



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE HALL-SMITH

MEMBERS: Mrs C Swetenham
Mr R Wood

BETWEEN:

Miss A Butterworth Fernandes Claimant

AND

Central And Cecil Housing Trust Respondent

ON: 16, 17, 18, 19 May 2016; 18, 19, 20 January 2017;
(Chambers) 20, 21 February, 7 March 2017

Appearances:

For the Claimant: Mr J Horan, Counsel

For the Respondent: Mr J Bromige, Counsel

JUDGMENT

THE UNANIMOUS JUDGMENT of the Tribunal is that:-

1. The Claimant was not dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996 and accordingly the Claimant's complaint of unfair constructive dismissal is dismissed.
2. The Claimant's complaints of unlawful sex discrimination and harassment are not well founded and are accordingly dismissed.
3. The Claimant's complaints of victimisation are not well founded and are accordingly dismissed.

REASONS

1. By a claim forms received by the Tribunal on 28 March 2015 and 6 July 2015 the Claimant, Ms Amy Butterworth Fernandez brought complaints of constructive unfair dismissal, direct sex discrimination, harassment and victimisation against the Respondent, Central And Cecil Housing Trust.
2. At the hearing the Claimant was represented by Mr J Horan, Counsel, who called the Claimant and Ms Michelle Walsh, to give evidence before the Tribunal.
3. The Respondent was represented by Mr J Bromige, Counsel, who called the following witnesses on behalf of the Respondent, named Mr Julian Peacock, asset investment manager, Mr James Warne, head of property services, Mr Dean Harvey-Dempster, property services manager, and Mr Chris Roberts, head of housing and support. There was a bundle of documents before the Tribunal contained in two lever arch files.
4. On the fourth day of the hearing, 19 May 2016, the case was postponed on the application of Mr Horan because he was unwell and was relisted for three days on 3, 4, 5 October 2016. Unfortunately, the case had to be postponed again because one of the lay members had a surgical operation scheduled over the October 2016 three day listing.

The Issues

5. There was an agreed list of issues at pages 140 to 144 of the Tribunal bundle. In broad terms the issues involved the following

Constructive Dismissal.

- i. The Claimant contended that she resigned as a result of conduct on the part of the Respondent involving a fundamental breach of contract, breaches of the term of trust and confidence implied into her contract of employment. The Claimant contended that there was a lack of support for her by the Respondent involving failures to take any action in respect of the Claimant's complaint of harassment, concerns about sexual harassment in the work place and a failure to take any or any adequate action in relation to a missing letter. In addition the Claimant complained about the Respondent's approach to her working hours.
- ii. The Claimant also contended that a number of her projects was rejected by the Respondent.

Direct Sex Discrimination.

- iii. The Claimant's allegations involved delaying her grievance and

rejecting it, mocking her appearance, suggesting that the Claimant was dangerous and referring to the Claimant as “snake eyes”.

- iv. Further the Claimant alleged that she was subjected to unwanted comments in relation to her relationship with another member of staff, Tim Davis and that she was stalking him.
- v. The Claimant alleged that she was subjected to less favourable treatment in the form of gossip and speculation by members of staff about the nature of her alleged involvement with Tim Davis.

Harassment.

- vi. The Claimant alleges that the Respondent subjected her to unwanted conduct by jokes and insinuations of her conduct including emails sent during working time about the Claimant’s appearance and her alleged involvement with Tim Davis.
6. The Claimant contends that the conduct had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for her.

Victimisation

7. The Claimant relies upon a grievance complaining of sexual harassment as amounting to a protected act. The Respondent denied that the Claimant had made a protected act.
8. The Claimant alleges the following detriments because of the alleged protected act including
- i. Failing to refer the Claimant to dignity at work policy;
 - ii. The Respondents approach to her alleged involvement with Tim Davis and its approach to the missing letter;
 - iii. Taking the Claimant to task over punctuality and for breaching the Respondent’s hot food policy;
 - iv. Delaying and failing to uphold the Claimant’s grievance;
 - v. Sending of unprofessional emails about the Claimant;
 - vi. Refusing the Claimant’s application for full time hours and your application for flexible working;
 - vii. Rejecting and thereby discouraging the Claimant;
 - viii. The Claimant’s proposal for a Green Team;

- ix. Refusing the suggestion of coaching for the Claimant and failing to provide the Claimant with a personal reference;
- x. Cancelling the Claimant's occupational health appointment and failing to move the Claimant's desk or make any adjustments to her day to day work environment.
- xi. Failing to grant the Claimant special leave during her grievance;
- xii. Delay in the HEAT project and refusing staff viewing of the solar panel installation.

9. The Claimant's allegations were set out in detail in a Scott Schedule at pages 118a to 139 of the Tribunal bundle, which was the document used by the Tribunal and the witnesses during the course of the Tribunal hearing.

The Facts

10. The Respondent Central And Cecil Housing Trust is a not for profit Housing Association which provides quality homes and care and support.

11. The Claimant Ms Amy Butterworth Fernandes commenced her employment with the Respondent on 28 August 2012. The Claimant was employed in the post of Environmental and Energy advice in the Respondent's Property Services Department. The Claimant worked part time four days a week involving 30 hours.

12. The Tribunal found that the Claimant was a committed and conscientious member of the Respondent's staff and that she was very enthusiastic in pursuing environmental and energy issues.

13. The Respondent's working environment was fairly informal and involved a significant degree of banter as evidenced by formal use of emails and internal communications between staff.

