EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE TSAMADOS**

MEMBERS: **Mrs R C Macer**
Ms S J Murray

BETWEEN:

Mr Thomas Reames

Claimant

AND

Sapphire Systems PLC

Respondent

ON: **18th, 19th & 20th June 2018 (partly in chambers)**

Appearances:

For the Claimant: **In person**

For the Respondent: **Ms Hall, Consultant**

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:

1) The claimant was not unfairly dismissed
2) The claimant was not discriminated against because of religion or belief;
3) The claimant has not suffered unauthorised deductions from wages;
4) The claimant is not entitled to damages for breach of contract;
5) The above complaints are therefore dismissed;
6) The claimant's complaint in respect of unpaid accrued annual leave is dismissed on withdrawal.

REASONS

The Claim/Complaints

1. By a claim form received at the employment tribunal on 26th September 2016, the claimant brought the following complaints: constructive unfair dismissal; discrimination on grounds of religion belief; entitlement to notice pay; and in respect of various outstanding payments in respect of wages, holiday pay and commission. In its response the respondent has defended the claim in its entirety.

The Issues

2. A preliminary hearing on case management was held on 12th December 2016 before Employment Judge Sage at which she identified the issues. These are recorded in detail in the Case Management Summary which is at pages 29 to 31 of the main bundle.

3. Essentially these set out the following complaints: unfair dismissal based on a constructive dismissal; direct discrimination on grounds of religion or belief, namely his marriage to a Muslim; entitlement to unpaid annual leave under the Working Time Regulations 1998; and damages for breach of contract in respect of failure to pay sick pay and commission (the sick pay claim is also claimed as an unauthorised deduction from wages).

4. Judge Sage also made a series of case management orders, including production of a schedule of loss, mutual disclosure of documents and exchange of witness statements.

5. The claimant was also ordered to provide further details of his complaint of discrimination because of religion and belief by 3rd January 2017 given the lack of a particularisation within his claim form. The respondent was also ordered to present an amended response by 17th January 2017.

6. The claimant provided the further details on 3rd January 2017 which can be found at page 35 of the main bundle. This reveals the complaint is of unfavourable treatment by Mr Tony Martin, the respondent's Head of Human Resources Operations, in the following regards: making deductions from the claimant's pay on several occasions for false reasons without discussion or notice; undertaking a biased disciplinary investigation against him; suspending him from work and withdrawing his IT access and restricting him from communicating fellow employees; and dismissing him.

7. In his further details, the claimant also requested disclosure of information and documents essentially seeking comparative evidence as to the treatment of other members of staff in respect of the alleged incidents of less favourable treatment set out in his further details.

8. The respondent provided a response to the further and better particulars which can be found at pages 36 and 37 of the main bundle. The respondent essentially denied the unfavourable treatment by Mr Martin as alleged, stating that deductions would have been made in conjunction with the claimant's manager and the disciplinary proceedings taken against the claimant were justified.

9. The respondent replied to the claimant's request for specific disclosure providing its sickness policy but otherwise expressed its inability to respond to what it considered to be unclear requests and its inability to provide confidential and irrelevant information.

10. It became apparent during the hearing that the claimant was not happy with the response to his request, but had not taken formal action in seeking an order of specific disclosure from the tribunal.

11. The hearing was originally listed for three days commencing 29th August 2017. However, it was postponed at the respondent's request due to non-availability of one of its witnesses. It was only possible to accommodate a further 3 day listing almost 10 months later.

Preliminary Matters

12. At the start of the hearing it was clear that the claimant had not fully complied with the case management orders. He had not produced a witness statement and he wanted to admit additional documents which he believed were not in the combined bundle. However, he admitted that he had not had time to go through the bundle or even prepare because was busy working. He also claimed not to have realised that he had to provide a witness statement, although I pointed out that the orders were quite clear and his own witness had produced one. He did exhibit a rather lax approach to preparation for this hearing, which had initially been listed for trial in August 2017, was unfamiliar with the documents in the bundle and unable to express his own case with particularity. However, we recognised and took into account that the claimant is appearing in person.

13. In order to move matters on expeditiously ensuring that there could still be a fair hearing for both parties, the tribunal made the following directions. The claimant's evidence in chief would stand as his details of claim at R1 14 to 15 and his further information as to his discrimination claim at R1 35 with further questions from me to draw out further details. He could also rely on a handwritten document which summarised his various claims (which was copied to the respondent and the tribunal). As to the additional documents, I told him to go through the combined bundle and identify which of his additional documents were not within it. I told him to make five copies of the resultant additional bundle and to give one copy to the respondent during our adjournment to read the witness statements and referenced documents within the combined bundle.

14. We then adjourned to read. After one hour, the parties returned and it emerged that the claimant had only made three copies of his additional bundle, including one for himself. I explained to him that we need three

more – two for the tribunal panel and one for the witness table. He replied that it would take him another hour to make further copies because the nearest copy shop is 15 minutes away. I indicated to him I was not happy with this having made it abundantly clear to him in the first place that we needed 5 copies. But in order to move matters on I said I would arrange for the tribunal administration to make additional copies and we would adjourn for half hour to facilitate this and to read his bundle, rather than losing the entire morning waiting for him to make the copies.

15. As the claimant was unrepresented, I took some time at the start of the hearing to explain the procedure to him, what was required in terms of putting his case with reference to the defined issues and I offered to assist where appropriate in cross examining the respondent's witnesses.

16. On the last day of the hearing, the appellant produced a further 3 page document. He said that he had only received this on Monday 18th June 2018 and it was the respondent's reply to his data protection request. The document is in the form of an email dated 15th June 2018 from Ms Thea Maloney who works in the respondent's HR department, responding to a Subject Access Request (under the Data Protection Act 1998). It lists his days of sickness and otherwise sets out a series of undated and largely unattributed emails in which the claimant is mentioned. The claimant believes it is relevant to his sick pay and discrimination complaints and as to how he was being treated by other members of staff.

17. The difficulty with the document was that its font size was so small it was largely impossible to read. The claimant said he had been unable to enlarge it. Given the delay in bringing the matter to our attention (he had it since 15th not 18th June), that it was now the final of three days of the hearing (20th June) and we had already heard several of the respondent's witnesses, that the hearing was originally listed for last August, that the document was largely illegible and generally its relevance not apparent, the tribunal only allowed him to rely on the final segment on the third page from line 750 onwards. This sets out a series of undated and unattributed emails remarking about the whereabouts of the claimant's work phone following his apparent arrest at work (which is dealt with below in our findings of fact) and so did appear to have some relevance to his claim.

Evidence

18. The tribunal heard evidence from the claimant and from his witness Ms Sophia Moore (known as Sophia Chab at the time of the events in question and referred to below in this style) by way of written statements and in oral testimony.

19. The tribunal heard evidence on behalf of the respondent from Mr Tony Martin, Mr Ian Caswell and Mr Richard Hudson by way of written statements and in oral testimony. The respondent provided witness statements in respect of Paul Rowan, Bilal Kamil, Cihan Acikgoz and Rupal Patel, but they did not attend the hearing. The tribunal indicated that this would affect what weight if any would be attached to their testimony.

20. The respondent provided a combined bundle of documents, which we refer to as "R1" where necessary, a chronology and cast list. The claimant's additional bundle is referred to as "C1" and the three page document as "C2", where necessary.

21. Pages 220-229 of R1 were repeated. Where necessary we refer to the second set of pages 220-229 with the suffix "A", eg R1 220A.

Findings of Fact

22. We set out below the findings of fact the tribunal considered relevant and necessary to determine the issues we are required to decide. We do not seek to set out each detail provided to the tribunal, nor make findings on every matter in dispute between the parties. We have, however, considered all the evidence provided to us and we have borne it all in mind.

23. We would say at the outset that due to the way in which the claimant's evidence was presented, in both a cryptic and fragmented manner and without clear references to documents within the bundles, the task of fact finding was made all the more difficult.

24. The claimant converted to Islam in 2001. He is married and went through an Islamic marriage ceremony in February 2016.

25. The claimant was continuously employed by the respondent as a Business Development Executive from 9th June 2014 until his resignation on 13th July 2016 with one month's notice, the effective date of termination being 12th August 2016.

