THE EMPLOYMENT TRIBUNALS

Claimant: **Ms E Wickerson**

Respondent: **LCC Support Services Limited**

Heard at: **Bury St Edmunds**

On: **23 to 26 July 2018, in chambers 16 August 2018**

Before: **Employment Judge M Warren**

Members: Mrs Gaywood and Mrs Morgan

Representation

Claimant: Mr Ridgeway, consultant

Respondent: Ms Williamson, counsel

RESERVED JUDGMENT

The Claimant's claims that she was unfairly dismissed and victimised contrary to section 27 of the Equality Act 2010 succeed.

REASONS

Background

1. By a claim form date stamped as received on 1 August 2017, Ms Wickerson brought claims against 2 Respondent's; her employer LCC Support Services Limited and the company to whom her services were provided by her employer, Castle Cement Limited. The claim against the latter was settled through the auspices of ACAS and dismissed upon having been withdrawn. This Judgment concerns the claim against LCC Support Services Limited, (the Respondent) and follows a four day hearing in July 2018 and a meeting of the tribunal in chambers on 16 August 2018.

2. Ms Wickerson's complaints against the Respondent are of victimisation following her complaint of harassment by an employee of Castle Cement Limited and of constructive unfair dismissal by reason of the detriments complained of in the victimisation claim.

The Issues

3. We had before us at the outset of the hearing, a draft list of issues prepared by Ms Williamson. It was not agreed. We talked through the areas of disagreement and agreed upon amendments to reflect those disagreements. The list of issues is set out below having been cut and pasted. The agreed amendments appear inserted by me, in bold italics:

Constructive Unfair Dismissal

Was the claimant constructively dismissed?

1. Did the claimant resign because of an act or omission (or series of acts or omissions) by the respondent? The claimant relies upon the acts and omissions set out at paragraph 17(a) – (g) of the amended particulars of claim.

2. If so, did the respondent's conduct amount to a fundamental breach of contract? The claimant relies on the implied duty of mutual trust and confidence. The Tribunal will therefore need to consider whether the respondent, without reasonable or proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties – *Bournemouth University Higher Education Corp v Buckland [2010] EWCA Civ 121*.

3. Did the respondent's failure to respond to the claimant's letter dated 10th March 2017 amount to the "last straw" which contributed (however slightly) to the respondent's breach? – *Omilaju v Waltham Forest London Borough Council [2005] IRLR 35*.

4. Did the claimant affirm any breach of contract?

If there was a dismissal, was that dismissal unfair?

5. The respondent has not advanced a potentially fair reason for the dismissal. The respondent has therefore accepted that, if the claimant is found to have been dismissed, the dismissal was unfair.

6. ***[These words are deleted: The respondent has not sought to rely upon the principle set out within Polkey and this is therefore not an issue which the Tribunal will need to address.] Inserted in their place is: The Tribunal may need to consider Polkey and contributory fault if it finds that the Claimant was constructively dismissed or victimised in its liability judgment***.

Wrongful Dismissal

7. Is the claimant entitled to her two weeks' notice pay on the basis that she was wrongfully dismissed?

Victimisation

8. Were the claims presented to the Tribunal in time?

9. If some or all of the claims are *prima facie* out of time, do they constitute a continuing act or course of conduct such that the claims are nonetheless in time in accordance with section 123(3)(a)?

10. If not, is it just and equitable to extend the time limit in accordance with section 123(1)(b) so as to allow the claimant to pursue her claims?

11. Did the claimant do a protected act or acts for the purposes of section 27(1)(a) and 27(2) of the Equality Act 2010? The claimant relies upon the protected acts set out at paragraphs 6, 7 and 8 of the amended particulars of claim namely:

a. The complaint(s) to Ms Hockey on 3rd January 2017;

b. The complaint(s) made and the information provided by the claimant at the meeting on 11th January 2017; and

c. The complaint(s) contained within the statement dated 16th January 2017.

The Respondent says that it does suggest that the alleged protected acts are not protected acts because they were made in bad faith, i.e. with a view to receiving compensation. The Claimant says that this is not pleaded.

12. Did the respondent believe that the claimant might do a protected act, namely bringing proceedings under the Equality Act before the Employment Tribunal and/or taking further steps for the purposes of or in connection with the Equality Act?

13. Did the respondent subject the claimant to a detriment or detriments? The claimant relies upon the detriments set out at paragraph 17(a)-(g) of the amended particulars.

14. If so, was the claimant subjected to any or all of those detriments because either:

a. she had done a protected act or acts; or

b. the respondent believed that she may do a protected act.

15. The respondent has not pleaded the statutory defence in accordance with section 109 and does not therefore rely upon it. **The Respondent says that the statutory defence is pleaded, (although not in terms) and seeks to rely on it.**

Discriminatory Constructive Dismissal

16. Did the claimant resign in response to acts that amounted to victimisation, such that the dismissal was itself discriminatory?

Holiday Pay

17. How many days holiday is the claimant entitled to under the Working Time Regulations 1998 and/or her contract of employment?

18. How many days holiday did the claimant take in the leave year 1st April 2016 to 31st March 2017?

19. Is the claimant entitled under the Working Time Regulations 1998 to pay in lieu of holiday that had accrued but not been taken at the time of termination of her contract with the respondent?

20. In the alternative, does the claimant have a contractual right to be paid in lieu of holiday that had accrued but not been taken at the time of termination of her contract with the respondent?

ACAS Uplift

21. Did the respondent unreasonably fail to comply with the ACAS code of conduct such that it is just and equitable to increase the award?

22. If so, what percentage uplift is appropriate? The claimant invites the Tribunal to award a 25% uplift.

4. To make sense of this list of issues, we need to know what are the alleged detriments set out at paragraph 17 of the particulars of claim. They are:

(a) The Respondent failed in a reasonable time to undertake any or any adequate investigation of the Claimant's complaint raised on 11 January 2017;

(b) The Respondent failed within a reasonable time to take any or any adequate steps to ensure the Claimant's safety at work by ensuring that she would not encounter Mr X at work;

(c) As set out at paragraph 10, [of the particulars of claim] no or no adequate risk assessment was carried out in relation to the Claimant's wrist injury;

(d) As set out at paragraph 11, [of the particulars of claim] the Claimant was not given any assurance that she would not encounter Mr X again, but was told to be polite to Mr X;

(e) As set out at paragraph 13, [of the particulars of claim] on 24 February 2017 Ms West denied that the Claimant had complained of harassment predating 3 January 2017, and/or that she had complained of the conduct on 23 December 2016, and/or that the conduct on 23 December 2016 amounted to harassment, and/or that any assurance had been given to the Claimant as to working arrangements;

(f) As set out at paragraph 13, [of the particulars of claim] on 28 February 2017 Ms West denied that the Claimant had complained as set out above;

(g) As set out at paragraph 14, [of the particulars of claim] Ms West failed to respond to the correspondence on 10 March 2017 within a reasonable time.

Claimant's Application to Amend

5. At the start of the hearing, Ms Williamson made an application to amend the Claimant's pleaded claim. We allowed the amendment for the reasons set out in the paragraphs below.

6. The points shortly is this. The pleaded claim is that in response to 3 particular protected acts, Ms Wickerson has been victimised. She says that upon exchange of witness statements last week, it came to her attention that at paragraph 38 of her statement, Ms Maya West had said:

> *"Liz Hockley had informed me – through information that she had received – that the Claimant was now being advised by a member of her family who intended to put a claim in"*

7. The key words there are the reference to understanding that the Claimant intended to put a claim in.

8. It is said on behalf of Ms Wickerson that she then realised that potentially, a motive on the part of the Respondent was not just that she had made the protected disclosures, but also that she might issue an employment tribunal claim under the Equality Act 2010. The proposed amendment is to bring into play s27(1) (b) of the Equality Act 2010. Specifically, that she *may* do a protected act.

9. The Respondent objects to the application. Mr Ridgeway submitted that:

   9.1. Ms West is an experienced HR professional, well experienced in employment tribunals and very informed; this was merely a statement by her and it does not mean that it was victimisation. That I think, with respect, misunderstands the point, which is whether Ms West or the other decision makers took the action complained of because they feared that there would be an employment tribunal claim.

9.2. He made some submissions about when the Respondent became aware of the Claimant's aunt, (the member of the family referred to in the quote above) being involved, which seems to us, does not really make any difference to the issue at hand.

9.3. There had been no reference to this in the original claim form. He said that if the Claimant really thought that this was a motive, she would have put it in, in the first place, (which again rather misses the point, which is that the Claimant says she knew nothing about this potential motive until the exchange of witness statements).

10. When considering an application to amend, one must have regard to the guidance of Mummery J, (as he then was) in the case of Selkent Bus v Moore [1996] ICR 836. In exercising discretion, a Tribunal should take into account all the relevant circumstances and should balance the relative injustice and hardship of allowing or refusing the amendment.

11. Non-exhaustive examples of what might be relevant circumstances given by Mummery J included:

11.1. The nature of the amendment, whether it is a minor error, a new fact, a new allegation or a new claim;

11.2. The applicability of time limits and if the claim is out of time, whether time should be extended, and

11.3. The timing and manner of the application and in particular, why an application had not been made sooner.

12. On the question of time limits, section 123(1) of the Equality Act 2010 requires that a claim shall be brought before the end of the period of three months beginning with the date of the act to which the complaint relates or such further period as the Tribunal thinks just and equitable

13. On the just and equitable test, the EAT in the case of Cohan v Derby Law Centre [2004] IRLR 685 said that a Tribunal should have regard to the Limitation Act checklist as modified in the case of British Coal Corporation v Keeble [1997] IRLR 336 which includes that:

13.1. One should have regard to the relative prejudice to each of the parties;

13.2. One should also have regard to all of the circumstances of the case which includes:

13.2.1. The length and reason for delay;

13.2.2. The extent that cogency of evidence is likely to be affected;

13.2.3. The cooperation of the Respondent in the provision of information requested, if relevant;

13.2.4. The promptness with which the Claimant had acted once she knew of facts giving rise to the cause of action, and

13.2.5. Steps taken by the Claimant to obtain advice once she knew of the possibility of taking action.

14. Selkent has recently been revisited by Underhill LJ in the Court of Appeal in Abercrombie v Aga Rangemaster Ltd [2014] ICR 209 and the guidance of Mummery J approved. Commenting on the now often referred to distinction between label substitution on pleaded facts as compared to substantial alterations pleading new causes of action, Underhill LJ said that it was clear that Mummery J was not suggesting so formalistic an approach that the fact that an amendment pleading a new cause of action, weighed heavily against allowing an amendment. These are just factors likely to be relevant in striking the balance of injustice and hardship. He said that the focus should be not so much on, "formal classification" but more on the extent to which the amendment is likely to involve different lines of enquiry, *"the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".* See paragraphs 47 and 48.

