EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Mrs P Kiani**

Respondent: **Aviareps UK Limited**

HELD AT: **London South**

ON: **09, 10, 11 and 12 January 2017**
In chambers on 20 & 21 March 2017

Before: **Employment Judge Freer**
Members: **Mrs J S Muir**
Mr O Husbands

Appearances
For the Claimant: **Mr L Wilson, Counsel**
For the Respondent: **Mr P Strelitz, Counsel**

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claims are unsuccessful.

REASONS

1. By a claim presented to the employment Tribunals on 23 March 2016 the Claimant claimed unfair dismissal and sex discrimination.

2. The Respondent resists the claims.

3. The Claimant gave evidence on her own behalf together with Ms Felicity Caiado, employee of the Respondent. The Tribunal received a witness statement from Ms Mukhtar Ahmed, Managing Director of Panama Travel, who did not attend to give evidence. The Tribunal placed weight on that statement as appropriate given that Ms Ahmed was not cross-examined.

4. The Respondent gave evidence through Mr Bogdan Stepniak, Account Director; Ms Maureen Chuter, Manager, Office Management and Human Resources; Mr Fawad Shaida, Reservation and Ticket Supervisor; and Mr Robert Keysselitz, Managing Director.

5. The Tribunal was presented with a bundle of documents comprising 424 pages.

6. Employment Judge Freer apologises to the parties for the delay in providing this judgment and reasons which has been due to a combination of unforeseen circumstances and lack of judicial writing time.

The Issues

7. The list of issues was agreed between the parties and attached to a Preliminary Hearing order of the Tribunal made on 25 May 2016. The precise allegations that comprised what is described in the list of issues as 'sexual harassment' were unclear and these were determined at the outset of the hearing and are set out below in the Tribunal's conclusions.

8. It was agreed that the Tribunal in the first instance will address liability and general unfair dismissal remedy issues where appropriate.

A brief statement of the relevant law

9. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

10. Where it is uncontroversial that an employee has been dismissed, an employer has to show one of the prescribed reasons for dismissal contained in sections 98(1) and (2). It is trite law that the reason for dismissal is a set of facts known to, or beliefs held by, an employer at the time of dismissal, which causes that employer to dismiss the employee. The reason for dismissal does not have to be correctly labelled at the time of dismissal and the employer can rely upon different reasons before an employment tribunal (**Abernethy –v- Mott, Hay and Anderson** [1974] IRLR 213, CA).

11. Also, a Tribunal may properly find that that the reason proffered by the

employer is not the real or principal reason, provided it is satisfied on adequate evidence that the reason it selects was the employer's reason at the time of the dismissal (**McCrory –v- Magee** [1983] IRLR 414, NICA). In addition and in practice, a principal reason may be compounded of several elements which do not necessarily each in themselves constitute several reasons **(Bates Farms and Dairy Ltd –v- Scott** [1976] IRLR 214, EAT).

12. If there is a permissible reason for dismissal, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case"

13. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of a reasonable employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).

14. The Court of Appeal in **Taylor –v- OCS Group Ltd** [2006] IRLR 613 emphasised that tribunals should consider procedural issues together with the reason for the dismissal. The two impact upon each other. The tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss.

15. This decision was echoed in **A –v- B** [2003] IRLR 405, EAT and the Court of Appeal in **Salford Royal NHS Foundation Trust –v- Roldan** [2010] ICR 1457 with regard to assessing reasonableness of the process and the decision to dismiss with the seriousness of the alleged conduct.

16. With regard to circumstances of third party pressure the EAT held in **Henderson –v- Connect (South Tyneside) Ltd** [2009] UKEAT 0209/09

"It must follow from the language of s. 98 (4) that if the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client – most obviously, by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee – but has failed, any eventual dismissal will be fair: the outcome may remain unjust, but that is not the result of any unreasonableness on the part of the employer. That may seem a harsh conclusion; but it would of course be equally harsh for the employer to have

to bear the consequences of the client's behaviour, and Parliament has not chosen to create any kind of mechanism for imposing vicarious liability or third party responsibility for unfair dismissal".

17. Section 13 of the Equality Act 2010 ("the EqA") 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".

18. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

19. Section 26 of the Equality Act 2010 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.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect".

20. A Tribunal should consider all the acts together in determining whether or not they might properly be regarded as harassment (**Driskel –v- Peninsular Business Services Ltd** [2000] IRLR 151, EAT and **Reed and Bull Information Systems Ltd –v- Stedman** [1999] IRLR 299, EAT).

21. The motive or intention on behalf of the alleged harasser is irrelevant (see **Driskel** above).

22. The Court of Appeal confirmed in **Land Registry –v- Grant (Equality and**

Human Rights Commission intervening) [2011] ICR 1390 "when assessing the effect of a remark, the context in which it is given is always highly material".

23. In **Richmond Pharmacology –v- Dhaliwal** [2009] ICR 724 the EAT held that the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.

24. Section 27 of the EqA provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a 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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

25. Causation is shown where the protected act materially influences (in the sense of being more than a trivial influence) the employer's treatment of the Claimant (see for example **Fecitt -v- NHS Manchester** [2012] ICR 372, CA on protected disclosures which adopted general discrimination principles). See also **Villalba –v- Merrill Lynch & Co Ltd** [2006] IRLR 437 where the EAT held with reference to **Igen** (above), if a discriminatory influence is not a material influence or factor, then it is trivial.

