



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4103971/2016

Hearing Held at Dundee on 6, 7 and 8 February 2017

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**Employment Judge: I McFatridge
Members: Mrs. EA Farrell
Mr. J Priestley**

15 **Mrs. M Juszczuk**

**Claimant
Represented by:
In person**

20 **Kettle Produce Ltd**

**Respondents
Represented by:
Ms Darling
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that

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1. The claimant was not unfairly constructively dismissed by the respondents.
2. The claimant's claim of sex discrimination does not succeed.
3. The claimant's claim of race discrimination does not succeed.
4. The claims are dismissed.

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REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unlawfully discriminated against on grounds of age, sex and race. Although she did not tick the appropriate box on the form it was clear from her claim that she also wished to make a claim that she had been unfairly constructively dismissed by the respondents. The respondents submitted a response in which they denied all claims. The claim was subject to a degree of case management and following a Preliminary Hearing a Judgment was issued clarifying the discrimination claims being made by the claimant. The Final Hearing took place over three days on 6, 7 and 8 February. At the hearing the claimant gave evidence on her own behalf. She then led evidence from Mrs. M Moffat, Mrs. A Karwat and Mr. D Czarnota; all former colleagues of hers. The evidence of the Claimant and Mrs. Karwat was given through a Polish interpreter who also assisted Mr. Czarnota. Evidence was led on behalf of the respondents from Cath Irvine HR Operations Manager with the respondents and Peter Strange Development Production Manager with the respondents. A joint bundle of productions was lodged. On the basis of the evidence and the productions the Tribunal found the following factual matters relevant to the case to be proved or agreed.

Findings In Fact

2. The respondents are a company which specialises in growing, processing and marketing a wide range of whole and prepared vegetables. They operate from two sites in Scotland and one overseas. In Scotland they operate a site at Orkie Farm which deals primarily with root vegetables. The main work at this location involves putting the root vegetables through a washer and packing them. The other site is at Balmalcolm which is fairly close by. This deals with prepared products. This can involve vegetables from Orkie Farm being transported to Balmalcolm. Between the two sites in Scotland the company has around 1200 employees. Around 45% of those are from Eastern Europe.
3. The claimant, who is of Polish nationality, commenced employment as a Night Shift Hygiene Operative on or about 28 July 2008. The claimant's work involved the industrial cleaning of the factory overnight. She was initially employed at Orkie.

She transferred to Balmalcolm at some point around 2010. The immediate catalyst for the transfer was that she was suffering from an injury and her GP had suggested that she be allocated light work. At around this time the claimant submitted a grievance regarding the way she had been treated. The grievance was dealt with. The claimant eventually returned to Orkie Farm.

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4. In or about 2012/13 the claimant was involved in a further grievance process. One of the respondents' very busy times is over the Christmas period and the run up to this. The respondents are keen to ensure that staff are encouraged to maximise their attendance over this period. In the period running up to Christmas in 2012 the respondents ran a raffle offering various prizes to members of staff. The intention was that only staff who worked without interruption over the Christmas period would be eligible.
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5. At some point around November 2012 the claimant asked for an extended period of holidays over the Christmas period in order to return to Poland. This request for holidays was refused. On or about 27 November the claimant went off sick and presented a Med 3 certificate from her GP indicating that she was suffering from an anxiety state and signing her off work for two weeks from 27 November. She remained absent for a total period of around six weeks submitting further medical certificates as appropriate. On or about 4 December, by which point the claimant had only been absent for around nine days, the respondents sought to refer her to Occupational Health.
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6. The respondents' Absence Management Procedure was lodged (pages 120-133). This usually envisages that

"At the three week stage the employee will be contacted to ask them to attend a health review meeting." (page 122)

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7. Although the policy indicated that an employee would only be called to a health review with Occupational Health after three weeks the respondents from around this time had started calling employees to a health review after two weeks or even

earlier in situations where it appeared merited. One of the things which might merit an earlier referral to Occupational Health would be if an employee was complaining of stress.

- 5 8. It would appear that the claimant was aggrieved that she had been called to an Occupational Health meeting earlier than she believed she should have been. The claimant had various other grievances surrounding her employment at this time.
9. Whilst the claimant was off the draw took place for the Christmas raffle. The
10 claimant's name should not have been in this draw as she was absent and the draw was purely for those staff who were working in the busy period in the run up to Christmas. The claimant's name was drawn in the raffle as the winner of a Kindle Fire.
- 15 10. Shortly after the raffle was originally drawn the respondents realised that the claimant's name should not have been in the raffle draw and drew it again. The Kindle Fire was won by an employee called "Bogdan" and the Kindle Fire was duly handed over to him. Other prizes which were won by employees were not picked up by them immediately and remained in the office until this happened.
- 20 11. The claimant returned to work around 23 January and was advised by colleagues that she had won a Kindle Fire. She was aggrieved that she had not received this and wrote to the respondents' Cath Irvine who is their Director of HR. The letter was lodged (page 145). It states

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"I would like to ask why I did not receive the prize that I have won in the annual Christmas Lottery taking place in Kettle Produce Ltd.

