



EMPLOYMENT TRIBUNALS

Claimant: Mrs H Shaw

Respondent: Graphictrail Limited

Heard at: Manchester **On:** 20-22 March & (in chambers) 31 May 2019

Before: Employment Judge Wardle
Mrs C Bowman
Ms V Worthington

Representation

Claimant: In person (assisted by Ms T Lee)

Respondent: Mr Flood - Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's complaints of constructive unfair dismissal, of direct discrimination because of the protected characteristic of sex and of harassment related to the protected characteristic of sex are not well-founded.

REASONS

1. By her claim form the claimant has brought a complaint of constructive unfair dismissal and ticked the box saying that she has been discriminated against on the grounds of sex. Subsequently, during the period when she was legally represented her representative advised that she also wished to bring a complaint of sex related harassment and that an application would be made at the case management hearing listed for 20 July 2018 to amend the claim. In the event it transpired that the proposed complaint of harassment was confined to the matters already referred to in the claim form.
2. At the aforementioned hearing it was established by Judge Aspden, after

discussion with the claimant that the acts and/or omissions on the part of the respondent that she relies upon as constituting either harassment related to sex or direct sex discrimination are as follows: (a) on or around 1 November David Scialom criticised her without good cause and in an inappropriate manner by shouting out across the pharmacy in front of the other staff "who parked the blue Fiat car (a company vehicle) up in front of the garage forecourt last night?" knowing that it was her who had done so (b) after that incident Kanish Patel failed to support her after she spoke to him about it (c) on 9 November 2017 Mr Scialom: (i) without good cause and in an inappropriate manner criticised her for parking in the alley way behind the chemist by writing across her delivery sheet in large letters the words "do not leave cars in the passageway at any time please (second warning) (no excuses) and by ordering her in an angry tone of voice and in front of other staff to move her vehicle immediately (ii) without good cause made a sarcastic remark to her after she returned from finding a parking space saying "you took your time, where have you been all this time?" and (iii) continued to berate and shout at her from the door of the pharmacy notwithstanding that she was upset (d) after those incidents Nailesh Patel and Kanish Patel failed to support her after she spoke with Nailesh Patel about them on 9 November 2017 and (e) on 15 November 2017 Mr Scialom (i) demanded that she apologise to him saying that he had had complaints from neighbours; that if she did not apologise he would make her apologise in writing; that she should not cross him because she would be sorry and speaking to her like a two year old (ii) asserted that the claimant had committed gross misconduct and told her not to ask for a reference both within earshot of staff and passers by.

3. By its response the respondent has denied the complaints in their entirety.
4. The Tribunal heard evidence from the claimant and on behalf of the respondent from Mr David Scialom, former owner of the Pharmacy and Locum Pharmacist and Mr Nailesh Patel, owner of the Pharmacy at the material time. Each of the witnesses gave their evidence by written statements, which were supplemented by oral responses to questions posed. We also admitted into evidence three statements from Councillor Ian Roberts, Gina Gibson and Belinda Priestly, the contents of which were agreed by the respondent going as they did solely to the difficulty in parking near the respondent's premises.
5. We also had before us documents in the form of a bundle contained in two lever-arch files running to 679 pages, which we marked as "R1".
6. The claimant had also sought to adduce witness statements from Peter Shaw, her husband; Theresa Lee, who assisted her with the presentation of her case; Shelley Jefferies; Sue Diggle; Julie Preston and Jackie Morton who were all former employees of the respondent. However at the outset of the hearing it was submitted by Mr Flood that the evidence which the claimant proposed to give by these witness statements fell into four broad categories as follows: (i) evidence that was potentially relevant but should nonetheless be ruled inadmissible (ii) evidence that was irrelevant and therefore inadmissible (iii) evidence that was so personally critical of Mr Scialom as to

go well beyond what she had to prove to succeed with her complaints and should be ruled inadmissible and (iv) evidence that could be agreed.