26. The EAT in **The Chief Constable of Kent Constabulary -v- Bowler** [2017] UKEAT/0214/16 gave guidance on detriments in victimisation claims:

"Determining whether the treatment that B is subjected to amounts to a detriment involves an objective consideration of the complainant's subjective perception that he or she is disadvantaged, so that if a reasonable complainant would or might take the view that the treatment was in all the circumstances to his or her disadvantage, detriment is established. In other

words, an unjustified sense of grievance does not amount to a detriment; the grievance must be objectively reasonable as well as perceived as such by the complainant".

27. The burden of proof reversal provisions in the EqA are contained in section 136:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(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".

28. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If the Claimant does establish a *prima facie* case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

29. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

30. The Court of Appeal in **Madarassy** above, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

31. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

32. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC has confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

33. Some main principles applicable in cases of direct discrimination have helpfully been summarised by the EAT in **Law Society v Bahl** (as approved by the Court of Appeal [2004] IRLR 799) and have been taken into account by the Tribunal in the instant case.

34. A tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A tribunal should not extend the range of complaints of its own motion (**Chapman v Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

Facts and associated conclusions

35. The Claimant, Mrs Paraivash Kiani, commenced employment with Gulf Air on 08 March 1999. The Claimant's employment transferred to the Respondent on 19 November 2012 by virtue of the TUPE Regulations. The Claimant's employment terminated on 31 December 2015.

36. The Claimant's job title was Reservation and Ticket Agent and her job duties involved liaising with travel agents in order to sell them Gulf Air Group tickets, principally for the Islamic pilgrimages of Umrah and Hajj.

37. Gulf Air is a very important client for the Respondent. It has a multi-million pound turnover in the UK and accounts for around 20% of the Respondent's gross profit.

38. As part of the TUPE transfer the Claimant and work colleague Mr Fawad Shaida moved offices in August 2012.

39. In 2013 Mr AlGaoud took over as the UK Country Manager for Gulf Air and his work was located in the Respondent's office where the Claimant and Mr Shaida worked.

40. The Claimant's sex harassment claims are only pursued against Mr Shaida. The Claimant worked alongside Mr Shaida. They first knew each other since 2003. They had become good fiends and Mr Shaida was invited and attended accompanied by his family to the Claimant's youngest daughter's birthday party and the 'coming of age' for her eldest daughter.

41. The Claimant accepts that she and Mr Shaida had a good and convivial working relationship with each other during the ten-year period up to the time Mr AlGaoud took over as Country Manager for Gulf Air in June 2013. Mr Shaida contends that the relationship was good until events in 2015.

42. The Claimant alleges that Mr Shaida and Mr AlGaoud were old friends, which gave Mr Shaida the confidence to change his behaviour towards the Claimant. The Tribunal concludes on balance that Mr Shaida and Mr AlGaoud did not have any friendship beyond a normal working relationship. They were not friends outside of work and communicated only in respect of work. As Mr Shaida put it: “I am his subordinate, he gives me instructions and I do them”.

43. There were six specific complaints of harassment against Mr Shaida: (i) throwing balls of paper at the Claimant at a frequency of approximately 3 to 4 times per week during the period from May/June 2013 to January 2015; (ii) flicking the Claimant's head with his finger during the same period with the same frequency as above; (iii) grabbing and squeezing the Claimant's hand in the Summer of 2014 causing her ring finger to bleed; (iv) sexually suggestive conduct with a banana throughout 2014 including comments such as "mine is thick and big" and conduct while eating; (v) questioning the Claimant's sex life at least once per fortnight throughout 2014; and (vi) stabbing the Claimant's right hand with a pen on 10 February 2015.

44. With regard to the first allegation of throwing balls of paper, the Tribunal on balance prefers the evidence of Mr Shaida which was that sometimes both he and the Claimant would throw paper balls and pens at each other, which was done in a playful manner and neither of them had any reason to believe the other was offended or hurt by these actions.

45. That view is corroborated by the evidence of Ms Caiado during the internal grievance investigation.

46. It is recorded in the interview notes that Ms Caiado was informed that she was being asked for some further information and was told that: "this is extremely important information and must be as accurate and detailed as you can possibly be. Please be as clear and precise and give answers to the best of your recollection".

47. Ms Caiado is recorded as stating: "Felicity did say that she had seen Parivash throw pens and paper balls at Fawad in a playful way. They would do it back to each other".

48. Ms Caiado was a witness for the Claimant at the Tribunal hearing and at the times of the events in question sat directly opposite and adjacent to Mr Shaida and the Claimant respectively.

49. On balance the Tribunal concludes that these actions were entirely consensual between the Claimant and Mr Shaida and did not amount to unwanted conduct, or unwanted conduct relating to the Claimant's sex or of a

sexual nature. The Tribunal also concludes that it did not have the purpose or effect of creating a prohibited environment.

