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EMPLOYMENT TRIBUNALS

Claimant		*Respondents*
Mr J Kopec	**AND**	**BDW Trading Limited**

Heard at: London Central **On**: 19-22 November 2018

Employment Judge: Ms A Stewart
Members: Mr D Schofield
Mr I McLaughlin

Representation
For the Claimant: In person
For the Respondent: Ms A Reindorf of Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

The Claimant's complaint that he was constructively unfairly dismissed is well founded and succeeds.

The Claimant's complaints that he suffered direct discrimination, contrary to s.13 of the Equality Act 2010, are not well founded and fail.

The Claimant's complaints that he suffered harassment related to his race and apparent sexual orientation, contrary to s.26 of the Equality Act 2010, are well founded, in part.

The Claimant's complaint that he suffered harassment related to his age, contrary to s.26 of the Equality Act 2010, is not well founded and fails.

REASONS

Introduction

1. The Claimant brings the following complaints before the Tribunal:

A] That he was constructively unfairly dismissed.

B] That he was directly discriminated against, contrary to **section 13 of the Equality Act 2010,** because of his age, and/or race and/or perceived sexual orientation in the following respects:

(i) On 16 December 2016 the Respondent treated the Claimant as at fault when a delivery driver called him a "fucking Eastern European".

(ii) On 5 March 2017 the Respondent treated the Claimant as at fault when a resident's boyfriend subjected him to verbal abuse, whereupon his Line Manager was offensive to him and removed his overtime working, leading to a reduction in income.

(iii) On 6 June 2017 the Respondent failed properly to investigate an incident when a visiting contractor called the Claimant a "fucking faggot" and a "fucking Russian".

(iv) The Respondent called the Claimant to a disciplinary meeting on account of the above events, plus one other.

(v) The Respondent failed to intervene when, in the presence of his Manager, an older resident said to him "come on, you're not that old".

(vi) That on 29 June 2017 the Respondent issued the Claimant with a verbal warning.

(vii) That on 1 July the Respondent suspended the Claimant for investigation after he had contacted the police and the abuser referred to in (iii) above.

C] The Claimant also complains that he was subjected to harassment, contrary to **section 26 of the Equality Act 2010**, related to his race and/or age and/or perceived sexual orientation in each of the respects set out above in relation to **s.13 of the Act.**

2. In relation to the Claimant's complaint of constructive dismissal, the Claimant contends that the Respondent was in fundamental breach of the implied term of trust and confidence in the following respects:

(1) Not providing support when he was abused

(2) Blaming him for what occurred, or his response to it, to the extent of issuing a verbal warning; and

(3) Suspending him after he informed the police and contacted the abuser after an incident on 6 June 2017

3. The Tribunal heard evidence from the Claimant and from the following witnesses called by the Respondent: Ms Caroline Lane, Development Manager at the Claimant's work place and his Direct Line Manager; Mr Robert Manikon, Property Manager and Disciplining Officer in relation to the Claimant.

The Issues

4. The issues which this Tribunal has had to determine were as follows:

(1) Has the Claimant satisfied the Tribunal, on a balance of probabilities, that the Respondent was in fundamental breach of the implied term of trust and confidence which should pertain in an employment relationship?

(2) If so, did the Claimant resign because of that breach?

(3) If the Claimant succeeds thus far, the Respondent does not seek to contend that the dismissal was fair within the meaning of **s.98 of the Employment Rights Act 1996.**

(4) The Respondent contends that the Tribunal has no jurisdiction to consider any complaints prior to the 9 May 2017 because they are out of time. The Tribunal therefore had to determine whether the Claimant has established, on a balance of probabilities, that any conduct prior to that date was part of a series of events/a continuing state of affairs. If he fails to do so the Tribunal must consider whether it would be just and equitable to extend time so as to consider all of his complaints.

(5) Has the Claimant shown facts from which the Tribunal could find, in the absence of any explanation provided by the Respondent, that its treatment of him was directly discriminatory on the grounds of his race, age, or sexual orientation?

(6) If so, has the Respondent satisfied the Tribunal, on a balance of probabilities, that its treatment of him was in no way tainted by unlawful considerations of the Claimant's race, sexual orientation or age?

(7) Has the Claimant suffered harassment related to a protected characteristic, within the meaning of **section 26 of the Equality Act 2010?**

The Facts

5. The Respondent, BDW Trading Limited, Barratt Residential Asset Management (BRAM), is part of Barratt Developments Plc, a large group of companies whose Head Office is in Leicestershire. BRAM, inter alia, manages a development of 273 flats in London at the Fulham Riverside Apartments, where the Claimant was employed to work as a day Concierge (one of a team of four).

6. The Claimant, who identifies himself as of Polish, Eastern European ethnicity and as a heterosexual man, started his employment with the Respondent on the 28 May 2014 and resigned forthwith on 11 July 2017. Prior to his employment with the Respondent the Claimant had eight years experience in a four-star deluxe Kensington Hotel where he began as night porter and went on to become the Golden Key Head Concierge, of which there are only 300 in the UK and 5,000 worldwide. Membership of the Society of the Golden Keys indicates a very high level of customer service attainment. The Tribunal had before it a variety of testaments to the Claimant's qualities as Concierge from residents, a previous employer and an ex-colleague, who was also critical about one of the Respondent's managers, one Steve Wilding.

7. Ms Lane was the Claimant's Line Manager and she reported to Mr Steve Wilding. The task of the Concierge in the Riverside Apartments Development was to provide a comprehensive, 24 hour, high-end service for residents, including receiving deliveries and outside contractors and handling all eventualities. This was a difficult period since only part of the development was built and the other part was still a construction site. Ms Lane told the Tribunal that she was the fourth Development Manager within the space of a year and was striving to improve customer service in a somewhat difficult working environment.

8. The Tribunal had before it the Claimant's annual and interim Performance and Development Reviews (PDRs), in which he was consistently graded 'meets requirements', indicating a solid performer not amounting to 'exceeds requirements' or 'outstanding', nor descending into partial failure at the role. A consistent theme throughout these PDRs was the need for the Claimant to improve his "softer skills", for example body language and manner in dealing with difficult situations, without aggravating the customer or visitor. The PDRs indicate that he was making big efforts in regard to these objectives and was improving. He was acknowledged to have strong organisational skills, was reliable and punctual and ensured that procedures were followed correctly.

