Case Numbers: 3201125/2017
3200523/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Smentek**

Respondent: **ISS Facility Services Limited**

Heard at: **East London Hearing Centre**

On: **9 & 10 May 2018**

Before: **Employment Judge Russell**
Lay Members: **Mr L Purewal**
Mr ML Wood

Representation
Claimant: **In Person**
Respondent: **Ms V Brown (Counsel)**

JUDGMENT

It is the judgment of the Employment Tribunal that:-

(1) The claim of direct discrimination because of sex fails and is dismissed.

(2) The claim of victimisation fails and is dismissed.

(3) The Claimant was not dismissed. The claim of unfair dismissal fails and is dismissed.

REASONS

1. By a claim form presented on 6 September 2017, the Claimant brought claims of sex discrimination. The Respondent defended the claims. At a Preliminary Hearing on 13 November 2017, the Claimant was granted leave to amend to include a claim of victimisation. The issues were agreed as follows:

Section 13: Direct discrimination because of sex

1.1. Has the Respondent subjected the Claimant to the following treatment:

(i) cancelling without notice the Claimant's training on the access control desk due to take place on 16 May 2017?

(ii) failing to offer the Claimant the opportunity to train on the access control desk on 5 and 6 June 2017?

(iii) Appointing Mr Ryan McLaughlin to hear the Claimant's grievance on 4 July 2017.

1.2. If so, has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated Ms Patricia Zazrivcova and/or a hypothetical female?

1.3. If so, was the less favourable treatment because of sex?

Section 27: Victimisation

1.4. Has the Claimant carried out a protected act? The Claimant relies upon the following:

(i) His grievance submitted on 23 June 2017;

(ii) His ET1 presented on 6 September 2017.

1.5. If there was a protected act, did the Respondent treat the Claimant unfavourably because of the same as set out below?

(i) Request by Mr Mark Alexander on 9 August 2017 that the Claimant carry boxes when this was not part of his job description.

(ii) Undue scrutiny and observation of the Claimant at work by Mr Alexander from the beginning of October 2017 to date.

2. The Claimant presented a second claim on 8 March 2018 in which he claimed constructive unfair dismissal. The effective date of termination given in the claim form was 15 November 2017. The Respondent defended this claim too.

3. I heard evidence from the Claimant and Mr Evaldas Mika on his behalf. For the Respondent, I heard from Mr Dave Gooda (Security Operations Manager), Mr Michael Alexander (Access Control Manager), Mr Jan Trapl (Central Support Manager), Mr Ryan McLaughlin (Security Control Room Manager) and Ms Ursula Williams (People and Culture Manager). I was provided with an agreed bundle and read those pages to which I was taken in evidence.

Findings of Fact

4. The Respondent is a large national company providing a range of facilities to its clients, including security services for Barclays Bank plc at 1 Churchill Place, Canary Wharf. The Claimant was employed by the Respondent initially as a member of the porterage team and from June 2015 as a security officer on this contract.

5. The Respondent's security operation for Barclays at 1 Churchill Place is divided into five teams labelled A to E. The A, B, C and D teams work shifts on a 24/7 pattern, with four days working and then four days off. Team E by contrast work only on Monday to Friday between 7am and 7pm. The facility services provided are both "back of house" (not public facing) and "front of house" (dealing with the public).

6. On the ground floor at 1 Churchill Place, the Respondent operates an access control desk which issues security passes to staff and visitors. The access control desk team comprised three employees; in May 2017 these were Mr Leaburn, Mr Mika and Ms Cross. At the material team, the Respondent's workforce of security officers were predominantly male. There were approximately 25 men on each team and only two women in total: Ms Hayley Cross on the access control desk and Ms Patricia Zazrivcova who worked in team C.