15. Underhill LJ also explains in Abercrombie that just because the amendment relates to allegations that are out of time, that does not mean we should automatically disallow it. It is still in our discretion to amend.

16. This is a new allegation, it is an addition to an existing claim under s27. We should not be hung up on whether this is a mere re-labelling exercise or the introduction of a new claim based on a new set of facts.

17. With regard to the limitation checklist, leaving prejudice to last:

17.1. We have explained the length and reason for the delay; it is because the Claimant has only just become aware of the potential for influence of fear of employment tribunal proceedings;

17.2. Cogency of evidence is of minor significance as there are not many new facts to be dealt with, it is all about what was in the mind of the decision makers;

17.3. There is no suggestion that the Respondent has failed to provide any information which has been requested of it;

17.4. As to the promptness with which the Claimant acted, as we understand it from submissions, within 2 days of exchange of witness statements, the application to amend was made, so there was prompt action, (a decision on the application was deferred to today by an employment judge to whom it had been referred);

17.5. The Claimant has been legally advised throughout.

17.6. That brings us to the relative prejudice to the parties. We see little prejudice to the Respondent. There is little further for it to deal with, other than its decision makers to confirm, perhaps by supplementary questions and certainly in cross examination, as to whether this might have been the motive for their actions. For the Claimant, the prejudice to her is that if we refuse the amendment, we would be refusing a potential cause of action about which she has only just become aware and if it were the case that the motive behind the actions about which she complains were a fear of employment tribunal proceedings, she will have been deprived of a remedy to which she is entitled.

18. Weighing these matters in the balance, the conclusion we have reached is that the amendment should be allowed.

Application to Allow New Evidence

19. On the morning of day three, (the Claimant's evidence having finished on day two) Mr Ridgeway had arranged for the tribunal to be sent an email regarding the issue of holiday pay, from someone who works in the Respondent's accounts department, setting out a breakdown of holiday taken and showing a calculation of what the Respondent says the Claimant was due, namely accrued holiday pay of 1 day. He applied to produce this as evidence in respect of the holiday pay claim. Ms Williamson objected.

20. The Claimant's pleaded case she was owed accrued holiday pay. The Respondent's pleaded case is that she was not.

21. The Claimant dealt with holiday pay in her witness statement at paragraph 104, where she says she was due 5 days accrued holiday in the amount of £259.79.

22. The Claimant had given her evidence. That had concluded at lunchtime the day before. She was not challenged about her evidence in respect of her holiday pay claim at paragraph 104.

23. None of the 3 witnesses for the Respondent who are to give oral evidence, deal the question of holiday pay. As we understand it, there are no documents in the bundle relating to the issue of holiday pay.

24. In reaching our decision we have had regard to the overriding objective and the importance of balancing the relative prejudice to the parties.

25. It is fair to say that the sum of money at stake is something in the order of £200.

26. It is in our view not proportionate and contrary to the overriding objective to seek to introduce evidence midway through a court hearing, after the

Claimant has already given her evidence, when such evidence should already have been dealt with in witness statements and in disclosure of documents prior to the hearing commencing.

27. For these reasons, we will not allow in evidence what is nothing more than an email, a statement by a person who is not here to give oral evidence on the issue.

Evidence

28. Miss Wickerson produced a witness statement of 118 paragraphs and we heard oral evidence from her.

29. For the Respondent, we had witness statements from:

29.1. Ms Maya West, former Head of Human Resources;

29.2. Ms Lorraine Larman, Health & Safety Training Manager;

29.3. Ms Elizabeth Hockey, Cleaning Supervisor;

29.4. Mr Colin Hayes, Cleaning Operative, and

29.5. Mr Jason Russel, Cleaning Supervisor.

We heard evidence from Ms West, Ms Larman and Ms Hockey.

30. We did not hear evidence from Mr Hayes and Mr Russel. Miss Wickerson was very keen that the tribunal should hear evidence from them, but the Respondent's did not call them. An application for a witness order, (of which the Respondent was aware and in response to which, the Respondent had written in to the tribunal to explain why they did not wish to attend) had been refused by Employment Judge Laidler. There was no application for a reconsideration and the witness order application was not renewed before us. The reasons given for non-attendance were that in respect of Mr Russel, his wife is pregnant, there are complications and he needs to be around in case of emergency. In respect of Mr Hales, he did not wish to attend because of anxiety issues. Ms Williamson submitted that we should not read the witness statements of Mr Hayes and Mr Russel. Mr Ridgeway submitted that we should do so. Having regard to the overriding objective and the relative prejudice to the parties, we decided to read their witness statements and attribute to their content such weight as we considered appropriate, having regard to the fact that they were not here to have their evidence tested under oath. Their written evidence consisted of signed and dated witness statements and unsigned and undated documents entitled, "Supplementary Questions asked by the Claimants Representative" purporting to answer such questions.

31. We had before us a paginated and indexed bundle of documents running to page 328. Unfortunately, the bundle was assembled in categories of documents rather than in date order, so that for example documents

disclosed pursuant to a subject access request were compiled separately. As a matter of practice, it is most helpful to the tribunal if all documents, save for policies and the like, are put together in chronological order.

The Law

Victimisation

32. The relevant law is set out in the Equality Act 2010.

33. Section 39 (2) provides that an employer must not discriminate against an employee by subjecting her to detriment.

34. Section 27 defines victimisation as follows:

> *(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…*

35. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

36. Whether a particular act amounts to victimisation should be judged primarily from the point of view of the alleged victim, whether or not they suffered a "detriment", rather than from the point of view of the alleged discriminator. Whether or not a claimant has been disadvantaged is to be viewed subjectively; see St Helens Metropolitan Borough Council v Derbyshire [2007] IRLR 540 HL. That said, an unjustified sense of grievance could not amount to a detriment.

37. To be an act of victimisation, the act complained of must be, "because of" the protected act or the employer's belief. Previous legislation had referred to, "by reason that" but this is unlikely to represent any significant change in the test of causation, see the remarks of Lord Justice Underhill in Onu v Akwiwu and Taiwo v Olaigbe [2014]IRLR 448. The protected act does not have to be the sole cause of the detriment, provided that it has a

significant influence, (see Lord Nicholls in Nagarajan v London Regional Transport [1999]ICR 877). "Significant influence" does not mean that it has to be of great importance, but an influence that is more than trivial, (see Lord Justice Gibson in Igen v Wong cited below).

Employer's Liability for Acts of Employees and the Statutory Defence

38. Section 109(1) provides that an employer is liable for acts of discrimination, harassment and victimisation carried out by its employees in the course of employment.

39. What amounts to an act in the course of employment in the context of discrimination legislation was considered in Jones v Tower Boot Co Ltd [1997] IRLR 168 CA, where it was held that "in the course of employment" should be interpreted in the sense in which those words are employed in everyday speech and should not be restricted by references to the principles set out in case law for establishing vicarious liability in the context of other torts. The Court of Appeal said that the application of the phrase was a question of fact for each Employment Tribunal to resolve

40. Employer's though, do have a potential defence to an action seeking to hold them liable for acts of employees, that is that they took all reasonable steps to prevent the discrimination taking place, s.109(4).

41. In Canniffe v East Riding of Yorkshire Council [2000] IRLR 555 the EAT held that the appropriate test as to whether the employer has established the s109(4) defence is to ask:

    41.1. Firstly, whether there were any preventative steps taken by the employer, and

    41.2. Secondly, whether there were any further preventative steps that the employer could have taken that were reasonably practicable.

42. Section 109 reads:

> ***109 Liability of employers and principals***
>
> *(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
>
> *(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*
>
> *(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*
>
> *(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—*
>
> *(a) from doing that thing, or*

(b) from doing anything of that description.

Burden of Proof

43. Section 136 deals with the burden of proof:

"(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.

44. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was set out in Igen Limited v Wong and others [2005[IRLR 258. That case sets out a series of steps which we have carefully observed in the consideration of this case and we will set them out-

44.1. It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent has committed an act of discrimination against the Claimant.

44.2. If the Claimant does not prove such facts, she will fail.

44.3. It is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit discrimination even to themselves.

44.4. The outcome, at this stage, of the analysis by the Tribunal will, therefore, depend upon what inferences it is proper to draw from the primary facts found by the Tribunal.

44.5. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead to the conclusion that there was an unlawful act of discrimination. At this stage the Tribunal is looking at the primary facts proved by the Claimant to see what inferences of secondary fact could be drawn from them.

44.6. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

44.7. These inferences can include, in appropriate cases, any inferences that are just and equitable to draw from evasive or equivocal replies to questionnaires.

44.8. Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and if so to take it into

account. This means that inferences may also be drawn from any failure to follow a Code of Practice.

44.9. Where the Claimant has proved facts from which conclusions could be drawn, that the Respondent has treated the Claimant less favourably on the prohibited grounds, then the burden of proof moves to the Respondent.

44.10. It is then for the Respondent to prove that it has not committed the act.

44.11. To discharge that burden of proof it is necessary for the Respondent to prove, on the balance of probabilities, that the prohibited ground in no sense whatsoever influenced the treatment of the Claimant, (remembering that the test now is whether the conduct in question was, "because of" the prohibited ground – see Onu v Akwiwu referred to above).

44.12. The above point requires the Tribunal to assess not merely whether the Respondent has provided an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the prohibited ground was not a ground for the treatment in question.

