EMPLOYMENT TRIBUNALS

Claimant: Miss L Vickers

Respondents: 1. Hill Biscuits Ltd
2. Mr D Ravenscroft

HELD AT: Manchester **ON:** 15-18 May 2017

BEFORE: Employment Judge T Ryan
Ms L Atkinson
Ms V Worthington

REPRESENTATION:

Claimant: Mrs K Muhammed, Citizens Advice Adviser
Respondents: Miss S Wheeler, Solicitor

JUDGMENT having been sent to the parties on 25 May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented to the Tribunal on 20 December 2016 the claimant alleged sexual harassment, race discrimination and victimisation.

2. By further information provided in the form of a document attached to a handwritten copy of the claim form received by the Tribunal on 22 December 2016 the claimant set out more details of that claim.

3. The claimant submitted an ACAS certificate with her claim, identifying the first respondent, Hill Biscuits Ltd, as the respondent. At the outset of this hearing it was confirmed that no ACAS certificate had been sought or obtained in relation to the second respondent. This point had not been noticed earlier by the Tribunal or

by the respondent. In consequence the parties agreed that the second respondent had to be dismissed from the proceedings.

4. For that reason, references in this judgment to the respondent are to Hill Biscuits Ltd. Where necessary we refer to documents in the bundle provided by the parties by page number.

5. The respondent resisted the claimant's complaints. A preliminary hearing for case management was listed before me and took place on 21 February 2017. The allegations of harassment and direct discrimination were identified there. Due to an oversight the allegation of victimisation was not separately identified. On the basis of the submissions of the respondent's solicitor at that time it was thought that all of the allegations of harassment and discrimination might be out of time and a further preliminary hearing was arranged.

6. That preliminary hearing took place before Employment Judge Sherratt on 27 March 2017 and by a judgment sent to the parties on 30 March 2017 the Tribunal allowed the complaints referred to as item 16 in paragraph 3.1.1 and item 3.3.1 to proceed to a full hearing. In addition Employment Judge Sherratt permitted the claimant to add a claim of constructive unfair dismissal and gave directions for further particulars of the grounds of that claim and for the response. In addition in the course of the conduct of this hearing the Tribunal noted that the claims of victimisation, as to which no issue of time arose, had, by oversight, not been included in the List of Issues and the respondent agreed that those allegations should be included.

Issues

7. In those circumstances, the issues that the Tribunal had to decide were as follows:

7.1. Whether the respondent engaged in unwanted conduct in relation to sex or race as set out in paragraph 16 of the claimant's additional grievances in a letter to Mary O'Donnell dated 24 August 2016, namely:

7.1.1. "It was my birthday on 19 February 2015 and I was 40 years old. Debbie at work bought a birthday card for me and had a collection. Mr Ravenscroft wrote inside the card 'all the best on your 50th Dave Rave' and overleaf on the inside of the card he wrote 'Lisa it's your birthday, I bet you're thrilled to bits, but not as much as I would be if I could feel your TxxS!!!'" It was not in dispute that that conduct related to the protected characteristic of sex.

7.1.2. The second allegation or issue was that set out at 3.3.1 of the case management summary, namely whether Nila Mistry told the claimant to ask Asian and/or Polish workers to speak English, yet when the claimant did as instructed she was taken to task by Ms Mistry and/or Mr Walmsley, and whether they conduct related to the claimant's protected characteristic of race.

7.1.3. The Tribunal also had to consider the allegation of sexual harassment contained in paragraph 16 of the claimant's letter of grievance that on

Monday 1 or Tuesday 2 August 2016 when the claimant was outside the work gate tying her shoes and bent over Mr Ravenscroft said to her, "Look at the fucking arse on that". She turned around and saw him smiling and said, "behave Dave". It was the claimant's case that that was the last incident on which she was sexually harassed by DR.

7.1.4. Whether the conduct had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and if not whether it had the effect of violating the claimant's dignity or creating such an environment having regard to the claimant's perception, the circumstances of the case and whether it was reasonable for the conduct to have that effect.

7.2. The allegation of victimisation which the Tribunal had to decide was set out in paragraphs 30 and 32 of the particulars of claim, namely whether the final written warning issued to the claimant was a punishment for raising a grievance concerning sexual harassment, and the claimant suggesting that issues concerning race and language which she raised may have played a part in being given a final written warning.

7.3. Finally, the claimant having resigned in March 2017 alleged that that amounted to a dismissal which was unfair invoking the concept of constructive dismissal. In that regard the claimant wrote to the Tribunal on 30 March 2017 in accordance with Employment Judge Sherratt's order setting out the reasons why she alleges that she was dismissed and her dismissal was unfair (57). At the outset of the hearing Ms Muhammed confirmed that in effect the claimant was alleging that the respondent was in breach of the fundamental implied term of trust and confidence.

Evidence

8. In determining this case the Tribunal heard evidence from the claimant herself. She called as witnesses Ms Deborah Dooley and Jacqueline Parker. The respondent called evidence from Mr David Ravenscroft, Sales Administration Manager; Mr Glyn Matthews, Director; Ms Nila Mistry, Supervisor; Mr Mark Bamber, Manufacturing Director; and Mr Martin Walmsley, Production Manager. The respondent had intended to call evidence from Ms Joanne Kennedy, a QA Sampler, but she was not fit to attend the Tribunal. The Tribunal read her witness statement, reminding itself that it should attach such weight as was appropriate to that evidence bearing in mind Ms Kennedy had not attended for cross examination.

9. The Tribunal was provided with a bundle of documents, a cast list and a chronology, some additional photographs showing the outside of the factory relevant to the allegation of sexual harassment, and both the claimant and the respondent made submissions at the conclusion of the evidence by reference to written outlines.

Findings of Fact

10. The respondent operates, at Smith Street, Ashton-under-Lyne, a factory making, packing and wrapping biscuits. It employs between 300-400 people. According to the evidence of Ms Mistry, who is a long-serving employee, the factory employs both men and women and approximately one third are white British employees, a third are Asian and a third are Polish. Of the Asians the largest group is Indian with a smaller proportion, perhaps 10% of the workforce, being Pakistani and Muslim.