9. There was a note on file on 14 July 2016 by Ms Lane noting that she had told the Claimant that he could not refuse to serve a resident, which he had attempted to do following a disagreement. A note in the 2015/16 PDR stated that the Claimant 'always has good ideas about improving procedures and understands well how the systems work but finds it difficult to deal with residents and visitors who do not want to obey the rules'. The Claimant told the Tribunal that he felt himself to be in receipt of contradictory messages at times; from Mr Wilding, whose message was that the rules and procedures governing reception and access to visitors and deliveries must be enforced at all times, otherwise disciplinary action would be taken against staff who fail to do so; and from Ms Lane urging softer more flexible approaches in his dealings with visitors and delivery men.

10. The Tribunal had before it the Respondent's Group Equality Policy which states "We believe diversity inclusion and flexibility are at the core of our business" and goes on to set out a comprehensive and thorough policy relating to discrimination, harassment, unacceptable forms of behaviour, including that "harassment can also include the actions of third parties such as customers, suppliers or visitors to the group's premises"…. "We strive to protect all employees and applicants for employment from discrimination, harassment and victimisation"… "The group believes that all employees should immediately appreciate what would amount to discrimination in any form … the group will not tolerate acts which breach this discrimination policy… and offences will be disciplined and could result in termination of employment."

11. The Barratt Development Plc Ethics Policy, designed to set standards of professionalism and integrity to be maintained by individuals in all the group's operations, includes that "all employees have a duty to maintain these standards through their decisions, actions and communications", that a heavier responsibility is borne by those in positions of authority and that "all agents, joint venture and other partners, sub-contractors and suppliers are expected to adhere to the principals of this policy in their dealings with the group" and that receipt of, and "agreement to conform with, this policy must be confirmed in writing on an annual basis by 1 September each year".

12. The Tribunal unanimously formed the view that Ms Lane, in her appraisals and line management of the Claimant, was genuinely trying to assist him in softening his dealings with others, making him more flexible and friendly in his approach, because in her perception the Claimant in his dealings with people,

especially those who were unpleasant or difficult, tended to exacerbate the situation by his manner. She had meetings one to one with him in which she tried to talk through how he might improve his softer skills, as well as praising the stronger aspects of his performance, and she told the Tribunal that when the Claimant was later suspended she had felt very upset and felt that it had been a personal failure on her part that she had not been able to achieve the improvement which was required. Further, when the Claimant was having trouble with a nuisance neighbour at home, Ms Lane tried to help resolve the issue and spent time dealing with the local authority on his behalf.

13. On 16 December 2016 an incident occurred between the Claimant and a delivery driver delivering a parcel to AH, one of the residents in the block. The Claimant said that the delivery man was angry, abusive and shouting and said, "you fucking Eastern Europeans should not be let in to this country" and hit him with the box he was wanting to deliver. The resident in question ran a business from her premises and was responsible for managing this and other delivery companies. The Claimant reported the incident personally to AH, including that he had been racially abused, and AH telephoned Ms Lane and told her what had happened. AH was appalled at the racial abuse. She had the driver suspended over Christmas and was on the verge of having him dismissed, but wanted to know if there were any extenuating circumstances before taking that step. Ms Lane stated that the Claimant was not at work at that time so she reviewed the CCTV footage and, although without sound track, she formed the view that the Claimant had not been very helpful in having left the delivery driver outside in the rain for some time and then kept him waiting inside at the Concierge desk. Since the Claimant would not be back at work before 5 January Ms Lane, on 22 December, sent a holding email to AH. This email included; "it does look to me as if the Claimant was not very helpful in explaining to the courier what he should do" and ... "we are supposed to be here to make life easier not the opposite".

14. The Tribunal noted in relation to this email and two others in the bundle, all written by Ms Lane and relating to the Claimant, that there were two different versions, yet, curiously, both identically dated and timed. One version had excised from it the two phrases quoted in paragraph 13 above, and it was the excised version which was sent to the Claimant during the subsequent disciplinary process, referred to below. The Respondent's solicitor, in giving disclosure of documents for the purposes of these proceedings, quite properly sent the fuller versions to the Claimant in full disclosure, as required by the Tribunal rules. Despite enquiry during this hearing, the Respondent was unable to bring before the Tribunal any explanation of who had removed theses passages from the three emails in question. The Tribunal noted, however, that the passages which had been excised were those which showed a tendency to lay blame on the Claimant, rather than on the other party to the various incidents. For example, a later email, sent on 8 June 2017 (paragraph 26 of these Reasons) had the final four paragraphs entirely removed from the excised version; namely those paragraphs dealing with a deeper analysis of what Ms Lane deemed to be the problem with the Claimant, and his requirement for an improvement plan.

15. Following the Claimant's return to work on 5 January 2017 Ms Lane and the Claimant sat down together and watched the CCTV footage of the December incident. Her evidence before this Tribunal was that the Claimant accepted that he could have been more helpful in the circumstances and they agreed that no matter how angry the delivery driver may have been, there was no excuse for racial abuse. Ms Lane's view was that the Claimant's failure to be helpful had led to the situation escalating. Following their meeting on 13 January Ms Lane sent a detailed, thoughtful email offering the Claimant advice and some suggested phrases which might be useful in relation to delivery drivers delivering parcels, including suggestions about how he might conduct the situation so as to make things smoother and easier for all concerned. This email the Tribunal found to be a genuine attempt to be helpful, sent to the Claimant at the general concierge email address and, in order to spare the Claimant any possible embarrassment from having it seen by his colleagues, Ms Lane suggested that he print it off and then delete it, so that he could have it to hand, and that they could have a catch up meeting the following Monday to see how her suggestions were working for him.

16. Following her meeting with the Claimant, Ms Lane sent an email to AH saying that she and the Claimant had met and discussed the incident and that although the driver was extremely rude she felt that the Claimant had not helped the situation. She said that they had spent some time discussing procedures and the management of such situations and that they had discussed ways in which the Claimant's giving of information might come across as less authoritarian and more friendly and welcoming and she ended; "I do think the driver was rude and aggressive but we should have handled the situation better both initially and as tempers rose" and that the Claimant felt bad about AH having to deal with the situation and that he had had it on his mind over Christmas. The Tribunal noted that there was no mention of the racist nature of the driver's comments in this email nor how unacceptable that conduct was, although AH was already aware of the racist nature of what had occurred.