44.13. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, the Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

45. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

46. There has been some controversy in this regard, with the decision of the EAT in Efobi v Royal Mail Group Ltd UKEAT/0203/16/DA suggesting that there is no initial burden of proof on the Claimant, (which is how the legal concept of the provision of s136 has always been described). That controversy has now been resolved, in Ajayi Ayodele v City Link Limited and Paul Napier [2017] EWCA Civ 1913 in which the court of appeal has confirmed that the initial burden to prove facts from which the tribunal could properly conclude that there had been discrimination, lies with the Claimant and that Efobi should not be followed.

Unfair Dismissal

47. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA).

48. Section 95 defines the circumstances in which a person is dismissed as including where:

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

49. That is what we call constructive dismissal. The seminal explanation of when those circumstances arise was given by Lord Denning in Western Excavating(ECC) Ltd v Sharpe 1978 ICR 221:

> *" If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed."*

50. The Tribunals function in looking for a breach of contract is to look at the employer's conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it, (see Browne – Wilkinson J in Woods v W M Car Services (Peterborough) ltd [1981] IRLR 347).

51. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal, but a contractual term frequently relied upon in cases such as this is that which is usually described as the implied term of mutual trust and confidence.

52. The leading authority on this implied term is the House of Lords decision in Mahmud & Malik v BCCI [1997] IRLR 462 where Lord Steyn adopted the definition which originated in Woods v W M Car Services (Peterborough) Ltd namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

53. The test is objective, from Lord Steyn in the same case:

> *"The motives of the employer cannot be determinative or even relevant…..If conduct objectively considered is likely to destroy or serious damage the relationship between employer and employee, a breach of the implied obligation may arise."*

54. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, "the last straw", (Lewis v Motorworld Garages Ltd [1985] IRLR 465).

55. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see London Borough of Waltham Forrest v Omilaju [2005] IRLR 35. However, an entirely innocuous act cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

56. A fundamental breach by an employer has to be, "accepted" by the employee, to quote Lord Browne-Wilkinson in the EAT in W.E. Cox Toner (International) Ltd v Crook 1981 IRLR 443 :-

> *"If one party (the guilty party) commits a repudiatory breach of the contract, the other party (the innocent party) can chose one of two courses: he can affirm the contract and insist on its further performance, or he can accept the repudiation, in which case the contract is at an end…*
>
> *But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by an express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation…*
>
> *Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contractual obligation, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation…"*

57. In a recent review of the law of affirmation in the employment contract context, HHJ Burke QC in Hadji v St Luke's Plymouth UKEAT 0857/2012 summarised the law as follows:

> *(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed.*

Western Excavating v Sharp [1978] QB 761, [1978] 1 All ER 713, [1978] ICR 221 as modified by W E Cox Toner (International) Ltd v Crook [1981] IRLR 443, [1981] ICR 823 and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.

(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay – see Cox Toner para 13 p 446.

(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12 July 2011) paras 45/46.

(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: Fereday, para 44.

58. The employee must prove that an effective cause of her resignation was the employers' fundamental breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach, the breach must have played a part (see Nottingham County Council v Miekel [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13).

59. In Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908 the Court of Appeal held that a repudiatory breach cannot be unilaterally cured by the party in default. However, Lord Justice Sedley warned:

> *"A wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends"*

60. There is also implied in every contract of employment, an obligation to deal with Grievances timeously and reasonably, see WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516.

Time

61. Section 123 of the Equality Act requires that any complaint of discrimination within the Act must be brought within three months starting with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

62. Section 111 of the ERA requires that a claim of unfair dismissal must be brought within 3 months of the date of dismissal, unless it was not reasonably practicable to do so.

63. Since 6 May 2014, anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the Employment Tribunals Act 1996). In doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date, a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the claimant. Further, (and sequentially) if the certificate is received within one month of the time limit expiring, time expires one month after the date the claimant receives, (or is deemed to receive) the certificate. See s207B of the Employment Rights Act 1996, s140B of the Equality Act and Luton Borough Council v Haque [2018] UKEAT/0180/17.

Credibility

Miss Wickerson

64. Mr Ridgeway submitted that we should prefer the evidence of the Respondent's witnesses over that of Miss Wickerson, although he did not provide any analysis or examples of why we should do so.

65. We have carefully reviewed and considered our notes of the evidence of Miss Wickerson and make the following observations about her evidence:

    65.1. Mr Ridgeway spent a good deal of time cross examining Miss Wickerson about the harassment to which she said she had been subjected. This was not an issue in the case. However, I allowed his questions because it seemed to me that his questions might go to credibility. It is not for us to make a finding that she was subjected to the harassment she complains of, not least because Mr X was not before us, but also because it was not an issue in the case. However, suffice to say that Mr Ridgeway did not succeed in undermining Miss Wickerson's credibility in this regard.

    65.2. It was suggested Miss Wickerson had changed her evidence over whether she had told Mr X that she was, "not interested" but she had not.

    65.3. There were occasions when Miss Wickerson made references to something that was not in her witness statement, but they were very minor matters that were not surprising or significant.

    65.4. It was suggested that Miss Wickerson had changed her evidence in giving different dates in her witness statement and her oral evidence in relation to the harassment, but she had made it clear

that she had not made a note of dates and that she was uncertain about dates.

65.5. It was suggested that the text messages between Mr Russel and Miss Wickerson at page 163 on 26 January 2017 show that he was not aware of Miss Wickerson's problems with Mr X. Actually, it seemed to us that the messages suggest that he was in fact aware, *"People asking about your stalker today LOL"*. He does not ask for an explanation.

65.6. Miss Wickerson was challenged over her witness statement evidence that Mr Russel may have seen the incident on 23 December 2016. The critical word is, "may". Miss Wickerson in answering the questions put to her, made sensible and apparently, honest concessions.

65.7. Miss Wickerson's oral evidence over whether, in the meeting on 11 January 2017, she had said she did not want to raise a grievance and that she did not want things dealt with formally, was muddled. She acknowledged that Ms West and Ms Hockely had told her that she ought to put in a grievance and she never did submit a document entitled, "grievance". However, she did put her complaint in writing which was, to all intents and purposes, a grievance and we think she was entitled to say, as she did, that she thought she was raising a grievance.

65.8. Although part of her case is that no risk assessment was carried out in respect of her wrist injury and in fact, no pro-forma document was produced entitled, "risk assessment", Miss Wickerson was ready to conceded in evidence that the meeting on 17 February 2017 did amount to a risk assessment.

66. In summary, we found Miss Wickerson a credible witness.

Ms Hockey

67. Our view of the evidence of Ms Hockey is that she was very guarded. It sometimes seemed that answers had to be squeezed out of her. Many of her answers gave the impression that she was anxious not to say the wrong thing and depart from, "the party line". Either she had very poor recollection, or she was not being straightforward. Either way, she could not be described as a reliable witness. Certainly, we felt that she was not trying to be helpful to the tribunal.

68. Ms Hockey said she had not been aware from the meeting on 11 January that that Miss Wickerson felt unsafe and she had felt no measures needed to be put in place, other then telling her to walk away if Mr X approached her. Miss Wickerson's statement written a few days later spoke of wanting to be able to return to work feeling safe and secure. An outcome of the meeting had been that she was not to work alone, at least until Mr X had

been spoken to. It does not seem to us credible that Ms Hockey had not been aware that Miss Wickerson did not feel safe.

69. Another key factual dispute on which we had to consider the evidence of Ms Hockey in conflict with that of Miss Wickerson, is whether over the years, Miss Wickerson had made Ms Hockey aware of her problems with Mr X. Ms Hockey's recollection of things in her evidence was not as clear as it might have been and it seemed to us, may have been influenced by the Respondent having put its case together on the basis of her not being aware. Ms Hockey and Miss Wickerson were on good terms, she went so far as to say she felt like a mother toward her. It seemed to us inconceivable that Miss Wickerson had not shared with Ms Hockey her experiences with Mr X over the years.

Ms Larman

70. Ms Larman struck as a more straightforward witness, but there were some difficulties:

70.1. The evidence in her witness statement was that on 11 January, Miss Wickerson had wanted to raise a formal grievance, had not wanted to make a fuss and just wanted to return the £100. This is contradicted by the written statement of 13 January 2017 and so we accept Miss Wickerson's evidence in that regard.

70.2. Ms Larman also said that Miss Wickerson had said that her partner was unhappy with the £100 gift, but the individual concerned was not her partner at the time.

70.3. She made contradictory statements in her witness statement at paragraphs 30 and 31, that they would make sure that Miss Wickerson would not work alone whilst the matter was dealt with and that at no point was she informed that she would not work on her own. The point is contradicted, as we shall see, by an email from Ms West on 17 January 2017, (page 249).

Ms West

71. There were difficulties with the credibility of Ms West's evidence, examples of which are:

71.1. She was reluctant to admit that there was anything odd about a work colleague giving another a Christmas present of £100, (manifestly, there is).

71.2. She would not accept that by Ms Wickerson setting out her concerns in writing, (albeit at Ms West's request) that in any way made the complaint more formal.

71.3. She expressed the view in evidence that Miss Wickerson and Mr X were friends, which is contradicted by what is said in the written complaint.

71.4. She suggested Miss Wickerson never gave any indication her relationship with Mr X was anything other than fine. That is contradicted by the content of the written complaint.

71.5. When challenged about the accuracy of her witness statement in a particular respect, she said she had read it, “ages ago”. She had signed it on 13 July 2018, 10 days earlier.

71.6. She claimed to have told Ms Hockey to tell Miss Wickerson that Mr X had been spoken to. That was not in her witness statement and had not been mentioned, as one would expect if true, by Ms Hockey, who had given her evidence earlier. It seems unlikely to be true given the text exchange between Miss Wickerson and Ms Hockey on 20 February, at page 169.

71.7. She denied giving Miss Wickerson the impression that she would not have to work alone, with no time limitation. This is contradicted by her email to Mr Thompson on 17 January, page 249. In cross examination she said she had spoken to Mr Thompson, not something that she mentioned in her witness statement and one would have expected her to.