11. The claimant had previously been employed by the respondent. She had left the employment but joined the respondent again in September 2010 as a production operator working in several departments and on different shifts. The claimant's two witnesses were also production operators for the respondent.

12. The claimant was born on 19 February 1975 and thus in February 2015 celebrated her 40th birthday. Although the claimant referred to 2014 as that birthday, it was a birthday card given to her on her 40th birthday that was the subject of the allegation against Mr Ravenscroft ("DR"). There was no dispute that DR had written on the claimant's birthday card the words which have obvious sexual connotation referred to in the issues set out above.

13. In May/June 2015 the claimant reported an incident in which she saw a colleague being assaulted and it was her case that she felt she had been treated badly by managers since making that report on behalf of the colleague. The claimant reported seeing DR on the shop floor virtually every day when he was making his rounds, and, according to the grievance made by the claimant subsequently, he would say such things as, "How big are your tits?", "Can I put my head between them?", "I bet your husband enjoys them" and "If you go out for a drink would you let me buy you one? Would you let me do anything else?".

14. DR was described by the claimant as a person who stood outside the work gate in the afternoon having a cigarette, watching females and making noises like "Kwour".

15. The claimant's case was that she felt she could not complain about that because DR was a manager and when she reported the contents of the birthday card to her partner he maintained that it was not acceptable. The claimant described herself as being upset and her partner being fed up seeing her coming home crying about things at work. When the claimant asked to see Ms O'Donnell, the HR Manager, she was told she was not in. The claimant described herself as constantly bending over to hide her breasts as she did not want them to stick out and that DR made her feel self conscious of her chest and she tried to hide her breasts.

16. In the course of a subsequent investigation Ms Kennedy reported hearing DR say something to the claimant about "big boobs" although she could not remember exactly what was said. When he was subsequently asked about that at a disciplinary hearing DR admitted the allegation, saying that. He said he could remember very clearly what he said. He said, "It was to Lisa and it was one day when she [Lisa] came out of work in a right state, going at it saying something like 'I'm fucking sick of it, fucking had enough, fucking sick of this place' and I said to her, 'Bloody hell Lisa you need to be careful with those boobs,

you'll have someone's eye out'". He continued in answer to Mr Matthews' questions saying, "when I said it I immediately thought I shouldn't of [sic] but as Joanne said, Lisa laughed it off". He described the claimant as a loud and bawdy person who often said things of an adult nature to people.

17. The claimant also gave evidence in relation to DR that during the week before she was suspended, in other words in early August 2016, her 17 year old daughter, Courtney, came to meet her after work. The claimant went outside the work gate and DR appeared to be talking to her daughter. She said that she spoke to DR saying, "I hope you're not talking to her like you talk to me because I won't put up with it and her dad definitely fucking won't", and according to the claimant DR started laughing and she said to a work colleague that she was going to report DR.

18. In paragraph 46 of her witness statement the claimant gave further details, saying that she asked her daughter, "Is he talking dirty to you?" to which her daughter replied, "No mum". She said that DR then asked her who the girl was and she replied, "My daughter". The claimant said that DR pulled a face and made a gesture which his lips, saying "Ooh, you can tell" whilst looking at her daughter's breasts. The claimant confronted DR saying, "Oi, I might have to put up with it in there but out here I won't and her dad definitely fucking won't".

19. The claimant also reported in her grievance and gave evidence that on 1 or 2 August 2016 as her shift came to an end she left the works without having tied her shoes. As demonstrated in the photograph she stopped immediately outside the factory gate when she heard DR make the remark, "Look at the fucking arse on that".

20. So far as that incident is concerned, when the disciplinary hearing was conducted DR denied that that was said. However, in his witness statement he stated that he was present. He had seen the claimant bend over, tying her shoelaces or fastening her shoes, and that another member of staff, Stephen Spooner, who was down the entry leading into the factory, stuck his head around a corner of a wall and made that remark about the claimant. The claimant turned round and saw him, DR, standing nearby whereupon he put his hands up and said it was not him who had said those words.

21. After the claimant raised a formal grievance the allegations of harassment were investigated and a number of interviews were conducted by Ms O'Donnell, the HR Manager. Each of those who were interviewed was invited to say whether they were agreeable to the notes of the interview being disclosed or not.

22. The first person to be interviewed, Ms Barker, did not agree but nonetheless the record of her interview was put before the Tribunal. Ms Barker, who is recorded as being upset at being questioned, said that DR had made inappropriate comments of a sexual nature. When it was asked what he said she is recorded as saying, "He sometimes comes up and rubs up against me and says sexual things", that he had slapped her bottom whilst in work but "it was just a bit of fun between friends" and she had not reported it. She said that everybody had banter with him, including Lisa herself. She said DR spoke to everyone and was friendly to everyone.

23. Joanne Kennedy recorded the comment about "big boobs" and she said that Lisa "just laughed it off". She said that she had not remembered DR saying anything else and he had definitely not made inappropriate comments of a sexual nature to her.

24. Monika Konopko said that DR spoke to her but she had never heard him saying anything sexual to anyone but he joked with her saying, "you look very nice, gorgeous, very sexy" or "have a nice day, sexy". She described it as "a joke" and that she had not reported it. She described him as always being nice and because it was a joke she would never report him because she was doing it too.

25. Amanda Bradshaw said that he had not made inappropriate comments but that he used to come down to the factory everyday and "give us a peck on the cheek but that was stopped ages ago". She described DR as a "nice, genuine bloke".

26. Maureen Atkinson said that she had never heard DR say anything that was sexual harassment, but that he had made inappropriate comments "as a laughing gesture, yes as a joke". She described it as "like a kiss on the cheek" and he said things like "how's my sexy girl then" and that he did it in front of the office staff upstairs and it was just a laugh. She considered him part of her family.

