



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Miss H Gosling

**Respondent:** Mark Harding T/A Butterwick Animal Rehab Clinic

**Heard at:** Teesside Justice Hearing Centre

**On:** 26 & 27 November, 17 & 18 December 2018

**Before:** Employment Judge Arullendran

**Members:** Ms S Don  
Mr D Cattell

***Representation:***

**Claimant:** In person  
**Respondent:** Mr Morton (Solicitor)

## JUDGMENT

The unanimous decision of the Employment Tribunal is as follows:

1. The claimant's claim for constructive unfair dismissal is not well-founded and is dismissed.
2. The claimant's claim for direct discrimination pursuant to section 13 of the Equality Act 2010 on the grounds of age and/or sex is not well-founded and is dismissed.
3. The claimant's claim for harassment contrary to section 26 of the Equality Act 2010 related to sex and/or age is not well-founded and is dismissed.
4. The claimant's claim for the unauthorised deduction of wages contrary to section 13 of the Employment Rights Act 1996 is not well-founded and is dismissed.
5. The claimant's claim for wrongful dismissal is not well-founded as is dismissed.

## REASONS

1. The issues to be determined by the employment tribunal were as follows:

- 1.1 Who is the correct respondent?
- 1.2 Was there a breach of the implied term of trust and confidence?
- 1.3 Did the claimant resign in response to that breach?
- 1.4 Did the claimant affirm the contract in the meantime?
- 1.5 Did the respondent act reasonably in dismissing the claimant?
- 1.6 Did the claimant contribute in any way to her dismissal?
- 1.7 Did the respondent treat the claimant less favourably in that it treated or would treat a hypothetical comparator when the claimant's keys and responsibility as a key holder of the business were removed on 6<sup>th</sup> March 2018?
- 1.8 Did the respondent treat the claimant less favourably with regard to any other treatment not found to be harassment?
- 1.9 If so, has the claimant proved primary facts on which the tribunal could properly and fairly conclude that the difference in treatment was because of one or both of the protected characteristics of age and/or sex?
- 1.10 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?
- 1.11 Did the respondent engage in unwanted conduct from January 2018 in particular on 27<sup>th</sup> February, 6<sup>th</sup> March and 20<sup>th</sup> March when the claimant alleges that she was verbally harassed by Mrs Harding and Mr Peter Johnson?
- 1.12 Is the conduct related to the claimant's age and/or sex?
- 1.13 Was the alleged conduct undertaken by an employee or a member of the respondent's organisation?
- 1.14 Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? In considering whether the conduct had that effect the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
- 1.16 Did the respondent take reasonable steps to prevent any alleged harassment?
- 1.17 Did the respondent deduct a sum from the claimant's wages in relation to a training course undertaken by her?
- 1.18 If so, was the respondent entitled to do so?

1.19 Was the respondent in breach of contract by failing to pay the claimant for her notice period, if so what sums are due and owing to claimant in that regard?

2. We heard witness evidence from the claimant, Mark Harding (the respondent), Mrs Francesca Harding (the respondent's wife), Ms Chloe Madison (an employee of Mrs Harding) and Peter Johnson (Mrs Harding's father). Mrs Harding, Ms Madison and Mr Johnson attended the third day of the hearing under the auspices of witness orders which were issued on the first day of the hearing. We were provided with a joint bundle of documents consisting of 387 pages plus a further supplementary bundle which contained the claimant's documents relating to mitigation. Both parties made closing submissions by reference to skeleton arguments and the claimant requested written reasons to be provided at the end of the hearing.

### **The Facts**

3. These findings of fact are made on the balance of probabilities.

4. The claimant began her employment with respondent on 2nd April 2014. She was employed as a Senior Canine Hydrotherapist. The respondent is a sole trader and employed two members of staff at the time of the claimant's employment, the claimant and Lucy Dobson. The respondent also had a student placement worker, Ms Lau, who attended the business in order to gain work experience.

5. The respondent provided the claimant with a written contract of employment, a copy of which can be seen at pages 19 to 23 of the bundle. The claimant was provided with a duplicate copy of the contract at her request, a copy of which can be seen on pages 84 to 94 of the bundle.

6. The respondent's wife, Mrs Francesca Harding, also operates the business as a sole trader in the form of a cattery and kennels at the same site as the respondent's business. Mr and Mrs Harding also lived on part of the premises, which was their primary residence at that time. The two businesses share a common reception area and its common ground that the staff handbook for the two businesses was compiled at the same time and the respondent's handbook makes references to Mrs Harding on several pages. However, it's also common ground that Mrs Harding was not employed in the respondent's business as an employee. The claimant claims that Mrs Harding was part of the management team at the respondent's business, however, the respondent claims that his wife did not manage his business and that he relied on her in situations when he could not be present at work and Mrs Harding was on the premises at the time, particularly as he had such a small workforce. Mrs Harding's evidence is that she was not part of the respondent's management team and only helped the respondent when he was not on the premises, for example by signing the claimant's holiday form whilst the respondent was away.

7. It is common ground that Mr and Mrs Harding separated in January 2018 and Mr Harding moved out of the family home. Mrs Harding suspected the respondent of having an affair with someone and the claimant says that she found out about the speculation that the respondent might be having an affair with her in January 2018 from Ms Chloe Fenwick, who is a friend of the claimant. Mrs Harding's evidence is that she spoke to Ms Fenwick and another friend on several occasions about her marital

problems and her friends speculated whether the respondent was having an affair and that the claimant's name was only one of the possible people the respondent had regular contact with and with whom Ms Fenwick had suggested a possibility of being involved. The claimant says she informed the respondent about Mrs Harding's speculations on 29<sup>th</sup> January 2018. The claimant then spoke to Mrs Harding about the speculations on 30<sup>th</sup> January and asked her why she thought she was having an affair with her husband. The claimant claims that Mrs Harding said it was because she was "young, pretty and single" and suggested that the business would be successful if the respondent and the claimant were running it together. Mrs Harding says that she never said that the claimant was young, pretty and single, nor did she suspect the claimant of having an affair, but that her conversation with Ms Fenwick had been taken out of context. The claimant says that she reassured Mrs Harding that she was not having an affair with the respondent and spoke to the respondent later that evening by telephone and informed him of the conversation which had taken place with Mrs Harding. We note that the claimant never told the respondent that Mrs Harding had used the phrase "young, pretty and single" and, on the balance of probabilities, we prefer the evidence of the respondent that this phrase was not used by Mrs Harding.