71.8. She would not accept that Miss Wickerson had raised a grievance; she would not accept that the written statement of 13 January amounted to a grievance and would not change her view in light of Miss Wickerson describing it as a grievance in her email of 20 February, (page 170).

72. In summary, we did not find Ms West a credible witness.

Mr Hales and Mr Russel

73. Not only were these two individuals not here to have their evidence tested under oath, it was well known to the Respondent that Miss Wickerson wanted them to attend. The reasons offered for not attending, without supporting evidence, were very weak. We attributed very little weight to their written evidence.

Facts

74. The events in question concern Miss Wickerson’s employment as a cleaner at a cement works. A business referred to as CBRE provided facilities management services to the cement works. The Respondent contracted with CBRE to provide cleaning services at the cement works. The operators of the cement works are referred as Hanson.

75. In April 2012, Miss Wickerson began working as a canteen assistant at the cement factory. She was employed at the time by a catering company who have no involvement in these proceedings.

76. There are approximately 250 individuals working at the cement factory at any one time. They are predominantly male.

77. Miss Wickerson says that in her time working at the cement works, she was harassed by a man we will refer to as Mr X. It is not an issue in this case, whether Miss Wickerson was harassed or not. That was the case against Castle Cement Limited, which is not before us. The case before us is, in short, that Miss Wickerson complained of harassment and because she had done so, was victimised and treated in such a way as amounted to a fundamental breach of her contract of employment. We do not therefore, have to make findings of fact about whether she was harassed or not. Nor would it be appropriate for us to do so, we have not heard from Mr X.

78. In February 2015, Miss Wickerson began working as a cleaner at the cement works, in addition to her work as a canteen assistant, employed by the Respondent's predecessors on the cleaning contract, CSG. Ms Hockey was her supervisor.

79. In September 2016, the canteen closed and the staff working there were made redundant. Miss Wickerson was able to increase her hours working for the Respondent as a cleaner on the cement works site.

80. Miss Wickerson says that Ms Hockey was aware of the difficulties she was having with Mr X. She says that the two of them were friendly even before she started as a cleaner, she had told her of her problems with Mr X during friendly chats and continued to mention them from time to time during informal chats once Miss Wickerson became a cleaner and Ms Hockey her supervisor. Ms Hockey says this is not true. We accept the evidence of Miss Wickerson that she had from time to time, whilst working as a cleaner at the cement works, mentioned to Ms Hockey, her difficulties with Mr X.

81. In November 2016, there was a meeting between Ms Hockey, Miss Wickerson and her cleaning colleague Mr Hales. In his written answer to questions posed by Miss Wickerson, Mr Hales says that he does not recall attending any such meeting. Ms Hockey acknowledges that such a meeting did take place. At this meeting, Ms Hockey discussed with Miss Wickerson and Mr Hales, that the Respondent was about to take over the contract for cleaning and that they would be transferred to the Respondent's employment. Miss Wickerson says that they were asked if they were happy about where they were working. She says that she assumed Ms Hockey asked this because of Miss Wickerson's concerns about Mr X and she says that she mentioned specific areas where she did not want to work. She says that Ms Hockey assured her that she would do all that she could to ensure Miss Wickerson would not have to work in areas where she would come into contact with Mr X. Ms Hockey says that

this is not true and that the first she knew of Miss Wickerson claiming to have issues with Mr X, was on 3 January 2017. We accept Miss Wickerson's evidence in this regard.

82. Miss Wickerson's employment transferred to the Respondent on 1 December 2016. The Respondent has approximately 2000 employees in operations across the UK. It relies upon a single HR advisor, (Ms West at the time in question) who has the support of one administrator.

83. On 23 December 2016, Mr X approached Miss Wickerson in the cement factory car park and quickly, before she could stop him, gave her what she thought was a Christmas card and kissed her on the cheek. She subsequently discovered that the Christmas card contained £100.

84. That was a Friday and the site was then closed over Christmas, (the Respondent was not closed, in that there continued to be people working at its head office over the Christmas break).

85. Upon her return to work on 3 January 2017, Miss Wickerson reported the gift and the kiss on the cheek to Ms Hockey by telephone. Ms Hockey was still on leave. She told Miss Wickerson to speak to the cement factory's plant manager. Miss Wickerson attempted to do so. He was not on site. She therefore spoke to his PA, who asked Miss Wickerson to prepare a written statement that she would pass onto the site manager.

86. Miss Wickerson reported this to Ms Hockey in a second telephone conversation that day. Ms Hockey told her not to provide a written statement statement until Ms Hockey had returned from leave and had checked what the Respondent's procedures were. In her witness statement at paragraph 22, Ms Hockey criticises Miss Wickerson for not providing the Respondent with a statement. In cross examination, she agreed that she had asked Miss Wickerson to make some notes but to hold fire until she got back. She also agreed Miss Wickerson did as she was asked, providing a statement after Ms Hockey had returned from leave.

87. Miss Wickerson heard nothing more until on 10 January 2017, she was informed by a text from Ms Hockey that there was to be meeting the next day with someone from HR, "about your £100".

88. On 11 January 2017, Miss Wickerson met with Ms Hockey, Ms West, (HR) Ms Larman, (Head of Health & Safety) and Ms Dzierzrqa, (the Respondent's Area Manager). No minutes were prepared of this meeting. When it was put to her in cross examination, Ms West agreed that she made notes but only of the first part of the meeting when they discussed a restructure and a change of hours, (after which Ms Dzierzrqa left) but that she gave up making notes when Miss Wickerson explained her problems with Mr X and what had happened on 23 December, because she could not follow what Miss Wickerson was saying. The notes which were made have not been produced.

89. Miss Wickerson explained what happened on 23 December; the card, the gift of £100 inside and the kiss on the cheek. She explained what had happened in the past. She agreed in cross examination that Ms West may have found it difficult to follow what she was saying because she was jumping around chronologically. She agrees that she was asked to prepare a written statement, which she did in due course.

90. The Respondent's witnesses say that Miss Wickerson was invited to submit a formal grievance. She says that is not true and she felt that as she was being asked to provide a written statement, her concerns were being taken seriously. She denies categorically the Respondent's witnesses evidence that she did not want to make an official or a formal complaint. Our finding is that the Respondent's witnesses probably told Miss Wickerson that she ought to put in a grievance, but that is what she thought she was doing when she prepared and submitted her written statement. She did not say that she did not want to make an official or formal complaint.

91. Ms Hockey's evidence was that Miss Wickerson was told that she would not have to work alone, "until the issues were addressed". Ms Larman says that she was told that the Respondent would try to make sure that she did not have to work alone, "in the short term". Ms West says that she told her that she would not have to work alone, "until I spoke to the client".

92. Miss Wickerson says that she made it very clear that she had on-going concerns about her safety at work and that she was given a verbal assurance by Ms West that she would not have to work alone in any area near Mr X in the future. We accept Miss Wickerson's evidence.

93. Miss Wickerson wrote a statement and sent it to Ms Hockey on 16 January 2017. It was typed, signed and dated 13 January. It was 2 pages long and included reference to:

    93.1. How Mr X gradually began appearing wherever she was working and polite conversation gradually became more lingering, so that she started trying to avoid going to where he was likely to be. She became progressively more uncomfortable.

    93.2. An occasion when Mr X had brushed concrete dust off her clothing, (after she had declined his offer to do so). After this occasion she spoke to her manager in the catering company, he spoke to Mr X, who apologised and thereafter, his behaviour ceased for a time. (Miss Wickerson subsequently formed a relationship with that manager, although that was over by the Autumn of 2016.)

    93.3. The behaviour resuming. Mr X had given her his phone number and asked for hers, (which she refused). He had tried to kiss her on the cheek, (she had said no and pushed him away). He constantly stared and blew her kisses. He had tried to befriend her on Facebook.

93.4. Mr X having given her a number of gifts for her birthday, (5 December) and Christmas over the years, secretly placing them in her coat pocket, including:

93.4.1. Haribo sweets in 2011;

93.4.2. Money, (£10) in Christmas 2012 and 2013;

93.4.3. Cat earrings in 2014, and

93.4.4. A cat necklace in 2015.

93.5. That she had in the past, spoken to her shift manager, (that would be Ms Hockey) who had moved her cleaning duties so that she would not come across him, that this arrangement had lapsed after the Respondent took over the contract but that she had been teamed up with a second cleaner.

93.6. The incident on 23 December 2016, as described above.

94. She concluded with:

"And what outcome I would like from writing this statement is that:

- *The money gets handed back to the person in question!*
- *That he leaves me alone!*
- *And that I can come back to work feeling safe and secure!"*

95. Ms West forwarded that statement to the Respondent's Regional Director, Mr Thompson, on 17 January 2017. In that email she said:

"*We need to inform CBRE of the attached and ask them to speak to Hanson in order to speak to the individual and give him his money back.*

Just to reiterate – Emma does not work on her own anymore and we have told her to report any further incidents immediately.

Emma, as you can see does not want to make this official but as a company we are aware of the incidents and the money and have to deal with this – she has been informed of this.

Can you call so we can discuss a way forward – not sure if you want to send an email or want me to do it from an HR point of view."

96. We note in particular, the reference to Miss Wickerson not working alone anymore, i.e. without temporal restriction.

97. Miss Wickerson was never told what was done with her statement and who it was provided to, nor what action was taken on it.

98. To begin with, Miss Wickerson was not left to work alone, she was always allocated to work with one of her colleagues.

99. As time passed, Miss Wickerson moved from feeling reassured after the meeting on 11 January 2011 that something was being done, to feeling anxious that nothing was being done.