27. Deborah Dooley, who supported the claimant's case, reported that on one day outside of work DR had said to her, "Debbie, getting a bit of a camel toe there" and that she had replied it was none of his business and she should not be looking. He had said to the claimant, "something about how big her arse is when she was bending down to tie her laces" and that the claimant's response was to tell him to "shut up" and that she was not happy about it. With regard to the question about him making inappropriate comments she said that he had done this inside work. He would mention Lisa's "boobs" and say things like "wanting to put his head in them". She [Lisa] described him as being a "Benny Hill" and Ms Dooley agreed. She said "he was very touchy feely with everyone. He likes to have a laugh with all the girls. Some are ok with it, some are not." She said that Lisa told DR to "bugger off". She said that she had seen him "slap everyone's arse...he goes up to them, whispers in their ears…he's too friendly with staff for someone in his position". She said that some staff did not mind and some got offended. She described him as an "alright manager" but "overstepping the mark".

28. In consequence of those enquiries the respondent wrote to DR on 27 September 2016 inviting him to a disciplinary hearing. The charges are set out at page 167. They consisted of five allegations.

    28.1. The comments that the claimant had repoirted listed at paragraph 14 above;

    28.2. the comment allegedly made to Miss Vickers, "look at the fucking arse on that";

    28.3. the writing in the birthday card;

28.4. the comment of a sexual nature made to Deborah Dooley; and

28.5. that he had made comments of a sexual nature to other employees and made sexual gestures towards other employees.

29. DR had not been asked about these matters prior to the disciplinary hearing. A record of the disciplinary hearing appears at pages 169-174.

30. In summary, DR denied allegation 1. In relation to allegation 2 he said, “No, don’t agree with what Deborah Dooley said there”. With regard to the birthday card DR accepted that the last word implied the word “tits” and he wrote it over 2½ years ago. He said that “Lisa was not the type of person to take things lightly and if she had been offended by it she would have said so at the time.” He said he wrote it as adult humour and that was how she accepted it. He denied making the comment to Deborah Dooley and described her and the claimant as being “thick as thieves and having got their heads together to come up with it.”

31. Generally he denied speaking inappropriately to members of staff. He might say things like “hi sexy”, “hi gorgeous” but not in a sexual way. He said it was just a term and there were no sexual undertones. He was asked about the allegation made by Ms Kennedy and he then gave the answer that is recorded above, that he had said the words reported.

32. In answering the allegations DR also reported that there had been three incidents of adult things said by the claimant recently, namely that there was a conversation about someone going to an adults only club and that she shouted out to him “Have you been to the swingers club, Dave?” and he replied “No”. The next time she was in the canteen she said, “Eh Dave, I’m putting a fucking coach on to go to that swingers club, do you fancy it?” and he said, “No thanks, not my scene”, and on the last occasion he described being asked about something he called “quite disgusting” – according to DR the claimant asked if he knew what “tea-bagging” was and said “I bet you’ve done it”. He said he had replied that he knew what it meant but he had never done it.

33. He was asked by Mr Matthews whether he thought it was appropriate for a manager to speak like that and he replied, “Well, how do you respond when asked things directly? Take Monica, she’s a lovely girl, really chatty and friendly. She comes in one day looking tired and I say to her ‘gosh you look tired’ to which she goes on to tell me her boyfriend has been visiting from Poland and she’s tired because she’s been having sex all weekend”. Mr Matthews said it was deemed inappropriate for people to be involving themselves in these types of conversations. DR said he did not feel it was inappropriate to talk to people. He was not saying anything to offend. Mr Matthews pointed out there was a fine line between what some see as derogatory, that some see the term “sexy” as derogatory and demeaning and DR said he took that on board.

34. With regard to the allegation that he slapped people on the bottom, he said it was rubbish. He had never slapped anyone. He would not dream of doing it. He was asked about kissing female members of staff on the cheek. He said that he used to do it until another manager spoke to him about it. In evidence DR explained that that manager was Mr Hughes and Mr Hughes had told him he

should not do it saying that some of the others would get jealous. DR explained to us that he knew that was Mr Hughes' way of telling him it was inappropriate and that he was saying it in that way to lessen the sting of the rebuke.

35. Having considered the allegations Mr Matthews wrote to DR on 30 September 2016 giving him a first written warning. He did not uphold most of the allegations saying that he did not believe the actions amounted to gross misconduct as the definition of sexual harassment did not appear to have been met in most cases. He went on, "Nonetheless you are a manager and you did accept that you are on occasion too friendly with staff and whilst I am certain that you will change your approach accordingly from here on, I have decided that a disciplinary sanction is appropriate."

36. So far as the definition of harassment is concerned, the respondent produced (91A) an extract from their handbook dated July 2006. A single page deals with equal opportunities, sex and race discrimination. Under the heading "Aims" a number of subparagraphs are set out. In relation to harassment, paragraphs (f) and (g) provide:

> "(f) We will ensure that the working environment is one in which no worker feels under threat or intimidated because of his/her race, sex etc.
>
> (g) Disciplinary action will be taken against any employee who is found to have committed an act of unlawful discrimination. Discriminatory conduct and sexual or racial harassment will be treated as gross misconduct."

37. The policy refers to the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995.

38. Mr Matthews, a senior member of staff who gave evidence before the Tribunal, confirmed that neither he nor had anybody else, except Ms Mistry in relation to recruitment and immigration, received any training in relation to equal opportunities matters such as fairness or dignity at work; nor was he aware of the statutory definition of harassment which was set out in the Equality Act 2010. He said that he thought that if words or conduct of a sexual nature was unwanted it amounted to harassment.

39. So far as there were disputes of evidence between the claimant and DR as to his behaviour, we were satisfied on the balance of probabilities that the evidence of the claimant was to be preferred. There were two admitted acts: the writing of the birthday card and the comment reported by Joanne Kennedy about the claimant's breasts. The second of those was not in fact reported in the grievance by the claimant but a third person and DR admitted it.