8. On 27<sup>th</sup> February 2018 the claimant gave a birthday present to the respondent which comprised of a picture frame containing photographs of him and his two sons, without Mrs Harding. That evening the claimant received a message from Mrs Harding informing her that she was upset about the present she had given to the respondent because she felt the claimant was trying to stop her from reuniting with her family. A copy of the message can be seen at page 330 of the bundle. Mrs Harding then telephoned the claimant and the claimant says Mrs Harding was very upset with the claimant and shouted and swore at her during the telephone conversation at which point the claimant ended the call. The claimant says that she found out later on that Chloe Madison, who is employed by Mrs Harding as a kennel supervisor, had also been present in Mrs Harding's car at the time of the telephone call which the claimant said took place on speaker phone and that she had heard the entirety of the conversation. However, Ms Madison's evidence is that she does not recall this conversation at all. The claimant said she received a message from Chloe Madison later that evening, which can be seen at page 331 of the bundle, asking if the claimant was OK and suggesting that Mrs Harding was purposely playing games with the staff and that she was crazy. Ms Madison says that she has not seen any of these messages before and cannot recall texting the claimant. She also said in re-examination that she does not know the meaning of the word "viciousness", which is used in the last message on page 331, and that it is not a word that she would use as it is not in her vocabulary. We prefer the evidence of the respondent as it is more probable than not that Ms Madison did not write the messages on page 331 of the bundle, particularly as she insisted that the presence of the word viciousness was a spelling mistake. It is evident from Ms Madison's evidence as a whole that her level of education is not commensurate with the content of the written messages attributed to her on page 331 and, therefore, we prefer Ms Madison's evidence that she did not hear the alleged conversation between the claimant and Mrs Harding on 27 February, which supposedly led to these messages being written, and we find, on the balance of probabilities, that although this conversation did take place, the content of it was not as claimed by the claimant and that Mrs Harding did not shout and swear at the claimant.

9. The claimant says she telephoned the respondent on 27 February and told him about the telephone conversation with Mrs Harding and they also exchanged messages, which can be seen at pages 325 to 329. It is common ground that the respondent told the claimant on the telephone that he would speak to Mrs Harding in order to resolve the situation. Mrs Harding then apologised to the claimant on 2<sup>nd</sup> March for the telephone call and for accusing the claimant of having an affair with her husband. The claimant accepted this apology as being sincere and it was agreed that the claimant and Mrs Harding would be friends again. It's the claimant's case that she felt better about the situation at this point.

10. The claimant says that she was told by Chloe Madison on 6<sup>th</sup> March that she believed Mrs Harding had been listening in to conversations in the workplace and that she had placed a hidden recorder in the shared reception area. The claimant says she was told by Ms Madison that a dictaphone was concealed behind the drawers in the reception area and that she had taken it away earlier and deleted four of the recordings because she was afraid she might lose her job if Mrs Harding had heard some of the unfavourable things that she had said and she was also afraid she would lose her job because she had deleted the recordings. The claimant says she told Ms Madison not to worry about it as she would take the Dictaphone to the respondent, which she did. The claimant says that as she was leaving the respondent's office, having handed in the Dictaphone, Mrs Harding entered the respondent's office at the same time. The claimant says that she does not know what was said between Mr and Mrs Harding about the Dictaphone.

11. Later that day, the claimant went to collect her dog from the kennels, which are owned by Mrs Harding, and she found that the kennel block was locked, so she asked Mrs Harding for the keys. Mrs Harding unlocked the door for the claimant and the claimant says that Mrs Harding then started shouting at the claimant and accused her of trying to split up her family and having an affair with the respondent. The claimant says Mrs Harding said she was going to speak to a solicitor the following day and that she would stop the claimant from setting foot on site again. The claimant says she told Mrs Harding that she would never have an affair with the respondent but Mrs Harding would not let her pass and she was shouting and swearing at the claimant, which she says she found intimidating. The claimant says that Mrs Harding said that she would not let her collect her dog until she had admitted what she had done and the claimant says that at this point she admitted to having an affair just so she could collect her dog and go home. Mrs Harding says that she did not swear or shout at the claimant but she did ask her what she had been saying about the respondent at work as she had overheard the claimant talking about him in an inappropriate manner, but the claimant refused to talk to her and tried to lunge for Mrs Harding's keys. Mrs Harding says that she found the claimant intimidating as she is bigger and stronger than her, which she knew from having played rugby with her regularly, and she eventually allowed her to pass but asked for the claimant to return her work keys because the claimant had left the premises unlocked on two previous occasions, which was unacceptable as Mrs Harding lived on the site with her two boys. We note that the claimant did not challenge Mrs Harding in cross examination as to the reason she asked for the keys to be returned to her. The claimant says Mrs Harding followed her to the office and asked for the claimant to hand over her work keys, which she did, and the claimant says she told Mrs Harding it was illegal to record people without their knowledge and she also called Mrs Harding crazy. The claimant says she was very upset by the incident and was shaking

and crying. The claimant says she sent a text message to the respondent when she got home advising him that she would not be going into work the following day and that she no longer had any keys to the site, but she accepted in cross examination that she did not mention anything about her sex or age in the message she sent to the respondent. The claimant says that it took the respondent several hours to reply to her message and that, at this point, she telephoned him and told him what had taken place between her and Mrs Harding at the kennels. The telephone conversation between the claimant and the respondent took approximately 40 minutes and the claimant told the respondent that she was scared to return to work. It is common ground that the respondent advised the claimant that if anything like that happened again she was to call the police and that she would not be left alone on site with Mrs Harding. The claimant accepted in cross examination that Mrs Harding would probably have demanded the keys back from anyone she suspected of having an affair with her husband regardless of their sex or age. Mrs Harding says that the respondent had asked her to stay away from the claimant, which she did, and it is common ground that there were no further incidents between the claimant and Mrs Harding after this date.

12. The claimant says that she went into work later than usual the following morning, however the respondent was not at work and Mrs Harding was on site. The claimant telephoned the respondent to tell him that Mrs Harding was still on site and that she was feeling upset about it, to which the respondent replied that he would be at work soon, however it took the respondent an hour and fifteen minutes to arrive at work so the claimant entered the workplace on her own and spent the time in her treatment with her clients because she says she was scared that if she went into the staff room Mrs Harding might assault her. The respondent was not at work on 8<sup>th</sup> and 9<sup>th</sup> March due to other work commitments and the claimant attended work with her co-worker Lucy Dobson. The claimant says that she saw Mrs Harding often walk past the treatment room and glare at her, however we note that the claimant did not put this allegation to Mrs Harding during cross examination.