14. We found that although the Claimant was initially anxious to make friends she did find the working environment at times uncomfortable.

15. The Claimant entered into a friendly relationship with one Tim Davis who was employed as a maintenance officer in the property services team. The Claimant was unhappy when a photograph was pinned up in the Respondent's central office showing the Claimant and Tim Davis at a Christmas dinner in December 2012.

16. At this stage the Claimant did not contend that there was anything sinister about the pinning up of the photograph, but the Claimant was clearly uncomfortable about the matter and Tim Davis requested that the photographs should be removed.

17. At paragraph 3 of her witness statement the Claimant included the following

in February 2013 I left a team gathering early. I felt laughter; staff generally mocked my accent, what I wore and what they assumed to be my posh upbringing. I specially recollect the following people mocking my accent and my clothes” (The Claimant also included a list of names in paragraph 3 of her witness statement whom she alleged were mocking her accent and her clothes.)

18. Although the Claimant was unhappy about the incident, we noted that Tim Davis himself with whom the Claimant was on very friendly terms, emailed the Claimant on the 11 February 2013 page 198

For the record, I can only talk for myself but I am pretty certain I speak for the whole team, when I say that we don't think we know you at all. When we pigeonholed you its only done in banter and I can assure you I don't really mean it. For you to say that you don't fit in is wrong because you do, you are part of our team and one of us. Variety is the spice of life remember. For what its worth I think you are great and I am only winding you up which is what I do with most people as I get enjoyment from people's reactions as I am a freak!!

I am not sure who is been receiving all my texts because that is a complete different number to the one I have for you!! Must say its very upsetting knowing that some of my best pick up lines and flirting have gone to waste.....just kidding!

19. In a reply dated 12 February 2013 pages 197 to 198 the Claimant thanked Tim Davis for his message and we noted that in her email the Claimant added the following

Tim, you are not a freak!! Your funny, very funny sometimes (so be proud of that!). Yes, it is usually at other people's expense but I am sure that nine times out of ten people don't get offended I am just a bit too sensitive!”

20. The Tribunal considered that the Claimant's observation that she was just a bit too sensitive, impacted upon her reaction to what the Tribunal found amounted to no more than office gossip and banter, which was a feature of the office working environment. The Tribunal considered that a thread of email exchanges between the Claimant and Tim Davis at pages 195 to 199 did evidence a significant degree of friendship between the Claimant and Tim Davis, which triggered office speculation about the nature of their relationship. The Claimant complained that in about March 2014 a member of staff, Bev Durran said to the Claimant in relation to Tim Davis:

He looks bronzed like a God Amy, like a God.

21. The Claimant additionally complained that comments were directed towards her

having a physical relationship with Tim Davis. By way of example on a staff night out the Claimant alleged that at the Slug and Lettuce Pub at Waterloo Bev Darran said *"just sleep with him and get it over with"*.

22. The Claimant further alleged that her colleagues were suggesting that the Claimant had an infatuation with Tim Davis and was stalking him. In about March/April 2014 Maxine Samuels informed the Claimant that rumours were circulating to the effect that the Claimant would follow Tim Davis to the tennis courts in Camberwell, track his movements on face book and that she had moved house to Clapham to be near him.
23. The Claimant clearly found the working environment uncomfortable because of the gossip and she felt undermined by it.
24. The Claimant also complained about comments in emails between members of staff about her appearance references to her as *"snake eyes"* and to her clothes. However these emails only surfaced after the Claimant had made a subject access request on the 25 March 2015 after she had given notice of her resignation. The Tribunal considered that the emails which surfaced as a result of the subject access request did evidence the fact that the Claimant was not liked by some of her colleagues and that the references to 'snake eyes' and her dress were mean spirited and did not reflect a happy working environment as far as the Claimant was concerned. The Tribunal well understood that the Claimant felt vulnerable and unhappy at work because of the conduct of some of her colleagues.
25. On 15 September 2014 the Claimant received an I-message from Tim Davis asking her if she had read a letter that he alleged that he had left on her desk marked strictly private and confidential on 26 August 2014. The Claimant replied that she had not received the letter. Tim Davis did not give evidence before the Tribunal and by the time of the Tribunal hearing he had been dismissed by the Respondent for gross misconduct in relation to issues unconnected to the Claimant. The text messages in relation to the letter page 348 included the following

"Monday 15 September 2015

Amy I am sorry to contact you after so long but I just want to know. Did you get my letter?

The Claimant replied:

I am sorry, not meaning to be rude but is this? I don't have your number.

Tim Davis Replied:

Tim? Sorry if that wrong.

Correct – sorry I didn't where did you send it?

OK no problem

I moved house thought you knew that. Assuming you sent it to my old one?

Be kind of you to say now you have brought it up because I am wondering

I left is on your desk a few week's back. After you came to mine in the rain.

26. The thread of text messages continued with the Claimant stating that she had not received the letter which Tim alleged he had left on her desk during the August Bank Holiday week. The Claimant in one of her replies stated in terms that someone had taken the letter and that she feared that was the case.
27. Apart from the text message from Tim Davis to the Claimant, quoted above enquiring of the Claimant whether she had received his letter, there was no other independent evidence of the existence of such a letter. There was no direct evidence that Tim Davis had left a letter marked 'private and confidential' on the Claimant's desk. The Tribunal also considered that in the exchange of texts, Tim Davis did not appear to attach any particular significance to the letter. The Claimant herself never disclosed what she believed was contained in the alleged letter.
28. On 16 September 2014 the Claimant emailed staff in Property Services, page 353 the subject of the email was missing letter – strictly confidential and importance "high" the email stated the following

Dear First Floor Colleagues,

I was on A/L during the last week of August and I am writing to you in the hope that someone is kindly looking after a letter for me.