17. On 5 March 2017 another incident occurred involving the Claimant, after which a complaint was made by a resident and her partner who were moving out of one of the flats, because the Claimant had refused access to a removal van because he had been instructed not to allow anyone to enter by that particular portal, because damage had been previously caused to an archway by a large van. The resident complained that the Claimant had also refused to give him a card revealing a number to which he could complain. The Claimant however stated that he had given the resident a card and had watched while the resident tapped the number into his smart phone. The Claimant stated that he had been told by Ms Lane never to allow anybody vehicular access through this particular pedestrian walk way and Ms Lane said in cross examination, "I don't remember ever having ever said that, but I may have said it and forgotten". The Claimant stated that he was simply obeying her orders, whilst Ms Lane said it was not the refusal so much as the manner in which it was delivered. The Claimant also stated that the CCTV clearly showed him handing the requested card over to the resident. Ms Lane said she could not remember having seen that on the CCTV but that this did not mean it was not on it. She stated that she could not remember a lot that had happened, since it was some time ago.

18. However, the Tribunal noted that Ms Lane's email to the resident, prior to exploring the matter with the Claimant or reviewing the CCTV was in the following terms; "I am really sorry to hear about the issues you had with the Concierge staff on Sunday, I can only apologise for his attitude and the way that he spoke to you". Her email to the resident clearly accepted their assertion that the Claimant had refused to give a contact number, before the Claimant had come back to work and discussed the matter with her and prior to her reviewing the relevant CCTV footage. There was no evidence before the Tribunal showing that the Claimant in particular was deprived of any overtime following this incident, nor that he was treated in any way differently to the rest of the concierge staff in this regard.

19. On 6 June 2017 there were two incidents involving the Claimant. Firstly, a delivery driver came to the flats to deliver a piece of furniture and the Claimant went to consult Ms Lane about how handle the situation. Ms Lane told him that if necessary she would go with the delivery driver to the flat concerned and that the Claimant should let her know if this was required. However, she told the Tribunal that the Claimant did not come back to her and that the delivery driver left without delivering the piece of furniture. The Claimant however stated that the resident to whom the delivery was due was away and in a telephone conversation with the driver had agreed that there was no urgency in the delivery being made.

20. In the second event on 6 June, some hour or so after the first, the Claimant said that he noticed that the bollards had been removed and that an unauthorised vehicle was entering the site. The Claimant said that the driver became aggressive when told to withdraw and had called him a "fucking Russian" and a "fucking idiot". When the Claimant told the driver that he would replace the bollard, whether the vehicle was inside or outside the site, the driver reversed out. The driver later called him a "fucking faggot". Ms Lane stated that she noticed a contractor shouting through the glass doors at the Claimant and saying that he was very rude and should not be working on a front desk. The Claimant went upstairs to eat his lunch and saw through the window that Ms Lane was outside speaking with the delivery driver in question. He told the Tribunal that he felt sick to his stomach and felt that she was taking the driver's version of events rather than supporting him and that he felt unable to eat lunch and was shaking with trauma, anger and fear. He said she was already very angry with him and now he knew that she was taking one side of the story and would jump to the wrong and one-sided conclusions. He went downstairs and told her that he could not stay at work and was going home. She asked him to wait, arranged for desk cover and came upstairs to speak with him.

21. In a later email to HR relating to this incident Ms Lane said: "this is the guy who the Claimant screamed at for coming through the barrier and then intimidated into giving a written explanation next time he was on site". However, Ms Lane told the Tribunal that she had only ever seen the contractor shouting and had never actually seen the Claimant screaming at the contractor through the barrier; that she had understood there had been a shouting match but she had not actually seen it herself but that she had believed the contractor's version

of events "without checking, because I had seen how the Claimant conducted himself over a period of eighteen months".

22. The Claimant insisted that he told Ms Lane on the day of the incident, either downstairs or at the meeting upstairs after lunch, of the actual racist and discriminatory words used by the contractor. Ms Lane denied that she was ever aware that racist or homophobic language was used by this contractor. However, Ms Lane's evidence regarding whom she had seen screaming and shouting (paragraph 21 above) adversely affected her credibility in the Tribunal's eyes and, on balance, it preferred the Claimant's account that he had, at least within an hour, and in any event before leaving the premises, revealed to her the racist and homophobic discriminatory language used against him by the contractor.

23. Ms Lane stated that when she went upstairs to speak with the Claimant, she had found him very upset and physically shaking and that she had tried to discuss the problem but that he was so upset it had made discussion difficult. She said that the Claimant appeared to suffer some sort of fit (perhaps a panic attack) whereby he slumped to the ground physically shaking, that she had offered an ambulance but that he had refused and after resting for some twenty minutes had gone home.

24. The Claimant came back the following day, 7 June, and they had a meeting during which the incident was discussed. The Tribunal formed the view that by the end of this meeting the following day the Claimant had certainly revealed the precise nature of the abuse which he had suffered, even if Ms Lane stated that she no longer remembered that he had done so. Ms Lane reiterated to him her position that, unfortunately, delivery personnel might be quite rude but that she felt that the Claimant did not always help the situation with his demeanour. The Claimant felt that she was taking the contractor's side and insisted that Ms Lane watch the CCTV and speak to a witness, Juan George, who was a fellow employee, whom he had pointed out to her immediately after the incident on the previous day, as a witness. He discovered that Ms Lane never did watch the CCTV and never did speak to this witness. He asserted that Ms Lane said to him "you have something in your face that pisses people off" and questioned his unwelcoming facial expression. Ms Lane stated that she had said that he had a "stern" face, but that the Claimant did not understand the word "stern" at the time. This meeting lasted between two and three hours and appeared to be a thorough exploration of the issues between them.

25. When the Claimant came to work the following day, 8 June, Ms Lane said that she wished to speak to him again but that he refused to speak with her and said that they had sorted everything out in their lengthy meeting on the previous day. Ms Lane said that the Claimant refused to discuss the incident again either with herself or with her Line Manager, Steve Wilding.