13. On 20<sup>th</sup> March 2018 Mrs Harding's father, Peter Johnson, was on site. The claimant knew Mr Johnson as he had spent some time renovating the treatment rooms in 2017 and he did some repair work around the site from time to time. Mr Johnson says he has never been employed by the respondent but he and some other friends had helped out with the renovations in 2017 and that he does some odd jobs as a favour, such as replacing lightbulbs when asked. The claimant says that on the morning of 20<sup>th</sup> March Mr Johnson entered her treatment room and closed the door, placing his hand on the door handle. The claimant says that Mr Johnson accused the claimant of bad-mouthing Mrs Harding to customers and accused her of calling Mrs Harding a cow. The claimant says that Mr Johnson was extremely aggressive and he was shaking his finger in her face. The claimant says that her co-worker, Lucy, tried to enter the room but she could not because Mr Johnson was holding the door handle. She says that when Mr Johnson opened the door he said to Lucy that she did not know anything and they were going to be sacked. Mr Johnson says that he did not threaten the claimant, but he told her that she had to stop bad mouthing his daughter on social media and to customers. He says that the reason he spoke to the claimant about this was because he had been told by Ms Madison that a customer had told her that she had heard the claimant bad mouthing Mrs Harding. Ms Madison also says that she received such a telephone call from a customer implicating the claimant and, because Mrs Harding was not on the premises at the time, she spoke to Mr Johnson about it

instead. The claimant says that she experienced a panic attack as a result of Mr Johnson's behaviour and decided that she would go home. She also says that she turned her telephone off for a couple of hours and switched it back on around 2pm, at which point she received a text message from the respondent advising her that Mr Johnson had been reported to the police. The respondent says that when he found out about that incident between Mr Johnson and the claimant he tried to telephone the claimant, without success, and he contacted the police as he was worried for the claimant's welfare, particularly because he could not contact her.

14. The claimant says that she kept a diary of events and a copy of some extracts from this document can be seen at pages 274 to 305 of the bundle. In cross examination, the claimant said she ordinarily keeps a diary and that the entries copied in the bundle form part of that diary and that it is mostly contemporaneous. However, the claimant was unable to explain why the entry in relation to the events with Mr Johnson completely omits the allegation that Mr Johnson accused her of calling Mrs Harding a cow in front of customers. The claimant says that she has only produced the items from the diary which are relevant to this hearing and has not copied other items in the diary, however in reply to a question from the Judge, the claimant admitted that she had stopped writing the diary once she was no longer in the workplace and this was the reason for the events leading to her resignation not being contained in that diary. We note that the diary entries do not have any gaps where extraneous matters have been blanked out or removed and that the claimant has not produced the original diary for inspection. We also note that the claimant refers to the diary as a "personal event log from January to April 2018" on her list of documents, rather than a diary.

15. On 20<sup>th</sup> March, after the claimant had switched her telephone back on, the respondent telephoned the claimant to advise her that he had reported Mr Johnson to the police and that they would be in touch with her so that she could make a statement. Its common ground that the claimant was interviewed by the police at work on 22<sup>nd</sup> March. The claimant was advised by the police that if she had any further issues she should call 999. The police advised the claimant that an officer would speak to Mr Johnson and PC Murphy, who had interviewed the claimant, spoke with Mrs Harding after he had concluded his interview with the claimant. Mr Johnson says the police never spoke to him and Mrs Harding says that after she had explained that she had been bullied by the claimant the police advised her to contact them should she have any further issues with the claimant. Its common ground that the respondent then told the workplace student, Ms Lau, not to leave the claimant on her own in the workplace. The claimant accepted in cross examination that there had been no further incidents with Mrs Harding after 6<sup>th</sup> March 2018 and there were no further incidents with Mr Johnson after 20<sup>th</sup> March 2018.

16. The claimant says she received a telephone call from her old practice manager, Wendy Bailey, on the evening of 22<sup>nd</sup> March 2018. She says Wendy told her that Mr Harding had indeed been having an affair with someone called Leanne who lives in Coventry and the claimant says that she felt absolutely heartbroken that she had been used as a scapegoat by Mr Harding for three months. Wendy had also been in touch with Mrs Harding about this issue and, on 28<sup>th</sup> March 2018, Mrs Harding approached the claimant at work and said that Wendy had told her she might want to speak with the claimant and then the claimant agreed to meet with Mrs Harding at lunchtime. At the lunchtime meeting Mrs Harding told the claimant that she had hired a private

investigator and hidden the Dictaphone in the reception area and in the respondent's treatment room in order to listen in to his conversations and, as a result, Mrs Harding had found out that the respondent was having an affair. The claimant says that her meeting with Mrs Harding was short due to work commitments and it was agreed that she would continue her conversation with Mrs Harding after work. The claimant says that she spoke to Mrs Harding at the end of the working day, after the respondent had left the premises, and she asked Mrs Harding if she and Lucy were safe at work with the respondent because she felt that he was no longer the person that she had thought he was.

17. The claimant went to her family home on 31<sup>st</sup> March 2018 and discussed the events which had taken place at work with her family. She says that she realised at this point how badly she had been treated and that the events at work had been affecting her mentally and physically. The claimant then went on sick leave on 2<sup>nd</sup> April. A copy of the claimant's sick notes can be seen at pages 198 to 206 of the bundle. The claimant sent an e-mail to the respondent on 2<sup>nd</sup> April 2018 informing him that she would be taking a week off due to bullying and harassment. A copy of the e-mail can be seen at pages 111 to 114 of the bundle. The claimant visited her GP and obtained a sick note for two weeks. The claimant notified the respondent of her continued sickness absence and the respondent replied in a compassionate and understanding manner, according to the claimant.

18. The claimant entered into a written conversation with Mrs Harding which was conducted via WhatsApp during her sick leave and a copy of the conversation can be seen at pages 306 to 319 of the bundle. The claimant has suggested that she did not reply to some of Mrs Harding's messages, that she gave a minimal reply and that the conversations were instigated by Mrs Harding. However, it was put the claimant in cross examination that the messages on pages 306 to 319 showed that the claimant was engaging in the conversation with Mrs Harding about the respondent's affair, that she commented on the future of the business and the claimant's future employment and she commented on intimate details about the respondent. The claimant admitted in cross examination that curiosity got the better of her during these conversations and that she did participate. We note that several of the conversations were started by the claimant. The claimant has suggested that if she did not reply to Mrs Harding's messages Mrs Harding would persist and send further messages insisting upon a reply, but no evidence of this has been produced at this hearing. The claimant's uncontested evidence is that the general environment in the respondent's and Mrs Harding's workplaces was that all the staff regularly and openly shared intimate details about their partners and personal lives and this is consistent with the tone and content of the claimant's messages on page 306 to 319 of the bundle.