26. The claimant had been previously employed by the respondent from 11th July 2011, in Marketing, until the termination of his employment on 14th September 2013. At that time, he received remuneration by way of payment of a salary and commission. This is clearly a quite separate period of employment.

27. It cryptically emerged from the claimant's evidence during the hearing but largely became clear on the last day from the evidence of Mr Ian Caswell, the respondent's CEO, that the claimant's employment was terminated in September 2013 due to his arrest in connection with sexual offence allegations made against him by his ex-wife.

28. Mr Caswell was very supportive of the claimant at what must have been a difficult time and it was agreed between them that the claimant would leave his employment and that there would be a future discussion when the matter was resolved as to his return to work.

29. At that time, the respondent's offices were on the 5th floor of the Northern Shell building in London. Their offices were open plan with a reception desk at the front. The building's reception was on the ground floor.

30. We heard evidence as to what happened at this time from Mr Caswell, who we found to be a careful and reliable witness. Two plain-clothes police

officers came to the respondent's building, identified themselves as police officers at the main reception and asked the receptionist to call the respondent's reception to get the claimant. They then went to the respondent's floor and waited for the claimant. It was a matter of common knowledge to the respondent's staff at the time that the police came to the office for the claimant and he was arrested (although we accept he was only escorted from the building and not arrested until later on), that he was released on bail, but subsequently placed in custody and ultimately was released without charge. This knowledge arose from the open plan set up at the office on the day the police arrived, that they identified themselves as police officers even though they were in plain-clothes and from the claimant himself in telling his colleagues what had happened to him and in posting details on Facebook. Mr Caswell stated that the claimant was not someone who could keep his own counsel. Further he told us that on his return to work for the respondent in 2014, the claimant was very vocal in telling others about what had happened to him.

31. At the time of the start of the claimant's second period of employment, the respondent had moved to The Shard building in London where they continue to be. They occupy an open plan office about four times the size of the tribunal room.

32. We find that the claimant's involvement with the police and the ensuing events were common knowledge within the respondent's office both at the time and thereafter, including at the time of the events in question in this claim. We further accept that this was because of the layout of the respondent's offices at both sets of premises and the claimant's own frankness in telling others about it. This is of some importance given the claimant's allegations that because of leaks of confidential information by the respondent's HR Manager, malicious gossip was being spread by colleagues about what had happened in 2013.

33. The respondent is a company which sells, implements and supports business management software. It has offices in London and Manchester. It employers 170 staff in total, 125-130 in London. It has a Human Resources department of 3 staff based in London. The CEO is Mr Caswell, the Head of Human Resources Operations is Mr Tony Martin and the claimant's line manager is Mr Richard Hudson, the Marketing Director. Mr Martin's HR team consisted of Ms Thea Maloney and one other.

34. The claimant's written statement of main terms and condition of employment is at R1 44-45. From this we note that the claimant's remuneration was a salary of £26,000 per annum and that there is no reference to any entitlement to commission. We also note the clause headed Sickness Pay and Conditions which states that there is no contractual entitlement to sickness/injury payment in addition to payment of Statutory Sick Pay ("SSP"). Further, that any additional payments which may be made will be at the respondent's absolute discretion. We also note that the disciplinary and grievance procedures are contained within the Employee Handbook and that notice of termination of employment on completion of probation is expressed to be one month either way.

35. We were belatedly taken to the Employee Handbook which is at R1 135-172 on the last day of the hearing, but it was not put to the claimant in evidence. However, we accept that it is incorporated into the claimant's terms and conditions of employment and referenced to within his statement of main terms and conditions. Whilst the version of the Handbook within R1 is a later version than that in existence at the time of the claimant's employment, the amendments page at R1 136 does indicate amendments made on specific dates and to which specific pages.

36. We were also referred to the Sales Commission Scheme at R1 193-200 which clearly applies to field sales staff.

37. Ms Rupal Patel is a Marketing Executive who has been employed by the respondent since 1 September 2015. She also reports to Mr Hudson the respondent's Marketing Director.

38. Ms Sophia Chab was employed by the respondent as a SAP B1 Consultant from November 2014 until August 2016.

39. On 29th June 2016, Ms Patel made a complaint against the claimant in an email to Mr Martin which se copied to Mr Hudson and Ms Maloney. This is at R1 72. It related to an incident that she alleged had occurred at the respondent's office during the morning 16th June 2016 in front of many members of the Marketing Team during which the claimant swore at her and called her names in an aggressive tone and with an intimidating demeanour[1].

40. Following receipt of the e-mail, Mr Martin conducted interviews with members of staff on 29th June 2016 and subsequently confirmed what each had said by e-mails to them.

41. In their exchange of e-mails at R1 84-85, Mr Carl Cooper confirmed the claimant had spoken to Ms Patel in an aggressive manner insisting that she answer questions concerning a non-work related issue. She asked him to leave her alone and he called her a "fucking bitch, fucking loser and fucking child".

42. In their exchange of e-mails at R1 86-87, Mr Bilal Qamar, a SAP Business One Consultant, confirmed that the claimant had attempted to engage Ms Patel in a conversation, she told him she did not want to talk about the subject, he persisted and called her a "fucking bitch" when she did not answer his questions. He was not really aware of what had caused the argument and it only got his attention when the claimant called Ms Patel "a fucking knob". He indicated that he hoped his statement would be used anonymously because he has to sit next to the claimant.

43. In their exchange of e-mails at R1 175A-B, Kiran Khosa confirmed that Ms Patel told the claimant that she did not want to engage in a conversation with him about a personal, non-work related matter, he persisted and spoke

[1] It later became apparent to the tribunal that incident arose from a rumour that Ms Chab's husband had said something inappropriate to Ms Loudres Pangaio at a social gather (e-mail at R1 81).

aggressively to her, calling her a number of names including "a knob and a fucking loser".

44. Mr Martin and Ms Maloney met with Ms Patel on 30th June 2016, the notes of which are at R1 75-76. At the meeting, Ms Patel explained the following:

44.1 On 16th June, the claimant came over to her desk to discuss personal matters about a situation that happened outside work. He asked her view, she said she did not want to become involved and was busy, but he insisted. She accused him of spreading rumours, he lost his temper and called her a "dickhead", "loser", "childish and knob" and said he no longer wanted to be friends with her. She said at this point, a colleague, Mr Cooper, told her to move away from the situation;

44.2 The claimant sent a text to her stating that she was "a knob, loser child and he did not want to hang out with non losers (sic)";

44.3 On 21st June 2016, Ms Lourdes Pangaio, Senior SAP B1 Consultant, came over to her desk to discuss a night out. The claimant took note of the conversation and started up Skype messenger (an instant messenger application on the respondent's employees' computers) and so did Ms Chab. Ms Patel felt that both of them were discussing this situation;

44.4 On 23rd June 2016, Ms Chab started to get involved with the situation and making comments. As she walked past, Ms Chab said to Ms Pangaio "she needs to stop telling people about my business and she needs to stop giving me dirty looks". Ms Pangaio told Ms Patel that she wants to stay out of the argument;

44.5 Ms Patel feels like the claimant will not leave the situation alone or it will never end;

44.6 Ms Patel named those overhearing the conversation on 16th June as Mr Cooper, Kiran Khosa, Mr Matthew Lowson, Ms Caroline Menzie, Ms Sharon Stevenson and Mr Kimal but said it was probably best to speak with Mr Cooper and Kiran Khosa.

45. Following this meeting, Mr Martin obtained copies of the Skype messages between the claimant and Ms Chab sent each other between 27th and 28th June 2016. These are at R1 46-71. These pages set out exchanges of messages between the two of them conducted during work time over a number of days and which include a number of insulting and derogatory comments about their work colleagues.

46. Mr Martin interviewed Ms Chab on 30th June 2016 to discuss the Skype messages. He then sent her an e-mail on 1st July 2016 setting out the gist of their discussion and asked her to let him know if she disagreed (R1 83). His email stated that she regretted being involved in the Skype exchange, that things had got quite emotional at that time and she believed and still believes there were malicious rumours about her husband and about her

and the claimant that she felt were very upsetting. He told that whatever the mitigation, the comments in the exchange were unpleasant and insulting and she agreed. He further stated that whilst the worst of what was written came from the claimant, she continued the conversation over several days and she could have ended it at any time.