100. On 2 occasions, at some point after 11 January 2017, but on dates she cannot recall, Miss Wickerson encountered Mr X:

100.1. On one occasion whilst she was working with Ms Hockey at a toilet block. He tried to engage her in conversation. She replied with yes or no answers to his questions. After he had gone, Ms Hockey asked her if she was alright. Miss Wickerson asked what she was supposed to do when he sought her out and Ms Hockey replied, “best be polite”. Ms Hockey denies seeing Mr X talking to Miss Wickerson. In her witness statement, she refers to working with Miss Wickerson during this period and her referring a number of times to seeing Mr X walking past or being nearby and winking or smiling at her, but that she had not noticed any such behaviour. In cross examination, she agreed Miss Wickerson had mentioned the encounter, but that she had not noticed anything. We prefer the evidence of Miss Wickerson; Ms Hockey saw Mr X talking to her and asked her afterwards if she was alright.

100.2. On the second occasion, working alone in an area called the Packing Dock, he said he had not seen her for ages and asked her for her telephone number, suggesting they meet for a coffee and chat. She declined and moved on, but he found her again, this time telling her that she was nice to talk to, that his wife did not understand him and suggesting that they meet when his wife was playing bowls.

101. On a number of occasions after 11 January 2017, Mr X would appear, watch Miss Wickerson, wave to her and start walking toward her. Each time she moved away and avoided him.

102. On 26 January 2017, there was a text exchange between Miss Wickerson and Mr Russel. He told her that Hanson employees were asking him about her, “stalker”, she asked who, he said he did not know her name and that he had replied that it was just someone making her uncomfortable, (page 163).

103. On 31 January 2017, a Contract Manager at CBRE forwarded to someone at Hanson, a copy of Miss Wickerson’s written statement. The email reiterated Miss Wickerson’s desired outcomes as set out at the end of her statement. Hanson is asked to confirm who is going to deal with the matter. The writer states that CBRE will ensure the money is handed

back. The writer expresses concern that Miss Wickerson has complained that people appear to have heard about the problem and are discussing it.

104. On 8 February 2017, Miss Wickerson was diagnosed at hospital with a right wrist, "strain/sprain/tendonitis". She reported this to Ms Hockey.

105. On 13 February 2017, in the context of Miss Wickerson's painful wrist, Ms Hockey asked Miss Wickerson if she could do certain tasks, which included, "the old shift managers office". This is a location at which Mr X was likely to be encountered. The timing of this task was raised by Miss Wickerson, explaining that Mr X does not finish until 3:30, sometimes later. Ms Hockey wrote:

> *"I need to be clear about what you are saying – do you not want to be on site when X is on site"*

Miss Wickerson replied:

> *"Im only trying to do what miya* [Ms West] *from HR told us to to and that was to hav no contact or b alone on site when he is on shift. Like I said it doesn't bother me liz. I am not trying to be difficult I hav enough problems at the moment I just don't want to do anything wrong. U tell me what time u want me in to work. And finish at what time and I will do it !"*

Ms Hockey replied that she should work 12 to 7.

106. On 17 February 2017, Ms Larman attended the cement works site with a new area manager Ms Kendal, (who had replaced Ms Dzierzgwa). Whilst there, Ms Larman met with Miss Wickerson, (not by prior arrangement). Ms Laraman says that she told Miss Wickerson that she was going to conduct a risk assessment on her wrist. She asked her to demonatrate her table wiping and mop and bucket techniques and having observed her, confirmed that her techniques were correct. Miss Wickerson says she was not told that this was a risk assessment.

107. Ms Wickerson complains that Ms Hockey and Ms Larman suggested that she probably did not have tendonitis, that she more likely had carpal tunnel syndrome. Ms Larman confirms that is so.

108. Miss Wickerson left the meeting but returned almost immediately and, having heard nothing more from the Respondent about Mr X, asked what she was to do if she encountered him. They told her to be polite, as not communicating might make matters worse and that she should contact Ms West for advice. If Mr X appeared in an area she was cleaning, she was to leave it and return later. Miss Wickerson says that she was left with the impression that nothing had been done and nothing was going to change. Ms Larman says at paragraph 55 of her statement that Miss Wickerson simply complained that Mr X had been talking about her. In cross examination, Ms Larman agreed that Miss Wickerson was complaining that Mr X was still making her feel uncomfortable, although having done

so, she tried to backtrack. She also agreed that Miss Wickerson was effectively, asking for help. Ms Hockey's evidence in her witness statement, (paragraph 63) is that no mention was made of her feeling uncomfortable, of being touched, of his discussing anything inappropriate, just that he had spoken to her. In cross examination, Ms Hockey agreed that from this conversation, she knew that Miss Wickerson was still worried about Mr X.

109. The Respondent has produced some notes of this meeting, they are at page 295. They were produced in response to a subsequent Subject Access Request. At paragraph 83 of her statement, Miss Wickerson sets out inaccuracies with the minutes**.** Those inaccuracies do not amount to evidence that the notes are fabricated, they are not untypical of inaccuracies one might expect to see in a set of notes written up after the event, as these were. The notes are, however, odd. They are not dated or signed. There is no indication who the author is. Neither Ms Hockey nor Ms Larman make reference to the note in their witness statements. Ms West refers to page 295 as details of a risk assessment. They read as a set of minutes. Ms Larman and Ms West both confirm that a Risk Assessment pro forma is usually used. Someone has hand written a heading to the typed document, "Risk Assessment Notes", it is not clear who.

110. The minutes record the following in respect of the conversation about Mr X:

> *"EW: After 5 minutes EW comes back into the room and asked if she can talk about the incident with Mr X – asking what to do if he spoke with EW i.e. passing the time of day*
>
> *LL: Informs EW that she should not be rude – but reply and then leave the room and to come back when Mr X had left*
>
> *EW: States that she was not uncomfortable working the area but was just asking in case he grabbed EW or something (red in the face)*
>
> *LL: Asks EW why EW would think he grabbed EW as she has never mentioned this before*
>
> *EW: (red in the face) States does not know but was just asking how EW should manage the situation*
>
> *LL: Informs EW that unfortunately Mr X works all over the site so was inevitable that EW would at some point bump into Mr X – asks if EW is uncomfortable working on site knowing that Mr X is there*
>
> *EW: (calm again) States that EW is okay was just asking for advice*
>
> *LL: Informs EW that if Mr X is in the area that EW is to clean then should clean a different area and come back once clear – if there were any issues should contact EH."*

In her criticism of the notes accuracy, Miss Wickerson did not challenge this passage.

111. Miss Wickerson says that she was told during this meeting to go home and reflect on whether this was the job for her. She observes that this is not reflected in the notes.

112. Miss Wickerson says that after this meeting, she was left feeling that her concerns about Mr X were not being taken seriously.

113. On 20 February 2017, Ms Wickerson was diagnosed with a viral infection. That day, she sent a text to inform Ms Hockey of this, which went on to say:

> *"A lot has happened over the last few days. And it has caused me a lot of stress and worry that has made me run down. And ill! I'm also going to send you and maya an email to see where I stand with what we do Mr X after re-reading the hand book."*

Ms Hockey replied giving her email address, commenting:

> *"…hopefully we will get some direction on this business and for all [sic]"*

114. Also on 20 February, Miss Wickerson emailed Ms West:

> *"As you are aware the Dr has advised me to rest at home until a nasty viral infection has had a chance to subside and until LCC has had a chance to respond to the very real concerns raised about my safety as a lone worker under the anti-harassment policy and because of the injury to my right wrist. I have been extremely worried and distressed that I have received:*
>
> *1. No help and no formal response to the complaint of harassment I have been subjected to by Mr X. She This was raised as a grievance w/c 9 January, and I am still being asked to work alone in the area where he can have contact with me.*
>
> *2. No full risk assessment with regard to my wrist injury.*
>
> *These factors are preventing me from returning to work and I am now losing income which I can't afford to be without.*
>
> *In looking at the Staff Handbook I realise that I may now need to raise these grievances at a more senior level and would ask you to advise how I should proceed"*

115. Having received no reply, Miss Wickerson wrote again on 23 February 2017 to chase for a reply, explaining that she wanted to return to work but that she could not do so until she has been assured about the actions

being taken with regard to her health and safety. Ms West replied that day to explain that she had been away from the business, but that she would reply once she had, *"gathered all the information necessary to do so".* Miss Wickerson replied to that on 24 February:

> *"Thank you for your response. I realise I am not a priority of the business. However:*
>
> *1. I first raised the matter of my harassment on 3rd January. You met with me w/c 9th January and assured me that I will would never have to work alone in an area near my harasser. This has not been the case and it will be 8 weeks from Tuesday since my initial complaint.*
>
> *2. The matter of my repetitive strain to the wrist emerged 2 weeks ago and despite the information from my GP the full risk assessment has still not been conducted.*
>
> *I cannot return to work until you honour these agreements, so please advise me of the actions taken and understandings agreed. If you do not I will have no alternative but to seek professional advice. I cannot afford not to work."*

116. Ms West told us that she was shocked by this email. She also told us that Ms Hockey had told her that Miss Wickerson was being advised by a relative and intended to put a claim in. She replied on 24 February, (page 175). Miss Wickerson complains about this email and it therefore warrants quoting in full:

> *"This is an initial reply.*
>
> *1. Please note this is not about you being a priority but getting the facts together before replying to you – the company has a legal obligation to ensure that any communication is accurate.*
>
> *2. In regards to your harasser – you did not accuse him of harassment – you accused him of giving you money and approaching you and giving you gifts for many years. You have always stated that he has never made any unwanted attention or made inappropriate comments. For him to potentially be harassing you, you would have deemed to have seen his behaviour as unwanted and not communicated with him.*
>
> *Since January I understand that you have communicated with him and gone against the company's advice and to date I am getting the facts together in order to officially reply to your email. I or no one from LCC has ever stated that you could not work near him as due to the size of the site we can never state where you or he will be. We did advise you to stay away from him and if you have to go into an area to clean where he is present you were asked to leave it and re-arrange the order of the areas you were to clean.*

3. In regards to your repetitive strain injury a risk assessment was carried out and I am awaiting notes from Dawn Kendall and Lorraine Larman who carried this out.

Your sickness I understand is due to a viral infection and nothing to do with the above. You talk about "honouring agreements" – please clarify as to what you mean by this as LCC has not made any agreements with you?

Should you wish to seek professional advice then please do so however the company will continue to act fair and reasonable and follow its policy and procedures.