19. The claimant returned to work on 18<sup>th</sup> April 2018 and the respondent asked her if there was anything she wanted to discuss with him, to which she replied that she would discuss the matter at lunchtime. The claimant went to see the respondent in his office at lunchtime and informed him that she was raising a formal grievance and handed him a copy of the grievance letter which can be seen at pages 95 to 98 of the bundle, which she says her father helped her to compile. The claimant's grievance relates to bullying and harassment in the workplace and the respondent's failure to meet his duty of care in respect of the claimant's health and safety. The claimant refers to sections of the Health and Safety at Work Act 1974, The Equality Act 2010, the case of Wigan Council



v Davies 1979, the Employment Rights Act 1996, the case of Waters v Commissioner of Police for the Metropolis 2000, the ACAS code and the respondent's procedures. The claimant states in her grievance that the incident with Mr Johnson was a final straw and asked the respondent not to breach the duty of mutual trust and confidence. The claimant accepted in cross examination that she was not accusing the respondent of discriminating against her on the grounds of her age or sex. The claimant says that she told the respondent that Mrs Harding had been very nice towards her during her sick leave and that she had given her a lot of information about the respondent. The claimant told the respondent that she felt that she had been made a scapegoat in the past three months in respect of his affair. The claimant became very distressed and was crying during this conversation with the respondent and then she left the respondent's office. The respondent asked the claimant later that day whether she wanted the grievance to be conducted formally or informally. The claimant replied that she wanted it to be dealt with formally. The claimant says she found the respondent's question perplexing at the time but she accepted in cross examination that the respondent had handled the previous complaints about Mrs Harding and Mr Johnson informally and that this could have been the reason the respondent had asked this question.

20. The claimant says that on 19<sup>th</sup> April 2018 the respondent came in to work but did not greet her or her colleague as he normally would and that she felt that he was purposefully avoiding her. At the end of the day the respondent gave the claimant a letter, which can be seen at page 99 of the bundle, inviting her to a grievance meeting. The claimant accepted in cross examination that the respondent may have been quiet because of matters unrelated to the claimant's grievance, such as the concerns raised by Chloe Madison with Mrs Harding about a customer complaining that a member of staff from the respondent's business had been talking openly about the respondent's personal relationship.

21. The claimant says that the respondent arrived to work later than her on 20<sup>th</sup> April 2018 and that she felt particularly lonely and isolated as neither Lucy or Ms Lau worked on Fridays and this meant that she was left alone on site with Mrs Harding and Chloe Madison. The claimant says that when the respondent arrived at work he asked her who would be accompanying her to the grievance meeting as she only had one other work colleague, to which the claimant said she had not decided. The claimant says that she felt bullied by the respondent and that she felt he was rushing her into making a decision about who would accompany her. Around 12:45pm that day, the claimant received an e-mail from the respondent about a breach of confidentiality by members of staff, a copy of the e-mail can be seen at page 100 of the bundle. The e-mail was addressed to both the claimant and Lucy Dobson, the two employees of the respondent's business. The claimant says that while she was reading the e-mail the respondent entered the room and said that he had been told by customers that one of his staff had been discussing his personal life and this was "not on". The respondent said that he would be looking in the matter further. The claimant says that she became hysterical that lunchtime and she felt that the respondent had absolutely no intention of resolving her grievances. She said she felt that she had been controlled and manipulated by the respondent, so she decided to hand in the work mobile to the respondent and told him that she was going home because she was "done". The respondent followed the claimant to her car and asked her if she was leaving without authorisation, to which the claimant replied "yes". The claimant then decided to travel to

her family home in Hull. The respondent sent an e-mail to the claimant about her unauthorised absence and a copy of that can be seen at page 101.

22. On 23<sup>rd</sup> April the claimant spoke to ACAS about the proposed grievance hearing and, as a result, she asked Mr Harding if the grievance could be held by means other than a face to face meeting. A copy of the claimant's e-mail can be seen at page 102 of the bundle. The claimant also informed the respondent that she would be self-certifying as being on sick leave. The claimant began her sick leave on 23<sup>rd</sup> April 2018. The respondent replied to the claimant on 23<sup>rd</sup> April and a copy of this e-mail is at page 103 of the bundle. In his e-mail the respondent disputed the claimant's reasons for leaving the workplace and he asked her four questions relating to her grievance. The respondent sent a further e-mail to the claimant on 24<sup>th</sup> April, which can be seen at page 104 of the bundle, stating that it was his understanding that the claimant had terminated her employment on the day that she had walked out. The claimant replied to this e-mail and the previous e-mail of 24<sup>th</sup> April, which can be seen at page 105 of the bundle, and she disputed that she had terminated her employment and stated that she did not understand what the four questions the respondent had asked related to. The claimant also said that she felt the e-mails were bullying in nature and were having a detrimental impact on her health. The respondent replied to the claimant's e-mail on 20<sup>th</sup> April, which can be seen at pages 106 to 107 of the bundle. The respondent told the claimant that she was being uncooperative in failing to answer the questions that he had previously asked her and pointed out that the claimant had been treated very well throughout her employment.

23. The questions asked by the respondent were: 1) whether she had launched her grievance in good faith and whether the contents were true and accurate; 2) whether she had been in contact by any means with Mrs Harding during her period of sick leave apart from the one message she had sent on her return to work; 3) whether she had foreseen the behaviour which she had stated in a grievance relating to Mrs Harding and Mr Johnson and 4) whether she had raised any concerns previously about Mr Johnson prior to the incident. The claimant says that she was appalled by the respondent's investigations into her grievances in that they only consisted of these four questions because it did not provide any insight into how the incidents had affected her. The claimant replied to the respondent in her e-mail dated 20<sup>th</sup> April, which is at pages 108 to 110 of the bundle. The claimant answered the four questions posed by the respondent and told the respondent that she felt his e-mail dated 23<sup>rd</sup> April had trivialised her mental and physical health and was written to intimidate her.

24. The claimant saw her GP on 26<sup>th</sup> April and a copy of the medical records can be seen at page 396 of the bundle. The GP states that the claimant felt that she may have to go down the legal route and possible constructive dismissal.

25. On 6<sup>th</sup> May the claimant received a letter by e-mail, which can be seen at page 116 to 120 of the bundle, setting out the outcome of her grievance. The respondent stated that the claimant had opted not to attend the grievance meeting and that the outcome was that the grievances were rejected. In his reply the respondent stated that he was not present when the incidents she complained about took place and he was not in a position to prevent the incidents from taking place as they were the actions of third parties who were not employees of the respondent company. The respondent stated that he could not exclude Mrs Harding from the workplace given that she operated her

business on the same site and it was also her primary residence. He also stated that it was unreasonable and impractical for a business owner to remain permanently on site in reply to the claimant's request that she should not be left alone in the workplace. The claimant's case is that the respondent failed to consider alternatives such as the claimant working from home or being placed on paid leave. She also claims that the respondent failed to consider that the claimant could have carried out off site duties, such as banking and going to the wholesalers, which the claimant claims would have allowed her some respite from Mrs Harding. The claimant accepted in cross examination that she did not believe the respondent had rejected her grievance as an act of discrimination on the grounds of her sex or age. In the respondent's reply to the claimant's grievance, the respondent stated that the claimant was already aware that the respondent was actively moving the business to another site and that the claimant had been kept informed throughout this relocation process. The claimant accepted in cross examination that she was aware that the respondent was relocating the business and that she had visited the proposed new premises with the respondent in or around March 2018. The claimant says that she did not receive any formal written formal notification of the proposed new site and for this reason alone she did not accept that the respondent was moving the business to a different site. The claimant also said in cross examination that the reasons that the respondent was moving the business to a different site had nothing to do with her grievance and the move was not as a result of her raising a grievance. At paragraph 82 of the claimant's witness statement she says that the business was to be moved to Darlington which was 14 miles south of the current working site and that she deemed this increased distance to be unacceptable.