7. The Claimant is a motivated and ambitious person, keen to develop his career. Work on the access control desk, whilst not strictly a promotion, is regarded as desirable as it involves less standing and affords the opportunity to develop skills which may provide a stepping stone to promotion. In his appraisals from 2016 and verbally, the Claimant expressed a desire to be trained to work on the access control desk. We pause to note that the Respondent was not able to provide complete and signed records of all of the Claimant's appraisals. Although nothing turned on it in this case, as the Respondent accepted that the Claimant had expressed an interest on several occasions, best practice would be to ensure more reliable recordkeeping of such important documents.

8. In the two years to 17 October 2017, approximately 16 people asked to be trained on the access control desk. Each received three days training, with the exception of Ms Zazrivcova who received two days. The purpose of providing training was to ensure a pool of security officers who could cover the absences of the regular members of the team. The training on the access control desk was undertaken flexibly and largely "on the job" due to budgetary constraints and the operational requirement of the client that a particular level of service be maintained at all times. The Claimant considered that such training was inadequate as training would be interrupted by operational matters and there was insufficient opportunity for training to assist career development. In an ideal world, it would be preferable to offer dedicated training in time outside of ordinary service delivery and to develop employees' skills with a view to promotion. However, we accept that this is not always practicable. On balance, we find that the Claimant was able to access the same on the job training as his colleagues and that training provision was objectively reasonable.

9. In his evidence, Mr Mika stated that there was a pattern of prioritising women for work on the access control desk. The Tribunal regarded his evidence as largely a matter of general assertion and reliant on a number of assumptions without full knowledge of the facts. One example cited of a female security officer allowed to work on the access control desk in fact had a back problem and the work was a reasonable adjustment in order to allow her to reduce the amount of standing otherwise required. For these reasons, we did not attach any weight to Mr Mika's evidence and instead decided the case on the specific evidence presented to us about the Claimant, Ms Zazrivcova and a hypothetical female colleague working at the same time.

10. In an appraisal conducted in February 2017, the Claimant again expressed a desire to progress to a supervisor role and to develop his career prospects. Although the access control desk was not expressly mentioned, we accepted the Claimant's evidence that he expressed to his supervisor a desire to be trained for such work. Mr Gooda agreed that such training was appropriate and told Mr Alexander, who was responsible for the operational management of the access control desk, to make the necessary arrangements. Mr Alexander scheduled three one-hour sessions on the desk for the Claimant and Mr Dev Gurung. Mr Gurung was also a security officer working in team E. The Claimant was scheduled to undertake his training on 9, 16 and 17 May 2017. The first session took place as planned but the second was cancelled by Mr McLaughlin as another (male) security officer was attending an essential training course and, as such, the Claimant could not be released from his ordinary security duties.

11. The Claimant considered a one-hour session on the desk to be insufficient time to be meaningful. The Respondent agreed and decided that the Claimant's rearranged training should take place on two full days. Mr Alexander identified three possible two-day sessions: 5 and 6 June; 7 and 8 June and 12 and 13 June 2017. As the Claimant was on holiday until 9 June 2017, he was allocated the training dates for 12 and 13 June 2017.

12. Ms Zazrivcova joined the Respondent in February 2016. Her manager in team C was Mr McLaughlin. Ms Zazrivcova wanted to be trained on the access control desk. This request was agreed by Mr McLaughlin and Mr Gooda and Ms Zazrivcova was allocated training on 5 and 6 June 2017.

13. We heard a lot of evidence about the inter-relationship of the work of the back of house A to D teams and the front of house E team. The Claimant's case appeared at times to be that as Ms Zazrivcova was in team C and worked 'back of house' she should not have been considered for training on the access control desk or, at least, that he should have been prioritised as a 'front of house' team E officer. We did not consider it necessary to make findings as the precise nature of the work done by each of the teams as we consider it perfectly proper and reasonable for the Respondent to allow all of its security officers to be considered for training and career development.