*Between 27 XI 2012 and 20 I 2013 I have had a sick line and I have informed HR about that. About me winning a prize (kindle fire) I have
30 been informed by KP workers.*

On 22 I 2013 I did ask Hygiene Controller, Brian Hutchinson about my prize but he could not answer my question.

So I am asking you to answer me on that question."

12. Ms Irvine wrote to the claimant on 14 February confirming the reason why she did not receive the raffle prize. The letter was lodged (pages 146-147). It stated

5 *"... You stated that you were off sick from 27 November 2012 to 20 January 2013 and followed the Company procedures with regards to Attendance Management.*

10 *After investigation, it was noted that whilst this detail was correct, it was also noted that you had submitted a holiday form for time off over the festive period, at the end of October 2012. This request was not authorised however, you informed Brian Hutchinson (Hygiene Controller) that your time off had been authorised and when it was confirmed that the holiday request had not been authorised, you stated that you would be 'going home anyway as it was booked'.*

15 *On 27 November 2012, a sick line was received signing you off work for an initial period of 2 weeks. A further line was received signing you off work for a further period of 6 weeks.*

20 *The raffle prizes were available for collection from 22 December 2012. A reminder re unclaimed prizes was sent on 31 December 2012, confirming that winners had to collect prizes by no later than COB on 3 January 2013 and that unclaimed prizes would be redrawn on 4 January 2013. Note that names for the raffle were collated toward the end of November 2012. At that point, you were not absent from work and eligible to take part in the draw.*

25 *Note that the raffle is not a contractual term of employment but an initiative the Company put in place to reward and motivate our staff."*

13. The claimant was dissatisfied with this response and wrote to Ms Irvine expressing her concerns. The letter is undated but was lodged (pages 148-149).

- 30 14. The respondents operate a confidential hotline reporting system called Safecall. This is advertised to employees as a potentially anonymous way of letting the company know of their concerns without going through their line management. At

around this time the claimant utilised Safecall to make a number of generalised complaints about her employment. The Safecall calls were forwarded to Ms Irvine. Although Safecall has been in use by the company for many years this was the first and only time it has ever been used by an employee. Ms Irvine was aware from the outset that the call to Safecall had been made by the claimant. She decided that it would be appropriate to invoke the grievance procedure in relation to both the claimant's letter and the report the claimant made to Safecall. She wrote to the claimant on 8 March 2013 advising her of this and inviting her to a meeting on 13 March 2013. The claimant was advised of her right to be accompanied. The letter was lodged (page 151).

15. The claimant duly attended a grievance meeting. She was accompanied by Margaret Moffat. Piotr Ogorzalek was also present to act as a translator. Cath Irvine conducted the meeting along with Jamie Gowans a representative of the company. Ms Irvine and Mr. Gowans produced a matrix setting out the key issues and actions which were decided upon. This was lodged (pages 153-155). The issues raised by the claimant were generalised issues about unfair allocation of work, allegations regarding Mr. Hutchinson the Hygiene Controller not carrying out his role, allegations that Lucas Domcek did not speak to the claimant respectfully and was unhelpful, the issue regarding Occupational Health and Raffle Draw. The claimant also denied strongly that she had made the comments she was alleged to have made to Brian Hutchinson regarding her holidays. Following this meeting Ms Irvine arranged for a full investigation to be carried out. She interviewed a number of witnesses. She looked at job sheets. She compared job allocations over a four week period (16 shifts between the claimant and three other members of the team). She wrote to the claimant on 16 April 2013 setting out her conclusions in respect of the eight points made. She could not find any evidence to support the claimant's allegations. The grievance was not upheld.

16. The claimant decided to appeal. The Appeal Hearing took place on 1 May 2013 which was reconvened on 28 May 2013. During this meeting the claimant confirmed that whilst her initial grievance had been mainly about the Kindle Fire it was now mainly about her perception she was being treated unfairly. Following the

meeting Melanie Reid the Shift Manager tasked with dealing with the claimant's appeal adjourned and went through the documentation. In particular she checked the file note from Mr. Hutchinson regarding the declined holidays. Ms Reid wrote to the claimant on 29 May 2013 giving her the outcome of her grievance. She accepted that it had been inappropriate for the section regarding the claimant's holiday request to have been included in the responding to the claimant's query about the Kindle Fire. She apologised for this. That was the end of the appeal process.