26. The respondent provided the claimant with the right to appeal against the outcome of the grievance findings by 11<sup>th</sup> May, which the claimant says was only four working days and that it was in breach of the seven working days provided by the respondent's own Equal Opportunities policy. The claimant lodged her appeal with the respondent on 14<sup>th</sup> May 2018 and a copy can be seen at pages 122 to 138 of the bundle. The claimant again requested that the appeal should be dealt with by means other than a face to face meeting. The claimant appealed on the grounds that she believed that the respondent had not taken reasonable and practical steps to avoid the detrimental treatment and failed to observe the ACAS guide. The claimant also says that she was subjected to detrimental treatment when the respondent e-mailed her about the potential breach of confidentiality and subsequently confronting her about it, which she says amounts to bullying because she had raised a grievance.

27. The claimant raised a further new grievance with the respondent dated 14<sup>th</sup> May which can be seen at pages 143 to 145 stating that the respondent had not interviewed her regarding the injury caused to her feelings as a result of bullying and harassment by Mrs Harding and Mr Johnson and had failed to obtain statements from her regarding her allegations of sex and age discrimination. The claimant's claim is that she was discriminated against by Mrs Harding and Mr Johnson because she was a young woman compared to Wendy Bailey who was an older woman and who was not subjected to such harassment. The claimant also claims that, had she been a man, Mrs Harding would not have suspected her of having an affair with the respondent. However, in cross examination the claimant accepted that if the respondent had an affair with a man Mrs Harding would have been equally upset with him. Similarly, she accepted that if his affair had been conducted with an older woman Mrs Harding would have been equally upset with that woman.

28. The claimant asked for an investigation to be instigated and raised a third grievance with the respondent dated 14<sup>th</sup> May, which can be seen at pages 146 to 147 of the bundle. The claimant claims that the respondent had acted in a capricious manner when investigating her grievances. She also states that the respondent's actions had seriously undermined the implied term of trust and confidence as he had not undertaken a fair and equitable investigation and hearing and that, in only allowing her four working days to appeal the grievance outcome, it was discrimination. She also considered her mental health amounted to a disability under the Equality Act 2010. The claimant's grievance alleges that the respondent had failed to apply a zero tolerance to a culture of harassment and bullying in the workplace.

29. The respondent contacted a number of organisations to obtain advice about how to deal with the appeal and he informed the claimant that he would hand the appeal onto an independent entity to deal with as soon as he was able to find a suitable person, as can be seen at page 139 of the bundle. The claimant replied to the respondent on 24<sup>th</sup> May, which can be seen at pages 148 to 149 of the bundle, stating that she had been placed at a disadvantage by the respondent in only allowing her four days to appeal and that the respondent's own Equal Opportunities policy stated that a grievance meeting would be held without unreasonable delay. The claimant's case is that, as the respondent had not acknowledged her new grievances raised in her letter of 14<sup>th</sup> May, she considered this to be further evidence of detrimental treatment and part of the culture of bullying and harassment at work.

30. The claimant entered into correspondence with the respondent about her sick pay and payslips on 16<sup>th</sup> May and, on 22<sup>nd</sup> May 2018, the claimant's tenancy expired and she moved house to another location but did not provide the respondent with her new address. The claimant asked the respondent to provide her with a PDF copy of her payslip, and this can be seen at page 152 of the bundle, failing which she gave her father's work address for a paper copy of the payslip to be sent to. The claimant says that she did not want to provide her mother's address because she feared the respondent or Mrs Harding knocking on her mother's door and confronting her. The respondent replied to the claimant in an e-mail dated 20<sup>th</sup> May, which can be seen at page 153 of the bundle, stating that her request for the breakdown of her payments was with his accountant and that the claimant's e-mails were becoming increasingly combative and distressing and that he would not reply to any further e-mails before speaking to his legal counsel. The claimant replied to the respondent on 27<sup>th</sup> May, a copy of which can be seen at page 154 of the bundle, stating that if he did not understand employment law he should have sought legal advice when the claimant had first submitted her grievance on 18<sup>th</sup> April. She also stated that she felt trust and confidence had been destroyed because the respondent had discussed her grievance with Lucy Dobson and that she was entitled to an itemised pay statement under Section 8 of the Employment Rights Act 1996. The claimant then raised a further grievance with the respondent about the failure to provide payslips on 27<sup>th</sup> May which can be seen at page 155 of the bundle.

31. On 31<sup>st</sup> May the respondent sent an e-mail to the claimant advising her that he had received a breakdown of the claimant's April pay and that he had forwarded this to the claimant's postal address. Unfortunately, the claimant no longer lived at that postal address which the respondent held on his file. There was an exchange of e-mails

between the claimant and the respondent about the claimant not providing a valid address and the claimant asserted that she believed the respondent had deliberately withheld her payslips.

32. On 1<sup>st</sup> June the claimant contacted ACAS and obtained an Early Conciliation Certificate dated 1<sup>st</sup> June, which can be seen at page 368 of the bundle. In cross examination the claimant said she had told the conciliation officer that she was claiming constructive dismissal, but when she was asked how she was able to do this when she had not resigned, the claimant replied that she was not able to answer this question and she was equivocal in her evidence about when she had made the decision to resign. The claimant told the conciliation officer that she did not want to enter into any negotiations with the respondent and the respondent says that he never received any contact from ACAS until the week before this hearing.

33. The respondent wrote to the claimant on 3<sup>rd</sup> June rejecting her appeal, as can be seen at pages 140 to 141 of the bundle. The appeal was rejected on the basis that there was no more that the respondent could have reasonably and practically done beyond calling the police, that the respondent was already in the process of moving the business as quickly as possible, that Mrs Harding had been told not to have any contact with any member of the respondent's staff and that Mr Johnson was not invited to attend the respondent's business on the day of the alleged assault or any subsequent day. The claimant replied to the respondent on 4<sup>th</sup> June, a copy of which can be seen at page 142 of the bundle, claiming that the appeal was no more than a sham. The claimant stated that the respondent had lied to her as the appeal had been conducted by Mr Harding rather than an independent entity, as previously suggested, and she suggested that this was further example of bullying and harassment in the workplace.

34. On 8<sup>th</sup> June the respondent sent an e-mail to the claimant with the outcome of the grievance the claimant had raised regarding her payslips and a copy of this can be seen at pages 164 to 165 of the bundle. The respondent rejected the claimant's grievance stating that the claimant's payslip and the breakdown of her statutory sick pay had been posted to her address which the company held on file and the claimant was given a period of five days to appeal against the decision. The claimant claims that this was a discriminatory timeframe because the respondent's policy allows for seven days. On 12<sup>th</sup> June 2018 the claimant appealed against the outcome relating to her grievance about the payslips and a copy of this can be seen 166 to 171 of the bundle. She claimed that the grievance meeting had been a sham as no questions had been put to her and it amounted to bullying and harassment.