The said letter was addressed to me (full name and marked strictly confidential). It was in a white envelope, handwritten and hand delivered by a colleague on Tuesday 26 August 2014. Having checked people's calendars I know that only a few people were in the office that day but I am hoping you can help.

This was brought to my attention yesterday and I am hoping this could be returned to my desk as soon as possible.

I appreciate your cooperation.

29. On 18 September 2014 the Claimant emailed Julian Peacock, Asset Investment Manager, who was then the Claimant's direct line manager, pages 359 to 361. In her email the Claimant complained about the office gossip about her, the fact that

her personal life had been discussed and mocked at. The substantial part of the Claimant's email focused on her friendship with Tim Davis. The Claimant stated that she and Tim had been close friends for two years, that this had been a source of entertainment and mockery for several people and the Claimant provided the comments to the effect that she stalked Tim Davis, and observations made to her by other members of staff about Tim Davis. The letter continued with the following

The gossiping and inappropriate jokes from colleagues regarding Tim and myself appear to have reduced and I was prepared to let it all go but then a personal letter went missing.

Tim wrote a personal letter to me marked "strictly confidential", which he left for me on my desk on Tuesday 26 August, when he believed me to have been back from my AL.

It was left in a white envelope which was handwritten and addressed to me (full name propped up on my computer).

The content of the letter was not only personal but important to us both. It was handwritten and, as such, irreplaceable. Although of no monetary value, it was of sentimental value.

I never received said letter when Tim drew my attention to it yesterday, I took it upon myself to thoroughly search my desk to find it. It is nowhere to be seen.

I have asked reception to see if it was handed and it was not. I even asked the cleaners, but they did not see it either.

I also circulated an email to all my colleagues on the first floor to ask if anyone had seen it. The only replies I have received were negative.

I would like staff present in the office 26 August (and perhaps the following day) to be questioned about this missing letter because some staff members involved in the ongoing gossip of me were present on that day.

I am suggesting that my letter was stolen from my desk by one of the people present at the office that day and it has raised concerns in me that not only has my personal life been exposed further but also personal life and private matters of my colleague and friend.

I am not expecting an apology but I would like the person responsible to admit this to HR (in an anonymous fashion if necessary) and to return the letter (at whatever state – opened or unopened) to my desk. I do not wish to rekindle any relationships with colleagues nor do I wish to develop friendships at work. I

simply wish to pursue my work interrupted and for the line between my professional and my private life never to be crossed again by staff at C and C.

I await your guidance on the above.

30. Julian, Peacock replied on the same day namely 18 September 2014 page 359 and attached the Respondent's grievance policy. Julian Peacock suggested a time for a meeting and referred to the fact that the grievance policy allowed her to invite a union rep or colleague to be present.
31. In circumstances where the Claimant complained about the interest shown by her work colleagues into her private life involving her relationship with Tim Davis, we considered the Claimant's reaction to the loss of the alleged letter to be disproportionate. We considered that the request that all staff should be questioned about the missing letter involving the implication that one or more of them must either have known about its existence or have been responsible for its removal, was unreasonable. Although the Claimant clearly found the gossip and banter about her relationship with Tim Davis upsetting, the Tribunal considered that the Claimant's reaction to the missing letter involving emails to members of staff could only have confirmed that there was some substance to the gossip and the Claimant never appeared to have questioned why such a letter had been left on her desk while she was on annual leave rather than being handed to her, if it was so important, when she was present in the office.
32. Julian Peacock referred the Claimant to the Respondent's employee assistance programme and after some reluctance, the Claimant took up the programme which she found helpful. Julian Peacock was appointed investigating officer into the Claimant's grievance as he was the Claimant's line manager. On 14 October Julian Peacock sent out email invitations to relevant individuals namely Bev Durran, page 411, Dean Harding Demspeter, page 412, Doug Myers, page 413 and Tim Davis, page 491. Julian Peacock's emails set out in detail the allegations involving the individuals concerned.
33. Julian Peacock interviewed the individuals identified in the Claimant's grievance, including Tim Davis, pages 495 to 498.
34. Tim Davis stated in his interview that he had dropped off the letter on 26 August 2014 before anyone else was in the office and that it was still there at 6pm. He stated that the letter was in an envelope with some post cards he had purchased on holiday and that the contents would confirm a relationship but nothing more.
35. On 8 October 2014 the Claimant emailed Tim Davis, pages 405 to 406. The Claimant's email included the following

the next stage of this will be for you to speak with HR and Julian Peacock. He will contact you, I am just giving you a heads-up. This will be dealt with sensitively (I have requested this time and time again) and you are not obliged to give any personal information of any kind, but I would be extremely grateful if you

could be honest and laugh it off out of respect for me and for yourself. Laughing things off is definitely the way forward for most in life but I think this has gone too far.

You will be asked to confirm that you wrote the letter, that you left it on my desk and that you have heard inappropriate comments about you and I. Please back me up with the truth. I don't think they will ask you much more than that.

I am sorry that I have to do this. I wish people didn't behave the way they do. I will leave C and C on my terms and when I am ready to; I cannot shy away and be pushed out, so I need to stand up for myself (and for you too).