26. At this point Ms Lane felt that some sort of formal process needed to be commenced because they simply were not making any progress with the Claimant's behaviour, but mainly because he had refused to discuss it any further with her. She therefore sent an email to HR and to Steve Wilding: This was a lengthy and detailed email regarding the Claimant's attitude to visitors and

the incidents which had occurred and her feeling that the Claimant needed to be put on an improvement plan. She also said that the Claimant told her he had been planning to leave and had applied to the Prison Service. For this reason, she had delayed the starting of an improvement plan. She said that she believed that the process needed to be made formal, 'i.e. agree that he needs to improve his body language and welcome and in return I will give him time to calm down before discussing the issue with him'. This email continued, in its longer un-excised form, with four additional paragraphs saying, in hindsight, she felt that he should have been on an improvement plan earlier but it is 'difficult to monitor if one is not present during the altercation' and that she had given him the benefit of the doubt, as he was always so sincere in wanting to improve but that the problem was 'he honestly believes it is nothing to do with him and that it is always the other person's fault'.

27. Following receipt of her email Mr Wilding suggested she talk to HR about setting up a disciplinary, which she duly did. DS, the driver involved in the last incident came back on site some while later and told Ms Lane that he had tried to make his peace with the Claimant but that the Claimant had demanded a written apology from him. The Claimant's version of this event is that he had been forbidden by Ms Lane to have any dealings with, or to speak with DS and that the driver had become so self-assured by feeling supported by Ms Lane that he had come over and started laughing and mocking in his face, but that he had then become scared when the Claimant had said it had gone to a disciplinary and that he was not prepared to let it go. The Claimant in fact reported the abuse which he had suffered to the police and DS was subsequently charged with a Racially Aggravated Public Order Offence.

28. On 9 June the Claimant was invited by letter to a Disciplinary Hearing, the Respondent having completed their investigations into the allegation that he had shown discourteous conduct towards clients, customers and suppliers of the group. Enclosed with the letter were the excised versions of the emails from Ms Lane outlining the events of 16 December, 17 March and 6 June. The letter said that this was potentially gross misconduct, potentially leading to dismissal.

29. On 17 June AH, the resident involved in the 16 December incident, wrote to the Claimant saying that she was concerned that a disciplinary had been raised against him and that she was not happy that they were using the courier situation which had happened the previous December. Her letter continued; "our company dealt with the courier, he was suspended as he was at fault. There is no reason for this to be brought up again and it is unfair if they use it against you. There was also a witness standing by you, so you must ensure if they do go ahead with this that they get their statement too".

30. On 23 June 2017 Ms Lane wrote another email to HR setting out DS's version of his treatment at the Claimant's hands, during the June incident, when he went back to make peace with the Claimant; that she had then spoken to the Claimant and the Claimant had told her he had wanted the driver to clear his name, as he had done nothing wrong and that he had therefore asked him to write an apology, but that the contractor had lied on the apology note. She added; if you talk to him you will see it is because he, the Claimant, absolutely

cannot believe he had done anything wrong. The Claimant told the Tribunal that he felt he could not trust Ms Lane anymore, that he felt betrayed, cheated and forsaken and that the conclusions she had come to in this email to HR were jumped to without having spoken to witnesses and without herself having witnessed the incident in question.

31. On 28 June 2017 a Disciplinary Hearing took place, chaired by Mr Manikon, and the Tribunal had before it notes hand written by HR and also a transcript of a covert recording of the entire meeting taken on the Claimant's mobile phone. Mr Manikon's evidence was that he had been unaware that there had been any racist abuse aimed at the Claimant during the 16 December incident, although it was clear that he was well aware of what DS said to the Claimant during the June incident.

32. Following the meeting, on 29 June 2017, Mr Manikon sent an outcome letter issuing the Claimant with a verbal warning to be placed on his file for a period of six months. His letter said that the Claimant had been faced with several difficult situations, which were not solely his own fault, but that he could have offered customers alternative approaches rather than just saying no; that he accepted the character testaments from residents that the situations had not been caused by the Claimant, but that he believed he could have handled them differently. The letter went on to say that he was going to suggest an informal capability improvement plan to be carried out by Ms Lane, in order to help and encourage the Claimant to achieve the expected standards of capability at work.

33. Mr Manikon had no knowledge of the apology note written by the contractor at the time of the disciplinary hearing. Mr Manikon told the Tribunal that he considered that the Claimant's conduct had fallen below the standard expected of a Concierge, although there had been mitigating circumstances, and that he had decided to issue the lowest available disciplinary sanction, namely a verbal warning. He elaborated in cross examination that a Concierge needed to think flexibly and outside the box and not in black and white, as live situations were not always 'yes or no' and that the Claimant needed to think on his feet. For example, if someone was struggling at the door it would be courteous to go and help.

34. However, it was clear that Mr Manikon had not been aware that there had been a witness to the latter incident until the matter was raised during the disciplinary hearing itself, and he accepted that he had got the papers very late, only on the morning of the Hearing and that, with hindsight, it would have been better to adjourn for a time and to take evidence from the witness mentioned. However, he stated his view that even had the witness been contacted he would have stood by his decision regarding the Claimant's conduct and capability, even after taking in to account the serious issues which the Claimant had faced. He stated that he had felt hopeful at the time that the warning and the improvement plan would lead to a positive outcome and improvement and that the Claimant would be able to put behind him the events which had occurred.

35. Mr Manikon also told the Tribunal that he had been entirely unaware of the Respondent's Equality Policy and Statement of Ethics at the time when he

conducted the Claimant's disciplinary and had never read it and had received his first ever training in equality awareness only some six weeks before the date of this Hearing. Ms Lane's evidence was to the same effect.

36. The Claimant told the Tribunal that a cleaner of one of the residents in the flats had once said to him, in Ms Lane's presence; "come on you're not that old, you should remember what flat I am going to". The Claimant contended that this was discriminatory in relation to his age (40 at the material time).

37. On 5 July 2017 the Claimant sent a text to the driver DS, in the following terms: "Good Morning. This is J from Fulham Riverside. You have been reported to the police. You can get up to 8 months for what you did. This is the last chance for you and come clean. Just say the truth that you have been asked nicely and you over reacted. You have to tell me as well what she told you on 16 June in the office. Your call before this messes up your life. With regards. J".

