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EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Mrs Marie-Antoinette St Joseph **AND** Westway Housing Association Ltd

Heard at: London Central **On**: 30-31 October 2018
1-2 November 2018
5-6 November 2018 (in Chambers)

Before: Employment Judge Pearl
Members: Mr D Schofield
Mr J Carroll

Representation

For the Claimant: In person
For the Respondent: Mr K Charles, of Counsel

REASONS

1. By ET1 received on 26 January 2018 the Claimant brought claims of race and sex discrimination among other matters that have now fallen away. She was employed by the Respondent as a Neighbourhood Officer from 31 July to 2 October 2017 when she resigned. The ET1 attached a chronological narrative with allegations that the Respondent replied to in the ET3. However, as Employment Judge Welch observed at a preliminary hearing on 20 April 2018, the allegations of discrimination and other essential information about those claims were not clear. The Claimant was ordered to prepare further information.

2. She did this in the form of a schedule and at a second preliminary hearing on 28 June 2018 Employment Judge Baty established with the parties that the claims of direct sex discrimination and direct race discrimination and harassment (race and sex) are the complaints in the schedule; and that, additionally, the Claimant says that her resignation is a discriminatory constructive dismissal on the basis of sex and/or race. These are therefore the issues and the schedule is annexed marked A.

3. Three features of the conduct of the Hearing need to be noted. First the Claimant produced a witness statement that in technical terms did not explain how she put the discrimination or harassment complaints. Mr Charles applied on this basis to strike out the claims at the outset of the hearing. We declined to do so, principally because it would be unjust to take that course. The Claimant could be asked to explain her claims in evidence and the Respondent would have ample time to deal with any new material that emerged. In any case the Respondent had come with witnesses fully prepared to deal with the factual allegations.

4. The second aspect of the case is that towards the end of the second day the Claimant indicated that she had no cross examination or virtually no cross examination of the Respondent's witnesses. We gave her time to consider the position and also explained to her that she could take this course if she wished without prejudicing her own case. The factual disputes are perfectly clear to the Tribunal and formal challenges to the Respondent's witnesses are not obligatory. However, when the Claimant returned the next day she decided, understandably, that she would question witnesses and she spent some time cross examining each.

5. Third, we mentioned the Claimant's 'diary entries' or more accurately the notes that she made soon after certain events. These are in the bundle but the Respondent wanted to see the original. The Claimant objected, but agreed that the Tribunal could see these notes. We looked at them and we summarised some of what we saw with the Claimant's consent and this was sufficient for Mr Charles's purposes.

6. In resolving the issues, we heard evidence from the Claimant; and from Mr Brown, Mr Scipio, Mr Laryea, Ms Boakye, Mr Obembe and Mr Tailor. We studied a bundle containing 316 pages together with a further exhibit that was handed in.

Facts

7. There are many factual disputes in this eight week chronology of employment. For the most part the Tribunal is able to make clear factual findings. It is not however our function to determine each and every factual dispute and what follow are the necessary findings that are relevant to the legal issues.

8. The Claimant was employed as a Neighbourhood Officer and her experience is as a housing officer in a number of organisations. Her CV shows that she had a sizeable number of short term appointments and this has been a convenient work pattern for her since 2002. However, this appointment with the Respondent was to a permanent position in a restructured team. The Respondent is a BAME – led organisation and was set up in 1988 to address, inter alia, race discrimination within the housing sector. It manages about 500 properties in a number of blocks and these blocks are spread over seven boroughs. The Claimants responsibilities in this new role covered the geographical spread.

9. She began employment on 31 July 2017 having succeeded in a competitive interview process for the post. Mr Brown, Housing Manager and the Claimant's line manager, had argued for her appointment during the process. The Claimant was one of four new employees although she was the only Neighbourhood Officer. All four were BAME by origin or race.

10. Mr Brown carried out an induction and one clear error in the Respondent's evidence (which is otherwise in our view accurate) is his recollection that on her first day he introduced the Claimant to Mr Scipio, the Chief Executive, and they shook hands. This could not have occurred because, as Mr Scipio told us, he was on honeymoon then and only returned to work on 9 August. However, we do not consider the Mr Brown's sought to mislead the Tribunal in oral evidence because when he was challenged by the Claimant on this point he immediately said that the introduction on day one is "normally what happens". He added that he did not remember if it was on day one in this instance and it could have been later. His preparedness to amend his evidence on that one point is in contrast to every other challenge made by the Claimant which he categorically denied in each instance. In our view he must have realised that paragraph 9 of his witness statement might have been wrong by the time he came to give evidence.