35. On 13<sup>th</sup> June the claimant e-mailed her letter of termination to the respondent, a copy of which can be seen at pages 175 to 176 of the bundle. The claimant states that she had no option but to resign because she had been subjected to a campaign of bullying and harassment by Mrs Harding, she was subjected to an assault at her workplace on 20<sup>th</sup> March by Mr Johnson and that she had suffered work related stress and anxiety due to the respondent's actions and lack of actions, that the respondent had ignored two of her grievances dated 14<sup>th</sup> May 2018, that the handling of the two grievances dated 18<sup>th</sup> April and 27<sup>th</sup> May were no more than a sham, that the respondent had acted in a way which was likely destroy or seriously damage trust and confidence, that the respondent had failed to observe good faith in his performance and take reasonable and practical steps to remedy the claimant's grievances and because

the respondent had failed to observe the ACAS guidelines with regard to the grievance procedure and subjected the claimant to detriment as a result.

36. The claimant submitted her claim to the employment tribunal for constructive dismissal and discrimination the following day, i.e. on 14<sup>th</sup> June 2018. In reply to questions asked by the tribunal, the claimant told us that she did not resign as a result of the incidents with Mrs Harding and Mr Johnson on 6<sup>th</sup> and 20<sup>th</sup> March, but rather as a result of the respondent's inadequate response to those incidents and the failure in his duty of care towards her. She also said the culture of bullying and harassment she refers to in her letter of grievance at page 96 of the bundle relates to the actions of Mrs Harding and Mr Johnson, but there was no such culture prior to the incident with Mrs Harding. She claims that the last straw was the incident with Mr Johnson on 20<sup>th</sup> March and she understood that she had three months to submit a tribunal claim as a result but did not resign at that stage because she wanted to see if she could resolve things with the respondent and she claims that her grievances were not resolved because the respondent failed to give her written notice that he was going to relocate the business elsewhere but, had he done so, she would probably not have resigned. The claimant does not accept the respondent's reply to her grievance, as set out at page 119 of the bundle, which states that she was aware that the respondent was actively moving the business, amounts to written confirmation of the business move.

37. The respondent replied to the claimant on 24<sup>th</sup> June, a copy of which can be seen at page 177 of the bundle. The respondent denied all the accusations put by the claimant in her letter of resignation and states that the claimant had systematically and deliberately eroded mutual trust and confidence from the outset. The respondent states that, had the claimant's original grievance been genuine, she could have gone on leave until the business moved and that the company had agreed to the claimant's request for her grievances to be dealt with by means other than a face to face meeting. The respondent refers to the e-mail he sent to the claimant on 20<sup>th</sup> April regarding the breach of confidentiality and states that he had been obliged to follow advice he had received that he should deal with the grievances before dealing with the disciplinary issue. The respondent states that the claimant was just stringing the company along and making allegations in order to get in first and get a big tribunal pay out. The respondent states that the two grievances raised by the claimant on 14<sup>th</sup> May had not been upheld because there was no evidence to support her claims.

38. The claimant was due to receive her final pay on 30<sup>th</sup> June, however when she had not received this she sent an e-mail to the respondent on 3<sup>rd</sup> July 2018, a copy of which can be seen at page 182 of the bundle. The claimant also states in this e-mail that she had not received her payslips for April, May or June 2018. The claimant received her final wages in the sum of £555.17 on 4<sup>th</sup> July which the claimant considered to be significantly less than what she was entitled to. The claimant then sent an e-mail to the respondent on 4<sup>th</sup> July 2018 asking how this figure had been arrived at, a copy of which can be seen at page 184 of the bundle. The respondent replied immediately, as can be seen at page 185 of the bundle, advising the claimant that she would receive the information in the post. The claimant sent another e-mail to the respondent on 4<sup>th</sup> July, a copy of which can be seen at pages 186 to 187 of the bundle stating that an unlawful deduction had been made from her wages in the sum of £400.00. It is common ground that the claimant attended a training course in September 2016 which was funded by the respondent's company and cost £2,200.00.

The claimant signed a training course agreement which stated that “should I leave the company in the next two years then the course fee would need to be repaid on a pro rata basis”. It is the claimant’s case that the company had no right to make the deductions from her salary as there was no provision in her contract allowing for this and that she should not have to pay back the training costs because she resigned as a result of a breach of contract by the respondent. The respondent relies on the clause in the claimant’s contract in which the claimant agreed to the company making deductions from her pay where money is owed to the respondent, as set out on pages 94 and 86 of the bundle.

39. The respondent says that he has never received any training on how to handle disciplinary or grievances in the workplace and he has never handled any grievances prior to those submitted by the claimant. He claims that he tried to obtain advice from various sources and that he does not have an HR department which caused some delay in his response to the claimant’s grievances. However, the respondent says that he had been told by Mrs Harding that she was receiving information from the claimant whilst the claimant was absent on sick leave and from the tone of the claimant’s grievances and the fact that she quoted case law in her letters, he was of the opinion that the claimant had already decided to resign but that she was looking to get the biggest pay out she could by bringing a claim in the employment tribunal.

### The law

40. We refer ourselves to section 95 of the Employment Rights Act 1996 in respect of the law on constructive dismissal and we refer ourselves to the leading case of **Western Excavating Excavating (ECC) Limited v Sharp 1978 ICR 221** in which the court of appeal held that in order to claim constructive dismissal the employee must establish the following:

- i) there was fundamental breach of contract on part of the employer
- ii) the employer’s breach caused the employee to resign
- iii) the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal

41. We also refer ourselves to the case of **Lewis v Motorworld Garages Limited 1986 ICR 157** in which the court of appeal held that a course of conduct can cumulatively amount to a fundamental breach of contract following a last straw incident even though the last straw itself does not amount to a breach of contract. It is immaterial that one of the events was serious enough in itself to amount to a repudiatory breach and the employee did not treat that breach as such by resigning at the time.

42. We also refer ourselves to the case of **Omilaju v Waltham Forest London Borough Council 2005 ICR 481** in which the court of appeal held that the act constituting the last straw does not have to be of the same character as the earlier acts but it must contribute to the break of the implied term of trust and confidence. The test of whether the employee’s trust and confidence has been undermined is an objective test.

43. We refer ourselves to Section 13 of the Employment Rights Act 1996 in respect of the claim relating to the unauthorised deduction of wages and note that there will not be an unauthorised deduction where there is a relevant provision in the workers contract allowing the respondent to make the deduction.