14. On 3 June 2017 there was a terrorist attack on London Bridge which led to heightened security across London, including at Barclays at Canary Wharf. This led to a requirement for an additional security officer to be present "front of house", in other words from team E. Mr Alexander cancelled the training dates for the Claimant and Mr Gurung as there would otherwise be insufficient personnel to cover the increased requirement in team E. Ms Zazrivcova was not affected in the same way as team C was not primarily front of houses and the Respondent had already arranged for her to undertake her allocated training days as overtime rather than as part of her normal duties. Ms Zazrivcova's training on the access control desk was not cancelled and took place as planned on 5 and 6 June 2017.

15. In or around early June 2017, Ms Cross applied for and was promoted to a management position on the Respondent's contract with Barclays at 5 North Colonnade. This created a potential vacancy in the established access control desk team. On 6 June 2017, Mr Alexander decided that in the interim as Ms Zazrivcova had undertaken one day of training and was already in place undertaking her second day,

she would cover Ms Cross' hours until the end of June when a long term decision would be taken. Ms Zazrivcova was not appointed to the vacant role but provided cover as required.

16. Upon his return to work, Mr Alexander told the Claimant of the decision to cancel his planned training and the reasons why this was necessary. This was not a formal meeting but it conveyed the relevant information to the Claimant nonetheless. The Claimant was unhappy that his training had been cancelled. He believed that the Respondent could have brought in another security officer to cover his shift and enable him to do the training. His training days were rescheduled for 28 June, 10 and 12 July 2017. Upon completing his training, the Claimant was allocated two, consecutive, full weeks of shifts on the access control desk starting on 24 July 2017. As with Ms Zazrivcova, the Claimant was not appointed to the vacant role but provided cover as required.

17. The shift records are consistent with the Respondent thereafter sharing Ms Cross' shifts on the access control desk between the Claimant, Ms Zazrivcova and others trained on the desk as envisaged by Mr Alexander on 6 June 2017.

18. On 23 June 2017, the Claimant raised a grievance against Mr Alexander in which he claimed that he had been discriminated against because he had not been given a fair opportunity to be trained on the access control desk, training had been cancelled without a valid reason and the role offered to Ms Zazrivcova, whom he described as a back of house, female colleague, relatively new in post. He complained that female colleagues were being prioritised.

19. The Respondent appointed Mr McLaughlin to hear the grievance. Mr McLaughlin was of the same level of seniority as Mr Alexander. He was trained in and had experience of hearing grievances, including a previous grievance brought by the Claimant which he had upheld. We accept Mr McLaughlin's evidence that as the Claimant had not identified the date of the cancelled training, he did not realise that it was he who had made the decision on 16 May 2017, and did not appreciate that there was a potential conflict in him hearing the grievance.

20. The Claimant objected to the appointment of Mr McLaughlin on grounds that he and Mr Alexander were friends and close colleagues as they shared an office; he asked that a manager from outside of security be appointed. We accepted Ms Williams' evidence that she considered the objection but rejected it as she had confidence in Mr McLaughlin's ability to be independent by virtue of his training and experience, she considered it preferable for the grievance to be considered by a manager in security who would better understand the operational pressures and that due to the relatively flat management structure, all managers worked closely. A table provided by the Respondent showed that it was common for a grievance to be decided by a manager in the same department as the complainant, a practice adopted by Ms Williams and her other HR colleagues. In the absence of any further substance or detailed reason to believe that there was a real risk of bias, Ms Williams maintained that Mr McLaughlin was an appropriate person to hear the Claimant's grievance.

21. In the grievance hearing on 4 July 2017, the Claimant stated that he relied upon the training cancelled on 16 May 2017 and that cancelled on 12 and 13 June 2017. The Claimant explained his belief that Ms Zazrivcova had received a full week of

training organised at a time when he had only had one hour scheduled and suggested that she had received 3 to 4 weeks in total. We find that the Claimant's belief was wrong. Ms Zazrivcova had received only two days' training and was then given shifts working on the access control desk to help cover the vacancy left by the departure of Ms Cross.