50. With regard to the allegation of Mr Shaida flicking the Claimant's head with his finger, Mr Shaida stated in his evidence that he may have on occasion brushed past the Claimant when accessing cupboards immediately behind her chair.

51. The Tribunal accepts that the space between the Claimant's chair and the cupboards was very limited.

52. The Claimant's evidence was that it amounted to inappropriate touching and eventually she confided in Ms Caiado and said that she did not like what Mr Shaida was doing and that he was hurting the Claimant.

53. In Ms Caiado's evidence at the Respondent's internal grievance investigation she confirmed that "she wasn't aware of any other incidents apart from the ring and the pen incidents".

54. Having carefully considered all the evidence the Tribunal does not accept the Claimant's account, particularly with regard to the two-year period and frequency with which it is alleged this action occurred and had not been observed by Ms Caiado who sits directly next to the Claimant in the office.

55. With regard to the allegation of grabbing and squeezing the Claimant's hand and causing her ring finger to bleed in the Summer of 2014, the evidence of Ms Caiado was that she did not see the incident but was later informed of it by the Claimant. Ms Caiado's evidence to the internal grievance procedure in July 2015 was that the event occurred sometime in early 2015. The Tribunal refers to Ms Caiado being told that her evidence was extremely important and should be as accurate as possible.

56. Mr Shaida could not recall any such incident.

57. The Claimant's evidence was that it happened in the Summer of 2014 and she had to use a plaster on her finger for five days.

58. The Tribunal concludes that even if this event did occur, it was not at the level of severity contended by the Claimant. The Tribunal also concludes that had the event occurred at some lesser extent, it did not have the purpose or effect of creating a prohibited environment. The Tribunal concludes that had this matter been at the level of prohibited environment required for a harassment claim, such as intimidating, hostile or degrading, the Claimant would have made Ms Caiado, her friend and work colleague, immediately aware of the circumstances. The evidence of Ms Caiado did not support that.

59. With regard to the allegation of sexually suggestive conduct with a banana throughout 2014, the evidence of Ms Caiado was that she had never seen any such incident and her evidence also did not corroborate the suggestive comments further alleged by the Claimant.

60. The evidence of Mr Shaida was that he had eaten a banana every morning for over twenty years and that he would eat that banana either sitting down, standing up, or moving around, depending what he was doing at the time.

61. The Claimant in her evidence has not suggested any context in which this alleged sexually suggestive conduct took place, such as furtive behaviour by Mr Shaida when he could assure himself that no one was around. It is notable that the Claimant and Mr Shaida worked in an open-plan office with others, which makes the conduct and its frequency less plausible. The Claimant in paragraph 10 of her witness contended that Mr Shaida would make suggestive actions "everyday".

62. It is also worth reiterating that Ms Caiado sat immediately opposite Mr Shaida and her work was undertaken in the mornings. Although the Tribunal heard evidence that there was a low screen partitioning the two desks, the Tribunal considers that it is notable that Ms Caiado did not see on any occasion or hear on any occasion the alleged sexual conduct by Mr Shaida that allegedly occurred every day for a year

63. Also, Ms Caiado did not confirm in her evidence to Tribunal, or anywhere else, that the Claimant had ever raised this alleged conduct with her.

64. In the grievance interview with Ms Caiado it is recorded: "Felicity [Ms Caiado] agreed it there was a good relationship between Paravash and Fawad and that they had worked together for many years. She also agreed that there is good working environment and rapport between the entire staff group".

65. Therefore, on a balance of probabilities, the Tribunal does not accept the Claimant's evidence and concludes this alleged conduct did not occur as alleged.

66. With regard to the allegation of questioning the Claimant's sex life at least once per fortnight throughout 2014, again the evidence of Ms Caiado in the internal grievance does not mention this matter and confirmed that she was not aware of any other incidents apart from the ring and pen incidents.

67. Ms Caiado was informed of the importance and accuracy of her answers at the grievance meeting and confirmed the good working relationships. She sat next to them both throughout that time.

68. The Tribunal again on a balance of probabilities concludes that the conduct did not occur as alleged.

69. With regard to questioning the Claimant's sex life, that matter is not mentioned at all in the Claimant's written witness statement and neither is it contained in her internal grievance to the Respondent.

70. The Claimant, for example, does not include it in her internal witness statement at pages 227 to 228 in the bundle, particularly the closing

paragraph which summarises all of the conduct the Claimant argued that she had received at the hands of Mr Shaida. The Tribunal finds it not credible that the Claimant would mention things such as having her head flicked, but not mention the unwanted questioning of her sex life at least once per fortnight for a year.

71. Is also not mentioned in the notes of the interview on 19 June 2015 with Ms Schofield (pages 186 to 204 of the bundle)

72. Mr Shaida was not cross-examined on the matter.

73. Ms Caiado does not mention it in her witness statement but, like the Claimant, does refer to what might be considered less serious matters.

74. In the Claimant's cross-examination one of the reasons she gave for why the matter is not mentioned in her witness statement was because it did not occur on a regular basis, which of itself is inconsistent with the way that the issue is framed for determination by the Tribunal.

75. Accordingly, on balance, the Tribunal comfortably concludes that this allegation is simply not made out on the facts.