As stated above you will be receiving a formal response once all the evidence and information has been gathered".

117. We note that there is no reference here, as one might have expected there to have been, to Mr X having been spoken to and the money returned.

118. Miss Wickerson replied at length on 26 February 2017, (page 176). She said she had been shocked and deeply hurt by the email. She referred to her written statement. She reminded Ms West that she and Ms Hockey had told her not to work in the vicinity of Mr X nor to speak to him, yet she had been rostered in such an area twice since. She comments, (with some justification) that the suggest that the matters she has complained of do not amount to harassment, "*beggars belief*". She complained about it having been suggested to her that contrary to her medical diagnosis, she must have carpal tunnel syndrome and not tendonitis and said that she had never been told that the meeting on 17 January was a risk assessment. In respect of, "honouring agreements", Miss Wickerson reminded Ms West that she had assured her that she would not have to work alone within the vicinity of Mr X again. She said that the Respondent had prevented her from being able to return to work by not responding to or acting on her initial complaint and by not carrying out a risk assessment and she cannot return to work until the agreements are honoured.

119. On 27 February 2017, Miss Wickerson was certified by her GP as not fit to work, diagnosed with, "acute stress reaction", (page 178).

120. On 28 February 2017, Ms West wrote a lengthy 8 page reply to Miss Wickerson, who describes the tone of the letter received as offensive and upsetting. It starts at page 179. The key points are that Ms West:

120.1. Appeared to criticise Miss Wickerson for not providing Hanson with a written statement as requested immediately after Christmas, (Ms Hockey had in fact told her not to do so).

120.2. Appeared to implicitly blame Miss Wickerson for what had happened, writing, "*Both Lorrain Larman and the supervisor re-iterated to you that you needed to stop talking to the individual in question…".*

120.3. Said that the incident on 23 December 2016 did not amount to harassment. She stated, "*To date there is no evidence that he harassed you".*

120.4. Made great play of Miss Wickerson having been invited to submit a formal grievance and her declining to do so.

120.5. Denied that anyone had been aware of difficulties with Mr X until she reported the 23 December incident.

120.6. Accused Miss Wickerson of having, subsequent to the meeting on 11 January 2017, met with Mr X and held a conversation with him, (in cross examination she confirmed that this was a reference to the toilet incident referred to above).

120.7. Appeared to deny that any assurances had been given on 11 January that she would not be rostered to work in an area where she was likely to come into contact with Mr X.

120.8. Seems to criticise Miss Wickerson for claiming to have tendonitis, commenting, *"…the hospital form says injury to wrist and goves [sic] various diagnosis and Tendonitis is just one of them".*

120.9. Claimed that Miss Wickerson had been informed that the money had been returned and Mr X spoken to, (not true).

120.10. Stated that Miss Wickerson had never raised a grievance. As the money had now been returned and the person spoken to, her, "complaint" was now closed and she could not appeal because she had not raised a grievance, (this is first Miss Wickerson knew of this).

120.11. Set out a list of provisions for home workers, (which do not appear to have any bearing on Miss Wickerson's circumstances).

120.12. Stated that Miss Wickerson's assertion that there had been no risk assessment was, "not true" and purporting to attach the notes referred to above, (they were not attached, as noted above, they were subsequently provided via a Subject Access Request).

120.13. Invited Miss Wickerson to submit a grievance, which would then be dealt with.

121. Miss Wickerson refers to a text exchange on 1 March, (copied at page 188) and in her witness statement suggests that this is from Ms Hockey asking her to drop off her keys, which made her wonder if she was being sacked. The text coped at page 188 does not say that at all. We see there, a text from Miss Wickerson to Ms Hockey informing her that she has

handed the key in, to which Ms Hockey replies, *"Thank you – hope you feel better soon".*

122. On 6 March 2017, Miss Wickerson wrote to the Respondent's Chief Executive, Mr Vincent, (page 189). In this letter, she says:

> *"I raised a complaint with my supervisor about harassment last year and this year became so concerned about my safety that I raised a grievance on January 3rd 2017. I also had to report that my Dr had diagnosed me with Tendonitis… I was asked to make a detailed statement about the harassment which I did on 17th January. Yet nothing has been done…. I have received no help and support and have had no acknowledgement or reply to my last email of 26th February… I'm very frightened and have no income coming in now (only statutory sick pay). LCC haven't honoured their harassment, grievance or health and safety policies and seem to be wanting me just to go away."*

123. On 10 March 2017, Miss Wickerson wrote a 5 page reply Ms West's letter of 28 February, (page 191):

123.1. She complained that the tone of Ms West's letter seemed to suggest that she was responsible for all that had happened.

123.2. She claimed to have sent a text message to Ms Hockey in November 2016 expressing her concerns about Mr X, (no such text appears in the bundle). She claimed to have subsequently, in a meeting with Ms Hockey, discussed that she did not wish to work in particular locations to avoid Mr X.

123.3. With regard to the critical suggestion that she had not provided a statement to Hanson, she makes the point that she was told not to, by Ms Hockey.

123.4. She made the point that Ms West had suggested Mr X had never been told that his behaviour was not welcomed and points out that in her statement she explained that he had been so informed in the past.

123.5. Although she had been told to walk away from an area she was cleaning if Mr X appeared, she said that Ms Hockey had informed her that this was not practicable, because she could not just abandon cleaning products and that she was assured someone would always be with her when she was cleaning in areas of particular difficulty.

123.6. She said that she had made it very clear that she felt very uncomfortable whenever Mr X was anywhere near her, contrary to Ms West's assertions that she had never said as such.

123.7. She denied that she had ever been informed that in order to raise a grievance, she would have to send a letter to that effect. She thought that the meeting on 11 January was a meeting to discuss her grievance.

123.8. She refers to the meeting on 11 January as a grievance meeting, that she had been told that they would ensure she was left alone, she would be able to return to work feeling safe and secure and yet, they had done nothing toward that end.

123.9. She said that other staff were aware of her problems including Ms Hockey and Mr Russel.

123.10. She takes issue with Miss West's suggestion that she had never stated she felt at risk, saying that she had repeatedly informed Ms Hockey, Ms Larman and Ms West and in her written statement, that she felt at risk.

123.11. She challenged Ms West's assertion that she had not been told not to work in the vicinity of Mr X and that Ms Hockey had told her in the meeting on 11 January that she would not have to work in the area where she would encounter Mr X or would not have to work alone in such an area.

123.12. With regard to Ms West's suggestion that she has not been harassed, she said that this suggested Ms West had not listened to her, not read her statement and had not read her emails.

123.13. She denies having been engaged in a conversation with Mr X and stated that she spends her time trying to avoid him.

123.14. She claimed that Ms West had done absolutely nothing to deal with her grievance or her health and safety issues. She had not even asked how she was. She said that she had been treated cruelly, inhumanely, and negligently.

124. On 10 March 2017, Ms Wickerson's aunt, Ms Johnson, wrote to Ms West to inform her that all future communications should be directed to her.

125. On 14 March 2017, Miss Wickeron was issued with a further fit note certifying that she was not fit to work due to, "acute stress reaction". A further such fit note was issued on 28 March.

126. On 28 March 2017, Miss Wickerson wrote again to Mr Vincent, (page 204). She commented that she had received no acknowledgement or reply to her earlier letter. She complained of agreements relating to harassment not having been honoured. She complained of problems relating to health and safety not being dealt with properly. She complained of being asked to hand in her keys. She complained that nobody was dealing with the concerns which she had raised and that her chosen representative had not been replied to. She refers to being ill with acute

stress and expressed the view that what had been done to her amounted to constructive dismissal.

127. On 29 March 2017, Ms West wrote to Miss Wickerson and invited her to attend an investigatory meeting on 3 April 2017, (page 206) stating that the Respondent is unsure how to proceed. This invitation letter set out the Equality Act definition of harassment, (in part) and stated that, *"To date there is no evidence that he has harassed you, as stated above, if there are examples where this has happened and please provide them"*. The letter made it clear that Ms Johnson would not be able to attend the investigation meeting as Miss Wickeron's representative.

128. On 30 March 2017 Ms Johnson wrote, (page 210) to say that as the Respondent would not allow Ms Johnson to attend with her, she, (Miss Wickerson) would not be attending the meeting.

129. On 10 April 2017**,** Miss Wickerson wrote to resign her employment, (page 211). She wrote:

> *"I confirm that I have resigned from my position as a cleaner, as a result of the series of breaches that I have occurred in my employment. I had wrongly assumed that you had realised this from my emails to you when I talked of your actions leading to my view that you had constructively dismissed me."*

Conclusions

The Allegations

130. We consider first of all, the allegations in respect of the events alleged to amount to a detriment and/or to have caused Miss Wickerson to resign:

130.1. (a) We agree that the Respondent failed to investigate the complaint Miss Wickerson raised on 11 January 2017. There is in fact no evidence Mr X was spoken to or the money returned to him, other than Ms West's passing reference to this in the letter of 28 February 2017. We saw that Ms West informed the Respondent's Regional Director on 17 January and that CBRE passed on a copy of her statement to Hanson on 31 January, but we did not see what happened after that. We do not know if Mr X was spoken to at all. If he was, we do not know what he might have had to say in answer to the complaint. Did he acknowledge what he was said to have done? Did he apologise? Was he given any words of advice? Was he given any Training? Was disciplinary action taken? We do not know and Miss Wickerson did not know.

130.2. (b) It is not right to say that the Respondent did not take any steps to ensure that Miss Wickerson did not encounter Mr X at work. It did initially take steps to ensure her safety, by agreeing

and arranging for her not to have to work alone in any area she might encounter him. That arrangement ceased to be in place as evidenced by the text messages on 13 February 2017, at which point Miss Wickerson was unaware that any action had been taken with regard to Mr X, who for all she knew, may still have thought that she had readily accepted his gift of £100 and the kiss on the cheek, without protest.

130.3. (c) We accept that a risk assessment was carried out, albeit not on the Respondent's usual pro-forma. The process followed was rough and ready, but it is clear that and we accept that, a risk assessment was conducted by Ms Larman on 17 February 2017.