44. We refer ourselves to the case of **Ayodele v Citylink Limited 2017 EWCA Civ 1913** in which the court of appeal held that it is for the claimant to prove on the balance of probabilities that there are facts from which the court could decide in the absence of any other explanation that the respondent unlawfully discriminated against the claimant.

45. We refer ourselves to the case of **Madarassy v Nomura International Plc 2007 IRLR 246** in which the court of appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination.

46. We refer ourselves to Section 109 of the Equality Act which makes provision for a principal to be liable for the discriminatory acts committed by an agent whilst acting under the principal's authority and we refer ourselves to the case of **Kemeh v MoD 2014 EWCA Civ 1991** in which the court of appeal held that the ordinary common law meaning of agency should apply in the discrimination context. Although it could not be readily encapsulated in a simple definition, it carried the sense of one person acting on behalf of or standing in the shoes of another with that person's authority.

47. The respondent refers us to the case of **Unite the Union v Nailard 2018 IRLR 730** in which the court of appeal decided, in relation to 3<sup>rd</sup> party discrimination, that the "associative" effect of the phrase "related to" a protected characteristic more naturally applied only to the case where the discriminatory conduct is the employer's own and that the negligent failure to prevent another's discriminatory act is very different from the liability for one's own act.

48. The respondent refers us to the case of **Burton v De Vere Hotels 1996 IRLR 596** in which the EAT held that an employer can be held liable for discrimination caused by 3<sup>rd</sup> parties where the employer allows or causes the event to happen in circumstances where he can control whether it happens or not. The respondent submits that this test requires there to have been previous incidents for the employer to be liable.

## Conclusions

49. Applying the relevant law to the facts we find that Mrs Harding was not an employee of the respondent's business at the relevant time as she was not employed under a contract of employment, or any other contract, with the respondent. We also find that Mrs Harding was not a member of the respondent's management team, but she was based at the same site as the respondent and the two businesses shared a joint reception area. We find that Mrs Harding is named in the handbook because both the respondent's business and Mrs Harding's business compiled the handbook together, but there is no evidence of Mrs Harding taking any part in the business decisions made the respondent, such as in respect of moving the business elsewhere or any other management decisions, and there is no evidence that the respondent told



the claimant that Mrs Harding was a member of the management team. However, we find that Mrs Harding did, from time to time, act as an agent for the respondent in accordance with Section 109 of the Equality Act 2010 in that she helped the respondent out when the respondent was not on the premises by, for example, signing holidays forms and contacting customers when the respondent could not attend work due to bad weather. Therefore, we find that the correct respondent is Mr Harding, acting as a sole trader.

50. In respect of the conversation between Mrs Harding and the claimant on 30<sup>th</sup> January 2018, we prefer the evidence of Mrs Harding that she did not say to the claimant that she thought the claimant was actually having an affair with the respondent and that she did not say that it was because the claimant was “young, pretty and single” because we find Mrs Harding to be a plausible witness and her evidence is entirely consistent with that of the claimant i.e. it was Ms Fenwick who had come up with this suggestion, not Mrs Harding. We find that the phrase “young, pretty and single” could be applied to several workers in both of the businesses operating on that site and is not any more relevant to the claimant than any other worker. The claimant accepted that she had been told by Ms Fenwick that she had had discussions with Mrs Harding and another friend and that Ms Fenwick had come up with several names by way of a list, of which the claimant was just one, of people the respondent might be having an affair with, but there is little or no evidence that this accusation was put to the claimant by Mrs Harding, rather it is the claimant’s own evidence that it was she who confronted Mrs Harding after her conversation with Ms Fenwick in which a list of people was mentioned. This is also entirely consistent with the claimant not using the phrase “young, pretty and single” when she sent text messages to the respondent immediately after the conversation with Mrs Harding, as seen on page 321 of the bundle. In the circumstances, we find, on the balance of probabilities, that Mrs Harding did not make any reference to the claimant’s age or sex during the conversation of 30 January.

51. We find that the claimant and Mrs Harding did have words on 6<sup>th</sup> March at the kennels, which was operated by Mrs Harding, when the claimant went to collect her dog. We find, on the balance of probabilities, that Mrs Harding did shout at the claimant and accused the claimant of trying to split her family up before she let her collect her dog and we accept that the claimant was probably offended by the things that Mrs Harding said to her, but it is more likely than not that the claimant was not physically intimidated by Mrs Harding given that the claimant is bigger and stronger than her and that she plays rugby; this is entirely consistent with the claimant’s messages, which she wrote after the event, at page 332 of the bundle expressing her desire to attack Mrs Harding. However, we find that Mrs Harding was not acting as an agent of the respondent but was acting as the owner of her own business at the time of these events. In any event, there is no evidence that this disagreement was related to the claimant’s age or sex and the claimant has failed to discharge the burden of proof in that she has failed to prove primary facts on which this tribunal could properly and fairly conclude that there was a difference in treatment compared to a man or older woman.

52. We find that Mrs Harding asked the claimant to hand her keys back to her because the claimant had left the premises unlocked on two occasions. We note that the claimant did not challenge Mrs Harding about this evidence in cross examination, nor did she present any evidence to the contrary when she was recalled to give evidence on matters arising from the respondent’s witness evidence as a result of their

attendance on the third day of the hearing and, therefore, we find that the reason for asking for the keys to be returned was not connected in any way to the claimant's age or her sex. We also find that it is more likely than not that Mrs Harding would have asked for a male employee or an older employee who had left the site unlocked for two nights to also return their keys under similar circumstances. In the circumstances and applying the guidance in **Madarassy**, we find that the claimant has failed to prove primary facts on which this tribunal could properly and fairly conclude that she was treated unfavourably compared to a hypothetical comparator.

53. We find that, as soon as the claimant reported the incidents of 27<sup>th</sup> February and 6<sup>th</sup> March to the respondent, he spoke to Mrs Harding straight away and asked her to avoid the claimant, which she did. We find that there were no further incidents with Mrs Harding after 6<sup>th</sup> March and therefore there was no reason for the claimant to be afraid of her in the workplace and there is no evidence that Mrs Harding tried to approach the claimant in the workplace after 6<sup>th</sup> March or that she behaved in a threatening manner in any way towards the claimant. In any event, the claimant's own evidence is that there were other workers present at the site, such as Ms Dobson, Mrs Lau and Ms Madison. Further, the claimant's own evidence is that, from 28 March onwards, she entered into conversations with Mrs Harding about the respondent, met her at lunch time and after work, and entered into extensive WhatsApp conversations with her which completely contradicts the claimant's assertion that she was frightened of Mrs Harding. In the circumstances, we find that there is no evidence of a culture of bullying and harassment in the respondent's workplace as alleged by the claimant.