- 10 17. It would appear the claimant submitted a further grievance in 2014 regarding her move from Orkie to Balmalcolm. No evidence was given by the claimant regarding this at the hearing however the grievance process ended with the claimant's grievance being upheld to the extent that it was accepted she should not have been moved to Balmalcolm. The respondents apologised and the claimant was transferred back to Orkie. This grievance was dealt with by Christine Graham a Technical Manager with the respondents.
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18. On 29 December 2015 an incident took place at around 6:00 am whilst the claimant was working on a night shift. The claimant was in the process of tidying up along with Agnieszka Karwat a colleague of hers with whom she was on friendly terms. Another friend of the claimant Damian Czarnota happened to be passing and the claimant asked him if he would assist herself and Agnieszka by putting the hoses back on the hook. A Mr. Turnbull came along driving a scrubber dryer. This is a machine used to scrub and dry the floors in the factory. Mr. Turnbull had a poor relationship with the Claimant. He said something to Ms. Karwat which she and the claimant took to be him complaining about the hoses being in his path. They moved the hoses to one side. Mr. Turnbull then approached the claimant on the scrubber dryer and pushed her on the shoulder with his hand. He then backed away on the machine. The claimant and her two colleagues decided that they should report the matter to Mr. Turner who was the Team Leader on duty. They approached him in his office and duly did so. He indicated to them that they should submit a formal report in writing. At some point thereafter the claimant did this in a
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document which has been lodged (page 177). It is probably as well to set out the document in full.

5 *"I would like to make a complaint about cleaner William Archibald Turnbull.*

On 29th of December 2015, around 6.00-6.05 a.m., after finishing the work, Agnieszka Karwat and I have rolled up hoses and left them on the ground near standing there powerwasher.

10 *We have asked Damien Czarnota who has been passed by to put the hoses back on the hook. However before he took the hoses, Archibald Turnbull was passing with the scrubberdryer – while doing that he (Archibald) started, as usual, to curse and insult us under his breath.*

Agnieszka pushed the hoses to the side, closer to the powerwasher, to make the space for him and after that we waited for him to pass.

15 *He came up to me and pushed me away forcefully, I told him not to touch me, and after that he clenched his fist and swung it in front of my face saying: "punch you . . . (unintelligible)."*

I reported the situation to James Turner.

20 *It is not the first time that a similar situation happened. Archibald Turnbull hundreds of times was addressing me, Agnieszka or other people in an aggressive manner.*

25 *Recently I have been, on the team leader's order, gathering people's clothing sizes to fill an order for thermal clothing. After I asked Archibald: "What is your size?", he told me: "Not your f...ing business" – that was also reported to the team leader, who spoke with Archibald about it.*

However it seems that there was no effect. Archibald Turnbull is arrogant and aggressive, especially toward me, but not only me. He always addressed me aggressively.

30 *Team leader told me to ignore him, however a physical assault cannot go unnoticed, it cannot be ignored.*

It was not his first physical assault on a cleaner. Few months earlier, in the store room, he attacked Andy Dick and only presence of other cleaners stopped him from hitting Andy's face with his fist. That event

was reported by me to manager Lukas Domcek, who ignored the matter entirely – and how it stands now, Archibald Turnbull’s behaviour has not changed.

I would like you to draw consequences from his behaviour because verbal reminders do not affect him at all, and it seems that Mr Turnbull thinks that no rules apply to him.”

19. The claimant read over what was in her letter of complaint to Agnieszka Karwat in Polish and to Damian Czarnota and had them sign the letter at the bottom (page 177). She then handed the document in to HR. On 30 December 2015 Jill Morgan, an HR Advisor with the respondents wrote to the claimant acknowledging receipt of the grievances. She went on to say

“Please be assured that we are taking this matter very seriously. Full investigations will be carried out and I will contact you shortly to advise the outcome of these investigations.” ... (page 178)

20. On 5 January Ms Morgan met with Mr. Turnbull and Mr. Turner was in attendance at this meeting. Mr. Turnbull’s position was that he accepted placing a hand on the claimant’s shoulder which he said he immediately removed. He said that he had asked politely the first time he had asked her to move but the second time he was more abrupt. Mr. Turnbull stated that he and the claimant did not like each other he said that he regarded her to be lazy and that he knew that, in the way the claimant spoke to him that she did not like him. He advised that they usually worked in different areas of the factory. Ms Morgan asked him about an incident which had happened in November with thermals and said he did not remember this. A note of this meeting was lodged (p180).

