant was therefore not subjected to less favourable or different treatment in either of the ways that she alleged. The complaint of direct age discrimination does not succeed.

Harassment related to age

69. As we have found, the event on which the claimant relied to establish her claim of harassment related to age did not happen. During the Slack call Mrs Turlapati did no more than refer to her own 20 years of experience, a figure which we note cannot have been much different to the claimant’s own experience, since the women were of similar age. There was no conduct related to age and therefore the complaint does not succeed.

Time Limits

70. In light of our findings above, we did not need to consider the time limits point.

Other points

71. EJ Dick wishes to apologise to the parties for the time it has taken to draft this judgment, which was due to pressure of other work. He wishes also to stress that the delay was in no way caused by the other members of the Tribunal.

APPENDIX:

Edited Version of the List of Issues set out by EJ Young following the hearing of 24 October 2023

1. Time limits

- 1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 3 December 2023 may not have been brought in time.
- 1.2 Were the discrimination complaints paragraph made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - 1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - 1.2.2 If not, was there conduct extending over a period?
 - 1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - 1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 1.2.4.1 Why were the complaints not made to the Tribunal in time?
 - 1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

- 2.1 Was the Claimant dismissed?

Constructive dismissal

- 2.1.1 Did the Respondent do the following things:

- 2.1.1.1 Change the Claimant's agreed flexible working arrangement in place from 4 July 2022 which required the Claimant to attend the office once in a month which was one block of 2 days a month. The Respondent did not honour that agreement from January 2023.
- 2.1.1.2 The Claimant's manager, Mrs Tirumalasetti require the Claimant to attend the office 2 days a week (Monday and Tuesday) from January 2023 in breach of the flexible working arrangement.
- 2.1.1.3 On 16, 17, 23, 24, 30, 31 January 2023 the Claimant's manager Mrs Tirumalasetti behave strangely towards the Claimant through her body language.
- 2.1.1.4 On 30 January 2023, Mrs Tirumalasetti said negative things to the Claimant by telling the Claimant she shouldn't have taken the book about self help.
- 2.1.1.5 On 31 January 2023 in a one to one meeting, Mrs Tirumalasetti attributed personal blame to the Claimant as not behaving professionally, and that people were making written complaints about the Claimant.
- 2.1.1.6 From March 2020 onwards, the Claimant's manager Mrs Tirumalasetti did not provide the Claimant with enough work.
- 2.1.1.7 The Claimant's manager, Mrs Tirumalasetti started the demotion process against the Claimant on ~~20~~ 31 January 2023.
- 2.1.1.8 On ~~20~~ 31 January 2023, in a one to one meeting the Claimant's manager, Mrs Tirumalasetti gave the Claimant the lowest value in assessing the Claimant.
- 2.1.1.9 On ~~20~~ 31 January 2023, in the same one to one meeting, the Claimant's manager, Mrs Tirumalasetti used documents that were for a training exercise to say that the Claimant had not achieved her objectives.
- 2.1.1.10 On ~~20~~ 31 January 2023, the Claimant's manager, Mrs Tirumalasetti continued to criticise the Claimant in the corridor where people could hear her, and the Claimant had to ask for a room to continue the meeting.

2.1.2 Did that breach the implied term of trust and confidence?
The Tribunal will need to decide:

2.1.2.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

2.1.4 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

2.1.5 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal, what was the reason for the breach of contract?

2.3 Was it a potentially fair reason?

2.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

3. Remedy for unfair dismissal

[...]

4. Wrongful dismissal / Notice pay

4.1 What was the Claimant's notice period?

4.2 Was the Claimant paid for that notice period?

4.3 If not, did the Respondent agree to the Claimant's request not to work her notice period which did not arise from the Claimant's allegation of constructive unfair dismissal.

5. Direct age discrimination (Equality Act 2010 section 13)

5.1 The Claimant's age group is 35-40 and she compares herself with people in the age group 55-60.

5.2 Did the Respondent do the following things:

5.2.1 At monthly away days, meetings and one to ones from September 2022 until January 2023, did Sujatha refuse to listen to the Claimant and cut the Claimant off when the Claimant was speaking but allow other members of staff to speak who were around Sujatha's age of 55.

5.2.2 From March 2020, did the Claimant's manager, Mrs Tirumalasetti allocate more work to Sujatha than the Claimant because of the Claimant's age and because Sujatha had more experience.

5.3 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The Claimant says she was treated worse than Sujatha and *or of staff members in the age group of 55-60.*

5.4 If so, was it because of age,?

5.5 Did the Respondent's treatment amount to a detriment?

5.6 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

5.6.1 []

5.7 The Tribunal will decide in particular:

5.7.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.7.2 could something less discriminatory have been done instead;

5.7.3 how should the needs of the Claimant and the Respondent be balanced?

6. Harassment related to age (Equality Act 2010 section 26)

6.1 Did the Respondent do the following things:

6.1.1 Did Sujatha (a female employee) say to the Claimant "I am older than you and more experienced than you and you

should listen to me and do what I am saying” at a meeting on 10 February 2023 in a Slack call.

- 6.2 If so, was that unwanted conduct?
- 6.3 Did it relate to age?
- 6.4 Did the conduct have the purpose or effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7. Remedy for discrimination

[...]

Employment Judge Dick

16 October 2024

REASONS SENT TO THE PARTIES ON
16 October 2024

.....

.....
FOR THE TRIBUNAL OFFICE