22. After meeting the Claimant, Mr McLaughlin met with Mr Alexander. Notes of the meeting show that Mr McLaughlin addressed the key points made by the Claimant and that Mr Alexander provided detailed explanations based upon the operational needs of the business at the time.

23. By a letter dated 3 August 2017, Mr McLaughlin informed the Claimant that his grievance had not been upheld. He provided detailed reasons, in essence that there were valid operational reasons for the cancellations and that the Claimant had been provided with the training shortly after the original dates. We note that in cross-examination, the Claimant accepted the validity of the operational reasons described by Mr McLaughlin. On balance, we do not accept as accurate the Claimant's evidence that the grievance led to Ms Zazrivcova being removed from her position on the access control desk. From Mr Alexander's email sent on 6 June 2017, it is evident that the intention was always that Ms Zazrivcova would provide cover only until the end of June.

24. Throughout the process the Claimant continued to work as usual. On 9 August 2017, he was asked to move some boxes from the loading bay on level -2 to the storeroom on level -4. By way of context, twice a year the Respondent receives a large delivery of goods for use by the security officers in the course of their duties. On the day in question, the Respondent's evidence was that Mr Trapl was in the loading bay when the delivery arrived. He gave evidence that he required assistance, telephoned Mr Alexander to ask if he could find somebody to help. Mr Alexander called the access control desk, spoke to Ms Zazrivcova, she said that the Claimant was available and Mr Alexander told her to send him down to the loading bay to help. The Claimant's evidence was that Ms Zazrivcova told him that Mr Alexander wanted him to go down to the loading bay and that he believed that Mr Alexander had chosen him because of his recent grievance. We found Mr Alexander to be a credible and reliable witness. We accepted his evidence that he did not identify the Claimant to be sent to the loading bay; rather it was Ms Zazrivcova who told him that the Claimant was available. We do not consider the Claimant's evidence to be inconsistent with that of the Respondent; upon being told that the Claimant was available, he did want him to go to help Mr Trapl.

25. The request for an available security officer to help move boxes was not improper. Whilst large deliveries were not frequent, we accepted the Respondent's evidence that guards would often collect smaller boxes. Whilst the porterage team could be used, we accept that such an infrequent request for assistance fell within the Claimant's job description in the category of ad hoc duties arising during the shift. The Claimant's concern about the weight of the boxes was genuine and arose from a previous back injury. We accepted as truthful the evidence of Mr Alexander that he had not been aware of the injury and if the Claimant had informed Mr Trapl that this prevented him from helping, he would not have been required to move the boxes.

26. In the period after his grievance, the Claimant became concerned that he was being unduly scrutinised by Mr Alexander. His initial allegation in this claim was generalised and vague; in his witness statement, he suggested that Mr Alexander could observe him for up to 30 minutes at work. The proper discharge of Mr Alexander's duties required him to be present in the reception area at times and to monitor activities in that area. In such circumstances, 30 minutes per day did not seem to the Tribunal to be an excessive amount of time. We infer that the Claimant was more aware of Mr Alexander's presence after the grievance because he was stressed and was more sensitive to the working relationship. It was the Claimant's perception and not the behaviour of Mr Alexander which had changed.

27. Despite having received his desired training on the access control desk, his subjective sense of injustice and perception that he was being targeted by Mr Alexander weighed on the Claimant's mind. Other than the email about moving the boxes, the Claimant raised no further concerns with the Respondent who believed that there were no ongoing problems.

28. On 8 November 2017, the Claimant notified Mr Gooda that he had been offered a position working as a security officer at Chelsea Football Club and asking whether there was any update on the internal transfer. Mr Gooda replied to congratulate the Claimant, calling him a "**talented guy with great customer service skills and their gain is our loss.**" We accept that Mr Gooda's warm wishes and praise were genuine and reflected his belief that there were no ongoing problems. Mr Gooda told the Claimant that he knew the site manager at Chelsea and would complete the transfer documents as soon as he received them.