21. Ms Morgan also met with Mr. Turner, the respondents’ Team Leader on his own. This was also on 5 January. He gave a history of having been made aware of the incident by the claimant. He said that he had immediately gone to see Mr. Turnbull and Mr. Turnbull had said that he had put his hand on the claimant’s shoulder and told her not to be so stupid. He said that Mr. Turnbull seemed quite calm. He said

that he had told the claimant that he would put a note of the incident to HR to go on file but that the claimant had not wanted this. With reference to the incident relating to thermal clothing he said that he understood this took place in mid-November. He had not witnessed the incident however when the claimant informed him he confirmed that he had told her to ignore Mr. Turnbull. Mr. Turner said he had followed this up with Mr. Turnbull and Mr. Turnbull hadn't said anything. Mr. Turner advised that the claimant and Mr. Turnbull "*do not like each other*" – that there is a mutual animosity. He confirmed they tended to work in separate areas of the factory. A note of this meeting was lodged (p181).

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22. Gill Morgan then met with the claimant on 6 January 2016. Because the claimant was on night shift the meeting took place at 5:00 am. A note of this meeting was lodged which I considered to accurately represent what took place (page 179). Ms Morgan met with Agnieszka Karwat on 6 January in the presence of a translator. Her statement is on page 181. She confirmed the claimant's version of what had taken place on 29 December. She was asked about the relationship between the claimant and Mr. Turnbull and said that it was always the same and that Mr. Turnbull was always like that with the claimant. She said the claimant had stopped talking to Mr. Turnbull as a result.

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23. Ms Morgan met with Damian Czarnota on 6 January. His statement is at page 182. He basically confirmed the claimant's version of events. When asked about the working relationship between the claimant and Mr. Turnbull he advised that "*they do not like each other but he does not know why*". He said that he had never seen the claimant be aggressive to Mr. Turnbull.

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24. On 15 January Ms Morgan wrote again to the claimant indicating that her investigations had been slightly delayed as one of the parties involved was absent from work due to sickness. He said that she would receive a response in due course.

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25. It would appear that around this time Mr. Turnbull suffered a heart attack and was absent from work for some months thereafter.

26. On 20 January 2016 Gill Morgan wrote to the claimant giving the grievance outcome. This was lodged (page 185). It is probably as well to set the terms of this document out in full.

5 "Grievance Outcome

I refer to the collective grievance dated 29th December 2015 concerning incidents involving William Archibald Turnbull.

Please be assured that we have treated this matter very seriously and a full investigation has taken place. On 6th January 2016, I took statements from yourself, Agnieszka Karwat and Damian Czarnota to establish an account of what happened. I also took statements from William Archibald Turnbull and the Hygiene Team Leader, Jimmy Turner. As a result of these investigations, we were unable to gather conclusive evidence to support your grievance.

10 *It is important that all team members work together, particularly in such a small team. We have noted your concerns and have held discussions with all relevant parties to reiterate acceptable behaviour at work.*

15 *If you have any further queries, please get in touch.*

Yours sincerely".

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27. The claimant did not agree with the outcome. The respondents' grievance procedure was lodged (page 119). Although this provides that there is a right of appeal from a grievance outcome the letter sent to the claimant makes no mention of this. The claimant was aware that she could appeal a grievance from earlier occasions when she had done so. She had previously received a copy of the grievance procedure at the time of her previous grievances. After she received the letter at page 185 the claimant spoke to Mr. Czarnota and Ms Karwat. She obtained written statements from them. These were lodged by the claimant (pages 25 193 and 194). She went to CAB and consulted a solicitor. The claimant felt stressed and began a period of absence due to stress on 1 February 2016.
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28. On 16 February 2016 a letter was sent from the respondents to the claimant. The letter was automatically produced by the clerical staff in the respondents' HR

department. It went out under the name of Cath Irvine but was signed pp her by an L Marshall. Ms Irvine did not see this letter before it went out. The letter stated

“Dear Miroslawa

5 *I refer to my letter dated 28 January 2016 concerning an alleged incident between yourself and William Turnbull on 29 December 2015 where I confirmed that as a result of the investigations, I was unable to gather conclusive evidence to support your grievance. I also stated that it was important that all team members work together, particularly in*
10 *such a small team and that I had noted your concerns and held discussions with all relevant parties to reiterate acceptable behaviour at work.*

I am disappointed to find that you are currently absent from work, and have been since 1 February 2016, with work related stress.