36. The Tribunal considered it unfortunate that the Claimant herself should have approached Tim Davis, who was to be investigated as part of the grievance process as to what his approach should be when asked about the letter and that he had heard inappropriate comments about himself and the Claimant. We considered that such an approach by the Claimant was tantamount to prompting an intended witness.

37. At the meeting with Julian Peacock on 8 October 2014 pages 365 to 367 the Claimant confirmed that she did not want any other outcome other than to find the missing letter.

38. There was some further delay in relation to the production of the grievance outcome because Julian Peacock became aware that Tim Davis had concerns about the conduct of the Claimant, page 509. Julian Peacock felt that he needed to speak to Tim Davis, page 507, and at his meeting with Tim Davis on 5 November 2014 Tim Davis in terms admitted that there was no substance to concerns about the Claimant's conduct.

39. On 7 November 2014 Julian Peacock wrote to the Claimant, pages 514 to 515 informing her of the outcome of her grievance. The Claimant's individual complaints were not upheld but the grievance outcome letter included the following recommendations

This grievance has affected the property services team's relationship. In order to bring team back together, I shall ask the learning team to arrange some mediation for the whole team.

Where you feel that comments being made in the office were inappropriate, they should be discussed with the individual, should this continue, raise with me immediately after the incident."

40. The Claimant appealed against the grievance outcome. The Claimant's letter of appeal was dated 12 November 2014, pages 518 to 524. The Tribunal noted that in the first paragraph of her letter of appeal the Claimant stated that the aspect of her appeal letter which was of most importance to her was the missing letter

which was the reason she started the grievance. At page 521 under the heading missing personal letter the Claimant stated the following

I was very clear at the outset of this grievance procedure that the missing letter remain my main priority and the reason behind raising this grievance in the first place. I am suggesting that someone has knowingly and recklessly obtained my personal information because nothing of any value appears to have gone missing from my desk in the two years that I have worked for C & C. My personal property has been stolen, my private life and the private life of a colleague has been invaded. This was a personal letter, addressed to myself marked strictly private and confidential.

41. The letter concluded at page 524 with the following

I would like to reiterate that my main request lies with finding my missing letter, or at least, ascertaining who stole it.

42. Chris Roberts, head of Housing and Support, was appointed to consider the Claimant's appeal against the grievance outcome. The appeal hearing took place on 26 November 2014. During the hearing the Claimant stated that she wanted an outcome which involved re-investigating what had happened to the alleged missing letter, page 548. The Tribunal found Chris Roberts a credible witness and we accepted his evidence that it appeared to him, that the focus of the Claimant's appeal was on one issue, namely the alleged missing letter, which the Claimant insisted had been stolen.

43. Chris Roberts did not uphold the grounds of the Claimant's appeal and he informed the Claimant of her appeal outcome by letter to her dated 9 December 2014 pages 614 to 615. In relation to the issue of the alleged missing letter Chris Robert's outcome letter included the following, page 615

There is no evidence that there was a letter apart from Tim telling you that he had left one on your desk at some point when you were on leave. There is no evidence to say that it had been stolen. You emailed all your colleagues on the first floor to ask if they had seen the letter and nobody said they had. You claim the colleagues are also lying about the letter and one of them must have stolen the letter to use the information against you. I am sorry to hear that you have such a low opinion of your colleagues. As stated at the appeal hearing I can make no determination on who is and who is lying. You agreed that we cannot make assumptions and I am not reassured by your continued belief that your colleagues on the first floor lie and continue to do so.

I asked you what outcome you would ideally wish as a result of your grievance appeal. You stated that you wanted the missing letter returned. You agreed at the appeal meeting that this was not likely to happen. You reported what you believed to be the

theft of a letter to the police and I understand they are not taking any action on your report. C & C will be taking no further action with regard to the missing letter.

As part of the resolution decision you've suggested we put CCTV into the offices. It is not appropriate to have CCTV in the workplace; there is a fairly comfortable sense throughout the building that this is a safe and secure place to work."

44. At this time Tim Davis himself was being investigated in relation to allegations of gross misconduct. He had admitted in his conversation with Julian Peacock on 5 November 2007, that allegations he had raised about the Claimant's conduct towards him had been a joke and the Tribunal found it disturbing that at no stage did the Claimant herself consider or question the possible reliability of Tim Davis about the existence of the letter before pursuing an approach which involved accusations by her that all her colleagues were lying and that at least one of them had stolen the alleged letter. If such a letter had existed there was no evidence that its contents whatever they were, had been aired or had been used in any respect to prejudice the Claimant.
45. The Tribunal found that both the investigation of the Claimant's grievance and the Respondent's approach to the Claimant's appeal against the grievance outcome had been appropriately dealt with by both Julian Peacock and by Chris Roberts. Neither the grievance nor the appeal had produced the outcome the Claimant wished for but the Tribunal found no evidence to support any contention that the Respondent's approach had been tainted by unlawful discrimination because of the Claimant's sex or because of any alleged protected act. All the relevant individuals had been interviewed. Again although there had been some delay in producing the grievance outcome, the Tribunal accepted Julian Peacock's explanations for the delay which involved his annual leave and further enquiries he made following documented concerns raised by Tim Davis about the Claimant's conduct, pages 509 and 588.
46. On 3 November 2014 the Claimant made a request for flexible working, pages 562 to 563. The Claimant wanted to work two days a week from her family home in Bristol in order to support her family. The Claimant's wish to work two days a week from home represented half her working week for four days per week.
47. By letter to the Claimant of 11 December 2014 pages 620, Julian Peacock turned down the Claimant's application for flexible working and his letter gave detailed operational reasons for the refusal of her application. The Tribunal noted that Julian Peacock's letter to the Claimant pointed out to her that when her role was advertised it was clearly a role that would be based in London as most of the Respondent's stock was located there and that "*we need to be local to support and manage that stock.*" The Claimant did not appeal against the refusal to grant her request for flexible working.
48. The Claimant had also applied to work full time hours from April 2015. Julian Peacock informed the Claimant that the budget had to be considered before a business case could be made to support the Claimant's application.