11. On 11 August Mr Scipio asked to see the Claimant and they had a conversation in his office which on the balance of probabilities we find lasted about thirty minutes. It happened during the afternoon and we know that the Claimant left the premises at 5:05pm. The meeting is important because in the Claimant's subsequent chronology she traces everything back to this meeting and maintains that Mr Scipio wanted her out of the organisation and that she realised this on 11 August.

12. Her case is that he was stern, unfriendly and said in this unfriendly way "tell me about yourself". Soon after this he said, "I can detect an accent where are you from?" And this was said in an aggressive way. Third, he told her that "having a baby is a major and big responsibility ... a big responsibility". He added "let me warn you now, you are the fourth in line occupying this position". He ended by saying "you do know your probation period can go both ways" and "people are watching".

13. We are unable to accept that this is an accurate account of the conversation. Our main ground is that for all the reasons we set out below we have found the Claimant to be unreliable in her evidence and prone either to exaggeration or misunderstanding, or in some instances she has convinced herself that things happened which did not. The subsidiary reason here is that Mr Scipio was a much more impressive witness and we have no grounds to disbelieve his account. Third, the two varying accounts of the conversation do have some points of contact and the resolution of those discrepancies suggests that Mr Scipio's recollection is accurate. Fourth, there are some aspects of the Claimant's account of the conversation, or her interpretation of what she says people said, that are so unusual as to be inherently unlikely to be correct.

14. Mr Scipio and Mr Brown maintain that he "meets and greets" new employers and that this is what happened on this occasion. We accept that

evidence. Further Mr Scipio gave a detailed account of the Claimant being quiet and nervous. He did ask her to tell him about herself. She was not forthcoming and he was trying to stimulate conversation. One of the reasons we accept this evidence is that it became clear during the Claimant's testimony that she believes that she should have been given notice of this meeting. She believed that at the time. We consider that she was therefore quiet and reticent. Mr Scipio's description of her is "very muted" and we accept that he did ask where her accent was from. This added to the Claimant's sense of grievance and offence but Mr Scipio's reasons for asking are cogent. He also refers to the great diversity of origin among members of staff.

15. Where there is no meeting of minds is over the tone of the meeting. Mr Scipio strongly maintains that he was open and friendly. The Claimant disagrees. We find Mr Scipio to be the more accurate witness. In particular he recites an exchange which, as we find, explains why he referred to the probation period. Because the Claimant was relatively unresponsive he asked her if she was happy and if she was going to stay. Her response came as a surprise to him because she said she was not sure. He then said that probation was a two way process in that each party had to decide if the employment relationship was the right one. The Claimant's account strikes us as a plain misinterpretation of what Mr Scipio was saying. Mr Scipio's evidence is in our view more moderate and plausible.

16. The Claimant's underlying belief and her evidence is that for reasons of his own Mr Scipio had decided by 11 August to get rid of her. This is in itself so surprising as to be somewhat unlikely but the Tribunal has had to look at all the surrounding evidence, since unlikely things do happen at work and that is not in itself a reason to reject the allegation.

17. Both Mr Brown and Mr Scipio firmly reject the suggestion and we have no basis for concluding that either of them, Mr Scipio in particular, has come to the Tribunal to assert a dishonest case that they know to be based on lies. Mr Scipio took us through the Respondent's normal recruitment processes which often involve a third party recruiter, which is what occurred here. Mr Scipio emphasised that he would never want to contradict or reverse or undermine the decision his colleagues had reached and to do so would also run counter to the Respondent's ethos. Second, he knew nothing at all about the Claimant and had no reason to want her to leave. Third, he was affronted by the suggestion that he did not want a Nigerian woman in the organisation when the Claimant put it to him. There is nothing anywhere here in the evidence that would lead us to find that this could have been the case. Fourth, he pointed out that he was on honeymoon when the Claimant began employment and that he returned two days before the 11th. We agree that it is unfounded speculation and thoroughly unlikely that he could have decided in those two days that he wanted a new employee whom he had never met to leave the organisation.

18. This last point is relevant because the Claimant believes that Mr Scipio communicated this wish that she leave to Mr Brown and others and instructed them to harass her. As will become apparent, that suggestion in our view runs

counter to all the credible evidence and has led the Claimant to construct an overarching theory that has come to dominate her own evidence.