76. With regard to the allegation stabbing the Claimant's right hand with a pen on 10 February 2015, Mr Shaida accepts in his evidence that he was joking around with the Claimant, picked up her Biro and gently tapped her hand leaving an ink mark. He contends that this was a light tap and was not an assault or an attack of any kind. He states that the Claimant simply pointed out the mark on her hand and had not screamed as alleged.

77. Ms Caiado stated in her witness statement that Mr Shaida "stabbed" the Claimant in her hand with a pen, the Claimant screamed out and after the event showed Ms Caiado her hand and "it looked quite bad". In her oral evidence to the Tribunal Ms Caiado stated that there was "a red spot with blood".

78. In contemporaneous interviews given by Ms Caiado she stated that Mr Shaida "poked" the Claimant with a pen and does not mention seeing any wound. In her written statement at page 181 of the bundle dated 12 June 2015, Ms Caiado says: "I did not say anything as I was busy with my work as I was going to leave for the day". In Ms Caiado's further written statement on 9 July 2015, she does not expand upon that account and in the grievance investigation interview on 16 July 2015 she again refers to Mr Shaida as having "poked Paravash with a pen". There is no mention of any wound or that "it looked quite bad"

79. The Claimant's evidence to the Tribunal was that the incident amounted to "an attack" where Mr Shaida "grabbed my right hand and stabbed it twice with a pen". The Claimant argued that the her skin was cut and bleeding and stated "the cut itself was circular in shape between 0.5 and 0.7 cm in size".

The Claimant also stated that: "Felicity [Ms Caiado] was attentive towards me".

80. The Tribunal concludes after considering all of the evidence that the accounts of the Claimant and Ms Caiado are materially and irreconcilably inconsistent. The Tribunal also records that Ms Caiado's evidence to the Tribunal lacked general credibility.

81. The Claimant's account appears to the Tribunal to be overly exaggerated and the Tribunal considers that Mr Shaida's evidence is consistent with the tenor of the evidence that he and the Claimant had an amicable and generally playful working relationship.

82. Accordingly, the Tribunal concludes the event was not as alleged by the Claimant. The Tribunal concludes that even if prodding the Claimant's hand with a pen leaving an ink mark can be described as unwanted conduct and related to the Claimant's sex (in the circumstances it cannot be described as being of a sexual nature), it was not at a level that had the purpose or effect of creating a prohibitive environment.

83. The Tribunal has stepped back and also considered the complaints cumulatively set within the context of the broader circumstances.

84. The Tribunal concludes that the evidence received paints a picture of a good working relationship between the Claimant and Mr Shaida that was reciprocally good-natured and playful.

85. The surrounding evidence suggests, for example, that the Claimant had received a neck massage from Mr Shaida on one occasion. The Claimant says that she reluctantly gave into pestering from Mr Shaida, but that was not corroborated to any extent in evidence from Ms Caiado who sat close to both participants.

86. It is also recorded during the grievance investigation (page 240 of the bundle) that another employee, Mr Andrew Herbert, recalled that the Claimant herself: "asked on several occasions for Mr Shaida to massage her neck and shoulders as she had a headache and could not recall her objecting on any occasion". The Tribunal has heard no evidence to suggest any potential bias or misunderstanding by Mr Herbert.

87. Also, the Tribunal heard a good deal of evidence regarding the Claimant giving Mr Shaida a lift home in his car and events that were alleged to have ocurred. However, the dates provided by the Claimant and Ms Caiado were materially inconsistent, which is particularly relevant as the Claimant also gave Ms Caiado lifts home during the periods in which some of these alleged events ocurred.

88. There was a suggestion, although no conclusive evidence, that at some of the material times the Claimant was in fact travelling to and from work in his own vehicle.

89. Tribunal observes and concludes that these were matters only raised by the Claimant after the Bahrain incident at the start of 2015.

90. The Claimant argued that because she was off work through sickness she was not informed about the Bahrain allegation until August. However, in her grievance letter dated 05 June 2015, the Claimant stated that she says received in March the letters referring to the allegation. In the grievance meeting in June 2015 the Claimant's representative said that they were not there to talk about it. Both of these points are fatal to the Claimant's argument that she lacked knowledge earlier than August. The Tribunal concludes that the Claimant knew in February and certainly by March. The Tribunal also concludes that the Claimant is likely to have known at the time of the incident that there would be some repercussions.

91. Accordingly, even when put into overall context and looked at cumulatively the Tribunal concludes that the Claimant did not receive unwanted conduct relating to her sex, or of a sexual nature, that had the purpose or effect of creating a prohibited environment.

92. The Tribunal unanimously concludes that the Claimant's evidence and allegations regarding sex harassment very strongly appear to be motivated principally to deflect attention from the potential disciplinary matters arising from the Bahrain incident, which is addressed below in relation to the unfair dismissal claim. Mr Shaida stated that he was being used as "a pawn in a barter game". The evidence received by the Tribunal appears to support that view. The Claimant's allegations could have cost Mr Shaida his employment and as was clear from his credible witness evidence, it has caused him a good deal of personal stress.