15 *On that basis, I would like to invite you to attend a meeting with Sally Davies, Occupational Health Nurse and myself on Tuesday 23 February 2016 at 11.30am in the study room at Balmalcolm. The purpose of this meeting is to discuss your current situation and state of health, with the view to getting you back to work as soon as possible.*

20 *I would be grateful if you could call me on to confirm your attendance.”*

The claimant duly attended the meeting with the Occupational Health Nurse. The Occupational Health Nurse is employed by the respondents and is permanently on
25 site. She works part time. The claimant told the nurse about the incident in the factory. She asked the claimant if she would consent to her GP being asked for a report and the claimant consented. The consent was lodged (page 188). In the meantime on 18 February a solicitor instructed by the respondents wrote to the claimant setting out the claimant’s view of the history of the matter and stating that
30 they wished to place this on record. On 25 February 2016 Cath Irvine of the respondents wrote to the claimant’s solicitor. This letter was lodged (page 189). She indicated that the claimant was currently off work but had been invited to attend an Occupational Health appointment. She advised that the company

considered that a thorough and reasonable investigation had been carried out but that if the claimant was dissatisfied she could appeal. She went on to say that if the claimant did decide to do this she should set out the full reasons for her appeal in writing and address to Ms Irvine within seven days of the letter. She then referred to the allegation contained in this letter that the respondents discriminated against female Polish employees and noted that this was not the subject of the claimant's grievance. She also stated that the company took allegations of discrimination very seriously and if any allegation was made by any employee this would be investigated thoroughly and any necessary action would be taken.

29. The claimant's solicitor was on holiday and on 29 February 2016 his office wrote to Ms Irvine confirming this. The claimant met with her solicitor on 10 March and he responded to the letter from the respondents on 11 March (page 192). He confirmed that the claimant did wish to appeal. The letter goes on to state

"Her ground of appeal is that no employer acting reasonably could have concluded in the face of unambiguous evidence from two witnesses to the assault by Mr. Turnbull that there was no conclusive evidence to support the grievance."

He included the two statements which the claimant had obtained from Ms Karwat and Mr. Czarnota (pages 193 and 194).

30. On 30 March Charlene Duffy, an HR Advisor with the respondents wrote to the claimant stating that following recent correspondence from her solicitor the claimant was invited to attend an Appeal Hearing on 4 April at 2:00pm. The hearing was to be conducted by Peter Strange, Shift Manager. Mr. Strange is a Development Production Manager with the respondents responsible for managing 350 people. At the time of the grievance he was a Shift Manager. He was responsible for 100-120 staff. He knew that the claimant worked for the Hygiene team and would see her on occasions. He had not worked directly with the claimant. He attended the meeting on 4 April along with Charlene Duffy of HR. The claimant, having been advised of her right to be accompanied was not

5 accompanied by anyone. Ms Duffy took notes of the meeting and these were lodged (pages 199-200). The claimant herself did not take notes but following the meeting she typed up a note which was also lodged (pages 197-198). I considered Ms Duffy's note at 199-200 to be an accurate note of what took place at the meeting. At the beginning of the meeting the claimant handed over a letter setting out her grievances. This was lodged (page 196).

10 31. In advance of the meeting Mr. Strange had been given a bundle of documents by HR. This included all of the statements. He asked the claimant to tell him what had happened and she essentially repeated her previous version. There was a confusion over whether the claimant was saying that Mr. Turnbull had punched her or pushed her. The claimant made it clear that the allegation was that Mr. Turnbull had pushed her. The word punch had been a misinterpretation of what had been said. The claimant was asked what outcome she wanted. She said that at the time she would have accepted an apology but it was now too late even for that. She said that she had no issues with Mr. Turnbull and understood that he was now old and ill. She did not want the situation repeated. She indicated that perhaps the incident had been her fault and said that some people see her as being a bad person. She said that she would have no difficulty in returning to work alongside Mr. Turnbull. The claimant's own letter was discussed. At the end of the meeting it was adjourned. Mr. Strange's initial position was that he wanted to re-interview the witnesses. He felt that whilst there was no doubt that there had been some kind of physical interaction between Mr. Turnbull and the claimant it was not clear to him how serious that had been. He felt that the claimant had been pushed but he did not know whether, in his words, this was a simple 'get out of the way' push or whether it was more sinister. Having discussed the matter with Ms Duffy however he realised that if he took this course of action it would be some time before the matter could be resolved given that Mr. Turnbull was off ill having suffered a heart attack. He also felt that the statements were unlikely to be any clearer at this point than they had been at the time given the lapse of time involved. He also noted that the claimant was quite happy to go back and work alongside Mr. Turnbull and had in fact conceded that at some level the altercation may have been her fault. At the end of the day he decided that on balance the altercation had happened in the way

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described by the claimant and her witnesses however, given the claimant's own view on the matter, he felt the appropriate way to deal with it was to advise the claimant of this and indicate that Mr. Turnbull would be spoken to on his return from sick leave.

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32. This decision was communicated to the claimant in a letter dated 25 April 2016 (page 202).