29. At 10:35 on 15 November 2017, Mr Gooda emailed the site manager at Chelsea to chase the paperwork and to confirm a start date for the Claimant. At 10:56 the same day, Mr Gooda sent HR a letter which he stated he had just been given by the Claimant. In his letter, which he described as a resignation letter, the Claimant stated that he could no longer work at 1 Churchill Place due to continued stress which had caused him to be unable to attend work. Mr Gooda spoke to the Claimant to ask whether he intended to end his employment or transfer to the contract at Chelsea. The Claimant confirmed that it was a transfer.

30. The Claimant's payslips confirm that he was paid salary for each of the fortnights commencing 16 October, 30 October, 13 November and 27 November 2017. From 27 November 2017, the Claimant worked for the Respondent at Chelsea Football Club. On 10 December 2017 the Claimant sent an email to his new manager, Mr Strippel, resigning on one weeks' notice. In the email, the Claimant made clear that he was resigning as a strategic career move and expressed great pleasure working with Mr Strippel. The Claimant confirmed in his evidence at this hearing, that he made no criticism of his managers at Chelsea and that he encountered no problems there. His evidence was that his resignation was due to the previous problems at 1 Churchill Place and the ongoing stress which he suffered as a result. We did not accept that as reliable evidence. There had been a gap of a month between the Claimant's decision to take the job at Chelsea and his resignation and he had been absent from 1 Churchill Place during that time due to ill health and the agreed transfer. The Claimant's resignation email refers to a "strategic career move", this is consistent with an offer letter dated 13 December 2017 for new employment at the BBC at a higher rate of pay (£2,211 pcm at the BBC rather than £1,700 pcm at the Respondent). On balance, we

find that the Claimant had received an oral offer of employment with the BBC by 10 December 2017 and that this was the reason for his resignation.

Law

Sex Discrimination

31. Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Sex is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that sex had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

32. In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

33. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination; they are not, without more, sufficient material from which we could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

34. Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Victimisation

35. Section 27 of the Equality Act 2010 provides that a person is victimised if he is subjected to a detriment because he has done a protected act. There is no need to show that a comparator would have been treated more favourably. There must however be: (i) a protected act; (ii) unfavourable treatment; and (iii) a causal link between the two.

36. If satisfied that there is a protected act, the Tribunal must be satisfied that any unfavourable treatment was because of the same. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that the protected characteristic or protected act had a significant influence on the outcome. The burden of proof provisions will also apply to a victimisation claim.

Constructive Dismissal

37. Section 95(1)(c) ERA provides that a dismissal occurs if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to do so by reason of the employer's conduct. Whether the employee was entitled to resign by reason of the employer's conduct must be determined in accordance with the law of contract. In essence, whether the conduct of the employer amounts to a fundamental breach going to the root of the contract or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, **Western Excavating Ltd v Sharp** [1978] IRLR 27 CA.

38. The term of the contract which is breached may be an express term or it may be an implied one. In this case, the Claimant relies upon breach of the implied term of trust and confidence. This requires that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employee bears the burden of identifying the term and satisfying the tribunal that it has been breached to the extent identified above. The employee may rely upon a single sufficiently serious breach or upon a series of actions which, even if not fundamental in their own right, when taken cumulatively evidence an intention not to be bound by the relevant term and therefore the contract. This is sometimes referred to as the "last straw" situation. This last straw need not itself be repudiatory, or even a breach of contract at all, but it must add something to the overall conduct, **Waltham Forest London Borough Council –v- Omilaju** [2005] IRLR 35.

39. An employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation provided that the later act forms part of the series, **Kaur v Leeds Teaching Hospital NHS Trust** [2018] EWCA Civ 978. Underhill LJ went on to hold that in the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

> **"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)**
>
> **(5) Did the employee resign in response (or partly in response) to that breach?"**

40. The question of fundamental breach is not to be judged by reference to a range of reasonable responses, **Buckland v Bournemouth University Higher Education Corp** [2010] IRLR 445, CA. The tribunal must consider both the conduct of the employer and its effect upon the contract, rather than what the employer intended. In so doing, we must look at the circumstances objectively, that is from the perspective of a reasonable person in the claimant's position.