49. The Claimant who was clearly a committed and enthusiastic employee considered that a number of her initiatives were not supported by the Respondent. The Claimant felt that the Respondent failed to respond positively to her initiatives in relation to the Respondent's Green Team another area in which the Claimant considered that she was not supported was in relation to the Respondent's HEAT project. The HEAT project had to be postponed and in an email to the team dated March 25, 2014 it was pointed out that budget cuts for the 2014/15 financial year would involve the HEAT project being deferred until April 2015, page 208.
50. The Claimant also raised an issue about the Respondent's employees being allowed to have access to the roof in order to view PV Solar Panels. The Tribunal accepted the evidence of James Warne, head of property services that he had genuine concerns about employees' health and safety having regard to the fact that the means of access to the roof involved a pull down ladder and he would not authorise access to the roof until a risk assessment had been carried out. The Tribunal considered that the Claimant's comments in her performance review form dated 24 March 2014, pages 300 to 305, evidenced the fact that she appeared to accept that there were financial constraints and a genuine reason for delays to some of her projects which she was keen to progress.
51. The Claimant complained that she was unjustifiably targeted in relation to her attendance. The Claimant had arranged with Julian Peacock that she could start work at 9.30am finishing at 5.30pm to enable her to avoid busy traffic because she was cycling to work, page 287. Julian Warne became aware that the Claimant was arriving late on occasions namely between 9.45am to 10.00am, page 362 and that she would often prepare and eat her breakfast before commencing her duties. In an email from Julian Peacock to James Warne dated 30 October 2014, page 446 Julian Peacock pointed out the following

The 9.30 start time still applies. Usually when Amy is running late, she does let me know such at the 10.00 o'clock arrival.

Admittedly she did not email me today.

As C and C has rolled out the flexible working policy, it is harder to stipulate a certain start time for Amy, as long as she is working her hours.

We have agreed a start time to ensure that I know that she has not been in an accident."

52. The Claimant contended that she had been singled out over punctuality and that this amounted to victimisation. The Tribunal considered that there was no substance to such a complaint and we accepted the evidence that it was wholly appropriate for management to have raised issues of attendance particularly where there were concerns about safety and that Julian Peacock would always raise issues of attendance and punctuality with staff who were late.

53. The Claimant also complained that she was singled out and reprimanded over the Respondent's hot food policy. The policy stated that staff should not eat hot food in the office. The rationale for the policy was that hot food created an unpleasant smell. There was an area on the fifth floor of the building where hot food could be eaten.
54. We accepted the evidence of Dean Harvey-Dempster, Property Services Manager that he did email Julian Peacock on occasions when the Claimant was eating hot food at her desk because his own staff were disturbed by the Claimant's tendency to eat hot food at her desk and that he considered that such conduct undermined his own efforts to discourage such conduct. The Respondent had undertaken a survey in 2013 over the issue of hot food and the use of microwaves.
55. An outcome of the grievance process was a proposal of the offer of mediation for the Claimant. The Claimant rejected mediation but the Respondent's HR was approached with a view to organise some form of coaching for the Claimant for both her work and personal behaviour/skills, pages 660 to 661. On 12 January 2015 Julian Peacock emailed James Warne in relation to coaching for the Claimant and the email stated the following page 688

Following a meeting I had with Solmaz, coaching was discussed as a way to help Amy. I have initially asked Amy if this is of interest, which it is.

Florentina has advised the cost of coaching for Amy is £1080 including VAT. HR advise that you hold the budget, can you advise whether we can provide this coaching to Amy”.

56. James Warne had been unaware of any proposal to consider coaching for the Claimant and he queried what the purpose was for coaching, whether it would be of benefit to the Claimant and whether there were any issues in relation to the Claimant's capability. The Tribunal considered that an enquiry by a senior manager about the benefit of coaching of an employee at significant cost was reasonable and in any event the Claimant resigned before any final decision had been reached. The Claimant contended that what she considered had amounted to a refusal of the suggestion for coaching amounted to victimisation.
57. We found no evidence to support the Claimant's contention that there was a causal link between James Warne's approach to the issue of coaching for the Claimant, an approach we considered wholly reasonable on the evidence, and the Claimant's grievance and subsequent appeal. In any event James Warne had not refused coaching for the Claimant.
58. Following the grievance process there was a proposal that the Claimant's desk should be moved to be near her line manager. The issue of a desk move was raised in an email from Solmaz Kolahi to Julian Peacock on the 6 January 2015, page 674 in which he stated that he had discussed the proposal with James Warne and that he needed to produce plans to show the desk arrangement which would also require smaller desks to be provided but there was no budget

allowance for this.

59. Julian Peacock did consider the issue of the Claimant's desk. One of the Claimant's colleagues Lisa Venn offered to swop her desk with the Claimant but the Claimant declined. A change to the seating arrangements could not be accommodated because it was not possible to relocate a number of cabinets which were located in the area.
60. On 26 January 2015 the Claimant wrote the following letter of resignation to Julian Peacock on page 699

I am writing to you to officially hand in my resignation as environmental and energy advisor at Central and Cecil.