47. Mr Martin also interviewed the claimant on 30th June 2016, although there is no record of their discussion in the documents before the tribunal.

48. The claimant's position is that he never swore at Ms Patel and that the only other person involved in the conversation, Ms Chab, confirmed this. He also expressed concern it was over two weeks before Ms Patel raised the matter and, in the meantime, he had got on with his work and with his colleagues.

49. On 30th June 2016 the claimant raised concerns with Mr Hudson about Ms Pangaio's behaviour towards him, as to malicious gossip about him circulating in the office regarding the previous criminal allegations against him and his concerns about how Mr Martin was dealing with the grievance investigation. He was further concerned that Mr Martin had told others about the previous criminal allegations against him. Mr Hudson said in evidence that the claimant thought he was being singled out but did not give any exact reason for it but was clearly distressed. He took his comments on board and said he would present them to Mr Caswell as Mr Martin's line manager.

50. In evidence the claimant said he was concerned that Mr Martin had ignored the fact that the only persons involved in the conversation were him and Ms Chab who both agreed that he did not swear at Ms Patel. However, in evidence he accepted that there were others in the open plan office at the time of the conversation. He also expressed concern that by the time the matter got as far as disciplinary proceedings his account and that of Ms Chab's were not included in the "investigation summary". He referred to this "summary" on several occasions but he could not produce it in evidence and both Mr Martin and Mr Hudson said there was no such document. Indeed, it did appear several times that the claimant was conflating two events, one being the grievance he brought and the other being the grievance against him which resulted in the disciplinary proceedings which of course were ongoing. However, he could not clearly explain what the "investigation summary" was.

51. On 1st July 2016, Ms Chab replied to Mr Martin's e-mail (at R1 82) confirming that his account of their discussion was correct. She also apologised for the nature of the Skype conversation on a company platform and she did at one point in the conversation tell the claimant not to get personal and that he was stooping to their level.

52. Mr Hudson was aware of Ms Patel's grievance and that the claimant was accused of being aggressive towards her. He also read the Skype messages. He formed the view that the claimant's continued presence would cause tensions in the office and after consultation with Mr Martin, he decided that the claimant should be suspended on full pay and his IT access withdrawn pending further investigation.

53. Mr Martin wrote to the claimant by letter dated 1st July 2016 advising him of his suspension from work pending investigation of the grievance raised against him. Mr Martin used a standard template from the respondent's legal advisers. We were shown the original of the letter, which was not in the bundle and it contains the usual conditions relating to a suspension, as to suspension not being a form of disciplinary action, that IT access was withdrawn pending further investigation and that the claimant should not contact members of staff in the office without the respondent's permission.

54. The claimant sent Mr Hudson an e-mail on 1st July 2016 attaching copies of WhatsApp messages between himself and Ms Pangaio and messages between himself and Ms Patel as evidence of their behaviour towards him (at R1 248, 249-256). His e-mail at R1 249 refers to the various matters raised and also states that he has got on with his work since the incident on 16th June and names a number of colleagues who could in effect vouch for his good work since the incident. Mr Hudson passed this e-mail and the attachments onto Mr Martin.

55. The claimant sent a further e-mail to Mr Hudson and Mr Martin on 1st July 2016 (at R1 77) which was written in unclear terms and again asked for various colleagues to be approached as witnesses.

56. Mr Martin replied to the claimant seeking clarification (at R1 78). The claimant sent a further e-mail (also at R1 78) providing the wider context and an explanation for what had happened.

57. The e-mail explained that the whole thing started with a false claim by Ms Pangaio and Ms Patel that Ms Chab's husband "tried it on with her". After the claimant confronted them, they approached his wife and told her to be careful because he and Ms Chab were attracted to one another and was she aware that he had gone to prison for rape? He also referred to a joke that Ms Patel made in a text about him doing community service. He stated that he tried to end the gossip on 16th June and was not rude to Ms Patel. Two weeks had gone by and he thought they had moved on. He mentioned that Victoria (Olorunsomo) in HR had told Ms Chab about the rape allegation and she had heard this from Mr Martin. He spoke of his suspicions arising from the closeness of Ms Patel and Ms Maloney and apologised for this. He said he wanted to move on and he expressed his regret for getting involved in the "silly discussions" on Skype. He expressed his deep regret for all of this but asked for it to be seen in context and in mitigation

58. On 4th July 2016, Ms Chab sent Mr Martin a further e-mail (at R12 81-82) in which she set out her account of what had happened on 16th June 2016. She explained as follows: first thing in the morning in the kitchen she asked both Ms Patel and Myriam if they had witnessed Ms Pangaio's allegation that Ms Chab's husband had been inappropriate to her (which would appear to have taken place at Ms Patel's house party the previous weekend); they both said no but she was not convinced by their answers; there was a disagreement, not so much an incident, later that day between the claimant and Ms Patel when they were sitting at their desks; Ms Chab told the claimant that both Ms Patel and Miriam denied any knowledge of the

allegation; there was an exchange of words between the claimant and Ms Patel to the effect that he challenged her denial and she said she did not want to get involved; Ms Patel may have told the claimant to shut up and he said if she is just going to deny being involved, "your (sic) just a child"; voices were slightly raised; she believed the claimant's friendship with Ms Patel was already beginning to break down because she and Ms Pangaio had raised sensitive information about the claimant to his wife on the previous Saturday (as to the past criminal investigations); on 15 June 2016, Ms Patel said in the office that she did not want to invite the claimant to the house party because Carl (we were not sure whether this was Mr Cooper or someone else) does not like him and he has been accused of rape; later that evening the claimant showed her some screen shots of a group conversation in which Ms Pangaio, Ms Patel, Myriam, the claimant and his wife were all joking about Ms Chab's husband and Ms Pangaio; whilst Ms Patel and Myriam are not talking to her, she and Ms Pangaio are fine, although she is annoyed with what she said about her husband.

59. Mr Martin spoke to Ms Pangaio on 1st July 2016 with regard to the WhatsApp messages that she had sent to the claimant. He e-mailed her later that same day setting out his record of their conversation and she responded confirming his account and adding to it on 4th July 2016 (at R1 79-80). He directed her to two of the messages in which she threatened the claimant, and in one, his wife, with violence. Ms Pangiao apologised but said she was frustrated and angry by what the claimant said to her but would never have harmed anyone. She said that the claimant had said awful things to her and called her names in the past, they were close friends and this was how they speak to each other.

60. Ms Pangaio was subsequently disciplined for using her company phone during company time to engage in a conversation on non-work related matters on WhatsApp and for using abusive language and threatening the claimant and his wife with violence. She received a final written warning. The disciplinary invite letter from Mr Martin dated 6th July 2016 is at R1 88, the notes of the disciplinary hearing in front of Mr Martin Royle, Global Services Director was held on 13th July 2016 are at R1 105 and the outcome letter from Mr Royle dated 13th July 2016 is at R1 106-107.

61. The claimant alleges that he was treated less favourably by Mr Martin because he was suspended from work pending disciplinary investigation and Ms Pangiao was not. Mr Hudson took the decision to suspend the claimant after liaising with Mr Martin. We have heard his reasons for suspending the claimant.

62. Mr Hudson was not Ms Pangaio's line manager and so it was not his decision to suspend her. However, he did say that if it was his decision, he would probably not have suspended her given that the allegation against her centred around one line of a heated text exchange. The two sets of circumstances were not comparable. The claimant was accused of face to face intimidatory, aggressive and offensive behaviour in an open plan office in front of other members of staff and had been involved in an exchange of offensive and derogatory Skype comments about various members of staff

whilst at work. Ms Pangiao had sent text messages to the claimant via WhatsApp albeit on a work phone and during work time.

63. Mr Martin wrote to the claimant by a letter dated 7th July 2016 requesting his attendance at a disciplinary meeting on13 July 2016 (at R1 90-91). The letter set out the following allegations:

    1. *It is alleged that in the open office on 16th June you behaved aggressively toward Rupal Patel and that you called her unpleasant names and used inappropriate language towards her.*

    2. *It is alleged that between 23rd and 26th June you sent personal messages on the company provided Skype instant message service during working hours.*

    3. *It is alleged that many of the instant messages that you sent consisted of insulting comments about your colleagues.*

64. The letter stated that the hearing would be conducted by Mr Caswell, with Sam Rowland-Jones, Global Service Director, taking notes. The letter advised the claimant of his right of accompaniment and warned that if the allegations were substantiated they will be regarded as gross misconduct and could lead to dismissal. The letter enclosed copies of the Skype messages and the respondent's disciplinary rules and procedures.