19. As to the comment about a baby, Mr Scipio accepts that he referred to his having a young child himself in the context of the Respondent maintaining a family friendly environment. A number of the witnesses confirmed this last point and we again have accepted his evidence. We also note that a number of other witnesses and Mr Scipio spoke of the awards that the Respondent has received (for example, from Investors in People, the Silver Award), the organisation's ambition to proceed to the next stage of award and their firm belief that under the formal rating system that applies to larger housing associations they would be assessed in the top category for financial performance and governance.

20. The allegation about the Claimant being "fourth in line" in her position is not readily explicable as she was the first person to be appointed as Neighbourhood Officer. A much more likely explanation, as Mr Scipio says, is that he referred to the four new starters ("one of four people we've appointed"), and she has misinterpreted this.

21. The next allegation relates to 13 September and we note in passing that the chronological gap itself would appear not to support the Claimant's theory that the managers were trying to oust her. In any event, on that day she records Mr Scipio passing her desk and saying, "so you are still with us eh, so there is something good after all". There is no real dispute about the first part of this conversation and Mr Scipio explains the comment in the context of the Claimant's earlier remark that she was not sure that she would stay with the Respondent. His account of the second part is, we consider, more likely to be correct and this is that he said something along the lines of "we can't be that bad".

22. The next claim relates to the six week probationary review, carried out by Mr Brown on 15 September. The Claimant's evidence is at variance both with the Respondent's evidence and also the written record at page 261. This records under the first itemised point: "Marie has been getting on well with the role and has demonstrated her commitment and reliability for the challenging role. She is getting used to the role in finding her feet and meeting the expanded expectation of our customers".

23. The first criticism made by the Claimant is that Mr Brown told her that she did not have to do all the estate inspections but could get others to carry them out "whilst they are on the estate". She says that this undermined her because it took away part of her core function.

24. The Respondent's evidence is compelling and on the balance of probabilities much more likely to be correct. There are 42 blocks of dwellings. The Claimant's case is that she must inspect all of them over 7 boroughs every month, i.e. 504 inspections a year. Regardless of the arithmetic, she was adamant in cross examination that Mr Brown was removing a responsibility and undermining her. Her suspicion is that he may have been put up to this by Mr

Scipio. He was collaborating with Mr Scipio's discrimination. In the view of the Tribunal this is an exaggerated and fanciful account of what really occurred.

25. We accept the Respondent's evidence that the Property Service Manager is a surveyor and he is assisted by an apprentice surveyor who is capable of carrying out these inspections. The surveys are of the common parts and the exterior of the blocks in order to see if any repairs or maintenance are required. All that Mr Brown was doing was to suggest that these two employees could, when visiting an estate, carry out an inspection thereby lightening some of the Claimant's workload. We accept, as he told us, that the two individuals had carried out inspections, indeed Mr Brown himself has done them. He was anxious not to duplicate efforts i.e. have two people visit an estate at the same time when only one need attend. The argument that he was making this helpful suggestion in furtherance of Mr Scipio's plan to oust the Claimant is fanciful.

26. The boilers at the block known as Tariq House were referred to at the meeting and this also gives rise to a claim. The Claimant says that Mr Brown asked her not to make a disclosure to the Board or to residents that four boilers had been bought for residents at a cost of £64,000. In a note the Claimant appears to have made that evening she says that she was asked to lie about six boilers rather than four.

27. The Respondent's witnesses described this as a bizarre allegation. Gas supply had been cut off for safety reasons and alternative heating and cooking facilities had to be provided to the tenants. No expensive boilers had been purchased. Mr Brown stated that this was not a misunderstanding in the conversation by the Claimant, it simply never happened. Neither he nor the Claimant reported to the Board and in any event expenditure is notified to the Board especially when it is as high as alleged. The Claimant has not put any value in her handwritten note and the entire episode is omitted from the Claimant's written grievance of 2 October 2017. We have little confidence that the Claimant's account could be correct.

28. Allegations (c)-(f) on page 47 (Annex A) also refer to this conversation and relate to a further conversation with Mr Brown on 22 September. This is covered at paragraph 25 of the Claimant's witness statement. There is no diary note from the Claimant about this conversation and it is also omitted from the grievance. It was only in cross examination of the Claimant that any context for these alleged remarks was provided. It seems that there was an inspection due at a property the day before but the Claimant did not attend, relying on the conversation we have set out above on 15 September. Mr Brown denies telling her to lie to residents. The Claimant's own account of this conversation on 22 September has him denying in clear terms that he was asking her to lie. In such circumstances it is dangerous for the Tribunal to make any finding about the conversation. We can certainly make no finding that the Clamant was asked to lie by Mr Brown.