54. We find that Mr Johnson did speak to the claimant on 20<sup>th</sup> March 2018 in her workplace on the basis of what he had been told by Chloe Madison about a customer accusing the claimant of bad-mouthing Mrs Harding. We find that Mr Johnson did close the door and he did tell the claimant to stop bad-mouthing Mrs Harding and that, if she did not, he would sue her for slander. We accept that the claimant found the incident offensive and upsetting and that she left work to go home as a result of it. It is common ground that the respondent called the police as soon as he heard about the incident and that the respondent spoke to Mr Johnson and told him to stop upsetting his staff, after which time Mr Johnson had no further contact with the claimant at all. We find that Mr Johnson was not at the premises on 20<sup>th</sup> March at the respondent's request and, therefore, he was not acting as an agent for the respondent at the time of the incident and the respondent was not responsible for Mr Johnson's actions, either as a principal or as an employer, especially as Mr Johnson has never been employed by the respondent. In any event, there is no evidence that Mr Johnson's treatment of the claimant related in any way to her age or sex and, applying the guidance in **Madarassy**, we find that the claimant has failed to prove primary facts from which this tribunal could properly and fairly conclude that she had been treated unfavourably when compared with a hypothetical male or older female comparator.

55. We find that the document that the claimant has produced at pages 274 to 305 of the bundle is not a diary in the ordinary sense of the word but, on the balance of probabilities, is more likely to be a document produced in contemplation of bringing employment tribunal proceedings because it only sets out matters which she has raised in these proceedings and there is no evidence of any personal entries that one would normally expect to find in a diary. As a result, we place little weight on the contents of this document, particularly as the claimant's evidence that it was a contemporaneous

document is not borne out by the evidence she gave in cross examination in relation to the incident with Mr Johnson on 20<sup>th</sup> March and because there are other aspects of the document which indicate that it was not written contemporaneously, such as at page 284 where the claimant has written about her colleague in the past tense referring to the “last couple of weeks” and elsewhere giving a description of Mr Johnson being Mrs Harding’s father, which seems superfluous if this was indeed a diary she was supposedly writing for her own record, as opposed to a document she intended to use in these proceedings to try and corroborate her claims.

56. We find that, as Mrs Harding and Mr Johnson were not acting as agents for the respondent on 27<sup>th</sup> February, 6<sup>th</sup> March or 20<sup>th</sup> March, the respondent did not engage in unwanted conduct, contrary to section 26 of the Equality Act 2010. We are not required to make any findings on issue 1.12 however, for completeness, we find that the conduct complained of was not related to the claimant’s age or sex. As we have found that there was no unwanted conduct on the grounds of sex or age, there is no requirement for us to make any findings on issues 1.14 and 1.15. We find that the events of 6<sup>th</sup> March and 20<sup>th</sup> March were not foreseeable, nor were they events he had any control over, and therefore the respondent could not have done any more than he did to prevent the events from occurring: applying the guidance in **Burton v De Vere Hotels and Nailard**. Further we find that the respondent dealt with each of the claimant’s complaints reasonably by asking Mrs Harding and Mr Johnson to stay away from the claimant, which they duly did, and the claimant accepted at the time that the issues had been resolved by the respondent to her satisfaction. Indeed, it appears that the claimant only decided to change her mind and raise a formal grievance after she found out that the respondent was indeed having an affair and she felt heartbroken and disappointed.

57. We find that the respondent dealt with the claimant’s grievances as best he could given that he does not have a Human Resources department and has no previous experience of dealing with the grievances. There is no evidence that the respondent’s handling of the grievances was in any way influenced by the claimant’s age or sex and the fact that the claimant was unhappy with the outcome of the grievances and appeal is not evidence that there has been a breach of contract by the respondent, particularly given that this is an objective test and is not dependent on the claimant’s subjective opinion of the outcome. The contractual requirement is to deal with the grievance, which the respondent did, regardless of the outcome. In the circumstances, we find that there is no evidence of the respondent dealing with the claimant’s grievances in a capricious manner, as alleged. Further, there is no evidence that the respondent had no intention of dealing with all of the claimant’s grievances or that he would not consider the issues in full before reaching a conclusion.

58. We find that there is no evidence that the respondent dealt with claimant’s grievances in such a way as would objectively undermine the requirement of trust and confidence, although the respondent might have dealt with them more expeditiously, but this in itself does not amount to a breach of contract in these circumstances given the resources at the respondent’s disposal. The claimant accepted in cross examination that the respondent had not discriminated against her on the grounds of age or sex in his handling of her grievances and, applying the guidance in **Nailard**, we find that the respondent did not discriminate against the claimant in the way he dealt with her various grievances and appeals. There is no evidence that the respondent’s staff handbook

was incorporated in to the claimant's contract of employment or that the policies relating to Equal Opportunities and grievances were anything more than policies providing a framework and guidance for the parties to follow. In the circumstances, we find that the failure to give the claimant a full 7 days to appeal the outcome of her grievance, coupled with the fact that the respondent accepted the claimant's appeals outside his initial time limit, does not constitute a breach of contract by the respondent.

59. We find that the respondent's e-mail of 20<sup>th</sup> April at page 100 of the bundle was not sent to the claimant as a direct result of the claimant raising a grievance, particularly as there is no evidence that the respondent fabricated the customer complaint received by Mrs Harding's business, given that there are statements that he had received from Mrs Harding and Chloe Madison about the specific complaint. Therefore, we find that this action by the respondent was not a breach of the implied term of trust and confidence and, consequently, the claimant did not resign as a result of a breach of contract by the respondent, let alone a fundamental breach of contract.

60. As there was no breach of contract by the respondent throughout the period from February to June 2018, we find that the last straw doctrine does not apply as the claimant has failed to establish that there was a course of conduct by the respondent which amounted to a fundamental breach and, as a result, we find that the claimant did not resign in response to a breach of contract and we are not required to make any findings on 1.4 to 1.6 of the issues, as set out above. The claimant clearly had resignation in her mind when she spoke to her GP on 26 April 2018 and she was equivocal in her evidence about when she decided to resign and in response to which incident. The claimant clearly misled the ACAS officer on 1 June 2018 as to her employment status in order to obtain an EC Certificate and we find that this is persuasive evidence that she did not resign in response to a last straw or repudiatory breach some 12 days later.

61. We find that the respondent did deduct the sum of £400.00 from the claimant's wages in relation to a training course undertaken by her. However, we find that, in accordance with the terms of the claimant's contract of employment with the respondent and the training agreement which she signed at page 207 of the bundle, the deduction was authorised by a relevant provision in the claimant's contract and, therefore, there is no unauthorised deduction of wages by the respondent contrary to Section 13 of the Employment Rights Act.

62. With regard to the claim for wrongful dismissal, as we have found there was no breach of contract by the respondent, we find that the claim for notice pay is not well-founded.

63. For all of the reasons given above, we dismiss all the claims brought by the claimant.

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**EMPLOYMENT JUDGE ARULLENDRAN**

Case Number: 2501261/2018

JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON

.....7 January 2019.....

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