65. This letter was sent by post only to the claimant's previous address. The claimant was unaware of the letter until it was referred to in e-mail correspondence between the claimant and Mr Martin regarding a "protected conversation".

66. In his e-mail to the claimant dated Friday 8th July 2016, Mr Martin refers to a formal meeting with Mr Caswell and states: "with reference to that, a letter went out to you today, inviting you to a disciplinary hearing next Wednesday" and advised the claimant to bring photo ID because his access to the building has been cancelled during his suspension (R1 225A).

67. The claimant e-mailed Mr Martin on Monday 11th July 2016 at 09:01 to say that he had not received anything in the post and provided his up to date address, which he said was previously advised in the last five weeks (at R1 223). Mr Martin replied at 10:31 (at R1 222-223) stating "please see attached" and that he will post the other documents mentioned. He also stated that he had also attached the outcome of his investigations into the claimant's grievance.

68. In evidence, the claimant expressed concern and suspicion as to why this letter was only sent by post and to the wrong address and had not been sent by e-mail. Mr Martin explained in evidence that the respondent sends out such letters by post given the seriousness of the matter. We accept on balance of probability that there was nothing untoward in this, although it was unfortunate that the letter was sent to the wrong address. However, the claimant subsequently received the letter.

69. Mr Martin's letter to the claimant as to his grievance outcome is dated 11th July 2016 (at R1 92-93). This was sent by e-mail as indicated above. We note it is addressed to the claimant's correct address, by which time the claimant had corrected the address. The letter identifies the claimant's grievances as follows:

    1. *Rupal Patel and Loudres Pangaio have been spreading malicious gossip concerning Sophia Chab and her husband during work time.*

    2. *Rupal and Loudres have been spreading malicious gossip concerning you and Sophia during work time.*

    3. *Rupal and Loudres have been spreading malicious gossip concerning an incident from your past during work time.*

    4. *At a private event Rupal and Loudres tried to influence your wife's view of you by telling her about a past episode in your life that they thought she was unaware of.*

    5. *During a WhatsApp exchange between you and Loudres, she threatened to inflict physical violence on you and your wife. She was at work at the time using a work phone.*

70. Mr Martin's letter then set out the terms of his investigation and the names of those members of staff that he spoke to. He also indicated that he had looked at the WhatsApp records and found no gossip about the claimant or Ms Chab on there.

71. With regard to points 1 to 3, he indicated that Ms Patel and Ms Pangaio both denied spreading malicious gossip, and of the five witnesses that the claimant named, only Ms Chab said she was aware of any such things. He therefore advised the claimant that he did not find these allegations to be substantiated.

72. With regard to point 4, Mr Martin indicated that he has no jurisdiction over what occurs at a private event outside work but informed the claimant that both Ms Patel and Ms Pangaio denied that such an incident took place.

73. With regard to point 5, Mr Martin stated that the allegation was substantiated and that the matter was being dealt with by the respondent's internal disciplinary process.

74. The letter ended by informing the claimant that he had the right of appeal to Mr Caswell within seven days giving the full reasons as to why he is dissatisfied with the decision.

75. In response, the claimant sent an email to Mr Caswell on 11th July 2016 at 15.44 (at R1 92-93). Whilst the claimant said in evidence that it was his appeal against the grievance outcome, we note it does make mention of the forthcoming disciplinary hearing.

76. The e-mail is almost four pages long and with the best will in the world is very difficult to comprehend clearly and is somewhat cryptic and rambling. Indeed, the claimant accepts it was written under adverse circumstances with limited IT access and certainly Mr Caswell found it very difficult to comprehend.

77. In essence, the email sets what appears to be a long complicated explanation/justification of the events leading to Ms Patel's grievance with regard to the conversation on 16 June 2016. This appears to rely on a level of awareness of the wider context which the claimant does not provide either in the e-mail or clearly in his evidence to the tribunal. His e-mail raises issues regarding the discussion of the events in 2013 when he was arrested by the police, which he believes had come from the respondent's own HR department and from Mr Martin. The claimant also raises issues regarding bias by Mr Martin in the matter, which has influenced Mr Martin's investigation and his concern that he does not want Mr Martin involved in the grievance or disciplinary process.

78. In the final paragraph at R1 98 the claimant appears to say the following. He refers to a discussion he had with Mr Martin the previous week seeking a resolution. He asks Mr Caswell if he can postpone the disciplinary hearing or be given the chance to discuss matters in confidence. He refers to his preferred outcome as being to be given a fair form of disciplinary action and then focus on his work and his least preferred option, although one perhaps in everyone's interests, of giving a month's notice and leaving with a positive reference.

79. Mr Caswell replied by e-mail that same day at 16.04 stating that he will "review this and get back to you" (R1 224).

80. Mr Martin then e-mailed the claimant later that day at 16.22 (at R1 222) in which he states:

"Ian has asked me to ask you if you want to talk again under what you describe as a Protected Conversation. If so, let me know when would be a good time to talk."

81. Mr Caswell said in evidence that he found the claimant's e-mail of 11th July 2016 very difficult to comprehend. He said it read first of all as a justification for what happened, but he found this very difficult to read, then the claimant blamed Mr Martin for his actions and then it moved onto "a call to action" in the final paragraph. Mr Caswell explained that he got to know the claimant and his brother Paul when the claimant was in prison and he helped his sister. He said he was shocked when he saw the disciplinary allegations against the claimant and wanted to proceed with the disciplinary hearing. But when he read this e-mail he felt very sorry for the claimant. So, he changed his mind and decided to let the claimant have his second option. He decided that he would allow the claimant to resign on terms in order that the claimant could leave with an unblemished record. This is why he asked Mr Martin to contact the claimant. We accept Mr Caswell's evidence.

82. The claimant alleges that Mr Martin was bullying at work. His evidence is that on his return to work for the respondent, things were made difficult because of gossiping about why he had left which he understood had been spread by Mr Martin. The claimant accuses Mr Martin of bullying him by leaking information to other members of staff about the previous criminal investigations against him and because of his treatment in being singled out in respect of sick pay deductions, suspension, disciplinary action and ignoring his evidence regarding the allegations against him.

83. The claimant accepts that he did not raise the matter as bullying by using that term during his employment but believes it was clear from his e-mail to Mr Caswell dated 11th July 2016 that this is what he meant.

84. The claimant further believes that the reason for this treatment was as a result of his Islamic marriage. He accepted in evidence that he never expressed this to the respondent as a reason during his employment or said that he was being discriminated against

85. The claimant alleged that he was very concerned that having raised his concerns about the way he was being treated and about Mr Martin's behaviour, he was being referred straight back to him.

86. Given the exchange of e-mails and our findings regarding Mr Caswell's evidence, we do not accept the claimant's construction of the referral back to Mr Martin. It is clear that Mr Martin was instructed to ask about the possibility of having further discussions to resolve the matter.

87. We deal with the legal position of the settlement discussions below. But in order to get that far we have to make findings about them.

88. From the beginning of July 2016, the claimant initiated settlement discussions with the respondent seeking a way of resolving the situation in which he had a grievance brought against him and had been suspended from work pending the outcome of a disciplinary investigation and had raised his own grievance and concerns as to Mr Martin's involvement in matters.

89. On 1st July 2016 we pick up the thread of e-mails relating to this. At R1 223A-224A there are a number of e-mails. The first is sent at 11.37 containing the subject "Hi, Tony, Could we please have an Offline chat about references and options. Thanks" (R1 224A). In response at 11.45 Mr Martin wrote "sure, it will be on the basis of what is known as "without prejudice and subject to contract" which mean that it is outside of the HR and employment process" (R1 223A). The claimant replied at 16.00 "a 'protected conversation'?" and Mr Martin responded at 16.13 "I guess so Tom, although the phrase we use is as described below. It means that its content cannot be brought up in any formal HR meeting or at employment tribunal" (R1 223A). The claimant then emailed Mr Martin at 16.50 asking for the weekend to think about it (R1 223A).