38. DS phoned Ms Lane to tell her about the text from the Claimant and later forwarded it to her. Following this phone call from DS, Ms Lane emailed HR and Mr Wilding saying that DS had been very upset and had said he would never be back on site again. She added; "this kind of threatening bullying behaviour is surely totally unacceptable? Is it sackable? thanks C". HR replied that no allegation is sackable until it has been investigated, disciplined and then found to be gross misconduct; that it would require to verify from which number the text message was sent and to see the message itself, without which there would be not much evidence to take matters further and in that case suggesting that she begin the process of the capability plan. However, if the text was forwarded then it could be examined and matters taken from there. On 6 July Ms Lane forwarded the text to HR, copied to Mr Wilding, saying; "this is outrageous". HR thereafter contacted Group HR Advisors and Manager.

39. On 10 July 2017 Ms Lane wrote to the Claimant suspending him pending investigation of the allegation that he had sent an intimidating text message to a contractor, which could be deemed as harassment and could bring the company into disrepute. The Tribunal noted that the Respondent's suspension policy states that a suspension should be for a maximum of 7 days and longer only with Senior Management approval. However, this suspension, although stated to be without prejudice and not constituting disciplinary action or implying any prior judgments, was open-ended and effective until further notice. The Respondent did not provide evidence that indeterminate suspension had been duly approved by senior management.

40. The Claimant's evidence was that Ms Lane and Mr Wilding met with him on 10 July and suspended him during that meeting; that they had the letter ready and that it was handed to him and that he had felt it was discriminatory and unjustified. The Claimant stated that when he went upstairs to pack his belongings, of which he had many in the staff room, including musical instruments, Ms Lane was in tears and had tried to stop him taking all of his things, saying that he did not have to take everything, that he may well be back. Ms Lane said that she had found it very stressful and that she was upset and had

felt a failure when she had finally had to involve HR and the Claimant was suspended.

41. Also on 10 July the Claimant had written an appeal against Mr Manikon's verbal warning sanction, which he regarded as highly unfair, reiterating his version of events and asserting that nobody had interviewed the witness or followed up any of the matters which he had raised during the disciplinary meeting and asserting that the Respondent's version of the minutes omitted many of the statements which the Claimant said were vital to his defence, including the discrimination issues.

42. On 11 July following his suspension, the Claimant emailed a resignation letter saying: "this decision has not been an easy one but hostile working environment became unbearable and it is affecting my health. I feel discriminated and harassed at work. I was abused, sworn at, spat at and hit on multiple occasions, I was sexually and racially discriminated and instead of investigating and protecting me, my managers completely ignored these situations and lately they took to further blaming me and got me in to a disciplinary meeting. I cannot stay at a place where the managers, even at the highest level, are manipulating facts, ignoring the statement of witnesses and colluding with abusers to suspend me, completely omitting disciplinary procedures. The Equality Policy which is supposed to be upheld by the Barratt Group is being wilfully ignored. That is enough and someone has to say NO to that. I have built an excellent relationship with the residents and colleagues and I will miss all who were kind and supporting to me during the three years of abuse and stress…" The Respondent on 14 July formally acknowledged receipt of the Claimant's resignation and confirmed that the last day of his employment would be Friday 11 August 2017 and that he would be paid up to that date.

43. On 13 July 2017 Mr David Thomas, the Chief Executive of Barratt Developments Plc sent an email to all Barratt users, group wide, subject; "Investing in our people". This reiterated the group's embrace of diversity and inclusion and the individual upholding of standards and values of Barratt and said that an employee had been recently dismissed for the use of racist and sexual language but that as soon as this had been found out the group acted swiftly to investigate and take disciplinary action but that, worryingly, the behaviour had been brought to their attention only after an employee had left the business and thereafter contacted them.

44. On 17 July Mr Andy Penhaligon, Regional HR Advisor, London and Southern, emailed the Claimant advising him that Ms Lane as Line Manager had actioned acceptance of his resignation but that they remained keen to meet with the Claimant in order to discuss the points raised in his resignation email of 11 July and to examine the grounds of appeal as per his email of 10 July.

45. The Claimant replied on 18 July reiterating the seriousness of what had happened to him and the level of stress suffered and that Ms Lane and Mr Wilding had "colluded with the abuser as reported to the police, because they did not do it, and suspended him". He gave the view that the perpetrator DS would most likely go to prison, that managers were too focussed on correcting him and

not on the real problem and stating that he did not know if there was any point in meeting up as it was simply too late and most likely would change nothing in the company. He offered however the possibility of meeting on the 31 July, if Mr Penhaligon saw any point in meeting.

46. An Appeal/Grievance hearing was arranged to take place on 9 August 2017, Mike Dowland, MD, Head of Operations BRAM, having stated that the Claimant had raised a number of serious issues and allegations in his resignation letter which they felt needed to be treated as a grievance and investigated, however "if you are happy to drop these allegations then we do not need to investigate the issues and we can close the file in regard to this matter. Please confirm". This was in a letter of 8 August, to which the Claimant replied; I will be attending the meeting tomorrow. The meeting duly took place, chaired by Mike Dowland.

47. On 18 August 2017 Mr Dowland wrote an outcome of Appeal letter upholding the verbal warning as being fair and appropriate, following an exploration of the process with Mr Manikon. The Tribunal noted that this letter included a paragraph saying that Mr Dowland had spoken with Ms Lane who had denied that she had been asked to obtain a witness statement and that the individual had been an operative working for a sub-contractor and therefore impossible to track down. However, it is clear from the evidence before this Tribunal that the witness in question was an employee of the Respondent. The outcome letter stated that the sanction was fair because Mr Manikon gave consideration to the strong contributing factors of the other individuals involved and it was this mitigation which caused the level of the warning to be reduced to the lowest level of disciplinary sanction available.