41. In **Tullett Prebon Plc v BGC Brokers LLP** [2010] EWHC 484 QB, Jack J stated at paragraph 81 that the conduct must be so damaging that the employee should not be expected to continue to work for the employer and that:

> "**Conduct, which is mildly or moderately objectionable, will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough**."

42. Establishing breach alone is not sufficient: the employee must also resign in response to it and do so without affirming the contract. Once an employee has affirmed the contract, the right to repudiate is at an end. Mere delay in itself is not an affirmation, but prolonged delay may be evidence of an implied affirmation.

43. The employee must satisfy the tribunal that he left in consequence of the employer's breach of duty. There may be more than one reason why an employee leaves a job; it is enough that the repudiatory breach was an effective cause with no requirement that it be the most important cause, **Wright v North Ayrshire Council** [2014] IRLR 4.

Conclusions

Sex Discrimination

44. The Claimant had expressed a desire to be trained on the access control desk from as early as his 2016 appraisal. The training was an important stepping stone to career advancement. In such circumstances, we accept that the cancelling of the training on 16 May 2017 and again on 12 and 13 June 2017 could objectively be considered to be detriments. By contrast, however, we do not consider that a reasonable employee in the Claimant's position could have a justified sense of grievance about the appointment of Mr McLaughlin to hear his grievance. Mr McLaughlin had previously upheld a grievance raised by the Claimant, he was well trained and experienced and the sharing of an office is not reasonable grounds to conclude that he would be anything other than fair and impartial.

45. We carefully considered the Claimant's case about the cancellation of his training and scrutinised the explanations given by the Respondent. On 16 May 2017, we have found that there was a genuine operational need to cancel the training as another, male, security guard was required to undertake training which was considered a greater priority by the Respondent. Moreover, by the time of the June 2017 training dates, the operational pressure upon the Respondent had increased in the aftermath of the London Bridge terrorist attack. Whilst we understand the Claimant's disappointment at the cancellation of this training, we have accepted that Ms Zazrivcova's training arrangements did not require the Respondent to arrange cover as was required for the Claimant's training. This was a difficult time for the Respondent and its operational management, ensuring that it had sufficient available personnel to

cover the need for heightened front of house security to satisfy the client's requirements. At that time the priority was not training, but operational security. The Claimant accepted as much in cross-examination and we concluded that the Claimant's real complaint was that it was not fair that his training had not been organised sooner rather than its cancellation when it was finally arranged. This was not the case which was pleaded or which was advanced before us nor was it a complaint which disclosed any hint of sex discrimination.

46. Ms Zazrivcova's situation was materially different and there was no evidence before us from which we could conclude that a hypothetical female in the same or not materially different circumstances to the Claimant, returning to work after the attack to have training cancelled but rescheduled within a little over a fortnight, would have been treated any differently.

47. Although we have not found it to be a detriment, we would not in any event have found the appointment of Mr McLaughlin to hear the grievance to be in any way related to the Claimant's sex. We accepted Ms Williams' explanation for the appointment of Mr McLaughlin and would have concluded that a hypothetical female would have been treated in the same way.

48. The claim of sex discrimination fails and is dismissed.

Victimisation

49. In his grievance submitted on 23 June 2017, the Claimant complained about discrimination and made clear that he believed female colleagues were treated more favourably. The first ET1 brings claims under the Equality Act 2010. Both are protected acts for the purposes of section 27.

50. The detriments relied upon are the request to carry boxes on 9 August 2017 and increased scrutiny by Mr Alexander. In circumstances where the Claimant had previously suffered a back injury and was asked to carry boxes which were heavy, we accept that this was a detriment. We have not found that the Claimant was subjected to increased scrutiny by Mr Alexander. It was simply the subjective perception of the Claimant and we do not consider that an objectively reasonable employee in his position could have regarded Mr Alexander's presence in reception for 30 minutes a day, an area for which he was responsible, to be undue scrutiny.