93. With regard to the complaint of direct discrimination that the Claimant was replaced by a male colleague, this matter was not advanced in evidence. Indeed no evidence was given on this issue at all. The Claimant was on sick leave from 16 Feb 2015 until 14 August 2015 and the terms of the Respondent's Response at paragraph 78 appears to answer the issue in the absence of any evidence being adduced by the Claimant. The Claimant has not discharged her burden of proof.

94. Further, the issue is out of time and the Tribunal concludes that it is not just and equitable to extend time. The Claimant was assisted by her trade union at all material times, even prior to her grievance letter; she was aware of the nature of the claim; and no evidence was provided on any impediment to the Claimant in presenting her claim on time. The balance of prejudice tips in favour of the Respondent.

95. The victimisation claim is based on an alleged protected act of the Claimant indicating that she "intended to raise a grievance against her colleague Mr Shaida contrary to the Equality Act 2010".

96. The Tribunal has been taken to page 140 the bundle which contains an email from the Claimant to Mr Stepniak dated 13 February 2015 which states: "As per our yesterday's meeting held in your office and you asked me if I would like to take further my grievance to HR regarding the physical abuse which I sustained in the office on Tuesday, 10 February 2015. I know at the time you asked me and at the spur the moment I said NO. I would like to give a good thought about it and will let you know". The Tribunal concludes from that email and the surrounding evidence that the Claimant did not indicate that she intended to raise a grievance during the meeting with Mr Stepniak on 12 February 2015.

97. There is cross-reference in that email to physical abuse at the meeting on 12 February, but having considered all the evidence including that from the Claimant herself, the allegation was of a "physical attack". That is confirmed in evidence by Mr Stepniak, in evidence by Mr Shaida and was also accepted by the Claimant as being the allegation made by her.

98. Therefore, the Tribunal concludes that the cross-reference to the physical attack was not anything done under the Equality Act 2010 because there is no mention of that alleged "physical attack" being an act of sex discrimination or sex harassment or in any way related to the Claimant's gender. The assessment has to be made on the facts at the time.

99. It is notable that at that meeting the Claimant was sufficiently assertive to use comments relating to Mr AlGaoud as "treating her like a slave". Accordingly the Tribunal concludes that had the Claimant considered that the "physical attack" had any sex discrimination or sex harassment angle she would have said so that time.

100. It is also appropriate to put this matter into the context that the Claimant herself did not make any express mention any allegation of "sexual harassment" until it was raised by her trade union representative at the grievance appeal meeting on 17 August 2015, some six months later.

101. There is an indirect reference to potential sex discrimination in the grievance meeting on 19 June 2015 at the top of page 196. However, the Tribunal notes that the Claimant's grievance appeal letter dated 03 August 2015, which is four pages of typed script, raises potential *race* discrimination matters, but contains no allegation of sex discrimination.

102. Accordingly, the Tribunal concludes that the Claimant did not raise a protected act as argued in the list of issues.

103. Further, the Tribunal concludes that the alleged unfavourable treatment of subjecting the Claimant to the Respondent's disciplinary procedures and dismissing her were not influenced by any indication that the Claimant intended to raise a grievance against Mr Shaida.

104. Mr AlGaoud had raised the confidentiality matter and the Claimant's continuance under the Gulf Air contract before the date the Claimant alleges

she made her protected act. The Respondent had also indicted through Ms Chuter that it may amount to a disciplinary matter.

105. As confirmed below, the Tribunal concludes that the confidentiality issue had not been resolved and/or left in abeyance and pursued later once the Claimant had raised her complaints against Mr Shaida as alleged.

106. The Tribunal unanimously concludes in all the circumstances that the disciplinary procedure and dismissal were genuinely decided upon because Mr AlGaoud on behalf of Gulf Air wanted the Claimant to be removed from the Gulf Air contract in accordance with the contractual agreement between Gulf Air and the Respondent. Also, as considered in the alternative, the Respondent genuinely believed in the Claimant's misconduct.

107. Therefore, the victimisation claim is unsuccessful.

108. With regard to the unfair dismissal claim, by way of background fact, on 02 February 2015 Mr AlGaoud phoned Mr Stepniak to inform him that during a business meeting in Bahrain the Claimant had divulged confidential information about a special deal he had done with one client to two of Mr AlGaoud's other clients who had not received the benefit of that favourable deal. It is not in dispute that Ms AlGaoud showed his serious displeasure at the time of the incident.

109. The following day Mr Stepniak and Ms Chuter met with the Claimant to discuss a flexible working request she had made earlier. It was explained to the Claimant why the request would be difficult for the Respondent from a business perspective and alternatives were discussed.

110. The next day Mr Stepniak received another phone call from Mr AlGaoud, who was back from Bahrain and wanted to raise a number of issues that included the Claimant having spoken to him after the flexible working meeting and said that since the Respondent was not prepared to be flexible she was going to leave precisely at 4.30pm, regardless of whether any work remained to be done.