33. In this letter the claimant was told

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"As you are aware Mr Turnbull is currently absent from work. However, as an outcome of this appeal process we will ensure that on his return to work he will be notified of our findings and he will be reminded that such behaviour is unacceptable, in any circumstance, and any future allegations of this type will be treated as misconduct and be dealt with in accordance with the Company's Disciplinary Procedure.

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You confirmed at the appeal hearing that you wanted to return to work and that you would have no issues working alongside Mr Turnbull as long as there were no further altercations.

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If there are any further issues then please report this to your Team Leader in the first instance."

34. The claimant duly returned to work around 18 April. When she first returned Mr. Turnbull was still absent through ill health. The claimant went on holiday and by the time the claimant returned in early June Mr. Turnbull was back working with her. The claimant was not advised whether or not Mr. Turnbull had been spoken to. The claimant had concerns about the way Mr. Turnbull looked at her and considered that he was following her around the premises but she did not raise any of these matters with her supervisor or any other person in the respondents' management.

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35. The claimant, like others on the night shift required to clock in and out. Her night shift ended at 6:30am. A practice had arisen whereby members of staff would

5 leave the factory floor before 6:30 and provided this was reasonable and the work was done it was tolerated by the claimant's supervisor. On one occasion in June the claimant was leaving with her two colleagues, Mrs. Karwat and Mr. Czarnota. Both are also Polish. The claimant was stopped by her supervisor who indicated to her that she was leaving too early. The other two colleagues simply walked past the supervisor and were not spoken to. The claimant did not return to work but simply left.

10 36. In late June, the claimant had begun to attend a new therapist seeking alleviation of the symptoms of stress and anxiety she was experiencing. She discussed her work situation with the therapist and was advised by her therapist that if her work was causing her stress she should resign.

15 37. The claimant submitted her resignation to the respondents on 26 June. The letter of resignation was lodged. The claimant's position was that the reason she resigned was because of the way the grievance had been handled. The claimant's letter of resignation was lodged (page 209). It stated

20 *"Due to continuous stress related to working in Kettle Produce I would like to terminate my contract, with 03.07.16 being the last day of my work.*

I would also like you to send me a reference letter on my home address."

25 38. On receipt of the claimant's letter of resignation the respondents wrote to the claimant on 4 July (page 210). They stated that they were accepting her resignation. They went on to state

30 *"I note that in your letter you state that the reason for your resignation from the Company is 'continuous stress related to working in Kettle Produce'.*

I would like to meet with you on Friday 8th July 2016 along with Derek Reid (Shift Manager) to discuss your reasons for leaving the Company

so we can understand fully your reasons for leaving, with the aim to resolve any issues we can.”

They went on to propose a date and place. The claimant did not attend the meeting on the date fixed.

39. The claimant did write to the respondents subsequently seeking a reference and this was duly provided on 27 July 2016. The respondents provided a factual reference only.

40. The claimant commenced employment with Amazon on or about 1 July 2016 which was while she was working her notice with the respondents. Certain relatives work with Amazon. The claimant was employed on a week to week contract with them. The contract terminated on or about 20 December 2016. Whilst working at Amazon the claimant made various attempts to find other work but was unable to do so. At the date of the hearing she remained unemployed.

Matters Arising from the Evidence

41. The Tribunal found the evidence of the respondents' witnesses to be credible and reliable. Generally speaking we also found the evidence of the claimant's witnesses to be credible although we had some doubts as to reliability. Mrs. Karwat gave evidence in relation to the incident with Mr. Turnbull. Interestingly, in her evidence she indicated that Mr. Turnbull had pushed the claimant but did not state that he had threatened her by raising his fist as stated in her original statement. She was not cross examined on this point. Mr. Czarnota similarly gave evidence about the incident with Mr. Turnbull. Again, like Mrs. Karwat he did not mention the matter of Mr. Turnbull allegedly raising his fist to the claimant as was in his statement. He was asked about this by the Tribunal and then indicated that he had simply forgotten to mention it. Mrs. Moffat's involvement was really confined to having accompanied the claimant at a meeting several years earlier some two years before her resignation. It was clear from the claimant's own evidence that she harboured a considerable sense of grievance