51. As for the reason for the request to carry the boxes, we have accepted Mr Alexander's evidence that this was as a result of an enquiry about who was available and as part of the Claimant's general duties in his job description. If another security officer had been available, he too would have been asked to help. Mr Alexander was not targeting the Claimant and the request to help Mr Trapl had nothing whatsoever to do with the protected act of the grievance.

52. The victimisation claim fails and is dismissed.

Constructive Dismissal

53. The Claimant's letter handed to Mr Gooda on 15 November 2017 referred to resignation. However, the Claimant had been offered and accepted an internal transfer to the Chelsea Football Club contract. He continued to work for the Respondent at all

material times until 10 December 2017 and was paid without break during this period. We find that the contract of employment did not terminate until 10 December 2017.

54. The conduct relied upon by the Claimant as amounting to a breach of the implied term of trust and confidence was the same as for the discrimination and victimisation claims. We have found, in the context of the Equality Act, that there was no detriment in the appointment of Mr McLaughlin to hear the grievance or in the alleged scrutiny by Mr Alexander. The same acts are similarly not capable of being conduct which is capable of amounting to a breach of the implied term, either individually or cumulatively, when objectively considered.

55. The cancellation of the Claimant's training on each occasion, the appointment of Mr McLaughlin and the request to move the boxes were each for reasonable and proper cause, as set out above. Taking the Claimant's case at its highest, these were matters which were subjectively upsetting for him but which could not reasonably be said to go to the heart of the relationship when considered objectively. The Respondent rearranged the training after only a very short delay and then allocated the Claimant shifts on the access control desk just as it did for his colleague, Ms Zazrivcova. The Claimant's unhappiness with the appointment of Mr McLaughlin had no objective basis. Even if he had been aware of the fact that Mr McLaughlin had taken the first cancellation decision but still heard the grievance, this could be no more than mildly objectionable behaviour and a long way short of the repudiatory breach required by the contractual test. Finally, the Claimant was asked to help move the boxes simply because he was available in circumstances where neither Mr Alexander nor Mr Trapl were aware that the Claimant had a back injury which rendered heavily lifting undesirable. The Claimant did not make them aware at the time of the request of his back injury, if he had done so, he would not have been required to lift the boxes.

56. In any event, the Tribunal must consider the position at the date of resignation on 10 December 2017. When spoken to by Mr Gooda on 15 November 2017, the Claimant elected to take the internal transfer. The Claimant had been working at Chelsea since 27 November 2017 and had clearly been happy there. The decision to transfer was an effective affirmation of the contract of the employment and there was no breach thereafter even on the Claimant's case. The Claimant sought to argue that he was made nervous by Mr Gooda's reference on 8 November 2017 to knowing the manager at Chelsea. This reference was in an email which was warm, positive and commended the Claimant on his qualities. There was nothing in the email which could reasonably make an objective employee feel nervous or distrustful even with the strain perceived by the Claimant in the working relationship with Mr Alexander.

57. The Claimant did not resign in circumstances in which he was entitled to treat himself as dismissed. The claim for unfair dismissal fails.

58. This was in many ways a sad case. A good employee with prospects and ambition became so disillusioned and stressed that he ultimately left his employment altogether. Whilst not a breach of contract (far less a repudiatory one), there are nevertheless points upon which the Respondent may wish to reflect. The Claimant had requested training from 2016 but there is no evidence that this was taken further, even when raised again by the Claimant. This led to the Claimant feeling ignored and undervalued. Even though the grievance decision was detailed and, we consider fair and for good reason, it was foreseeable that the Claimant may have felt vulnerable and anxious about his working relationship with his manager. Some sort of meeting to

"clear the air" or other step to reassure the Claimant and enable him to move forward in his employment with the Respondent may have enabled it to retain the services of a security officer with good career potential.

Employment Judge Russell

10 September 2018