90. The claimant maintains that the respondent used the phrase "protected conversation". He states that he telephoned ACAS that day and they

advised him that he needs to have a third party, a legal representative, involved in the discussions.

91. This is picked up in the e-mails at R1 222A. Mr Martin e-mailed the claimant at 17.00 in which he stated:

"If you already engaged in legal representative and copied him into our conversation, perhaps we should leave it there and proceed as already discussed. Note that Sapphire does not intend to engage in any sort of negotiation with you or your solicitor."

92. The claimant replied at 17.23 in which he stated:

"That's not a solicitor as such it's a representative that I'm advised by acas I'd need to involve in such a protected conversation and subsequent agreement from what I was advised."

93. Mr Martin was clear that the claimant first used the phrase "protected conversation" and that the intention behind the discussions was purely as to the terms on which the claimant would resign from his employment. However, when he spoke to Mr Caswell with regard to this, Mr Caswell said that he did not want to enter into any agreement with the claimant.

94. Mr Martin then sent the email dated Friday 8th July 2016 (at R1 225A) which we already referred to above. The context of this email is at this stage clear:

"I raised with Ian what you and I had spoken about in our protected conversation. He said that he felt it was more appropriate that he had a formal meeting with you. With reference to that, a letter went out to you today, inviting you to a disciplinary hearing next Wednesday."

95. Mr Caswell was aware of the settlement discussions but told Mr Martin he did not want to proceed given the seriousness of the allegations against the claimant and wanted to press ahead with the disciplinary proceedings. However, as we have indicated above, when he got the claimant's email of 11th July 2016 he relented and instructed Mr Martin to reopen the discussions.

96. The discussions between Mr Martin and claimant resumed on the basis that the claimant would resign on agreed terms. We can see the thread of this in emails exchanged on 12th and 13th July 2016 at R1 103A-F. In these emails, at R1 103A Mr Martin requests written confirmation of the claimant's resignation and in return he will put together an acceptance letter confirming the details of which they spoke of earlier that day and then the claimant confirms that in their earlier conversation they agreed a month's notice and a positive reference. At R1 103B Mr Martin provides confirmation of payment of contractual notice and accrued annual leave. He further states he will provide a standard reference confirming start and end dates and salary. He also indicates that the respondent will not be pursuing the disciplinary case against him. The letter closes by inviting the claimant to "run this past" his legal adviser and states "I am not trying to deny you

anything that we discussed but merely keeping it simple". In response the claimant e-mailed Mr Martin to confirm his resignation as follows:

"As requested and agreed:

I would today like to give my notice to leave Sapphire as per my contractual rights. This follows our discussion around holiday pay and paid notice, and a positive standard reference to govern my time at Sapphire."

Thanks and regards."

97. At R1 103A Mr Martin emailed the claimant accepting his resignation and indicated that he would write to him formally later today. At R1 104 is a letter from Mr Martin to the claimant dated 13th July 2016 confirming his resignation and acceptance. The letter states that his last day of service will be 12th August 2016 and although he will be paid during this period he will not be expected to attend the office. The letter then sets out the arrangements for payment of outstanding salary, commissions and unused accrued holiday. The letter also confirms that if the respondent is asked to give an employee reference about the claimant, the response would be the standard one simply giving the time that he worked for them, his job title and final salary.

98. The claimant's original evidence was that he was told to resign or he would be sacked. He tried to speak with the respondent about other options but there were none. He tried to involve a legal representative as advised by ACAS and was refused. They were shutting down every avenue open to him. When he raised the matter with Mr Caswell, he was referred back to the very person he had complained about, Mr Martin. In the end he resigned because he was told this was the only way forward. He had tried to raise his concerns, but a false picture was painted, evidence ignored, he was being singled out. He was pressurised and bullied into resigning.

99. However, he later resiled partially from this evidence. He accepted that Mr Martin had explained to him that if they were to go ahead with the disciplinary proceedings this could result in his dismissal and not that Mr Martin had threatened him with dismissal unless he resigned.

100. We find that balance of probability the claimant opened the settlement discussions and first used the term "protected conversation". We further find that the respondent only wished to discuss the basis on which the claimant would mutually agree a parting of the waves, having at first simply wanted to continue with the disciplinary process given the seriousness of the allegations but then relented in response to the claimant's e-mail of 11th July 2016.

101. We cannot find evidence of any pressure being put upon the claimant to resign as he claims. We prefer the respondent's evidence. Further, we find that he was not prevented from seeking legal advice simply that the respondent did not want to negotiate with him or his legal representative. We find that there was no dismissal. This was a mutual leaving albeit the

claimant resigned on agreed terms as to payment of final monies, a standard reference and discontinuation of the disciplinary proceedings.

102. We note that Ms Chab was disciplined for her involvement in the Skype messages on 14th July 2016. The notes of her disciplinary hearing are at R1 108-109. She was given a final written warning for conduct by letter dated 14th July 2016 at R1 110-111. We are aware that Ms Chab was subsequently dismissed by the respondent on 12th August 2016. However, we were not provided with any documents in relation to this and there was a conflict of evidence between Ms Chab and the respondent as to the reason for her leaving which is not a matter relevant to the issues before us.

103. The respondent operated a scheme whereby an employee could purchase 5 days of leave which is then deducted over the course of a year from the employee's wages. At the time of bringing his claim, the claimant believed he had been charged in excess of the holiday he had taken at the time his employment ended. However, he accepts that it has been deducted pro rata. He therefore withdrew the complaint and I record it as dismissed on withdrawal.

104. The claimant refers to an incident in which he had a day's pay in respect of 4th June 2015 incorrectly deducted from his salary in respect of sickness which took him months to resolve. This was a sum of approximately £100. He was ultimately paid the sum owing. He referred us to C1 Section D. He alleges that no one else was subjected to this treatment and relies on it as one of his complaints of discrimination because of his Islamic marriage. He was not able to point to any comparator in particular. He said that he asked the respondent for information about others but they said it was confidential.

105. The claimant also replies on a further incident both as unauthorised deduction and unlawful discrimination when without warning the sum of £56.59 was deducted from his July 2016 salary in respect of "unpaid sickness". This is indicated in his pay-slip dated 31st July 2016 at R1 217. His evidence is that this relates to the 16th June 2016, that he came to work that day, did not feel well, got permission to leave and to work from home and went home. His evidence as to what way he was unwell and who he spoke to was vague. He believes he spoke to Mr Hudson and was given permission to work from home. He was not sure when he went home, although the respondent states it was at 12 noon. He said he had not prepared for this, indicating that he did not expect to be asked questions about it.

106. He claims that this deduction was not only illegal but was another incident of unlawful religion and belief discrimination because others with more sickness absences did not have deductions made from their pay. He was unable to name any comparator, having asked the respondent for this information but they had refused to provide it.

107. He accepted that at R1 44 of his terms and conditions of employment there was no entitlement to sickness pay other than at the respondent's discretion but he had always received full pay in the past when he was off sick. However, he provided no evidence of this.

108. Mr Hudson gave evidence that on 16th June 2016, he does not recall the claimant approaching him to go home. He was in a meeting and unaware that the claimant had left work until after he came out of the meeting and was told that the claimant had gone home unwell. He was unaware that the claimant was given permission to work from home.

109. At R1 117 Mr Martin wrote to the claimant on 5th August 2016 explaining why the respondent had deducted half a day's wages from his salary.

110. On balance of probability, we accept Mr Hudson's evidence. The claimant was vague as to what had happened and yet he has had over a year to prepare for this hearing. Mr Hudson's evidence was clear. The reason why the claimant had his wages deducted is set out in the respondent letter of 5th August 2016 and there is nothing to suggest that the deduction was for an improper reason.

111. The claimant alleges that he is owed unpaid commission by the respondent from two period of time.

112. The first relates to his previous period of employment with the respondent. The claimant claims that he is owed commission from 2013. However his evidence as to when and how this was owing was vague and unclear. He has referred to C1 24-29 which contains some documentation referring to the issue. Mr Caswell said in evidence that the claimant e-mailed him regarding commission that he said was outstanding, he asked Mr Wassem Hanif, the respondent's Financial Controller, to enquire into it and it turned out that there was an amount owing and this was paid to the claimant.