40. So far as the third allegation is concerned, namely the comment made to the claimant when she was bending over, the Tribunal did not accept DR's evidence given first several months later that Mr Spooner had made that comment and he had only heard it. In the Tribunal's judgment it seemed improbable that given the circumstances DR would not have remembered that incident at the time of the disciplinary hearing with Mr Matthews. He said he was not simply an observer but had actually said, when the claimant turned and looked at him, that he had

not said it. In the Tribunal's judgment that account simply did not stand up to scrutiny. Alternatively if, as is now common ground, the remark was said, and the respondent could not dispute that a member of its staff had said it, and DR had, as he accepted, made at least one earlier comment which he himself thought was inappropriate, it is extremely unlikely that he would not have remembered it when he was taxed with it so soon after it occurred.

41. in our judgment those allegations show a sufficient pattern of behaviour that they support a finding that the other acts of harassment of which the claimant complained also occurred. We are satisfied that DR had the conversation with the claimant's daughter and made the comments about the claimant's breasts.

42. Whilst is not strictly necessary for us to go on to find whether the other allegations are made out, the specific findings we have made are consistent with those made by other staff, even those who supported in their records of interview, as we have recited, DR as being a nice person. They speak of sexualised speech or conduct, such as that described by Ms Dooley, which, even if they did not find it inappropriate, could have amounted to harassment of those who witnessed them who were female and for whom they were unwanted and considered they violated their dignity or created a prohibited environment.

43. So far as the suggestion by the respondent that this was unwanted or not unwanted by the claimant is concerned, we accept that the claimant may have spoken in bawdy terms in the workplace with DR on occasion. In our judgment comments that are made directly to or about a person who hears them and are about personal sexual attributes such as their breasts or bottoms are of a different character from general lewd banter in which people participate in the workplace from time to time. The fact that a woman engages in such banter does not mean that she will not consider personal remarks unwanted.

44. The respondent relies on the claimant not reporting this earlier as showing that the remarks were not unwanted. The claimant pointed out in her evidence that DR was a manager and that for that reason she did not feel that a complaint earlier would be substantiated. Whether the claimant was right or wrong in that, in our judgment there is no persuasive reason to doubt that the comments were unwanted.

45. We note that it was not suggested by or on behalf of the respondent that the comment outside the works in relation to the claimant's bottom was anything other than a comment that related to her sex. It was not suggested by the respondent that the comments if made would not at least have had the effect of violating the claimant's dignity or creating a humiliating or offensive environment. We accept the claimant's evidence to the effect that the remarks were offensive.

46. We consider the remainder of the allegations.

47. The claimant's first grievance was submitted to Ms O'Donnell on 27 July 2016 (93). It was to the effect that a member of staff, Kashmira, had directed offensive language at the claimant with no provocation. The claimant said that she had requested that Kashmira speak to her in English and her response was "Piss off, I don't have to speak English". According to the claimant she emphasised that

management instructed staff to speak English when required on the shop floor and Kashmira replied "My handbook says I don't have to".

48. It appears to be common ground that on that day the claimant was at work and should have been packing bourbon biscuits into the relevant part of the box. Apparently that task had not been carried out efficiently and according to Mr Walmsley, who was a relatively new employee, he himself had spent 45 minutes on the shop floor helping the staff correct the errors of packing that had been made. He was then in Ms Mistry's office when Kashmira and the claimant arrived at the door.

49. Ms Mistry accepted that she had spoken with staff on another occasion and had asked them, in line with company policy, to make sure that they speak in English to one another as set out in a memorandum to staff. Although she could not specifically remember telling the claimant that she could tell other staff to speak in English if she wanted to do so, Ms Mistry accepted that she probably had said it to her. She certainly did not dispute the claimant's evidence to this effect.

50. The account Ms Mistry gave was that Kashmira came to her office and reported the claimant for missing biscuits. The claimant then came in and started arguing with her and both women were asked to go back to the production line. Ms Mistry's account was that if the claimant interpreted that as being reprimanded it was as a result of poor performance alone.

51. Both Mr Walmsley who was present in the office and Ms Mistry denied that the claimant had raised being told to "piss off" by Kashmira and their evidence was to the effect that the only thing they did was to tell the women to go back and carry on with their work.

52. The Tribunal is prepared to accept that the claimant on one hand and Ms Mistry and Mr Walmsley on the other may have been at cross purposes. The claimant may have thought that she was making a complaint about Kashmira Solanki, and indeed had made such a complaint.

53. The claimant's case is that she was told by management on one hand that she could tell people to speak in English, and yet, when she did so, she was taken to task by Ms Mistry or Mr Walmsley. Neither Ms Mistry nor Mr Walmsley appeared to have taken the claimant to task at that point or for that reason.

54. A few days later, on 5 August 2016, Lee Clarkson, a line supervisor, was in Ms Mistry's office. The claimant came into the office and that gave rise to the incident which led to the claimant herself being disciplined. Ms Mistry's account, set out in writing on 5 August and signed on 9 August, was that Ms Vickers came in, both angry and aggressive, shouting that she needed to go home by herself, and that Wendy, another member of staff, had said she could not talk to the claimant. Significantly Wendy White did not confirm that that was what she had said to the claimant when she was subsequently interviewed by Mr Walmsley on 21 September 2016 (page 159).

55. According to Ms Mistry she said that no-one had said they could not talk. Another supervisor had separated Wendy and the claimant on an earlier occasion due to issues with horseplay and singing. This was the singing of national anthems and Rule Britannia having regard to the outcome of the Brexit vote. According to Ms Mistry she tried to tell the claimant to calm down but she would not listen and said she felt like going home. According to Ms Mistry the claimant said "it would give you lot a chance to get rid of me". The claimant denied she said that, but did agree she said she felt like going home, and agreed that she was told to get back on the job. She denied that when Ms Mistry had said that they were short staffed she had said, "Do you fucking wonder what this place is doing to them all". According to Ms Mistry, the claimant said she had put a letter in about a complaint from her solicitor about Kashmira "but nothing gets done about it". The claimant did not accept the remainder of the account as given by Ms Mistry the.