29. On 20 September there is another allegation, now against Mr Laryea, Housing Director and Deputy Chief Executive. This episode is documented and we have a number of straightforward factual findings. On 13 September 2017 the Claimant sent a report to a tenant's representative Ms Jones: page 249 on 18

September. At page 250 Ms Jones said she was concerned that the report contained sensitive information about tenants. She said that she expected that it would not be sent to all of the tenants, Ms Jones copied this email to Mr Laryea. The Claimant responded to Ms Jones at page 251 and said her comments had been fully noted "with regards to the point you have raised concerning the disclosure of tenant's details, this was not intended to be part of any circulation to other residents as this was for your reference at this stage".

30. Mr Laryea then wrote to the Claimant on 20 September at page 252 "Marie. Linda Jones' residence should not receive any sensitive information on other residents, please be very careful what information is being sent out in this regard". The Claimant responded to him "these were issues I discussed with her in confidence. However, as it has been pointed out, I will note this for future reference".

31. It is evident that Mr Laryea was writing a routine managerial email which cannot be classified as a reprimand or a criticism. The Claimant's response reflects this. There was no reason for Mr Laryea to look at the report. Had he done so it would indicate that he might be more concerned about it than in fact he was. This was a minor matter, yet the Claimant has made a claim of discrimination or harassment principally on the basis that Mr Laryea should have read the report. It is a claim that we cannot understand.

32. On 25 September 2017 are the four allegations (a)-(d) that relate to Mr Obembe's telephone call to the Claimant. She alleges that his first words were "who is Chinwe Agabah?" This was her original name and she changed it shortly before she commenced employment. The employment agency the Claimant had approached concerning this post knew her by her original name. In due course the agency sent him an invoice and this was given to Mr Obembe, Finance Officer. The Claimant questions the genuineous of the invoice but this is in our view an unduly suspicious stance to take towards what appears to be an entirely routine document.

33. It became clear towards the end of the Hearing that if Mr Obembe had asked "do you know who Chinwe Agabah is?" the Claimant would have made no complaint. Her claim, she tells us, is that he was too peremptory, however the witness statement does not complain about this. The Claimant seems there to be saying that the discrimination or harassment was asking her at all, because "appropriate records of my personal information which should include my deed poll to this respect would have been taken into account rather than being questioned". This is not easy to understand, especially as the issue of her personal information or deed poll records never surfaced during the questioning of witnesses. In any event such a complaint cannot survive the Claimant's final position which is that a polite enquiry to the same effect was one that would have been justified.

34. The Respondent's evidence is considerably more cogent. Mr Obembe asked a colleague who Chinwe Agabah was; the colleague was not sure but thought that it may well be the Claimant. Mr Obembe had tried to speak to two managers before speaking to the Claimant. He then says that when he

telephoned the Claimant she immediately said that it was her. He believed that the conversation was friendly in all respects.

35. The allegation widened in cross examination because the Claimant suggested that Mr Obembe was dropping a hint that there was no need to change her name. There is no basis for this suggestion but it illustrates the extreme suspicion that the Claimant now harbours towards the Respondent and all aspects of this evidence. The invoice for example is now said to be a forgery. Although we have not dwelt on any of this, the Claimant has also suggested that some of the emails and at least one other document were forged or fabricated for the purposes of this case. There is no basis for any of these allegations. The most important point to make for this claim is that Mr Obembe did not know that she had a previous name and was simply trying to ascertain to whom the invoice referred, which he was bound to do as the Finance Officer.

36. On 27 September are the three allegations at pages 48 to 49. Although the Claimant has initially said that Mr Brown returned from a Board meeting it is now agreed that he had been at a Tenants' Association committee meeting. A representative, LB, told Mr Brown (as we find) that the Claimant had not updated her on ASB cases. This is again not pursued in any sense as an item of misconduct. Mr Brown, however, wanted to ask the Claimant about it and told her what he had been told by LB. He said she should give her feedback on ASB cases and there the matter rested. The Claimant's case is that Mr Brown should not have reverted to her with the comment but should have told the tenant what she had been doing. Her grievance says, "I cannot spend my whole time updating only one person" when she is depending on third party actions. In context, this is another complaint about an unexceptionable workplace interaction between a manager and a direct line report. The Claimant's criticism of Mr Brown is unreasonable.