113. The second relates to his second period of employment and is with regard to the Sydney Living Museum. The claimant's evidence is that he entered into a commission agreement with Mr Paul Rowan, who at the time was the Senior Vice President of Argentis Systems Pty, a subsidiary company of the respondent in Australia. The agreement was that the claimant would help to co-ordinate a response to a document sent by Sydney Living Museum and in return they would do a split deal of 75/75 commission on the software and maintenance margin. We were referred to R1 221 in support of the arrangement.

114. The claimant's position is that because of the nature of the split, which in effect paid out a total of 150% commission, it could only be sanctioned with the agreement of Mr Caswell as the respondent's CEO. The claimant points to e-mails in which he provides updates of the long hours he was working in the office on this matter, as evidence that the respondent was aware of the agreement (C1 Section E).

115. Mr Caswell gave evidence that he was completely unaware of this arrangement until he saw it in the tribunal claim form. He said that Mr Rowan never spoke to him about it and neither did the claimant. Further, neither he nor the Director of Sales were copied into any e-mails about the arrangement. He added that the claimant never asked the respondent for payment, he asked Mr Rowan, who paid him out of his post sales

commission. Whilst Mr Caswell was aware of the e-mails at C1 Section E updating the Director of Sales as to the progress of that deal, he could not see anything in those e-mails mentioning that the claimant was going to be paid any commission for that work.

116. Mr Caswell's evidence is that this was an entirely private arrangement between the two of them. He explained that there is such a thing as a 75/75 split but it is only given to Fields Sales staff and is e-mailed to them. We were referred to the Sales Commission Scheme at R1 193-200. He further explained that because such a split involves playing an extra 50% commission it has to be with the express consent of the Director of Sales. He stated that if Mr Rowan had spoken to him about such a deal, he would have said no. He said in 25 years of the company, they have never paid a non-sales person a sales commission. If they had done so, this would have opened the floodgates because then everyone would claim commission whenever they introduced a company to the respondent.

117. We accept Mr Caswell's evidence in this regard.

118. With regard to the allegations of religion or belief discrimination against Mr Martin we have considered the elements of this complaint as raised by the claimant in his further information and in evidence at this hearing.

119. We were not provided with statistics as to the religious breakdown of the respondent's staff. However, we heard evidence from Mr Caswell that the respondent has a multi-cultural and multi-religious workforce. He believes that the respondent employs at least 12 Muslim staff in London. The respondent's Head of Sales in the US is married to a Muslim women. At both its premises, the respondent had made arrangements for the availability of a prayer room for use by its Muslim staff. We have no reason to doubt Mr Caswell's evidence.

120. Mr Martin denies discriminating against the claimant and is clearly offended by the allegation. He denies knowing that the claimant got married through an Islamic ceremony although admitted he knew the claimant had been a Muslim for serval years. The claimant puts his claim on knowledge of his Islamic marriage but there is no evidence to support this. On balance of probability we find that Mr Martin was not aware of his Islamic marriage.

121. The claimant referred to an incident in February or March 2015 in which a colleague had posted an offensive image of a pig mating with a Muslim. He claimed that whilst Mr Martin dealt with the matter, he did not suspend or disciplinary anyone. Mr Martin's evidence was that he was very disgusted and angry about this and that the transgressor had been disciplined. On balance of probability we prefer Mr Martin's evidence.

122. The claimant claims that a former member of the respondent's HR team, Ms Victoria Olorunsomo, discussed his past with Ms Chab. Ms Chab also states this in her evidence and further states that Ms Olorunsomo told her that Mr Martin was laughing and joking about this and was not sure why the claimant was allowed to return to work after his arrest and if he had his way, he would not have allowed him back.

123. Mr Martin gave evidence that in the past he had spoken to Ms Olorunsomo about the claimant's past. Ms Olorunsomo was a CIPD qualified HR practitioner who left the respondent's employment 18 months previously. He explained that this arose in a professional context when a complaint had been made by another member of staff about the claimant making what she thought were racist comments. It became clear to Mr Martin and his colleague that the claimant had not intended to say anything offensive and that it was just a misunderstanding. They concluded that the problem was that the claimant chose not to defuse the situation but continue to argue with the colleague on the subject. Mr Martin told Ms Olorunsomo in this context that the claimant had previously got himself into trouble not knowing when to keep his own counsel. He told her about the incident which had led to the claimant spending time in prison on remand having breach bail conditions. Mr Martin explained that when he told Ms Olorumsomo he placed his trust in her as a CIPD qualified HR practitioner to be discrete. It did not occur to him that the conversation would go any further as the claimant has claimed.

124. Whilst it is unfortunate that Ms Olorunsomo passed on this information to Ms Chab, we accept Mr Martin's evidence as to why he discussed the matter with Ms Olorunsomo and that he could not be responsible for her indiscretion and of course she no longer works for the respondent. On balance of probability we do not accept Ms Chab's further evidence as to Mr Martin's reaction and comments on telling Ms Olorumsomo.

125. The claimant alleges that Mr Martin also discussed his past with Ms Maloney who then passed this information on to Ms Patel. Mr Martin gave evidence that the first time he mentioned this to Ms Maloney was around 30th June 2016 when the claimant raised it with him. He said that Ms Patel had in fact learned about the incident from Mr Sandeep Bhambhra, who was working for the respondent at the time the incident took place. We accept Mr Martin's evidence on balance of probability and in the light of our findings as to the level of knowledge within the respondent company of what had happened in 2013 arising from it being a matter of common knowledge and through the claimant's own self-publicising of the matter.

126. Given that Paul Rowan, Bilal Kamil, Cihan Acikgoz and Rupal Patel did not attend the hearing to give evidence, we attached no weight to their witness statements.

Essential Relevant Law

127. Section 95 of the Employment Rights Act 1996:

> *'(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or*

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

128. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.'

129. Section 13 of the Equality Act 2010:

'(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

130. Section 23 of the Equality Act 2010:

'(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.'

Conclusions

Protected conversation/without prejudice discussions

131. During the course of the evidence, which as I have already indicated came out in a somewhat fragmented and cryptic way, it gradually became apparent that discussions between the parties leading to the claimant's

resignation may have been privileged. However, in order to determine whether this was so and whether privilege should apply to those discussions, given that the complaints are of constructive dismissal/forced resignation both in terms of unfair dismissal and discriminatory treatment, it was necessary to hear the evidence in full.

132. Under section 111A ERA 1996, evidence of pre-termination negotiations cannot be referred to in an ordinary unfair dismissal complaint. This covers any offer made or discussions held, before the termination of the employment in question, with a view to employment being terminated on terms agreed between the employer and the employee. It includes the fact as well as the content of such discussions. Privilege cannot be waived on such discussions. However, if the tribunal believes anything said or done in the pre-contract negotiations was improper or connected with improper behaviour, evidence of the protected conversation can be excluded only to the extent that the tribunal thinks just. ACAS has produced a Code of Practice on Settlement Agreements which sets out good practice, for example allowing the employee to bring a work colleague or trade union representative along to discussions, allowing reasonable time to consider an offer. It also sets out examples of improper conduct, including not putting undue pressure on the employee, not threatening the employee with dismissal if s/he refuses the offer.

133. Where there is an existing dispute between the parties, discussions with a view to agreeing a compromise or settlement may be covered by both the 'without prejudice' principle (ie they are privileged discussions) and section 111A. The 'without prejudice' principle will apply unless there has been some 'unambiguous impropriety', ie a party relies on privilege as a cloak to hide the true position.

134. The claimant has asserted that the discussions with regard to the termination of his employment were on the basis of a protected conversation (under section 111A). In turn, the respondent has said that the discussions were without prejudice at one point, a protected conversation at another, and then refers to resumption of the protected conversation, as the claimant called it (R1 222, 223A and 225A). The significance of this was not raised by the parties who simply adduced the evidence relating to these discussions given their potential relevance to their respective cases.