56. Mr Clarkson, who was present but not party to this, gave a statement also on 5 August 2016 (page 102) that the claimant came in and asked if she could go home. The claimant agreed that she said that. Ms Mistry asked why. The claimant said she really needed to go home. According to Mr Clarkson she said, "Because I'm so worked up I might do something that would get me fucking sacked". She said that Nila would not let her go home. He confirmed that the claimant referred to a letter put in to Ms O'Donnell, or her solicitor had, and that she had said, "Even my solicitor has told me to let me sack you. The best thing for you to do is sack me".

57. Mr Clarkson described the claimant as having a reddened face, getting irate and louder and louder with tears rolling down her cheeks. He said that she referred to the altercation she had had with Kashmira Solanki. She said, "As soon as a fucking Pole reports something to you, you act on it straight away." She went on to say, "You are the racist ones. You've got a woman at home on suspension because a Pole has made a complaint against her and she's done fuck all wrong. You wouldn't stop Indians talking with Indians or Poles dealing with Poles. Your managers are even bonking the Polish girls".

58. Ms Mistry said that she would try to phone Mary O'Donnell and see what was happening but before she could do so the claimant said, "This place fucking stinks, it sucks. It's getting right on my fucking tits. I've even got to the point where I just want to bang you one but I can't cos I'd get sacked. I'm 42 years old and you're treating me like a fucking dick. It's like being in school. I just want to go home. Go and get a sick note. I don't want to come back here until after the shutdown".

59. The claimant agreed that she did mention school and wanting to go home. She said, "I'm going home all worked up, crying and taking it out on my husband and kids. I'm not a racist person, never have been." She denied she said, "I've not done anything wrong and if I get the sack I'll be taking this place down with me".

60. Shortly after that Mr Hughes went into the office. The claimant was then downstairs on the work floor. Mr Clarkson and Ms Mistry reported the matter to Mr Hughes. A written statement from Mr Hughes (page 96) suggests that Mr

Bamber was also in the production office shortly after that and that Ms Mistry went through what had just happened again and that both he and Mr Bamber acknowledged that the claimant must be suspended. Mr Hughes went down and spoke to the claimant and after a period of time he suspended her.

61. A letter was sent to the claimant on 8 August 2016 confirming the suspension and on 24 August 2016 she raised her additional grievances (page 105) in which for the first time she made the allegations of sexual harassment against DR.

62. The company decided to investigate the grievances prior to conducting any disciplinary procedure against the claimant. For that reason there was a delay and it was not until 6 October 2016 that the claimant attended a disciplinary meeting with Mr Walmsley having been given a notice on 4 October 2016 that she was charged with using foul and abusive language to Ms Mistry, and acting in a threatening and aggressive manner towards her. The notes of the hearing are set out at pages 184-189.

63. It is right that Mr Walmsley in the course of evidence said that he was unaware of the claimant's grievances at the time. However, the Tribunal noted that at several places in the course of that hearing, together in a written statement provided by the claimant and presented to Mr Walmsley, which he agrees he read at least in parts, Mr Walmsley acknowledged that the claimant had referred on several occasions to her grievances.

64. Accordingly Mr Walmsley's evidence that he was only aware from factory gossip that the claimant had put in a grievance seems to the Tribunal unlikely to be reliable.

65. Mr Walmsley wrote to the claimant on 13 October 2016 (198-199) upholding the allegations of using foul and abusive language and acting in a threatening and aggressive manner towards Ms Mistry. The outcome letter simply states that he considered the allegations were founded and that the actions did amount to gross misconduct. He went on to say that the result could have resulted in the termination of her employment and he said: "Nonetheless, I have also taken into account your length of service and the fact you do not have any live disciplinary warnings on your file and I have therefore decided to take a step short of dismissal and issue you with a final written warning." He also said, in warning the claimant about her future conduct: "Whilst I appreciate that not everyone will always get on in the workplace, every person is entitled to be treated with respect and professionalism and using foul and abusive language is simply not acceptable." The claimant was informed of her right to appeal to Mr Bamber.

66. The claimant had received, on 30 September 2016 from Mr Bamber, a letter giving the outcome of the grievance. The outcome letter (175-177) went through the several issues raised by the claimant. In particular Mr Bamber rejected the allegation that Kashmira had sworn at the claimant.

67. So far as the allegations made against DR were concerned, Mr Bamber referred to the claimant waiting 2 years to complain. He noted the claimant had said that she could not raise the matter before. Mr Bamber rejected that and said

that had it been raised, "given the seriousness of the allegation, it would have been treated very seriously, as it has now."

68. Mr Bamber referred to the claimant's other allegations of comments and investigatory interviews having been held with many staff members. He acknowledged that while they all indicated that David Ravenscroft made such comments in the workplace, almost all said it was because he was friendly and they did not have an issue with it. He said that DR had accepted he had made some of the comments but that she, the claimant, had also started discussions of a sexual nature and that other staff supported the contention that many people, including the claimant, engaged in that type of banter with DR.

69. Mr Bamber said that banter will happen and "it is good for morale to an extent" and that sexual comments will be made and will be accepted by some people. He said he also understood that other people could be offended. He referred to the fact that the allegations against DR had happened over a considerable amount of time previously and in his opinion if the conduct was so serious and caused concern the claimant would have raised the matter at the time. He therefore concluded that the claimant did not consider the incidents serious enough to warrant raising them at that time. Furthermore, given that the matters were not raised in an initial grievance letter he did not accept that the actions amounted to harassment which was defined as unwanted conduct. Therefore he considered that he could not conclude it was unwanted conduct.

70. Mr Bamber found that there was no evidence to substantiate that DR had said, "Look at the fucking arse on that". Mr Bamber did not refer to Ms Dooley's evidence supporting that allegation.

71. With regard to the most recent incident and DR making a comment in regard to the claimant's "tits" DR, he recorded, accepted that "he could have made a comment that had caused you offence" and he could conclude that that comment had offended the claimant as she alleged. He therefore upheld that part of her grievance. He said, "I also confirm that Dave has been subjected to appropriate corrective action in line with the relevant company procedures". Again the claimant was given the opportunity to appeal against that decision.