I will serve the required notice period of three months and as such will be leaving Central and Cecil on 26 April 2015.

Thank you for your support over the past 29 months.

61. Prior to the Claimant's letter of resignation the Claimant had informed Julian Peacock on 14 January 2015 that she had received an offer of employment at the University of East London and that she required a reference. Four days later on 19 January Julian Peacock provided a reference for the Claimant, pages 695 to 696. The reference included the observation that the Claimant was a diligent and inquisitive individual and it bulleted some of the Claimant's major achievements.
62. The Claimant complained that there had been a failure to initially provide her with a personal reference. The Tribunal concluded that considered objectively the reference was positive and was made available promptly. The Tribunal was unable to understand the Claimant's complaint that a delay in providing the reference amounted to victimisation.
63. The employee assistance scheme had recommended that the Claimant should be referred to occupational health. An appointment was arranged with occupational health for the Claimant but shortly before the appointed day for the Claimant to attend an occupational health meeting, a junior member of staff in the Respondent's HR cancelled the meeting in circumstances where it was believed that the Claimant had resigned. The Claimant unfortunately attended the appointment only to be informed that it had been cancelled. However the Claimant did see an occupational health advisor, an assessment took place and a report was subsequently produced.
64. The Claimant complained that she had not been granted special leave during the grievance process. This was a complaint of victimisation. The Tribunal found that it was not normal practice to grant an employee special leave in the circumstances and we noted that the Claimant was in any event absent on sick leave for a substantial period during the grievance process.
65. The Claimant also complained that she had not been referred to the Dignity at Work Policy by the Respondent. The Tribunal found there was no substance to

such complaint. The Respondent's policies was readily available to members of staff such as the Claimant, and we accepted Julian Peacock's evidence that at about the time the Claimant raised her grievance, she had informed him that she was aware of and was familiar with all the Respondent's relevant policies on the intranet, which included the Grievance and Dignity at Work policies. The Claimant's grievance policy contains a reference to the Dignity at Work policy.

66. After the Claimant had given notice of resignation the Claimant complained about Dean Harvey-Dempster's reading and sharing her emails. Dean Harvey-Dempster was one of the individuals involved in the investigation of the Claimant's grievance. Dean Harvey-Dempster was himself conducting an investigation into Tim Davis's conduct in relation to contract issues and during the course of his investigation he came across emails between Tim Davis and the Claimant which he felt might be relevant to the Claimant's grievance and he passed them on to James Warne. In a short hand note to himself which was never shared, he included the words "*revenge plots*" because of a concern that matters might not be resolved and might escalate in the future. The Tribunal found that there was no causal link between Dean Harvey-Dempster's approach to emails and the Claimant's grievance and subsequent appeal.
67. The Claimant complained about what she alleged amounted to ongoing victimisation following her resignation. The Claimant alleged that the Respondent's HR director Pam McDonald had shown no respect for her confidentiality by sharing her email regarding early conciliation with ACAS other staff for no other reason than to share it. The Claimant complained that Pam McDonald's email which contained the words: "*how very interesting. This suggests Amy is going to put in an ET as this is now the process that Claimants have to go through.*"
68. The Tribunal did not consider that an observation in an email could amount to victimisation in circumstances where the Claimant would only have become aware of Pam McDonald's email to Adrian Eggington as a result of the Claimant's subject access request. In any event the Claimant as predicted by Pam McDonald did present a claim form on 28 March 2015. Adrian Eggington was the executive director of residence services, and the Tribunal considered that as a senior manager he needed to be informed.

Submissions

69. The Tribunal heard submission from Mr Bromidge on behalf of the Respondent and from Mr Horan on behalf of the Claimant. Mr Bromidge supplemented his oral submissions with written submissions. The parties' submissions are not reproduced in these reasons.
70. The Tribunal was referred to and considered a number of authorities which included **Weeks v Newham College of Further Education UKEAT/0630/11, EAT; Chief Constable of West Yorkshire Police-v-Khan [2001] UKHL 48; Ministry of Defence v Jeremiah 1980 ICR 13, CA, O'Neill v Governors of St Thomas More RCVA Upper School 1997 ICR 33, EAT, Burrett v. West Birmingham Health Authority 1994 IRLR 7, EAT, Vairea v Reed Business**

Information Ltd UKEAT/01777/15.

The Law

71. The Claimant's Tribunal claims involve constructive unfair dismissal, direct sex discrimination, harassment and victimisation. There were also time jurisdiction issues in circumstances where the Claimant's first claim form had not been presented until the end of March 2015.

72. Section 95(1)(c) of the Employment Rights Act 1996 provides:

(1) For the purposes of this Part an employee is dismissed by his employer if (and,....only if) –

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

73. To found a complaint of constructive dismissal the Claimant has to show that his resignation has been caused or justified by a fundamental or repudiatory breach of his/her contract of employment by the Respondent employer, namely a breach which goes to the very root of the contract between them; in other words conduct on the part of the employer which evinces the employer treating the contract of employment as discharged. In the circumstances of this case the Claimant alleged that the Respondent's conduct involved breaches of the term of trust and confidence implied into her contract of employment. In **Malik –v- BCCI [1997] ICR 606, HL**, the implied term of trust and confidence was defined as:

The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

The Claimant also contended that the alleged discriminatory conduct of the Respondent involved repudiatory breaches of her contract of employment.