111. On 9 February 2015 Mr AlGaoud informed Mr Stepniak that he wanted to put his concerns in writing.

112. Mr Stepniak took advice from Ms Chuter by e-mail of the same date (page 132 of the bundle) and she replied by e-mail dated 10 February 2015 (page 131 of the bundle) stating that she would address the Claimant's flexible working request as a separate issue and suggested that Mr Stepniak hold a meeting with the Claimant: "regarding her unacceptable conduct (discussing issue with client re working to rule and lack of flexibility etc) and if what she does attracts more complaints she will leave you with no alternative but to deal with any future conduct or performance issues via the formal disciplinary procedure. At this stage we do not intend to give a verbal warning but we do need to make it clear to her that if her behaviour does not improve it will lead to a disciplinary. Depending how strongly you think Rashid feels about the

incident in Bahrain you can incorporate this as part of your meeting or if you think Rashid feels it is more serious it can be addressed separately as a formal discipline issue (invite to formal meeting) and a verbal warning given".

113. The Claimant was informed by letter dated 09 February 2015 from Ms Chuter that her request for flexible working had been declined. The rationale for that decision was set out clearly in the letter and a possible alternative was suggested.

114. Mr Stepniak held a meeting with the Claimant on 12 February 2015 and his account at that meeting was sent in an email to Ms Chuter (see page 135 to 136 of the bundle). The Tribunal has noted the content of that email, but will not replicate it in full in these reasons.

115. On 12 February 2015 Mr AlGaoud sent an e-mail to the CEO's of the Respondent setting out complaints he had regarding the Claimant including the Claimant's alleged breach of "very confidential information" and stating "Could you kindly take these concerns on board and as per our contract point 12.3 we do reserve the right to request a replacement of personnel if this matter cannot be resolved in the best interests of GF and Aviareps". A reply was given that the matter would be investigated.

116. The Tribunal finds as fact that there was a further meeting between Mr Stepniak and the Claimant on 13 February 2015 which is confirmed in an email from him to Ms Chuter of the same date and under the subject heading "Follow-up meeting with Parivash Kiani". Mr Stepniak informed the Claimant that the Respondent was in receipt of an email from Mr AlGaoud expressing concern and dissatisfaction with the Claimant and that the Respondent was "in the process of investigation before next steps are taken" and "I did let her know that we will return to this topic at a later occasion". The Tribunal rejects the Claimant's contention that this meeting did not happen and by implication that the e-mail by Mr Stepniak was either false or referring the meeting on 12 February 2015.

117. The Claimant was absent from work through sickness from 14 February 2015.

118. By an e-mail dated 02 March 2015 Mr AlGoud again wrote to the Respondent's CEO's and highlighted confirmation he had received regarding the Claimant's alleged breach of confidentiality and the sensitive position in which he had been placed regarding a customer now refusing to sign a new deal. The e-mail states: "Hence I respectfully ask as per out agreement Clause 12.3 for Paraivash to be removed from the Gulf Air account with immediate effect as we have no confidence in working with her and we would constantly need to worry about what she tells our clients". The reply was that the request was noted, the Claimant was on sick leave and an investigation would be conducted when she returned to the office.

119. An e-mail from Ms Chuter to the Claimant dated 16 March 2015 confirmed the Claimant's anticipated return to work from sickness and that the confidentiality matters would then need to be discussed.

120. Ms Chuter wrote the Claimant a letter dated 27 March 2015, which confirmed that a meeting was to be held on 01 April 2015 and the reasons for holding that meeting were to discuss the Claimant's absence, state of health and "we will also need to revisit the issues that Bogdan had started to discuss with you on 12 and 13 February regarding confidentiality as we do need to continue with our investigation and we do want to give you the opportunity to give your side". The letter included a summary of the breach of confidentiality allegation.

121. However, the Claimant notified the Respondent that she would "not be able to attend any kind of meeting in the near future" until she had recovered (page 160 of the bundle).

122. The Claimant lodged a grievance with the Respondent by a letter dated 05 June 2015 (pages 176 to 177 of the bundle).

123. Mr AlGaoud provided a statement to the Respondent dated 17 June 2015 confirming his request for the Claimant to be removed from the Gulf Air account.

124. The Claimant's grievance progressed through the Respondent's grievance process and was ultimately unsuccessful. The Claimant was able to attend at the grievance meeting on 19 June 2015 and the appeal meeting on 17 August 2015.

125. The Tribunal concludes in light of the evidence that the confidentiality issue had not been resolved and left in abeyance as suggested by the Claimant. Also, the Claimant's argument was not correct that the matter had been left without action and then pursued later, particularly after the Claimant had raised her complaints against Mr Shaida.

126. By a letter dated 20 August 2015 from Ms Maureen Chuter, the Claimant was informed that Mr AlGaoud had instructed the Respondent to remove the Claimant from the Gulf Air account and that "the Company is still in a position where it needs to investigate the allegation that [the Claimant] divulged confidential commercial information from one client to another".

127. The Claimant was provided with the statement from Mr AlGaoud and was requested to provide a statement in reply.

128. The account by Mr AlGaoud raises two incidents of breach of confidentiality and the Tribunal finds that the Claimant was fully aware at this stage what the allegations comprised.

129. The Claimant submitted a witness statement in reply dated 31 August 2015, which is at pages 279 to 280 in the bundle. Mr AlGaoud was provided with a

copy of that witness statement and made further comments in a statement dated 17 September 2015 at page 281 of the bundle.

130. The Respondent also took a statement from Ms Wafa Hijazi, at pages 284 to 285, dated 17 September 2015; and from Mr Stepniak by an email dated 01 September 2015, at pages 302 to 303 of the bundle.