130.4. (d) Miss Wickerson was not given an assurance that she would not encounter Mr X again. It would have been unrealistic to give such an assurance, given his role was such that he could properly appear anywhere on site. She was told to be polite to him. In itself, not inappropriate advice, but in context, Miss Wickerson had not been given any information that Mr X had been spoken to and warned that his behaviour toward her was unacceptable. We can understand how Miss Wickerson might have found the instruction to be polite, upsetting.

130.5. (e) Ms West's email of 24 February 2017, (page 175) does not seem to expressly deny that Miss Wickerson had complained about harassment before 3 January 2017 or deny that she had complained about what had happened on 23 December 2016. She does however write, *"You have always stated that he has never made any unwanted attention or made inappropriate comments".* Ms West did suggest that what Miss Wickerson had complained of did not amount to harassment, *"you did not accuse him of harassment …For him to potentially be harassing you, you would have deemed to have seen his behaviour as unwanted and not communicated with him".* Ms West did deny that any assurances had been given, by stating, *" I or no one from LCC has ever stated that you could not work near him…We did advise you to stay away from him and if you were asked to go into an area to clean where he is present you were asked to leave it…"* and , *"…LCC has not made any agreements with you".* In the context of Miss Wikerson in her earlier email referred to having first raised the matter of her, "harassment" on 3 January and having been, "assured" that she would never have to work alone in an area near her, "harasser", Ms West's words do seem to us to amount to a denial that the conduct complained of amounted to harassment and that any assurance had been given about her working arrangements.

130.6. (f) In Ms West's long letter of 28 February 2017, (starting at page 179) she replied to Miss Wickerson's quoted comment, *"You have known the facts about this situation for a long time"* by writing, *"I can confirm once again that we knew about the facts*

as soon as it was raised after the Christmas period…". That does seem to amount to a denial the Respondent as a body, knew anything before that date. She does not seem to suggest that she denies that Miss Wickerson had complained about what had happened on 23 December. Ms West does specifically suggest that the conduct complained of did not amount to harassment.

130.7. (g) Ms West did not respond to Miss Wickerson's letter of 10 March 2017 until 29 March. That is 19 days later and one day after Miss Wickerson wrote to the Chief Executive to say that she regarded herself as constructively dismissed, (see below). That is not a reasonable time frame in the circumstances.

131. We will now structure our decision, by answering the questions posed in the agreed list of issues

Unfair Dismissal

Question 1:

132. In our judgement, Miss Wickerson did resign her employment because of the acts or omissions complained of in the allegations set out at paragraphs 17 (a) to (g) of the Amended Particulars of Claim. Dealing with suggestions that were made or alluded to during the hearing; she did not resign because she had another job to go to, because she wanted to move or because she wanted to claim compensation.

Question 2:

133. We consider that the following matters together amount to conduct without reasonable or proper cause, likely to undermine mutual trust and confidence between employer and employee and therefore a fundamental breach of contract:

133.1. Miss Wickerson's, "complaint" made orally on 11 January and put in writing on 13 January was a grievance. She may not have initially called it a grievance or purported to advance it under the terms of the Respondent's Grievance Policy, but it was nonetheless in our view, quite clearly what any competent experienced employment relations practitioner would recognise as and refer to as, a grievance. We will refer to it as such. The Respondent did not investigate Miss Wickerson's grievance. The only action taken was that the statement was forwarded eventually, to the client. The Respondent knew from the Particulars of Claim that Miss Wickerson's case was that it was not dealt with and yet, they have produced no evidence that it was. We conclude that it was not. More importantly, the Respondent gave Miss Wickerson the justifiable impression that her grievance had not been dealt with at all, not even that it had been forwarded to the client.

133.2. Having initially taken the sensible and reassuring step of ensuring that Miss Wickerson would not have to work alone, that arrangement was reversed without, (so far as Miss Wickerson was aware) Mr X having been spoken to. That placed her in the reasonably perceived jeopardy of being subjected to further such treatment.

133.3. In the context of not being given any assurance that Mr X had been spoken to about his conduct, Miss Wickerson was told to be polite to him if he spoke to her, reinforcing her perception that he had not been spoken to, (he would be unlikely to approach her again if he had been). She was upset by that instruction.

133.4. Ms West's letter of 24 February 2017 quite remarkably, suggests that the conduct by Mr X toward Miss Wickerson, as reported to her, did not amount to harassment. It plainly did. It was reported as unwanted and in Miss Wickerson's reasonable perception and in the circumstances as reported, it had the effect of violating her dignity and created an environment for that could reasonably be described as degrading, humiliating and offensive.

133.5. Ms West's letter of 24 February also denied arrangements and assurances, which we find, had been given.

133.6. Ms West repeated the error of suggesting the conduct complained of did not amount to harassment and does deny that the Respondent knew anything of these matters before January 2017, which we find not to be the case, in that Ms Hockey had known of the history.

Question 3:

134. We are asked whether the Respondent's failure to reply to Miss Wickerson's letter of 10 March, (a detailed response to Ms West's of 28 February) amounted to the, "last straw". The sequence of events is that 18 days later, she wrote to the CEO, Mr Vincent, referring to the lack of a reply and saying, *"I view what you have done to me as constructive dismissal."*. On 29 March she received a letter from Ms West inviting her to a grievance hearing. On 10 April she submitted a hand-written letter clarifying that she had resigned because of a number of breaches and that she had wrongly assumed that the Respondent had realised this from her 10 March email. Her aunt on her behalf, in an email of 14 April 2017, confirmed that, *"the effective date Tuesday 28th March 2017"* [sic]. The ET1 refers at Section 5.1 to 10 April 2017 as the date employment ended. As Miss Wickerson explains in her witness statement and we accept, she had written the letter of 10 April because having started Early Conciliation on 3 April, (consistent with having resigned on 28 March) the Respondent had indicated that it did not accept that Miss Wickerson had resigned and that she should do so immediately.

135. It is clear to us that the final straw was Ms Wests failure to respond to Miss Wickerson's letter of 10 March, that is what caused Miss Wickerson to resign. She resigned on 28 March. The letter of 10 April was only written because the Respondent would not accept that the letter of 28 March was a resignation.

136. Whatever view one takes of the date of resignation or when the employment was terminated, when she wrote her letter 28 March, she had decided to resign and that was because of the matters referred to above.

Question 4:

137. It was suggested in closing submissions that Miss Wickerson affirmed her contract of employment because she had expressed her dissatisfaction in February 2017 and then waited 2 months before resigning. Before the delayed response by Ms West in March, the last incident of conduct undermining trust and confidence was her letter of 28 February. Ignoring the delayed response, it was 6 weeks until Miss Wickerson took the decision to resign. However, she was away from work with, "acute stress reaction". There was nothing in the meantime by which she suggested that she had waived the breach, that she had affirmed the contract. In the circumstances of this case, the lapse of time did not amount to affirmation.

138. Mr Ridgeway refers us to paragraph 44 of the Judgment of Sedley LJ in the case of Buckland cited above. He prays this in aid to his suggestion that because the Respondent had offered to make amends, (by which he means that they had invited her to attend a grievance investigatory meeting) we should find that Miss Wickerson has affirmed the contract. It is difficult to see how the Respondent's action, (inviting Miss Wickerson to a meeting) can be interpreted as an act by the Claimant, (affirming the contract). The situation in Buckland was of course quite different; there the Respondent had upheld Professor Buckland's grievance before he resigned and yet it was held that on the facts, he had not affirmed the contract by waiting for the outcome of the investigation into his grievance. It was acknowledged that there might be circumstances in which reasonableness by the employer might be relevant to determining whether there had been a fundamental breach of contract by the employer in the first place. In Miss Wickerson's case, there had already been a fundamental breach before the grievance process was belatedly implemented and that cannot be later rectified so as to preclude acceptance of the breach. At paragraph 44 of his Judgment, Sedley LJ suggests that Employment Tribunals might take a robust approach to acceptance, particularly if the wronged party, "fails to make its position entirely clear at the outset". In this case Miss Wickerson had made her unhappiness clear in the February correspondence and that she considered herself constructively dismissed on 28 March, before the invitation to a meeting in the letter of the 29th. In our judgment, Miss Wickerson cannot be said to have affirmed the contract.

Question 5:

139. We find that there was a dismissal. No potentially fair reason is advanced; the dismissal was unfair.

Question 6:

140. Miss Wickerson has not contributed toward her dismissal nor could it be said that she might have been fairly dismissed in due course.

Wrongful Dismissal

Question 7:

141. As she resigned because of the Respondent's breach of contract, Miss Wickerson is entitled to pay in lieu of notice. 2 weeks is claimed.

Victimisation

Questions 8, 9 & 10:

142. Before we decide whether the complaint of victimisation is in time, we must first decide what if any, of the allegations of victimisation succeed. If any of them are potentially out of time, we must decide whether they are saved by continuing acts and if they are not, whether it is just and equitable to extend time.

Question 11:

143. The complaint to Mrs Hockey, what was said by Miss Wickerson in the meeting 11 January 2017 and then what was said in her statement of 13, (not 16) January 2017, are plainly complaints of being harassed contrary to section 27 (1) (a) and (2) of the Equality Act 2010. Miss Wickerson was complaining of conduct by Mr X which she did not want and which had the effect of violating her dignity and of creating a degrading, humiliating and offensive environment.

144. The Respondent says that these are not protected acts because they were made in bad faith, with a view to receiving compensation. Irrespective of the point that this argument is not pleaded by the Respondent and that it arguably ought not be permitted to rely on it, we are unhesitatingly of the view that Miss Wickerson was not looking for compensation when she raised her complaint; her motive was that she wanted Mr X's behaviour toward her to cease and for the £100 to be returned.

Question 12:

145. On or about 23 or 24 February 2017, Ms Hockey told Ms West that Miss Wickerson was being advised by a relative and that she was going to put a claim in. From that point, the Respondent believed that she might do a protected act, namely issue a claim in the employment tribunal

complaining of discrimination and harassment, contrary to the Equality Act 2010.