against the company. Many of her grievances appeared to relate to matters which were entirely straightforward and normal HR practice and it appeared to the Tribunal that she looked on everything the respondents did with a great deal of suspicion and wished to put as poor an interpretation on it as possible. For example she considered that she was treated badly by being referred to occupational health before she had been absent for three weeks but was unable to point out how this amounted to any kind of detriment. In cross examination the claimant was generally unwilling to accept perfectly straightforward points which were put to her at first although eventually she would accept that the position was as stated. She accepted that the reason she resigned was because of the way the grievance was dealt with. She considered that she was treated badly by HR and in particular that Cath Irvine singled her out for poor treatment because of the previous grievance she had lodged. She did not accept the evidence that in fact Cath Irvine had had virtually no involvement in the way her most recent grievance had been dealt with. The Tribunal did accept the respondents' evidence regarding this. In her evidence the claimant initially maintained that at the grievance appeal she had said that she was happy for Mr. Turnbull to return but only if he was kept away from her. The Tribunal did not accept that she had stated this condition. The HR notes are perfectly clear on the point and Mr. Strange's evidence was absolutely clear to the effect that the Claimant said she would have no problem working alongside Mr. Turnbull. The Claimant's own note of the meeting says that there would be no problem so long as Mr. Turnbull did not touch her or anyone else. The Claimant eventually accepted this in cross examination.

42. Interestingly in her evidence the claimant made absolutely no reference to being singled out for poor treatment as a result of her Polish nationality, her sex or her age. Neither did her witnesses. The claimant had indicated in her grievance appeal that she believed the respondents singled out Polish people however when asked about this she confirmed that the appeal was not a fresh grievance and that the grievance was simply about being pushed by Mr. Turnbull. The evidence of the respondents was that the company's workforce is around 45% Eastern European. From the evidence of the claimant there was really nothing to go on which would

allow the Tribunal to draw any inference that her treatment was tinged with discrimination in any way.

Discussion and Decision

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The Issue

43. The claimant claimed that she had been unfairly constructively dismissed by the respondents. She also claimed that she had been unlawfully discriminated against on grounds of nationality and sex. She relied on her Polish nationality and her female gender. She had previously indicated she was also claiming age discrimination but this claim was dropped at the hearing.

44. The respondents' representative made a full submission in the matters. The claimant made a shorter submission which clearly set out her position albeit it did not go into any detail regarding the legal background. The Tribunal found this perfectly acceptable given that the claimant was not represented.

Unfair Dismissal

45. The claimant pled that she was unfairly constructively dismissed by the respondents. Her position was that the respondents committed a repudiatory breach which led to her giving one week's notice of termination of employment on 26 June 2016. I considered that the respondents correctly referred us to the well-known case of *Western Excavating –v– Sharp [1978] IRLR 27* as setting out the basic requirements for a constructive dismissal. There are four elements. There must be a breach of contract by the employer. The breach must either be sufficiently important of itself to amount to a repudiation of the contract of employment or last in a series of incidents which amounts to a repudiation of the contract by the employer. The employee must leave in response to the breach and the employee must not delay too long in leaving in response to the breach otherwise she may be held to have affirmed the contract.

46. During the Hearing the claimant did not refer to any express term of the contract and it appeared to the Tribunal that her claim was based on the allegation that the respondents were in breach of the implied term of trust and confidence. Whilst the claimant was not particularly clear it did appear to us from the evidence that the claimant's position was that the respondents' handling of the grievance against her breached the implied term of trust and confidence and led to her resignation. That having been said the claimant also indicated in evidence in chief that the incident when she was told she was leaving the factory floor too early at 6:15am also contributed to the dismissal. When directly asked in cross examination if the claimant considered this to be the final straw she said that she did not but that it was all part of the background. She also indicated that she had concerns about Mr. Turnbull's behaviour towards her after he returned to work but accepted that she had not raised these with the Respondents.
47. It was the respondents' position that there had been no repudiatory breach of contract in this case. The claimant had given evidence regarding the two most recent grievance procedures she had been involved in. In 2012/13 she raised a grievance about the Kindle Fire which she had won in a raffle but was withheld from her. She then during the course of this grievance broadened it out to include complaints about the work she was being asked to do. The Tribunal noted that there had been a meeting about the grievance and that it had been dealt with and that there had also been an appeal which had been dealt with. Whilst the claimant may not have liked the outcome it did appear to the Tribunal that there was nothing in the respondents' handling of this which could amount to a breach of the implied term of trust and confidence. With regard to the second grievance the Tribunal were concerned that the initial grievance outcome letter appears to deal with the claimant's concerns in a perfunctory way. The HR Officer who dealt with the grievance no longer works with the respondents and did not give evidence to the Tribunal. The Tribunal could quite see that any employee faced with a letter stating that there was no evidence to support their concerns in a situation where they had provided two eye witness accounts as well as their own might feel aggrieved. That having been said we did not consider that this by itself could amount to a breach of the implied term particularly as the respondents dealt with

the claimant's complaint about the matter by allowing her an appeal. We accepted the evidence of Ms Irvine that the letter sending out the grievance outcome to the claimant ought to have stated that she was entitled to an appeal. It was simply excluded by mistake. This is provided in the policy and was mentioned in previous grievance outcome letters which went to the claimant. We were also of the view that the claimant knew very well that she was entitled to an appeal. We also note that the respondents did in fact offer the claimant an appeal. The claimant was critical of the respondents for replying to the claimant's solicitor rather than to herself. Her position seemed to be that the respondents ought to have known that the claimant's solicitor would be on holiday. She was critical of them for imposing a time limit on her appeal. It appeared to us that these criticisms were unfounded given that at the end of the day the respondents did allow the claimant an appeal outwith the time limit stated.