72. The claimant did appeal against both the grievance outcome and the disciplinary hearing outcome, and an appeal hearing was scheduled for 28 October. However, Mr Matthews on 27 October 2016 noted that the claimant had been signed as unfit for work and therefore postponed the meeting until such time as she was fit to return to work.

73. The claimant was signed off work with job related stress from that point through the winter of 2016 and was signed off work for three months by a fit note dated 28 December 2016.

74. On 9 March 2017 the claimant wrote to the respondent and resigned. It appears that that was pursuant to a telephone call that took place the day before in which the claimant said that she had spoken to Ms O'Donnell about how she could resign. The claimant did not give any reason at that point as to why she had resigned, although she did so shortly thereafter. That was the first

communication between the claimant and the respondent in the period October 2016 to March 2017.

75. The claimant's oral evidence was that she had been unwell, indeed she had been receiving medical treatment and taking antidepressants. However, in the early part of 2017 or around Christmas 2016 as a result of a discussion with her husband she felt well enough to return to work, or was beginning to feel well enough to return to work, and decided that she would not wish to return to the respondent, or as she put it, "New year, new job". She had looked for work at that time but had not found it. She did not want, she told the Tribunal subsequently, to go back to work in a factory.

76. At the conclusion of the evidence both parties made submissions. We identify the points that we considered helpful in reaching our conclusions below.

Relevant legal principles

77. The relevant legal principles are as follows.

78. Harassment is defined by section 26 of the Equality Act 2010. It can take the form of unwanted conduct related to a relevant protected characteristic, unwanted conduct of a sexual nature or unwanted conduct of a sexual nature or conduct related to gender reassignment or sex resulting in less favourable treatment because the person so treated rejected or submitted to the conduct.

79. In each case the conduct must either have the purpose or effect of violating the dignity of the person subjected to the contract or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

80. In deciding whether the conduct has such an effect the perception of the person so treated, the other circumstances of the case and whether it is reasonable for the conductor have that effect must be taken into account. The consideration of effect has thereby both a subjective and objective component.

81. Victimisation is defined by section 27 of the Equality Act 2010. It is unlawful in respect of employees and applicants by section 39(3) and (4) to subject them to a detriment because they have done or the employer believes they may have done or may do a "protected act". The protected acts are defined in subsection (2). There are specific types of protected act and a general form "making an allegation (whether or not express) that "A" (i.e. the employer) or another person has contravened the Act.

82. In summary, a complaint of victimisation by an employee has three elements, that:
    82.1. the claimant had carried out a protected act or that the employer believed the claimant had done or might do that;
    82.2. the claimant was subjected to a detriment by his employer because of that protected act;
    82.3. the victimisation arose in one of the prohibited circumstances - see section 39.

83. The guidance given by the Court of Appeal in **Igen Ltd v. Wong [2005] IRLR 258** in respect of the statutory provisions replaced by the Equality Act 2010 is still applicable but must be read in the light of those elements and subject to the provisions of section 136 which provides:

    "(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."

84. Section 123 of the Equality Act 2010 provides for the time limit in respect of complaints brought in the Employment Tribunal under section 120 of the Act.

85. Complaints may not be brought after the end of the period of three months beginning with the date of the act complained of or such other period as the tribunal thinks just and equitable.

86. In respect of complaints about conduct extending over a period, the conduct is to be treated as done at the end of the period.

87. The effect of these provisions, in summary, is that if a complaint is made in respect of conduct which occurred more than three months before the date of the presentation of the complaint (subject to the provisions in respect of early conciliation) then the claimant has to satisfy the tribunal that it would be just and equitable to extend time. If a complaint is made in respect of conduct some of which occurred within three months before the date of presentation and some earlier conduct, then the tribunal has jurisdiction without having to exercise its discretion to extend time if it is satisfied that it was "conduct extending over a period".

88. In respect of a complaint of constructive unfair dismissal. The tribunal has to find that there has been a dismissal within the definition of section 95(1)(c) of the Employment Rights Act 1996.

89. In order to do is to do so it is necessary for the claimant to satisfy the Tribunal that: there has been a breach of contract by the employer; the breach was additionally serious to be repudiatory or in other words, a fundamental breach of the contract; the resignation was, at least in part, in response to that breach; and that before resignation the contract was not affirmed by action or inaction on the part of the claimant.

90. Claimants often rely upon a breach of the fundamental implied term of trust and confidence as derived from **Malik v BCCI [1997] UKHL 23** and formulated in earlier cases. The implied term is that: "the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously undermine the confidence and trust that should exist between employer and employee."

91. In the case of **Frenkel Topping Ltd v King [2015] UKEAT 0106/15** the demanding nature and stringency of the test to be applied in considering whether there has been a constructive dismissal was confirmed - see paragraphs 11 to 15 and the earlier authorities referred to there.

Conclusions

92. So far as the allegations of sexual harassment are concerned, for the reasons already indicated, the Tribunal upheld them. This includes the one allegation that was within time relating to the comment outside the works on 1 or 2 August 2016. The Tribunal is satisfied that that was unwanted conduct. The respondent argued that it was not a comment made by DR. For the reasons that we have given, we find that it was. However, we put to Miss Wheeler in the course of argument the proposition of whether it would make any difference whether it was made by DR or another member of staff. Miss Wheeler, without acknowledging the force of the point, did not argue to the contrary. Indeed, Mrs Muhammed made the same submission.

93. So far as the allegation of harassment by Ms Mistry and Mr Walmsley taking the claimant to task is concerned, it was argued by the claimant that failing to deal with the allegation of Kashmira Solanki swearing at her was the equivalent of being taken to task. The Tribunal did not accept that argument. It seems common ground that Ms Mistry had told the claimant to ask Asian or Polish workers to speak English, and it does appear to be the case that when the claimant did so there was a dispute between her and Ms Solanki and they were both then called into the office with Ms Mistry. However, there was no evidence on which the Tribunal could find as a fact that either Ms Mistry or Mr Walmsley took her to task. Indeed, the high watermark of the allegation would appear to be that Ms Mistry and Mr Walsmley did not do anything about it and simply returned the two women to the work floor. In the Tribunal's judgment it is not open to it now to go behind the identified allegation. That would be to decide the case on an alternative basis to that which is contained in the pleadings or otherwise identified. In those circumstances the Tribunal concluded that the second allegation was not made out.