48. On the same day Mr Dowland sent an outcome of Grievance letter, in which he did not uphold the Claimant's grievance, as set out in his letter of resignation, because having investigated these points with Ms Lane, Mr Manikon and Mr Wilding he concluded that there were structures and mechanisms in place to support staff in dealing with difficult situations and that "you have it within your remit to shape to a certain degree the outcome of customer and third-party interactions". And as the events did not relate to an employee, "we are to a degree limited in the actions we can take outside of, where possible, raising concerns with the appropriate persons or organisations they work for". Mr Dowland continued "I can find no evidence that Barratt equality policy was being wilfully ignored".

49. The Claimant presented his complaints to the Tribunal on 9 September 2017.

The Law

50 As to the law, the Tribunal directed itself as follows:

(i) **Section 13 (1) of the Equality Act 2010** provides that "a person (A) discriminates against another (B) if, because of a protected characteristic (including race, age and sexual orientation) A treats B less favourably than A treats or would treat others".

(ii) **Section 26 (1) of the Equality Act 2010** provides that "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 violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B." **Sub-section (4) of section 26** provides that "in deciding whether conduct has the effect referred to in **(1) (b)** above, each of the following must be taken into account; (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

(iii) **Section 39 (2) and (4)** provide that an employer A must not discriminate against an employee of his, B, … by dismissing B or subjecting B to any other detriment".

(iv) **Section 136 (2) of the Equality Act 2010** provides that "if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred … **(3)** but this does not apply if A shows that A did not contravene the provision".

(v) The Tribunal reminded itself that discrimination may not be deliberate and may consist of unconsciously operative assumptions on the part of the employer. It is therefore incumbent upon the Tribunal to examine indicators from the surrounding circumstances and events, both prior and subsequent to the acts complained of, in order to assist it in determining whether or not particular acts were discriminatory (**Anya v University of Oxford [2001] IRLR 337).**

(vi) Inferences of unlawful discrimination may not properly be drawn solely from the fact that the Claimant has been unreasonably treated, although they may properly be drawn from the absence of any explanation for such unreasonable treatment. (**Bahl v The Law Society [2004 IRLR 799).**

(vii) The Tribunal had regard to the cases of **Igen v Wong [2005] ICR 931** and **Madarassey v Nomura International Plc [2007] IRLR 246** in setting about its task, as well as to the cases of **Shamoon v Chief Constable of the RUC 2003 ICR 337 HL** and **Laing v Manchester City Council 2006 ICR 1519 EAT.**

(viii) Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought before the Tribunal after the end of a period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. For the purposes of this section, conduct extending over a period is to be treated as done at the end of the period **(section 123(3)(a)).**

(ix) In the light of his resignation, it is for the Claimant to show, on a balance of probabilities, that he was dismissed; that is, that he terminated his contract of employment, whether or not with notice, "in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct." (**Section 95(1)(c) of the Employment Rights Act 1996)**.

(x) It is a repudiatory breach of the employment contract for an employer, "without reasonable and proper cause", to conduct itself in a manner "calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties" (**Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84, EAT**).

(xi) The Claimant must also show, on a balance of probabilities, that any such repudiatory breach or breaches were the effective cause of his resignation.

(xii) A repudiatory breach may consist of a series of lesser breaches culminating in a 'final straw', which may not in itself be a serious breach, but must however relate in some way to the earlier breaches with which it is alleged to be cumulated and must not be entirely innocuous **(London Borough of Waltham Forest v Omilaju [2005] IRLR 35).**

(xiii) If the dismissal is found to be procedurally unfair, the employee's compensation will be reduced to the extent that the Tribunal finds that correcting the procedural irregularities would have made no difference to the dismissal outcome (**Section 123(1)** of the **Employment Rights Act 1996** and **Polkey v Dayton Services Ltd [1988] ICR 142).**

(xiv) Compensation shall be further reduced to the extent that the Tribunal finds that the employee's own actions caused or contributed to his own dismissal (**Section 122(2)** and **123(6)** of the **Employment Rights Act 1996**).

Conclusions

51 Constructive dismissal: The Claimant has satisfied the Tribunal unanimously, on a balance of probabilities, that he was entitled to terminate his contract of employment, without notice, by reason of the Respondent's conduct, which amounted to a fundamental breach of the implied term of trust and confidence in the following respects:

(i) The Respondent, in the particular persons of Ms Lane and Mr Wilding completely failed to follow the Respondent's Equality Policy and Ethics Policy, as set out in paragraphs 10 and 11 of these Reasons in relation to the racist and sexual orientation abuse suffered by the Claimant on 16 December 2016 and 6 June 2017. Respondent management showed a complete lack of awareness that there was anything at all notable or particularly serious about the fact that one of their staff had been subjected to racist and other discriminatory abuse. Mr Dowland's outcome of grievance letter (paragraph 48 of these Reasons) shows the same abject failure of approach to matters of discrimination, and this from the MD, Head of Operations in BRAM.

(ii) Neither Ms Lane nor Mr Manikon, nor any other of the Respondent's senior management or other staff, as far as the Tribunal could detect, had ever read the Respondent's Equality or Ethics policies at the material time, nor had ever received any equality and diversity awareness training at all, until just 6 weeks prior to the date of this Tribunal Hearing. The Tribunal was unanimously

astonished by this state of affairs, extending at least up to the MD of BRAM, in a large PLC, which nevertheless boasts a strong and cogent set of *written* policies.

(iii) Ms Lane's blindness was even more remarkable, following the December incident, when contrasted with AH the tenant's reaction, of which Ms Lane was very well aware, which was immediately to focus on and to condemn the driver's racist abuse of the Claimant, to the extent of having him suspended over Christmas and considering his dismissal.

(iii) Ms Lane told the Tribunal that her whole focus had been on how the Claimant's demeanour and lack of 'softer' skills was exacerbating the incidents, based on her general observation of him over an 18 month period. It was clear to the Tribunal that discriminatory abuse simply did not figure as important in her mind, despite the fact that she knew that it had occurred. From the Claimant's point of view, the abuse which he had suffered was simply ignored and its reality and seriousness thereby implicitly denied, a matter of particular distress to any victim of discrimination.