37. The Claimant by this point was seeing "a conspiracy with a hidden agenda" to use the words of her diary note for this day. It is therefore not difficult to see the reason why the Claimant resigned just five days later. As a matter of evidence there is no possibility that either Mr Brown or others had any hidden agenda or were discriminating against her in regard to this or other complaints that we have already covered. Unfortunately, the Claimant's cast of mind was such that she saw harassment and disadvantage in the most mundane and innocuous conversations.

38. Issue (c) on page 49 is also related to some feedback given to the Claimant by Mr Brown. A cleaning company representative had called Mr Brown. Mr Brown told her that she had not answered some questions raised by the Claimant. The representative however said that she had left telephone messages for the Claimant who had not reverted to her. In these circumstances Mr Brown was obliged to ask the Claimant about this, which is exactly what he did. The Claimant alleges that he blamed her for the situation and this is not established in evidence. We find that he merely raised the matter. She told him that she did not know how to use the pin code so as to retrieve answerphone messages and she now blames Mr Brown for not showing her how to do this on induction. He maintains that he did, but the claim here is limited to Mr Brown raising the query

with her; and this is unsustainable. There is no basis for even suspecting that her race or gender had anything to do with Mr Brown passing on a simple enquiry from the cleaning company representative, who was telling him that she had contacted the Claimant, or tried to do so, and had had no response.

39. The Claimant resigned on 2 October and her letter of resignation contained six of the above claims as grievances. It also contained eight additional reasons for resigning and these are in summary: (1) the current structure does not support the proper execution of the role; (2) there was a lot of laxity with the repair and cleaning maintenance contractors; (3) the Respondent was not in one regard carrying out its responsibilities; (4) there was a very high ASB level across most schemes; (5) her recommendation for a decentralised neighbourhood management function was not taken up; (6) the vision statement that she expected was not being followed through; (7) there was a lack of transparency in the way information is cascaded down to employees; (8) the Claimant had had a lack of support. She therefore concluded by saying that she did not think she was the best person to work with the Respondent in helping it to achieve its objectives and she resigned.

40. In the few days before the resignation the Claimant had sought time off to deal with personal matters and Mr Brown, consistent with his attitude throughout, allowed her to take this time. It is also evident, as we find, that her resignation came as a surprise to the Respondent and all its witnesses.

41. Ms Boakye is an independent HR consultant and she has had approximately three years experience of working on commission from time to time for the Respondent, through her own company. The Claimant accuses her of not being independent because she is reliant on the Respondent's custom, but the Tribunal found her to be an entirely professional and accurate witness when she came to give her account of matters. We accept that when she has conducted investigations into grievances she has found both for employers and employees. She was commissioned to carry out this investigation and to make recommendations. Mr Tailor, Director of Finance Services commissioned her and he was the point of contact and the person to whom she sent her report for onward transmission to the Board.

42. All of the Claimant's claims in this part of the case are very weak. Ms Boakye sent her a letter at page 113 inviting her to a meeting and said she could be accompanied "by a companion or trades union representative but not anyone acting in a legal capacity or with a legal background". This last clause is said to be discrimination or harassment. The clear evidence that we accept is that this consultant includes this text in every similar letter that she sends to employees who have raised grievances whenever she is commissioned to carry out an independent investigation.

43. Ms Boakye denies that at the grievance meeting she either tape recorded the meeting or had any recording equipment in the room. The Claimant believed she saw something with a red light on it. Ms Boakye says she might have had her phone on the desk but was categorical in denying the Claimant's allegation

and that allegation, in the view of the Tribunal, has no support anywhere else in the evidence.

44. The Claimant was told at the outset at the meeting that she could not appeal the outcome as she was an ex-employee. In the event she was granted an appeal but did not take advantage of it.

45. She alleges mistakes and errors in the notes of the meeting and, significantly, paragraph 42 of her witness statement makes no claim of sex discrimination or harassment in this regard. Ms Boakye maintains that she typed contemporaneously as the meeting proceeded and that her notes are accurate but she nevertheless appended the Claimant's different version to her report in due course. For completeness, we do not have any material or any reasons to query the accuracy of the evidence Ms Boakye gave to us.

46. The last matter of complaint is that the Respondent did not pass the grievance investigation report with its recommendation to the Chairman of the Board. This fails as a factual allegation as the evidence of Mr Tailor is supported by the documents at page 157 (Mr Tailor to the Chairman), page 161 (3 November from the Chairman to Mr Tailor), and page 193 (Mr Tailor attaching the final report to the Chairman). We also note that Ms Boakye was under no duty to pass her report directly to the Chairman or to the Board.