131. By a letter dated 22 September 2015 the Claimant was invited to a formal disciplinary hearing and that letter states: "I refer to the incidents that took place during a business trip to Bahrain in January 2015 and a request from Rashid AlGaoud to remove you from the Gulf Air account. Due to the nature this matter, I feel it is appropriate for us to discuss the issue formally."

132. The Claimant was invited to a formal disciplinary hearing on 24 September 2015 and the letter from Ms Chuter states: "The reason for a disciplinary hearing is to consider a case of misconduct against you and a request for you to be removed from the Gulf Air account. You should be aware if we reach a conclusion that the Company has a reasonable belief that you did disclose confidential information to third parties as alleged we may also have to consider if a disclosure of this nature in the circumstances would amount to gross misconduct. The issues we would consider to reach such a decision will be as follows: The breach confidentiality; Failure to follow management instruction; Wilful negligence; Negligence; A serious error of judgement".

133. The details of the disclosure of information and its effect are set out in the letter. The Respondent enclosed with the letter the statements of Mr AlGaoud and Ms Hijazi and the email from Mr Stepniak.

134. The Claimant communicated with her trade union representative who confirmed he was available to attend at the disciplinary hearing.

135. The hearing went ahead on 24 September 2015 conducted by Ms Chuter. Although only two days' notice had been given of the hearing, neither the Claimant nor her representative made any complaint at the meeting or made any request for a postponement.

136. The Claimant was represented at the hearing and had a full opportunity to put her case. The Claimant confirmed at the conclusion of the hearing that she had nothing further to say and asked for the Respondent to speak to Mr AlGaoud to tell him to reconsider his decision due to the Claimant's loyal long service with the Respondent organisation.

137. That request was put to Mr AlGaoud in the precise form it was stated in the disciplinary hearing. It was rejected by him.

138. The Claimant received confirmation of the termination of her employment by letter dated 7 October 2015 at pages 325 to 332 of the bundle.

139. It is a detailed letter that confirms the issues, the findings, gives a timeline of communication, confirms the considerations, the disciplinary investigation, sets out the conclusions and the final decision.

140. It was confirmed in that letter that the request by Gulf Air for the Claimant to be removed from its account was reasonable and that the Claimant committed a breach of confidentiality which amounted to gross misconduct.

141. The letter states that: "This being the case, we need to consider whether your employment should be terminated for gross misconduct and/or some other substantial reason".

142. The letter confirms: "The reason for termination is Some Other Substantial Reason, that is to say, that at the behest of Gulf Air we must remove you from working on the account. We do consider this request to be reasonable given that the client's confidential information was disclosed to an agent".

143. It was confirmed that Mr AlGaoud had been approached to review the decision; that the Respondent had no other vacancies available; had taken into account the Claimant's period of service and work record; and confirmed that had the client revised its decision the Respondent still believed that it would have no alternative but to terminate Claimant's employment: "Even taking into account your long service, the nature of the breaches, combined with an apparent lack of appreciation on your part that there have been any breaches at all, mean the Company cannot have trust and confidence in you to keep information confidential when representing Aviareps or any other professional associates' business interests and we do not consider that a lesser sanction would have the potential to improve the situation".

144. It was confirmed that the Claimant was dismissed on notice and was provided with a right of appeal.

145. The Claimant appealed against the decision by letter dated 14th of October 2015, at pages 333 to 334 of the bundle.

146. The appeal hearing took place on 12 November 2015 conducted by Mr Robert Keysselitz, Managing Director assisted by Ms Dinah Reagan an independent HR Consultant. Again the Claimant was represented by her trade union representative. The Claimant was given a full opportunity to put her points of appeal to the appeal hearing.

147. The Claimant received the outcome of her appeal by a letter dated 23 November 2015 at pages 345 2348 of the bundle. The letter is detailed and fully addressed the appeal points raised.

148. The Claimant's appeal was unsuccessful and the dismissal upheld.

149. The Respondent's Employee Handbook contains a section relating to "Confidentiality" and provides: "During the course of your employment with Aviareps you will have access to confidential information. (Examples include

information relating to existing and prospective clients and customers, pricing and sales figures, profit margins, security arrangements, and contact details for colleagues and associates. This list is not exhaustive.) To protect the business of Aviareps you are expressly forbidden, either during or after your employment, to disclose any confidential information relating to Aviareps either verbally or in writing to any person or company, or make use of any such information, without the prior consent of a Director of Aviareps".

150. The Tribunal concludes that the Respondent genuinely believed the reason for dismissal. It was in response to the request by Mr AlGaoud of Gulf Air, the Respondent's principal customer. The Respondent genuinely pressed Mr AlGaoud to reconsider his request, but to no avail. The Tribunal finds that this was the reason for dismissal and is permissible under the statutory provisions as some other substantial reason of a kind such as to justify the dismissal of the Claimant holding the position which she held.

151. With regard to the Claimant's relationship with Mr AlGaoud, there were no material background events relied upon by the Claimant that occurred prior to the alleged breach of confidentiality. The Claimant had not raised the 4.30pm finish issue at that stage and was considered to be a good worker. Therefore, there was no reason put to the Tribunal why Mr AlGaoud would deliberately make up the allegation, or have some other alternative motivation such to make the Respondent's belief in the request unreasonable.