(iv) Ms Lane unfairly assumed the Claimant's guilt in the incidents of March and June 2017, prior to investigating the incidents with the Claimant himself, without looking through the CCTV images and without even attempting to follow up the witness put forward by the Claimant, who was in fact a member of staff. She sided with the other persons involved in the incidents without proper analysis of what had actually occurred. The Tribunal noted that the passages blaming the Claimant a priori were excised from those copies of her emails which were sent to the Claimant for the disciplinary hearing. This indicates some awareness of their questionable nature on somebody's part, perhaps Ms Lane herself, since HR's more balanced approach may be seen in its reply to Ms Lane set out in paragraph 38 of these Reasons.

(v) Mr Manikon knew that the Claimant had been subjected to racist and homophobic abuse yet admitted to the Tribunal that he had been unaware of the Respondent's policies at the date of conducting the disciplinary. For him too, therefore, it simply did not figure as of any particular importance. He also acknowledged that, with hindsight, he should have adjourned the disciplinary hearing and followed up on the racist complaints and also on the witness who was being put forward by the Claimant in his own defence. Mr Manikon regretted these matters but opined that he would have made the same decision regarding the sanction, even if he had done so.

(vi) Whilst issuing the Claimant with a verbal warning for the short-comings in his people handling skills would not per-se amount to a breach of the implied term of trust and confidence, (although performance management at an earlier stage might well have been more appropriate), the matters set out in (iv) and (v) above demonstrate breaches of the rules of fairness and natural justice in the disciplining of any employee. This was exacerbated in this case by being coupled with the abject failure of those involved to give proper attention to the fact that the employee in question had been subjected to racist and homophobic abuse during the incidents in question, contrary to every tenet set out in the

Respondent's own policies. A reasonable employer would have given equal attention to the Claimant's conduct/performance issues and to their duties and obligations under the Respondent's zero-tolerance policies in relation to the abuse which he had suffered. Preferably, these two aspects would have been dealt with separately, with due and proper hearing and attention given to each. The policies in question give considerable and explicit power and scope for the Respondent to go a long way in enforcing its policies even against outside contractors and other outsiders dealing with the Group.

(vi) The disciplinary treatment of the Claimant coupled with the Respondent's blindness to their duties under the Respondent's own policies cumulatively amount to a fundamental breach of the implied term of trust and confidence, highly likely to destroy the trust and confidence of an employee, as explicitly set out by the Claimant in his letter of resignation of 11 July 2017 (paragraph 42 of these Reasons).

52 Resignation: The Respondent contends that because the Claimant had been job-hunting from 6 June 2017, everything which happened after this date cannot be seen as causal of his resignation. However, the Tribunal concluded that the Claimant's suspension on 10 July 2017 was the final straw leading to his resignation on the following day because;

(i) The Claimant had made an application for the Prison Service, as a long-term project, prior to February 2017, as he told Ms Lane in June 2017, and was made a provisional offer on 18 March 2017, but advised not to resign any employment on the strength of it, since it was subject to an extensive vetting procedure. In the event, this offer was made unconditional by phone in the last week of September and in writing only on 13 November 2017, four months after his resignation from the Respondent's employment. He was not prepared to leave the Respondent's employ without having a secure job to go to.

(ii) The Claimant stated that he began applying for other jobs, including in the hotel industry, on 6 June 2017, after seeing Ms Lane through the window talking to 'the perpetrator' of the abuse against him, which had upset him so much that he had had to go home, after suffering what appeared to be a panic attack. He told the Tribunal that he was interviewed after 8 June and offered a hotel job in early July to start on 1 August, on a 3 month contract. However, he felt unable to 'jump ship' on the basis of this offer, because, as he told the Tribunal, 'until you get your first payslip, you have no job in the hotel industry.' Financially he could not risk it. Job hunting is not the same as resignation.

(iii) The Tribunal accepted the Claimant's evidence that he would have resigned after the suspension, even without a job to go to, because his health was suffering, he had chest pains by this time and this was the last straw. In the event, he started a job as an interim building manager on 1 August and has now accepted a job in the Prison Service.

53 The Tribunal concluded that, irrespective of the fact that the Claimant was job-hunting over a period of some months, his resignation on 11 July was the result of the build up of events in December 2016, March and June 2017, in which he felt unsupported by his managers, unfairly blamed and disciplined for incidents in which he had been the subject of racial and homophobic abuse, culminating in his suspension for attempting to clear his name by getting a confession of the truth, as he saw it, about the last incident, from his abuser.

54 Although the Respondent was entitled to suspend the Claimant pending investigation of the sending of what it regarded as a threatening text to the contractor in question, this suspension was the culmination for the Claimant of a lengthy series of events in which he had been blamed, but the racial abuse of other parties against him entirely ignored by his employer. He was at the end of his tether and could take no more. In this light, the suspension cannot be taken in isolation and cannot be seen as entirely innocuous.

55 The Tribunal's unanimous conclusion was that, in all these circumstances, the reality was that the Respondent's cumulative breaches of the implied term of trust and confidence were the substantive cause of the Claimant's resignation on 11 July 2017. Accordingly, his complaint of constructive dismissal is well-founded and succeeds. The Respondent does not seek to argue that this dismissal was fair, within the meaning of **section 98 of the Employment Rights Act 1996**.

56 Jurisdiction: The Tribunal concluded unanimously that the discrimination claim, as pleaded, amounts to a continuing state of affairs in that all of the Respondent management dealing with the Claimant demonstrated a continuing, striking ignorance of the Respondent's own policies regarding discrimination, harassment, equal treatment and their own duties thereunder. This informed Ms Lane's and Mr Manikon's treatment of the Claimant throughout the entire period and underlay all of the events of which he complains. Accordingly, the Tribunal has jurisdiction to consider all of his complaints of discrimination.

57 **Section 13 of the Equality Act 2010:** The Tribunal found the following facts from which it could decide, in the absence of any other explanation, that the Respondent's treatment of the Claimant, as set out in paragraph 1B] of these Reasons amounted to direct discrimination on grounds of race and/or sexual orientation:

(i) The complete failure to deal with the Claimant's allegations that he had been racially abused and suffered homophobic abuse, on the part of Ms Lane, Mr Manikon, Mr Dowland and apparently Mr Wilding, and their complete ignorance of the contents of the Respondent's Equality and Ethics policies and the duties which these placed upon them as Managers, in relation to these allegations.