135. If these pre-termination negotiations/discussions are privileged under section 111A, then they cannot be relied on as evidence in support of the claimant's unfair dismissal complaint. If they are privileged in both senses, then they cannot be relied upon in any of the complaints. If they are only covered by section 111A, then they can be relied upon as evidence in the non-unfair dismissal complaints. If they are privileged on a without prejudice basis only, then they cannot be relied upon as evidence any of the complaints.

136. If then, this is right, and both section 111A and the without prejudice rule apply or purely the latter, then only the fact of the claimant's termination of employment as evidenced in his e-mail at R1 103B and the confirmation of

this by the respondent at R1 103B and 104 can be adduced in evidence. This would simply record that the claimant resigned.

137. Given the nature of the claimant's case with regard to constructive dismissal, forced resignation and discriminatory treatment, to exclude evidence of these discussions would present a distorted picture of the extent to which the claimant was co-operative and a willing party in the discussions arriving at his resignation on terms and also as to the referral back to Mr Martin by Mr Caswell. This would of course prejudice the respondent and to a lesser extent the claimant. If it is right in terms of section 111A only, then the pre-termination negotiations can be referred to in the non-unfair dismissal claims.

138. We find that if the pre-termination discussions were excluded under section 111A then this would in effect make what was said in those discussions improper or connected with improper behaviour given the nature of the claimant's complaints and it would therefore be unjust to exclude them.

139. If we are wrong as to this point, then what there is otherwise of the claimant's constructive dismissal/forced resignation and discriminatory dismissal complaints would not succeed in any event, for the reasons we set out below. Further, if we are wrong, then those discussions can be adduced in evidence in respect of the non-unfair dismissal complaints.

140. We further find that if the without prejudice rule applies as well or alone, it would amount to an unambiguous impropriety to allow the claimant to present a case of constructive dismissal/ forced resignation both in terms of unfairness and unlawful discrimination without revealing evidence of the pre-termination discussions.

141. If we are wrong as to this point, then, given the stance of each party with regard to the without prejudice discussions it must follow that they have waived privilege in producing the e-mails of those discussions and presenting evidence about what happened and what was said.

142. But in any event whether or not this evidence is adduced, we have found for the reasons set out below that these complaints in any event fail.

<u>Unfair Dismissal</u>

143. For the purposes of a claim of unfair dismissal there of course has to be a dismissal. This has to fall within section 95 of the Employment Rights Act 1996 ("ERA 1996"). This falls down to one of the following situations:

142.1 termination by the employer;
142.2 expiry of a fixed-term contract;
142.3 forced resignation;
142.4 resignation amounting to constructive dismissal.

144. The claimant was initially alleging that he had been constructively dismissed. However, in evidence it became clear that he is in fact alleging that the respondent forced him to resign.

145. If an employee resigns as a result of the employer saying that s/he must resign or otherwise be dismissed, this can count as a dismissal (*Sheffield v Oxford Controls Company Ltd* [1979] IRLR 133, EAT; *Sandhu v Jan de Rijk Transport Ltd* [2007] IRLR 519, CA. The difficult issue is for the employment tribunal in determining whether the resignation was forced.

146. In this case we have found that the claimant was not forced to resign but entered into mutual discussions as to the terms on which his employment would end. He resigned and in return the respondent would pay him notice pay and other monies, provided him with a standard reference and discontinue the disciplinary action against him. If we were to exclude the evidence relating to the protected conversation, then the claimant is left with a situation where he simply resigned as recorded in his e-mail at R1 103B and the respondent's confirmation at R1 103A and 104.

147. The claimant initially claimed that he was constructively dismissed. A termination of the contract of employment between the parties by the employee will constitute a dismissal within section 95(1)(c) if s/he is entitled to so terminate it because of the employer's conduct. This is colloquially and widely known as a 'constructive dismissal'.

148. The leading case is *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27, CA. As Lord Denning indicated an employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

149. Thus in order for an employee to be able to claim constructive dismissal, four conditions must be met:

    149.1 There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;

    149.2 That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his/her leaving;

    149.3 S/he must leave in response to the breach and not for some other, unconnected reason. S/he must not delay too long in terminating the contract in response to the employer's breach, otherwise S/he may be deemed to have waived the breach and agreed to vary the contract;

149.4 If an employee leaves in circumstances where these conditions are not met, s/he will simply have resigned and there will be no dismissal within the meaning of ERA 1996 and so there can be no claim of unfair dismissal.

150. In the present case, Judge Sage identified the claimant's case as set out at R1 29-30. The claimant relies on a breach of the implied term of mutual trust and confidence in the following respects: the respondent ignored his alleged concerns; continued to leave the claimant with Mr Martin; deliberably omitted witnesses supporting the clamant; pressurised him into resigning' pressured the claimant against seeking legal advice; making unauthorised deductions from his wages; alleging bullying and discrimination and conducting an unfair investigation; non-payment of commission; and alleged continued harassment, breach of privacy.

151. The House of Lords in *Mahmud v Bank of Credit and Commerce International SA* *[1997] ICR 606*, *[1997] IRLR 462* defined this as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

152. This follows the formulation adopted in a series of cases by lower courts, eg *Woods v W M Car Services (Peterborough) Ltd* *[1981] IRLR 347*, *[1981] ICR 666* per Browne-Wilkinson J, approved by the Court of Appeal in *Lewis v Motorworld Garages Ltd* *[1986] ICR 157*.

153. However, a note of caution needs to be expressed in relation to the precise terms of the formulation adopted by Lord Steyn in the *BCCI* case, as referred to above. In *Baldwin v Brighton and Hove City Council* *[2007] ICR 680*, *[2007] IRLR 232* the EAT had to consider the issue as to whether in order for there to be a breach the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view taken by the EAT was that this use of the word 'and' by Lord Steyn in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met ie it should be 'calculated or likely'.

154. In the *BCCI* case, the House of Lords in particular held that this term may be broken even if subjectively the employee's trust and confidence is not undermined in fact. It is enough that, viewed objectively, the conduct is likely to destroy or seriously damage the trust and confidence. The term may be broken even where the employee actually remains indifferent to the conduct in issue. Similarly it also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see *Omilaju v Waltham Forest London Borough Council* *[2005] IRLR 35, CA*).

155. The term not to undermine trust and confidence is of potentially wide scope. It can extend to extremely inconsiderate or thoughtless behaviour. For

example, refusing to investigate complaints promptly and reasonably is capable of falling into this category (see *British Aircraft Corp v Austin [1978] IRLR 332*, which can probably best be explained as a breach of this term). Similarly, unacceptable abuse may fall within its scope: *Palmanor Ltd v Cordon [1978] IRLR 303*, *[1978] ICR 1008*, and indeed any conduct which is 'so intolerable that it amounts to a repudiation of the contract': per Phillips J in the *Austin* case, referred to approvingly by Talbot J in *Post Office v Roberts [1980] IRLR 347*. However it needs to be stressed that the conduct does need to be repudiatory in nature in order for there to be a breach of the implied term of trust and confidence (see *Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT*). This tallies with the comments of Lord Steyn in the *BCCI* case where he refers to the conduct of the employer causing *serious damage* to the employment relationship.

156. In *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445, the Court of Appeal confirmed that the question of whether the employer has committed a fundamental breach of the contract of employment is an objective test. It is not to be judged the range of reasonable responses test which applies to the later issue of whether a dismissal is unfair, if of course a constructive dismissal is made out. Whilst the Court of Appeal acknowledged that reasonableness could be considered by the Employment Tribunal it made clear this was not applicable as a principle of law.

157. Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.

158. In *Lewis v Motorworld Garages Ltd [1985] IRLR 465, CA*, Glidewell LJ expressly commented that:

> *'… the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?'*

159. However in *Omilaju v Waltham Forest London Borough Council [2005] IRLR 35, CA,* the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It follows that although the final act may not be blameworthy or unreasonable it has to contribute something to the breach even if relatively insignificant. As a result, if the final act did not contribute or add anything to the earlier series of acts it was not necessary to examine the earlier history.

160. We were referred to the case of *GAB Robins (UK) Ltd v Triggs* [2007] IRLR 857 by the Respondent. In that case the Employment Appeal Tribunal derived the following principles from *Omilaju*:

    160.1 The final straw need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial;

    160.2 Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous;

    160.3 The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. It will, however, be an unusual case where the final straw consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test;

    160.4 An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence.

161. The EAT also found that in a true final straw case the range of reasonable responses test has no application to the employer's conduct of a grievance procedure where that conduct is the final straw relied on.