Submissions

47. We are grateful both to Mr Charles and the Claimant for their cogent submissions made at the close of the case.

The Law

48 Section 13(1) of the Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 23(1) provides that: "On a comparison of case for the purposes of section 13 … or 19 there must be no material difference between the circumstances relating to each case."

Section 26 provides that "(1) A person ('A') harasses another ('B') if – (a) A engages in unwanted conduct related to a relevant protected characteristic and (b) the conduct has the purpose or effect of – (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …

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

Section136(2) provides that: 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. It is then provided that this subsection does not apply if A shows that A did not contravene the provision. This provision is mirrored in the antecedent legislation and there is no discernible difference in statutory intent.

As to burden of proof, the older law in **Igen Ltd v Wong** [2005] IRLR 258 still applies and the guidance is as follows (all references to sex discrimination apply equally to all the protected characteristics):

" (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the claimant who complains of sex discrimination 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 which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(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.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved 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 sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a 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."

There was further analysis of the burden of proof provisions made by Elias J in **Laing v Manchester City Council** [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in **Madarassy**. This case has confirmed the Laing analysis. In particular, we refer to paragraphs 56 to 58 and 68 to 79. Paragraph 57, in relation to the first stage analysis, directs us to consider all the evidence. "'Could conclude' … must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it." Mummery LJ returned to the theme in dealing with the competing arguments that have emerged concerning the words "in the absence of an adequate explanation." All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation.

Conclusions

48. It will be apparent from our factual findings that the Claimant fails to establish any direct discrimination or harassment. She fails either to establish or to point to any facts on which such claims could be based. The necessary factual substratum for such claims is absent. Beyond this there are further fundamental flaws to her case and we refer to these below.

49. The originating conversation of 11 August is fundamental to the Claimant's case because she is categorical that Mr Scipio was exhibiting hostility; had already decided that she should be pressured to leave the Respondent; and that he thereafter orchestrated a campaign against her. We have rejected all these allegations. There was no orchestrated campaign or any conspiracy that could be detected anywhere in the evidence. The Respondent was satisfied with the Claimant's performance. Her later allegations are unfounded for the reasons we have given. Mr Scipio would not have decided in the two days preceding the meeting that a female Nigerian employee whom he had never met should be bullied out of the organisation.

50. Beyond this, as we have reflected in our findings, the Claimant has mis-recorded or misinterpreted very normal lines of conversational dialogue on Mr Scipio's part. As we have covered this in detail we say little more here, but we are referring to the remarks about an accent, her being a mother, the probation period and the so called "fourth in line" comment. The Claimant barely says that

he would have treated a person of different ethnical or national origin or gender differently, but to the extent that this has to be her claim under very many of these heads she fails to raise in any instance a prima facie case. The harassment claims also fail for the same reason. In relation to 11 August It would not be reasonable to say that any of the remarks had the effect of violating her dignity or creating a hostile etc environment. This reasoning applies to each of the harassment claims made in the alternative.

51. In the list of issues there are five further conversations or interactions before resignation that give rise to claims under s.13 or s.26. In no case can the Claimant surmount stage one of Igen. There are no facts established or found from which a Tribunal could either find or infer tortious behaviour on the Respondent's part. In no case does the burden of proof pass to the Respondent and the Claimant fails to persuade us that any of the necessary factual findings for such claims could be made.

52. The underlying claim made by the Claimant is that all of this is traceable back to 11 August and that the Respondent's managers were executing their Chief Executive's plan to oust her. This is a belief that the Claimant appears to hold with conviction and we have little doubt that she has formed this view at a relatively early stage in her employment. It runs counter to all of the objective evidence.

53. We have already dealt with the post-grievance allegations and these fail for the same reasons and have led the Claimant to make a series of further inaccurate claims.

54. As to the constructive dismissal claim, the Claimant fails to establish a breach of contract of any sort and this is because the discrimination claims all fail. We can go further, however, because her letter of resignation gives ample reasons why she disagreed with the culture and the methods of operation of this relatively small housing association. She told us about her local authority experience and we conclude that the policy reasons that she gave in her letter of resignation were a significant ground, when taken together, as to why she resigned; and of course these policy matters involved no breach of contract on the Respondent's part.

55. For these reasons all the claims of direct discrimination and harassment fail and are dismissed.

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Employment Judge Pearl

Dated:. 14 November 2018

Judgment and Reasons sent to the parties on:

15 November 2018
For the Tribunal Office