(ii) Their complete lack of any training in equality, diversity, harassment in general or in the contents of the Respondent's policies relevant to these matters

and their resulting blindness and unawareness when dealing with the Claimant. These issues were simply not on their radar. Overwhelming focus was on the Claimant's part in the incidents which occurred.

58 The Tribunal therefore looked to the Respondent for an explanation of its treatment of the Claimant and considered whether the Respondent would have treated an hypothetical comparator any differently to the way in which it treated the Claimant. For these purposes, the hypothetical comparator would be a male day concierge with the same work history and characteristics as the Claimant, including his weak performance in the softer skills, save that he is of a non-Eastern European ethnicity, and who had had suffered equivalent racial and/or homophobic abuse at the hands of delivery personnel and/or contractors.

59 The Tribunal, as it is obliged to do, had regard to two background matters put forward by the Claimant in support of his complaint;

a) pay differentials among concierge staff: The Tribunal was entirely satisfied with the Respondent's evidence showing that everyone was paid at the same rate, save for another Eastern European man who was on a Performance Management Plan, and that this was the sole reason for his lower pay.

b) severe treatment by the Respondent management of a Russian family residing in the block: The Tribunal was satisfied on all the evidence before it that the family in question had been the author of sustained and unacceptable levels of nuisance to other residents by way of noisy parties, over an extended period of time, despite regular and incremental warnings from Respondent management. The level of nuisance and disturbance caused by this family was of a sustained and far greater order of magnitude than anything created by any other resident and this amply justified, and was the sole cause of, the Respondent's treatment of this family.

60 The Tribunal scrutinised very carefully the Claimant's allegation that Ms Lane was prejudiced against Eastern Europeans, including the possibility of unconscious prejudice resulting from assumptions and generalisations regarding various national characteristics. For example, Ms Lane admitted that she had at first assumed that the Claimant not making eye contact with her was lack of regard. He had then explained to her that, culturally, for him, it was just the opposite, namely a mark of respect. It was clear to the Tribunal that Ms Lane's line management of the Claimant betrayed her complete lack of any form of diversity awareness training. It was equally clear, on the evidence, that she had genuinely tried to assist the Claimant in overcoming his lack of the softer skills in his dealings with other people, especially when people and situations were difficult. This included his home situation as well as at work. It was also clear that the Claimant could be difficult of manner and challenging in certain situations, including in his dealings with Ms Lane herself, and that in the end she became disappointed and exasperated by his failure to change his ways, despite her efforts. On all the evidence before it, the Tribunal concluded that her treatment of the Claimant was not due to his Eastern European ethnicity and that she would have treated the hypothetical comparator, displaying the same

conduct and with the same history of incidents, in exactly the same way as she treated the Claimant.

61 The Tribunal unanimously concluded that all of those involved in the disciplining and suspension of the Claimant would have behaved in the same way in respect of the hypothetical comparator. Their ignorance of, and failure to adhere to, the Respondent's policies would have been the same, irrespective of the ethnicity of the member of staff in question, and was not due to the Claimant being of Eastern European ethnicity or any real or apparent sexual orientation.

62 Accordingly, his complaint of direct race and/or sexual orientation discrimination fails.

63 Age discrimination: The only age discrimination complaint relates to the incident set out in paragraph 36 of these Reasons. The Tribunal concluded that there were no facts from which it could find age discrimination. It was not clear to which age group the Claimant contended to belong. He was 40 at the time and this is neither young nor old. In any event, this single comment by a resident's cleaner was not in fact offensive and the Claimant made no complaint of it to the Respondent at the time. His complaint of age discrimination therefore fails.

64 Harassment related to race and/or sexual orientation and/or age: The Claimant complains that he was subjected to harassment in each of the respects set out in paragraph 1B] of these Reasons. Each of these events was certainly 'unwanted conduct' as far as the Claimant was concerned. The question before the Tribunal was whether any or all of the alleged acts amounted to harassment by the Respondent within the meaning of **section 26 of the Equality Act 2010**.

65 The authors of the abusive language used against the Claimant in (i), (iii) and (v) related to a protected characteristic (race or sexual orientation or age) but on each occasion the perpetrators were not members of staff or management. Allegation (ii) was equally by an outsider, but there was no content relating to one of the protected characteristics within **section 26**. The Tribunal concluded that (iv), (vi) and (vii) – disciplinary steps taken by the Respondent itself - were not related to any of the Claimant's protected characteristics but were focussed on his conduct.

66 However, the Tribunal unanimously concluded that the Respondent's failure to take seriously and to investigate the abuse suffered by the Claimant in incidents (i) and (iii) greatly exacerbated and perpetuated the hostile, degrading, humiliating and offensive environment which this third party verbal abuse created for him. The Respondent's failure to protect an employee in the workplace from racist and/or homophobic abuse was entirely contrary to the Respondent's own avowed and explicit policies, of which management at the material time were wholly ignorant, and was a serious matter which in itself had the effect of violating the Claimant's dignity and, at least in part, creating the hostile, degrading, humiliating and offensive environment in which he found himself. The Tribunal concluded that this failure to act in relation to harassment by third

parties in the workplace fell within the ambit of 'conduct related to' the relevant protected characteristics, within the meaning of **section 26 of the Act**.

67 The Tribunal, in coming to this conclusion, had regard to the Claimant's perception of the incidents, the whole circumstances of the case and whether it is reasonable to consider that the incidents and the Respondent's failure should have that effect. The Tribunal considered that (i) and (iii) clearly fell within this test but that (v), as a passing and light-hearted remark, apparently unrelated to the Claimant's actual age group, could not reasonably be considered to have the effect of harassment as set out in **section 26**.

68 Accordingly, the Claimant's complaint of harassment to the extent of the Respondent's failure to investigate and to pursue with due seriousness the third party racist and homophobic abuse which the Claimant suffered on 16 December 2016 and 6 June 2017, as it was obliged to do under the express terms of its own Equality and Ethics policies, including as against outside contractors and those having dealings with the Group. The Respondent has accepted throughout that the verbal abuse of which the Claimant complains, actually took place.

69 A Remedy hearing will take place on 22 March 2019, this provisional date having been agreed in Tribunal.

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Employment Judge Stewart
Dated:. 15 January 2019
Judgment and Reasons sent to the parties on:
29 January 2019
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For the Tribunal Office