48. The tribunal heard the evidence of Mr. Strange and it is clear that he listened to the claimant's concerns regarding the appeal. He partially upheld her grievance and the claimant herself accepted this in evidence when she said that her grievance had been at least 50% upheld. Mr. Strange's position which we suspect was also that of the HR Officer who carried out the initial hearing was that there was not much doubt that Mr. Turnbull had pushed the claimant. The issue for Mr. Strange was what kind of push was it. We also accepted that during the Grievance Appeal Hearing the claimant herself accepted that if Mr. Turnbull had apologised about the incident the next day that would have been the end of it. We accepted Mr. Strange's evidence that at the end of the hearing there were essentially two courses he could take. The first would be that he re-opened the investigation. He said that he would want to speak again to Mrs. Karwat and Mr. Czarnota. He also wished to speak again to Mr. Turnbull. One of the difficulties in following that course of action was that Mr. Turnbull was absent having suffered a heart attack and it was not known when he would be returning. Mr. Strange indicated that the mere fact that Mr. Turnbull had a heart attack and was off sick was no barrier to investigating the matter but it was clear that the investigation could not take place until Mr. Turnbull was fit to return to work. The other option which he took was that given the claimant's opinion that the matter could have been dealt with by an

apology at the time he deal with the matter as he did by stating that Mr. Turnbull would be spoken to on his return and that any repetition would be dealt with severely. We considered this was an outcome which was entirely open to any reasonable employer in the circumstances. It was not a breach of the implied term for the respondents to decide to deal with matters in this way.

49. The claimant was critical of the fact that if another incident occurred she would require to start again at the beginning by putting in a grievance but realistically we do not know what other options were available to the respondents. The claimant indicated that she was well aware that it was up to her to raise any issues which arose regarding Mr. Turnbull's behaviour but she accepted that although she did have concerns she had not raised the matter with anyone in management at all.

50. With regard to the suggestion that the incident when her manager spoke to her about leaving early was a final straw the claimant's own evidence was that it was not. It appeared to the Tribunal that this was simply an appropriate comment by a manager who saw three staff leaving early. The Claimant's position was that a degree of flexibility was permitted but her own words were that "*the supervisor wouldn't say anything so long as it was within reason and the work had been done*". The claimant was employed and paid until 6:30. In those circumstances it is reasonable for a supervisor seeing someone leaving at 6:15 to speak to them about it. The claimant's own evidence that the other two employees simply walked past and that the claimant was the only one to engage with the supervisor. It was not clear from her evidence whether he had intended to speak to her alone or all three. In all the circumstances the Tribunal did not consider that the respondents had committed any fundamental breach of contract.

51. Even if we were wrong in this it appeared to us that the reason the claimant left was that she had attended a new therapist who had advised her that her workplace was causing her stress and that she would be better getting out of it. We also consider that if the alleged breach of contract was the way the respondents handled the grievance then the claimant delayed too long in resigning. The claimant returned to work on 18 April and affirmed her contract by working perfectly

normally from then until her last day of work on 3 July. During this period she took paid holidays. The Tribunal therefore considered that the claimant's claim of unfair constructive dismissal should not succeed.

5 52. With regard to the discrimination claims the difficulty for the Tribunal was that, as mentioned above, the claimant gave no evidence whatsoever which demonstrated any link between her alleged poor treatment by the respondents and either her nationality or her sex.

10 53. In the claimant's evidence in chief there was not even an assertion of such a link. In cross examination it was put to the claimant that she had not provided any evidence to support a finding of discrimination and her response was that she believed that the fact that she and her two witnesses were Polish meant that the respondents had discriminated against her. There was absolutely no evidence for
15 this presented to the Tribunal.

54. In the absence of any evidence to support the link the Tribunal could not make any finding that there were primary facts from which an inference of discrimination could be drawn. The claimant's claims of sex discrimination and race
20 discrimination therefore fall at the first hurdle. The claims are dismissed.

25 Employment Judge: Mr Ian McFatridge
Date of Judgment: 02 March 2017
Entered in register: 03 March 2017
and copied to parties