94. The third allegation was one of victimisation. In this regard the claimant made a number of points. Ms Muhammed relied upon the timing of DR's disciplinary outcome and the claimant's disciplinary outcome and submits there was coordination at the same time. What happened in fact on the evidence that the Tribunal heard was that there was a consideration of the grievance first and that the grievance outcome and the disciplinary hearing for DR were determined at the same time. It was not until DR had given his answers to Mr Matthews in the disciplinary hearing that the claimant's grievance outcome was provided by Mr Bamber. This was because he only knew what DR's answers to the grievance allegations were when he saw the notes of the disciplinary meeting that DR had attended.

95. Whilst it is right, as Ms Muhammed submitted, that the claimant denied Mr Clarkson's account of what happened in Ms Mistry's office, in the Tribunal's judgment it was open to the respondent to accept the account that was given. It

was a detailed account by someone against whom no allegation was being made at the time.

96. Ms Muhammed next argued it was within the respondent's power to give the claimant a lower sanction but they chose not to, saying that they wanted to punish her and make her suffer for submitting and pursuing her grievance. Again, whilst the Tribunal accepted that, contrary to the indication in his evidence, Mr Walmsley was aware of the claimant's grievances, there was no persuasive reason for the Tribunal to find that the reason for the final written warning was anything other than that which he stated in the outcome letter. The evidence before him, if he accepted it on its face which he was entitled to do, amply justified a finding of abusive language and aggressive behaviour. That was clearly defined within the respondent's policy as gross misconduct. It was therefore open to him to impose the sanction of dismissal and he drew back from that and did not do so. In those circumstances the suggestion that he set out to punish the claimant was not made out.

97. For the avoidance of doubt, the claimant accepted in evidence that she was not aware of the sanction that had been imposed upon DR at the time that she was subjected to her own disciplinary proceedings, nor indeed before she resigned. The claimant accepted that she could not compare the sanctions for either the purposes of unfair dismissal or for the purpose of the claim of victimisation.

98. In summary the claimant has established that she in both of her grievances set out a protected act. There was no dispute about that by the respondent. She is entitled to say that she was subjected to a detriment in that the imposition of a final written warning could properly be perceived by the claimant as a detriment. The respondent again did not argue to the contrary. However, in order to succeed in a complaint of victimisation under this section the tribunal has to find that the treatment was because of the protected act having regard to the section. The Tribunal could make that finding, accepting as it does that the reason for the imposition of the final written warning was as stated by the respondent. Although we find Mr Walmsley was aware of the grievances we accept that they were not part of the reason for his decision.

99. Finally, the Tribunal turns to the allegation of unfair dismissal. The issue here was whether the claimant was dismissed. The respondent did not, if the Tribunal were to find that the claimant was dismissed, assert a potentially fair reason for dismissal.

100. The relevant test is whether the employer has committed a breach of contract which is repudiatory, namely a significant breach going to the root of the contract. The test for a breach of the implied term of trust and confidence is whether a party without reasonable and proper cause conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The respondent relies upon the dictum in **Hilton v Shiner Ltd (Buildings Merchants) [2001] IRLR 727** that the key is reasonableness: if the employer has reasonable and proper cause for the conduct it provides a complete defence for a breach of the implied term, and the respondent relies upon the non employment related dicta in **Tullett Prebon PLC**

and others v BGC Brokers [2011] EWCA Civ 131. In considering whether there is a repudiatory breach it is whether the contract breaker has shown a intention objectively judged to abandon and altogether refuse to perform the contract.

101. The Tribunal reminded itself that in the case of **Frenkel** those dicta have been held by the Employment Appeal Tribunal to indicate the seriousness of the conduct which is required in order for the claimant to demonstrate a breach. The language of "destroy", "seriously damage", "to abandon and altogether refuse to perform the contract" is language which shows that the quality of the act relied upon must be grave.

102. The claimant did not rely upon specific matters that can be identified in her further information. However, in her written submissions a number of matters were set out. They are set out on the third page of her submissions. They are:

102.1. Subjecting the claimant to sexual harassment. In the Tribunal's judgment the allegation of sexual harassment, including the earlier ones, have been made out by the claimant and such sexual harassment undoubtedly can be, and in this case would be, a breach of the implied term. Again as a matter of principle Miss Wheeler did not dispute that such acts would amount to a breach of the fundamental implied term.

102.2. The Tribunal has not held that the claimant was subjected to race discrimination. It has not held that Ms Mistry and Mr Walmsley failed to back the claimant up over speaking English, or on an earlier occasion telling the claimant that she was racist for voting out of the European Union at the time of the Brexit vote. That was an allegation made against Ms Mistry. Ms Mistry denied saying that it was racist and she had never said that to anyone.

102.3. It was alleged that the respondent failed to investigate the allegation that the claimant was sworn at. In fact that was not right. That was dealt with as part of the claimant's grievance.

102.4. The issue of a final written warning as a detriment. We do not doubt a final written warning is a detriment. However, consistent with the findings the Tribunal has made above the claimant cannot sustain the argument that that was not given without reasonable and proper case.

102.5. The claimant relies upon the failure to uphold the grievances. Whilst the Tribunal has come to a different conclusion in relation to the grievances, particularly in relation to the sexual harassment allegations against DR, the Tribunal is conscious that it is not generally for it to substitute its decision for that of the employer. An employee is entitled to expect a prompt and reasonably thorough investigation of grievances and to be provided with a rational explanation. Whilst the Tribunal has reached a different conclusion from that of Mr Matthews and Mr Bamber, in our judgment that is not of itself a finding that supports an allegation that there is a breach of contract in failing to uphold the grievances. The Tribunal is conscious that it has not heard the same evidence of that presented to those officers.