162. The difficulty for the claimant in the case before us is that the respondent was acting within its grievance and disciplinary procedures. He had the right of appeal against his grievance outcome and was exercising it. He had yet to have his disciplinary hearing.

163. If considered in evidence, he had initiated settlement discussions and when these were reopened by the respondent he became involved in them again. The respondent reacted to his concerns through Mr Hudson, Mr Martin and Mr Caswell's involvement. The claimant expressed concern about Mr Martin purely in the context of being referred back to him by Mr Caswell, but this was simply to renew possible settlement discussion and he engaged freely in these. Without this evidence there is nothing to base the claimant's contention on. With it we do not find anything untoward in the respondent's actions or Mr Martin's involvement.

164. The claimant named witnesses and they were interviewed.

165. However, the respondent concluded that the evidence did not support the claimant and Ms Chab's account of the incident on 16th June 2016.

166. The claimant was not pressured into resigning with or without consideration of the evidence arising from the pre-termination discussions. The claimant was not prevented from seeking legal advice, he was simply told that the settlement discussions were around the terms on which he would leave and that the respondent did not want to negotiate further. Without this evidence, the claimant simply was not prevented from seeking legal advice.

167. The claimant as we have found, did not suffer any unauthorised deductions. The earlier one was in 2015 and the claimant subsequently received payment. The later one was notified and the respondent had valid reasons for non-payment.

168. We have found the allegations of bullying unfounded and there is no evidence of an unfair investigation.

169. The claimant was not entitled to any commission from the respondent.

170. Whilst the claimant complained of malicious gossip, he did not allege harassment or breach of privacy in those terms. The respondent could find no general evidence of malicious gossip during his employment and certainly nothing amounting to harassment or breach of privacy. It took action against a member of staff who was sending threatening messages. The claimant's past was a matter of common knowledge due to the open plan nature of the premises at the time and his own actions in broadcasting it.

171. We therefore find that these incidents did not amount to a fundamental breach of contract either individually or cumulatively.

172. In any event the claimant resigned by mutual agreement.

173. We therefore find that the claimant was not dismissed and so his complaint of unfair dismissal fails.

Religion & Belief Discrimination

174. Under section 136 of the Equality Act 2010:

> *'…(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision….'*

175. This wording whilst slightly different from that used in the legacy legislation (section 54A of the Race Relations Act 1976 and section 63A of the Sex Discrimination Act 1975) is identical in terms of its meaning.

176. What it boils down to is the following: where the Claimant proves facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of

discrimination, the Tribunal must uphold the complaint unless the Respondent proves s/he did not commit that act.

177. With regard to the legacy legislation, the Court of Appeal in *Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster* [2005] IRLR 258 set out guidance on the stages which an Employment Tribunal should follow. Although these guidelines were expressed in terms of a sex discrimination case, the same would apply to the other types of discrimination. The Court of Appeal said the Tribunal must go through a two-stage process. At stage 1, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent had discriminated against the Claimant. In deciding whether the Claimant has proved these facts, the Employment Tribunal can take account of the Respondent's evidence. At stage 2, the Respondent must prove s/he did not commit that discrimination. Although there are two stages, Employment Tribunals generally hear all the evidence in one go, including the Respondent's explanation, before deciding whether the requirements of each stage are satisfied.

178. The full guidelines (as adapted for the Equality Act 2010) are as follows:

178.1 It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful under the 2010. These are referred to below as 'such facts';

178.2 If the Claimant does not prove such facts s/he will fail;

178.3 It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few Respondents would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 's/he would not have fitted in';

178.4 In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal;

178.5 It is important to note the word 'could' in section 136(1). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them;

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

178.7 These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire or any other questions that fall within the Equality Act 2010;

178.8 Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice;

178.9 Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on grounds of a protected characteristic or act, then the burden of proof moves to the Respondent.

178.10 It is then for the Respondent to prove that s/he did not commit, or as the case may be, is not to be treated as having committed, that act;

178.11 To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic or act, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive 97/80/EC;

178.12 That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question;

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

179. The difficulty for the claimant is that the primary facts do not support his claim of unlawful discrimination on grounds of Islamic marriage.

180. We have found that Mr Martin was unaware of his Islamic marriage.

181. The claimant complaints of a deduction from his wages on two occasions. The first one occurred before his Islamic marriage and so cannot be less favourable treatment on that basis. The second one occurred after the Islamic marriage, but we have found that Mr Martin was unaware of the claimant's Islamic marriage. The claimant has not provided any actual comparator. Ms Chab cannot be the comparator as he claims because she has also had an Islamic marriage and is not a practicing Muslim. The primary facts as found do not support the claim in any event.

182. As to the suspension and the terms of suspension. We accept that the primary facts as to the claimant's suspension being for the reasons set out by Mr Hudson. Mr Hudson took the decision to suspend. Mr Martin concurred and simply sent out a standard letter. Ms Pangiao was not suspended because they were not similar circumstances and were not comparable in any event.

183. As to the claimant's grievance outcome, the respondent's action was reasonable on the evidence before it and only supported the complaint against Ms Pangiao, who was subsequently disciplined.

184. As to the disciplinary action taken against the claimant. The process had only got as far as setting out allegations arising from the investigation carried out by Mr Martin. The claimant was yet to have a hearing and that hearing would have been in front of Mr Caswell and not Mr Martin who was not even on the face of it to be involved. Disciplinary action was taken against Ms Chab and Ms Pangiao in respect of allegations arising from these events. The claimant has not identified a comparator and on the primary facts the respondent was reasonable in taking steps to commission a disciplinary hearing against him given the nature of the allegations against him. In any event the claimant resigned before the matter went any further.

185. As we have already indicated we do not accept that the claimant was dismissed but simply resigned. There is no indication of discrimination within this with or without consideration of the protected conversation or without prejudice discussions.

186. As to the referral of the matter back to Mr Martin. We have made clear findings as to the reasons for this above. It was purely on the basis of agreeing the claimant's exit and the claimant went along with it. Even without consideration of this evidence, the claimant has not made out his case against Mr Martin of discriminatory treatment.

187. As to the allegations of bullying. We do not find that the claimant was bullied by Mr Martin. We accept that Mr Martin only told members of his HR team about the claimant's past on need to know basis for legitimate reasons. We accept that Ms Olorunsomo was very indiscrete and told Ms Chab of this but not the reaction of Mr Martin when telling her or the words she attributed to him.

188. We accept Mr Caswell's evidence that the claimant was escorted off the respondent's premises by police and it was common knowledge to staff. Further, from and by his own volition he has discussed the matter with staff and on Facebook. We can see some evidence of the taunts and offensive allegations made by staff (at the last page of C2 – which was not put by the claimant in evidence to the respondent's witnesses) but we do not see that this results from Mr Martin. As we have found Mr Martin relating the claimant's past to a member of his staff who was then indiscrete. We would comment that the respondent would do well to take steps to control the use of work phones and computers to send texts, make calls and send instant messages as well as use of social media during work time.

189. We therefore find that the claimant was not unlawfully discriminated against due to religion or belief. The complaint is dismissed.

The monetary claims

190. With regard to the claimant's complaint of commission owing from his previous period of employment which ended om 14th September 2013. This cannot succeed under section 13 ERA 1996 because it is more than 2 years before the complaint was made to the employment tribunal. Such complaints are precluded by section 23(4A) ERA 1996. It also cannot succeed as a complaint of damages for breach of contract under the Employment Tribunals (Extension of Jurisdiction) (England & Wales) Order 1994 because whilst it is an amount outstanding on termination of employment, it is not outstanding on termination of this employment. The complaint for earlier commission therefore fails and is dismissed.

191. In view of our above findings, we do not accept that the claimant has suffered any authorised deductions from pay or is entitled to damages for breach of contract in respect of sick pay or the later complaint of commission owing in respect of the Sydney Living Museum. The complaints are dismissed.

192. The claimant's complaint in respect of holiday pay has been dismissed on withdrawal.

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Employment Judge Tsamados
17th July 2018