Direct sex discrimination

74. S.13 of the 2010 Act provides

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

Harassment

75. Section 26 of the 2010 Act provides

(1) a person (a) harasses another (b) if –

- a. *A engages in unwanted conduct related to a relevant protected characteristic, and*
- b. *The conduct has the purpose or effect of –*
 - (i) *violating B's dignity, or*
 - (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
 - (iv) *In deciding whether conduct has the effect referred to in subsection (i) (b), each of the following must be taken into account –*
 - (a) *the perception of b;*
 - (b) *the other circumstances of the case;*
 - (c) *whether it is reasonable for the conduct to have that effect.*

Victimisation

76.S.27 of the 2010 Act provides

- (1) *A person (A) victimises another (B) if A subjects B to a detriment because*
 - c. *B does a protected act, or*
 - d. *A believes that B has done, or may do a protected act.*
- (2) *Each of the following as protected act –*
 - (a) *bringing proceedings under this Act;*
 - (b) *giving evidence or information in connection with proceedings under this act;*
 - (c) *doing any other thing for the purposes of or in connection with this Act;*
 - (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*

77. Section 136 of the Equality Act 2010 contains burden of proof provisions and provides:

- (2) *If there are facts from which the court could decide, in the absence of any other explanation that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

Conclusions

78. The Tribunal reached its conclusions having regard to the evidence to his

submissions of the parties' representatives and to the relevant law.

Direct Sex Discrimination

79. The Claimant's complaints involved complaints that she had been treated less favourably because of her sex, as a result of subjecting her to banter and jokes about her appearance and about her relationship with Tim Davis. The Claimant only became aware of the detail of two of her allegations of direct sex discrimination, namely suggestions that she had an infatuation with Tim Davis and was stalking him after she had seen emails following her subject access request.
80. The Tribunal did not conclude on the evidence that the fact that the Claimant was subject of office gossip was in any way related to her sex and we noted that Tim Davis had also been a subject of gossip about which he complained. We considered that there was force in Mr Bromidge's submission that in circumstances where she had nominated Tim Davis as her comparator for all the 17 allegations of direct sex discrimination the Tribunal must identify a difference in treatment if any between the Claimant and Tim Davis and decide whether the difference in treatment was less favourable for the Claimant. Further the Claimant named Tim Davis as an alleged discriminator in two of the Claimant's complaints. We accepted Mr Bromidge's submission that "it is a logical and legal nonsense for Mr Davis to be the comparator of less favourable treatment when he is also the alleged perpetrator".
81. There was a body of evidence before the Tribunal both in the form of documentary evidence and oral evidence that the Claimant had been involved in a very close relationship with Tim Davis. Indeed the Claimant did not deny that such had been the case but she understandably resented the relationship being the subject of gossip. The Claimant's reaction to the alleged missing letter in our judgment only served to reinforce the extent on her part, of the relationship. It was the relationship which gave rise to the gossip and not the Claimant's sex. In any event some of the comments about which the Claimant was aware at the relevant time were, in our judgment fairly innocuous, and did not cross the threshold into unlawful conduct involving discrimination because of the Claimant's sex or unlawful harassment.
82. The Claimant's complaints of direct sex discrimination are not well founded and are accordingly dismissed.

Harassment

83. Mr Bromidge referred the Tribunal to the speech of Lord Hutton in ***Waters-v-Metropolitan Police Commissioner [2000] IRLR 720*** at paragraph 37 namely that a Respondent

"will not be liable unless he knows or ought to know that the harassment is taking place and fails to take reasonable steps to prevent it."

84. The comments relied upon by the Claimant as amounting to harassment with the exception of two of them, surfaced after the subject access request. In such circumstances we did not conclude that they had the purpose or effect of s.26(1)(b)(2) of the 2010 Act in circumstances where she had already resigned from her employment. In any event the focus of the Claimant's complaints about her work place environment was the missing letter and the Claimant stated in terms that she would have let the behaviours and comments she had been subjected go but the fact that there was something missing from her desk was a step too far. Further we did not conclude that the conduct about which the Claimant complained which she alleged amounted to harassment was sexual in nature and we had regard to the guidance of *Mummery J in O'Neil-v-Governors of St Thomas Moore RCVA Upper School* in which he suggested that the basic question was

“what, out of the whole complex of facts before the Tribunal is the effective and predominant cause or the real and efficient cause of the act complained of?”

85. In our judgment on the evidence the cause of the gossip about which the Claimant complained was her relationship with Tim Davis who was also subjected to gossip. We did not conclude that any conduct complained of by the Claimant was related to a relevant protected characteristic namely the Claimant's sex.

86. The Claimant's complaints of unlawful harassment are not well founded and are accordingly dismissed.

Victimisation

87. The protected act relied upon by the Claimant for the purposes of her complaints of unlawful victimisation is her grievance email dated 18 September 2014. The Tribunal noted that the subject of the grievance, page 359, was “missing letter”. The body of the email complains about the gossip the Claimant had been subjected to of which she summarised as the following

“the gossiping and the inappropriate jokes from colleagues regarding Tim and myself appear to have reduced and I was prepared to let it all go, but then a personal letter went missing.”

88. The Tribunal did not consider that the Claimant's email, on the broadest interpretation, involved a complaint by the Claimant that the treatment she complained of was related to her sex and that it fell within the scope of s.27(2) of the Equality Act 2010. In particular the Tribunal did not consider that the Claimant's grievance email involved making an allegation (whether or not express) that a person or another person had contravened the Equality Act. The Claimant included in her complaint an allegation that she had been reprimanded by the head of property services when she had reported very inappropriate comments about a colleague which essentially mocked the humane objects of Fair Trade, namely a comment *‘I want sugar with the blood of orphans in my tea’*.