152. Having regard to all the evidence and information before the Respondent the Tribunal concludes that it was objectively reasonable for the Respondent to dismiss the Claimant upon the request by Mr AlGaoud that the Claimant be removed from the Gulf Air account.

153. The Respondent had two statements from Mr AlGaoud confirming his request for the removal of the Claimant from the Gulf Air account. When Mr AlGaoud raised his initial concerns with the Respondent's CEOs and referred to the capability under the contractual arrangements to have the Claimant removed from the contract and then requesting her to be removed, the Respondent's CEOs did not immediately acquiesce to the request and stated that it would be investigated. The Respondent then queried the decision with Mr AlGaoud on two occasions. The Respondent engaged in a reasonable process with the Claimant, informing her of the position and holding a meeting in which it was discussed and at which the Claimant was represented by her trade union. The mitigation points raised by the Claimant in that meeting were put to Mr AlGaoud as the Claimant had requested and in a manner that accurately expressed her views.

154. Given the Respondent's strong reliance upon the business of Gulf Air, it being by far the Respondent's best customer, the request of Mr AlGaoud and the pursuance of that request despite the Respondent's appeals to him for it to be revised, it was within the range of reasonable responses for the Respondent ultimately to act upon that request.

155. The Tribunal accepts the Respondent's evidence that there were no other vacancies available for the Claimant. The Claimant did not produce any evidence to rebut the Respondent's contention.

156. Accordingly, the Tribunal concludes that the Respondent took reasonable steps to avoid or mitigate any injustice brought about by the stance of Mr AlGaoud and Gulf Air. The Respondent's CEOs did not take any immediate knee-jerk decision, the Respondent made reasonable and genuine efforts to persuade Mr AlGaoud to change his mind and gave reasonable consideration to possible alternative employment. In those circumstances the Tribunal concludes that the Respondent cannot be held to have acted unreasonably in bowing to the demand of its best customer.

157. Therefore, the Tribunal concludes overall that the decision to dismiss fell within the range of reasonable responses.

158. Further, the Tribunal concludes that the Respondent had a reasonable belief in the Claimant's conduct in the event that the request by Mr AlGaoud for the Claimant's removal had been rescinded and that it was within range of reasonable responses for the Respondent to categorise the matter as gross misconduct.

159. The Tribunal concludes that the Respondent genuinely believed the misconduct.

160. The Tribunal also concludes that the process adopted was reasonable. The Claimant was invited to a meeting, the allegations were set out in advance; the Claimant had advance sight of the relevant documents; had the right to be accompanied, participated fully in the meeting; received a detailed outcome letter; given the right of appeal; did appeal, an appeal hearing was held, the Claimant was accompanied; had the opportunity to participate fully and received a detailed outcome letter.

161. In all the circumstances the Tribunal concludes that it was not outside the range of reasonable responses for Ms Chuter to conduct the disciplinary hearing. The confidentiality issues had not been considered in detail earlier by Ms Chuter whose involvement was in a general advisory capacity. Further, the appeal was considered by Mr Keysselitz who had not been involved in the detail of the disciplinary matters. When considered overall the Tribunal concludes that their involvement in the dismissal matters were not outside the range of reasonable responses.

162. The Tribunal unanimously concludes that the reasoning contained in the Claimant's dismissal letter by Ms Chuter for her belief in the Claimant's conduct was within the range of reasonable responses on the information reasonably available to her.

163. There were some aspects where a decision had to be made on a balance of probability in respect of whose version of events was to be preferred, but the decisions made were not unreasonable.

164. The Respondent had the witness statement of Ms Wafa Hijazi contained in an e-mail dated 17 September 2015 and also the statement from Mr AlGaoud. Ms Hijazi was more senior to Mr AlGaoud and the Respondent had no reason to consider that her statement would be inaccurate. Ms Hijazi's statement contradicts the Claimant's account of events. Therefore, it was open to the Respondent to reach the conclusions expressed in the dismissal letter and upheld on appeal.

165. The Tribunal concludes on the evidence that was available to Ms Chuter she made decisions that were more likely to have been correct. The conclusions reached by her under that heading in the dismissal letter at the foot of page 329 were comfortably within the range of reasonable responses.

166. Upon the Respondent's consideration of the mitigating circumstances, particularly the Claimant's long service, the Tribunal concludes that the sanction of dismissal was within the range of reasonable responses.

167. The Respondent weighed the Claimant's service, its findings relating to the nature of the breaches and the Claimant's apparent lack of appreciation of them, and the trust and confidence required in the Claimant to maintain information confidential in the future and considered that a lesser sanction was not appropriate.

168. The Tribunal concludes that there may have been alternative disciplinary options reasonably available to the Respondent in the circumstances, such a final written warning, but it was objectively reasonable for the Respondent to conclude that had the Claimant not been dismissed because of the request from a third party, that she would have been dismissed on conduct grounds.

169. The Tribunal therefore finds that all the Claimant's clams are unsuccessful.

Employment Judge Freer
Date: 08 June 2017