102.6. The claimant alleges next that the respondent had failed to inform her about what action was taken against DR. She was not entitled to be told what the sanction was against DR, if any. That was a matter between him and his employer. She was entitled to be told whether the grievance had been upheld and as part of that she was told that DR had been subjected to discipline and had been subject to "corrective action". In our judgment it was not a breach of contract or anything contributing to a breach of contract to tell her more than that.

102.7. Finally the claimant suggests that her grievance was not addressed fully by an appeal not being arranged. In argument Ms Muhammed accepted that whilst normally an appeal would not take place while somebody was on sick leave unless they asked for it, she accepted that the claimant had not asked for it. Although the claimant said she would have attended an appeal meeting even though she was signed off sick, it would not, in our judgment, be a breach of contract for the employer to wait a reasonable length of time to see whether an employee was fit to return to work before considering an appeal further, particularly when it was an appeal against a grievance or a warning rather than an appeal against dismissal. The claimant's allegation that she was isolated by telling them not to talk to her was not to talk to her was not borne out upon the evidence.

103. So in terms of the breach of the implied term of trust and confidence the only matter in our judgment which the Tribunal can properly rely upon are the allegations of harassment against DR. We therefore have to ask the question: did that amount to a breach of the fundamental implied term? In our judgment it did.

104. Did the claimant resign because of that breach? In our judgment she did not. Whilst the claimant raised the allegations of harassment in a grievance, it is correct to say that a significant number of the allegations occurred earlier. However, there were at about the time of her suspension two allegations of sexual harassment.

105. In our judgment the reason the claimant resigned was not because of those allegations of harassment. Thereafter, the claimant had become unwell and remained off work in consequence of her treatment, in particular the final written warning. She had generally lost confidence in the company as she said in her letters.

106. However, as the weeks and months went by the claimant came to the view that she would prefer to work for another employer. In our judgment although in the early days her illness may have been contributed to by the harassment, the reason for the claimant resigning was that she wanted to work for another employer. The underlying reason for that may in part have been due to the sexual harassment but in our judgment, taken as a whole, the reason for the resignation was by that stage not because of the breach of contract. With every month that passed DR's behaviour, subjected to corrective action, would have less effect, and the claimant's warning would have been progressively expiring.

107. Put another way, in our judgment to resign six months after the last allegation which could amount to a breach of contract is a sufficient length of time to amount to a waiver of the breach and an affirmation of the contract. Whilst we accept that the mere passage of time itself may not amount to such a waiver and affirmation, in the circumstances of this case and having regard to the fact that the claimant said that she would like to return to non-factory work, in our judgment they do so.

108. In those circumstances we do not uphold the allegation of constructive dismissal.

109. Although at the earlier stage the Tribunal had indicated to the parties that it would consider remedy at a separate hearing, having only upheld the allegation of sexual harassment the Tribunal offered the parties the opportunity to have that matter resolved at this hearing, which they accepted.

110. No further evidence was called by either party. The claimant indicated, so the Tribunal had some measure of it, that she had been prescribed antidepressants by the doctor which she was still taking, but she had started to look for work, although she had been unsuccessful in doing so, for a period of some months, having started after Christmas 2016.

111. The appropriate period for the Tribunal to consider in relation to injury to feelings, in our judgment, was from early August 2015 up to the date of the Tribunal hearing. The finding by the Tribunal that the claimant was subjected to harassment in our judgment is likely to assuage her feelings. We consider that the relevant period is in the order of 9½ months. We accept in that time, for the reasons already stated above, that the claimant's feelings were injured. We also take account of the fact that whilst the harassment was not trivial the claimant's injury to feelings will have diminished over the period and, as we say, will we believe be assuaged to a considerable degree by the findings of the Tribunal. The fact that the claimant had decided in any event in the meantime not to return to the workplace itself is an ameliorating factor.

112. We remind ourselves of the appropriate guidelines. See: **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102** and **Da'Bell v NSPCC [2010] IRLR 219.** In our judgment looking at the change in the value of money as at the date of the award the boundary figures between the lower and middle, the middle and upper and the top of the upper bands which were rated at £6,000, £18,000 and £30,000 in the case of **Da'Bell** at a time when the Retail Price Index stood at 214.4 should be considered now in the light of the Retail Price Index which at the end of April 2017 stood at 270.6. The equivalent figures are £7,573, £22,718 and £37,864.

113. The parties submitted, in the case of the respondent, that this was a case in the lower band and Miss Wheeler submitted a figure of £5,000. On behalf of the claimant Ms Muhammed suggested it should be at the top of the middle band and submitted a figure of £15,000. It appears that £15,000 would be at the middle of the middle band on the current figures. , although it would have been towards the higher end of the middle band or indeed at the top at the time of **Da'Bell** and **Vento**.

114. Doing the best we could, having regard to the value of money and the effect upon the claimant as we perceived it to be and as she had described it in her witness statement, we considered that the proper sum for injury to feelings in this case was the sum of £10,000.

115. The Tribunal must consider the question of the award of interest. It is appropriate to award interest. We consider that the appropriate award is interest at 8% on that sum over the period of what we take to be 41½ weeks from the date of the commission of the tort for which the claimant has jurisdiction, and accordingly to that sum we add £638 by way of interest.

116. The parties agreed at the conclusion of the hearing that the tribunal fees of £1,200 for the claimant's case would be reimbursed to her by the respondent. Since the judgment was sent, in the case of **R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51** the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances I shall draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to be refunded. The details of the repayment scheme are a matter for HMCTS. The attention of the parties is drawn to the President's Case Management Order made in connection with this issue on 9 August 2017 which may be found at: https://www.judiciary.gov.uk/publications/directions-employmenttribunals-england-wales.

117. The total sum of the judgment for compensation, interest and fees amounted to £11,838. The respondent agreed that payment should be made within 14 days of the date of hearing, and it was so ordered.

118. Finally, may I apologise to the parties for the delay in sending these reasons to them in writing. This has been due to the volume of other judicial work.

Employment Judge Tom Ryan

Date 16 August 2017

REASONS SENT TO THE PARTIES ON

.29 August 2017

FOR THE TRIBUNAL OFFICE