89. In an event the Tribunal concluded that none of the 21 allegations identified by the Claimant as allegations of victimisation, had any connection or causal link with the Claimant's grievance. By way of example the Claimant alleged that she was singled out and reprimanded over breaching the Respondent's hot food policy and that her proposal of a green team had been refused, did not amount to detriments in circumstances where we accepted the evidence of the relevant witnesses that there were justifiable reasons for the Respondent acting as it did.
90. The Claimant's complaints of unlawful victimisation are not well founded and accordingly dismissed.

Constructive Unfair Dismissal

91. The issue for the Tribunal was whether the Claimant had resigned in response to or partly to fundamental or repudiatory breaches of her contract of employment with the Respondent see ***Nottinghamshire County Council-v-Meikle [2004] IRLR 703***. The Claimant relies upon the gossip she had been subjected to and her alleged treatment by the Respondent.
92. In the circumstances of this case the Tribunal found on the evidence that the issue over the missing letter prompted the Claimant's grievance and the Claimant expressed in terms that she considered its restoration to her as a priority.
93. The Tribunal has referred in these reasons to an observation in an email to Tim Davis that the Claimant said in terms that she would leave in her own time, and the Claimant wanted to work full time. The Tribunal found that there were genuine reasons for the Respondent's refusal to increase the Claimant's hours to full time working, in circumstances where there was not a business need for the Respondent to do so.
94. In her grievance letter the Claimant stated that the gossiping and inappropriate jokes from colleagues regarding Tim and herself appeared to have reduced, but it was then that the letter went missing.
95. The Claimant did not resign from her employment with the Respondent until 26 January 2015, page 699, by which time she had requested references for her position at the University of East London. The Claimant had informed Julian Peacock on 14 January 2015 that she had received an employment offer from the University of East London and that she required a reference. The Tribunal further noted that in her letter of resignation on 26 January 2015 she thanked Julian Peacock for his support over the past 29 months.
96. The Tribunal concluded that neither individually nor cumulatively did any of the matters complained of by the Claimant amount to repudiatory breaches of the Claimant's contract of employment or any breach of her contract of employment. In any event the Tribunal was driven to the conclusions that the reason for the Claimant's resignation was because she had obtained alternative employment, which was full time employment.

97. The Tribunal further considered that the Claimant's application for flexible working in December 2014 to enable her to spend some time working from home in Bristol and her application for full time working, were inconsistent with a situation in which, as the Claimant alleged, the Respondent was in breach of her contract of employment. In cross examination the Claimant stated:

I applied for my present job at the end of December 2014 I knew at that time I was going to be given a full time post. I do not know if I would have applied for another job if I had got full time work with the Respondent

98. The Tribunal concluded that the Claimant was not dismissed within the meaning of s.95(1)(c) of the Employment Rights Act 1996 and accordingly it is the unanimous Judgment of the Tribunal that the Claimant's complaint of unfair constructive dismissal is dismissed.

Time/Jurisdiction

99. The effective date of termination of the Claimant's contract of employment was 26 April 2015 at the expiry of the Claimant's notice period. The Claimant's letter of resignation was dated 26 January 2015. The Claimant's first claim form was received on 28 March 2015 and her second claim form was received by the Tribunal on 6 July 2015. The date of receipt by ACAS of the early conciliation notification was 5 February 2015.

100. The Respondent contended that an Employment Tribunal had no jurisdiction to hear and determine the Claimant's complaints which occurred more than three months before the Claimant applied for the ACAS Early Conciliation on 5 February 2015. The last allegation of sexual harassment took place in September 2014.

101. In her oral evidence the Claimant stated that she had become aware of ACAS at the time she sent an email to Pam McDonald, HR Director on 3 February 2015 stating that she was considering pursuing Early Conciliation through ACAS following her grievance. The Claimant stated that she had to go outside to get help and that she had become aware of the three month time limit at about this time.

102. In cross examination the Claimant stated she could not remember the detail about she became aware of the three months she had spoken to the CAB and her lawyers. She also stated she did various amounts of research and looked at the internet. She stated that she had consulted a Solicitor in Bristol in 2014 and that she obtained free help from Lambeth Law Centre. The Claimant added that over the Christmas period 2014 she needed to prioritise her own health and well being in circumstances where she had exhausted the in-house route that the only thing she could do was to leave.

103. The Claimant had stated in her email to Tim Davis of 8 October 2014 that she would leave the Respondent on her terms and when she was ready to. It appeared to the Tribunal from the same email that the Claimant may well have

been receiving legal advice as early as 8 October 2014 by her reference to *“all the advice I have received has alerted me to all this being bullying in the workplace and I have to stand by my morals.”*

104. Although the Tribunal has concluded that the Claimant’s Tribunal claims were not well founded, we considered that in any event the matters complained of by the Claimant after October 2014, namely her complaints in relation to the grievance and the issues over full time working did not amount to acts continuing over a period from acts which occurred outside the three month time limit. Further having regard to the fact that the Claimant was an individual who was clearly capable of taking advice in relation to employment matters and did take advice, the Tribunal concluded that had there been substance to the Claimant’s claims, there would have been no grounds enabling it to exercise its discretion to extend time on just and equitable grounds in relation to those events which occurred outside the three month period.

Employment Judge Hall-Smith
Date: **25 May 2017**