Question 13:

146. We have made our findings of fact about the alleged detriments already and have set them out above. Our findings on whether they amounted to detriments are as follows:

146.1. (a) The Respondent failed to investigate the complaint Miss Wickerson raised on 11 January 2017. That amounts to a detriment.

146.2. (b). The Respondent did initially take steps to ensure Miss Wickerson's safety, by agreeing and arranging for her not to have to work alone. However, that arrangement fell apart on 13 February 2017, at which point Miss Wickerson was unaware that any action had been taken with regard to Mr X. That amounts to a detriment.

146.3. (c) We accept that a risk assessment was carried out; there was no detriment in this respect.

146.4. (d) Miss Wickerson was not given an assurance that she would not encounter Mr X again, but we accept that it would have been unrealistic to give such an assurance. That was not a detriment. However, giving her advice to be polite to him in circumstances where she had no idea whether or not he had been spoken to and what his reaction had been, did amount in our view, to a detriment; she would have felt at a disadvantage continuing to work on-site alone, where her employers only apparent action was to advise her to be polite to her harasser.

146.5. (e) We found that Ms West did not in her email of 24 February 2017, deny that Miss Wickerson had complained of harassment before 3 January 2017, nor did she deny that Miss Wickerson had complained about the conduct on 23 December 2016. However, she did deny that the conduct complained of amounted to harassment and did deny that any assurances had been given as to working arrangements. These latter two points do amount to detriment: it was wrong to deny that the allegations as described amounted to harassment and it was false to deny that any assurances had been given. Both upset Miss Wickerson and further enhanced her apprehension about going to work and encountering Mr X and amount to a detriment.

146.6. (f) We have found that in Ms West's letter of 28 February 2017, she did seem to deny that the Respondent as a body, knew anything before 3 January 2017. She did not suggest that she denied that Miss Wickerson had complained about what had

happened on 23 December, but she did specifically suggest that the conduct complained of did not amount to harassment. Again, making her all the more apprehensive about going to work and amounting to a detriment.

146.7. (g) Ms West did not respond to Miss Wickerson's letter of 10 March 2017 within a reasonable time frame. Failing to deal with her expressions of concern timeously continued Miss Wickerson's concern about her return to work and the apparent confrontational, aggressive, attitude of her employer. It amounted to a detriment.

Question 14:

147. We now consider each of the allegations that we have upheld as amounting detriments in turn and consider whether we conclude that they were inflicted because Miss Wickerson had done a protected act, or because the Respondent thought that she would do:

147.1. (a) To begin with, the Respondent took Miss Wickerson's complaint seriously; Ms West wrote to the Regional Director, Mr Thompson. It looked as if the Respondent was prepared to face up to the potential embarrassment of having to go to its client with a complaint of harassment. There appears to be no adverse view taken of Miss Wickerson because of her complaint. The subsequent failure to progress the investigation further, seems to us at this stage, to amount to incompetence and oversight.

147.2. (b) We do not criticise the Respondent for failing to take steps to ensure that Miss Wickerson did not encounter Mr X.

147.3. (c) We have found that there was a risk assessment.

147.4. (d) Miss Wickerson being told to be polite to Mr X was in our view, insensitive and incompetent, but not because she had complained of harassment; the motivating factor in the mind of Ms Hockey, Ms Larman and Ms West, was to give sensible advice.

147.5. (e) We have found that in her letter of 24 February 2017, Ms West did not deny that Miss Wickerson had complained of harassment before 3 January 2017 or that she had complained about the conduct on 23 December 2016, but she had seemed to deny that the conduct complained of amounted to harassment and that any assurances had been given about working arrangements. We have thus far concluded that there are no facts from which we could properly conclude that Ms West's motive was the complaints or fear of the issue of proceedings. However, at this point, in our view Ms West had gone into, "defensive mode". On 23 or 24 February, Ms West learnt that Miss Wickerson had made reference to taking professional

advice, which suggested to Ms West that she might bring a claim under the Equality Act. The evident more aggressive tone of Ms West's letter, is something from which we could conclude that the reason for the more aggressive approach is the fear that Miss Wickerson may issue proceedings. The burden of proof shifts to the Respondent. It is true to say human resources advisors will work on the basis that every case is a potential claim, but it seems to us that here, Ms West realised that the situation had not been handled well, thought that there was a very real possibility of a claim and misguidedly, thought it better to go on the offensive and get her points in. It is of course, completely the wrong approach to take. A competent HR professional would have adopted a polite, conciliatory approach. Having heard evidence from Ms West, she has failed to satisfy us that the aggressive approach of her letter of 24 February 2017, arguing that the conduct complained of did not amount to harassment and denying that any assurances had been given, was not because Ms West thought that proceedings under the Equality Act might be issued. Miss Wickerson's complaint of victimisation in this respect, succeeds.

147.6. (f) For the same reasons, we find that when Ms West denied in her letter of 28 February that Miss Wickerson had complained before 3 January 2017 and denied that the conduct on 23 December 2016 amounted to harassment, she did so because she thought that Miss Wickerson might issue proceedings under the Equality Act.

147.7. (g) As for the delay in replying to Miss Wickerson's letter of 10 March 2017, Ms West satisfied us that she did not deliberately delay her reply because she anticipated proceedings might be issued, but because she had been slow in doing what she needed to do to put a reply together.

148. In summary, the complaint of victimisation succeeds in respect of allegations (e) and (f).

Time – Questions 8, 9 & 10

149. Now we return to the question of time. Although the claim form is dated 1 August 2017, it was in fact originally submitted on 14 July 2017. It was rejected at that time because the cheque to cover the fees due at that time, was made payable to the wrong payee. Tribunal fees have since then, been declared unlawful and the regulations introducing them, void. We therefore treat the claim as issued on 14 July 2017.

150. The ACAS early conciliation certificate covers the period 3 April to 3 May 2017. Time is therefore extended by 30 days by virtue of the conciliation period.

151. Dismissal was on 28 March 2017. Time for the unfair dismissal claim would have expired on 27 June 2017. Adding the 30 days for early conciliation extends the time limit to 27 July and the unfair dismissal claim was therefore in time.

152. The 2 acts of victimisation, which are connected acts, (by the same actor and for the same reason) were on 24 and 28 February 2017. The 3 month time limit would therefore ordinarily expire on 27 May 2017.

153. The 30 days conciliation period extends the time limit to 26 June 2017. The early conciliation certificate was sent to Miss Wickerson on 3 May 2017, that is more than a month before the limitation period, (as extended by s140B(3)) expired and therefore s104B(4) is not engaged. Time therefore expired on 26 June and the victimisation claim was issued 18 days late.

154. We must therefore consider whether it is just and equitable to extend time. I have already set out the relevant law when dealing with the application to amend.

155. At the time, Miss Wickerson was acting in person. She did not understand what are complicated provisions as to time limits. Cogency of evidence was not affected: she had raised her complaints at the time, the events were in dispute anyway in connection with the unfair dismissal claim and were aired without difficulty at trial. Miss Wickerson acted promptly in that she sought assistance from ACAS at an early stage, (ironically, if she had left it later, s140B(4) might have been engaged and time extended further to bring her in time). There is no suggestion of lack of cooperation by the Respondent. Miss Wickerson did not seek professional advice at the time.

156. As to prejudice, we have found that Miss Wickerson was victimised because the Respondent thought that she might bring a claim. If we do not extend time, she will be deprived of a remedy to which she is entitled for a wrong which has been done to her. The prejudice to the Respondent is that it will have pay out some compensation, but if we do not extend time, it will benefit from the windfall of escaping liability. Parliament saw fit to put the 3 month time limit in place, but it also made that time limit subject to the just and equitable test. The greater prejudice is to the Claimant.

157. Bearing these matters in mind, we find that it is just and equitable to extend time.

Question 15:

158. The Respondent relies on the statutory defence. Ms Williamson says it is not pleaded.

159. Mr Ridgeway relies on paragraph 2 of the Grounds of Resistance:

"The First Respondent will aver that it took all necessary measures to prevent any alleged harassment".

160. The First Respondent is not accused of harassment. However, it would not be in the interests of justice to decide an employment case on a mere technical pleading point, even if the Respondent has the benefit of professional representation. Clearly, the Respondent intended to argue that it had taken reasonable steps to prevent the discrimination taking place, which is the statutory defence set out at s109(4).

161. In closing submissions, Mr Ridgeway made reference to the existence of, "appropriate policies" of which employees were aware. He said that there were arrangements in place for training, (acknowledging at the same time that may be a pitfall for the Respondent – by which he was referring to the fact that the training had been put in place after the events in question) and that it reacted swiftly.

162. The problem for the Respondent is that the person responsible for the acts of discrimination and harassment is the very person who ought to know better, the one human resources professional in their employment, Ms West. There is no evidence before us as to what steps the Respondent took to ensure that it employed a competent human resources advisor who would not discriminate or victimise in the way that she carried out her duties. This was not the basis on which the Respondent ran its defence, which was simply that it had policies, it did training and it reacted quickly. These are not steps that would prevent a human resources advisor from dealing in a discriminatory manner with a complaint of victimisation of a complaining victim.

163. The reasonably practical preventative steps that could have been taken was the employment of a competent human resources advisor. The Respondent did not take such a step. The statutory defence therefore fails.

Question 16:

164. Miss Wickerson did resign in response to acts that amounted to victimisation, in that a significant factor in her decision to resign was the aggressive replies in the letters of 24 and 28 February 2017.

Question 17 to 20:

165. The Claimant had 5 days holiday pay accrued due at the date of termination of her employment at £51.96 per day and is entitled to Judgment in the sum of £259.79 in respect of her claim for holiday pay.

Questions 21 and 22:

166. The questions of whether the Respondent unreasonably failed to comply with the ACAS code and if so, what uplift to compensation should be applied, if any, will be determined at the remedy hearing, notice of which will follow in due course.

Dated: 18.09.18

_____

Employment Judge M Warren

JUDGMENT SENT TO THE PARTIES ON 15.10.18

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FOR THE TRIBUNAL OFFICE