7. Having taken the Tribunal through the various statements Mr Flood contended as follows: (a) there was no relevant evidence within the statements of Theresa Lee and Shelley Jeffries and they should not be admitted (b) the statement of Jackie Morton contained a number of disparate allegations against Mr Scialom that did not relate to the factual nexus of the case; amounted to a character assassination and should not be admitted (c) there was potentially relevant evidence within the witness statement of Julie Preston, but as it related to historical matters relating to the termination of her contract involving Mr Scialom and his wife and did not relate directly to the issues set out in the Case Management Order (CMO), the respondent was taken by surprise by it, which were it to be admitted would require an adjournment in order that statements could be taken from Mr Scialom and his wife to rebut it and in such circumstances it should not be admitted having regard to the overriding objective to deal with cases fairly and justly and in particular with a view to avoiding delay, so far as compatible with proper consideration of the issues and saving expense (d) the statements of Sue Diggle and Peter Shaw, whilst containing some evidence that was irrelevant did also contain some admissible evidence and could be admitted.
8. Furthermore Mr Flood referred us to portions of the claimant's evidence and that of her husband Mr Shaw, which he submitted amounted to personal attacks on Mr Scialom, which went well beyond the matters that she was required to prove and to large sections of her evidence that did not relate to the matters set out in the CMO, in view of which he sought our consent to proceed by:(i) ruling all relevant portions of witness statements that made personal attacks on Mr Scialom inadmissible and thereafter (ii) permitting the claimant and Mr Shaw to swear to the remaining portions of their witness statements but not requiring the respondent to cross-examine them on those portions of their witness statements that were not relevant to the issues set out in the CMO.
9. Having been reminded of our powers to control evidence by reference to the case of HSBC v Gillespie [2011] ICR 192 to ensure that evidence is relevant to the issues requiring determination and having received submissions by Ms Lee opposing any limitation on the claimant's witness evidence on the basis principally that it was all of probative value we decided after retiring to consider matters that having regard to the core of the claimant's case as distilled at the CMO and the hearing time left available to us after lengthy reading time that there was considerable force in Mr Flood's submissions on admissibility and that the overriding objective of dealing with cases fairly and justly and in particular in a way that was proportionate to the complexity and importance of the issues and that would avoid delay, so far as compatible with proper consideration of the issues would be best served by proceeding in the manner proposed by him.
10. In regard to Mr Shaw and Ms Diggle, whose statements were to be admitted neither of them in fact attended subsequently to give evidence and indeed

both of the statements were requested to be withdrawn from evidence by the claimant.

11. There was insufficient time to receive the parties' closing submissions before the close of the third and final day of hearing and the parties were given the option of making these in writing, which they were agreeable to do and they were directed to file them by 12 April 2019 in circumstances where the Tribunal's judgment would inevitably be reserved. We later sat in chambers on 31 May 2019 when we were able having regard to the evidence, the submissions and the applicable law to reach conclusions on the matters requiring determination by us.
12. Having heard and considered the evidence we found the following facts.

Facts

13. The claimant was employed by the respondent as one of three drivers for the purpose of delivering prescriptions to customers in different local areas from a pharmacy in Cheadle. She had fulfilled this role from 6 January 2006 transferring from the employment of Mr Scialom, who operated the pharmacy as a sole trader in January 2014, under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to the respondent upon the sale of the business to it. She worked five days a week Monday to Friday between the hours of 13.00 and 18.00. Her employment terminated on 15 November 2017 by reason of her resignation without notice.
14. The respondent is a company that runs a pharmacy business called Singers Chemist from premises at 15 Church Road in Gatley within the Cheadle area. It is owned by Mr Nailesh Patel. The shop was managed at the material time by Mr Kanish Patel. Following the sale of the business to Mr Nailesh Patel in 2014 Mr Scialom retained ownership of the premises, which included three parking spaces behind it in an alleyway running behind all of the shops on the row to an opening at both ends. The respondent took a lease of the premises. In regard to the three parking spaces it was Mr Scialom's evidence that Mr Nailesh Patel allowed him to manage their use and that he used one of them whilst attending the pharmacy; his tenant in the flat at 13 Church Road was permitted to park in one of them after 6.00 p.m. until 8.30 a.m. and that the third space was used by suppliers of pharmaceuticals.
15. In addition to Singers Chemist Mr Scialom owned the adjacent premises with associated parking spaces in the alleyway and a garage with a forecourt lying at one end of the alleyway, which was of single vehicle width.
16. Mr Scialom also continued to attend at Singers Chemist following his sale of the business working as and when required as a locum dispensing pharmacist usually when Mr Kanish Patel was elsewhere.
17. The events which gave rise to the claimant's complaints had as their origin a change of practice by the respondent in the second half of 2017. Up until mid 2017 the respondent had employed three delivery drivers, comprising the

claimant, a man referred to as Sotos and another man by the name of Peter Coates to deliver prescriptions, each of whom were provided with a business vehicle, which they would take home with them at the end of their shift. In regard to loading they were allowed to park up in the abovementioned alley way behind the shop. As regards their respective delivery hours it was understood that Mr Coates did mornings between 9.00 and 12.00 and Sotos and the claimant did afternoons with the former starting around 12.00/12.30 and the latter at 13.00.

18. In the autumn of 2017 one of the three delivery cars broke down and the respondent decided not to repair it, choosing instead to share the two remaining cars between the three drivers given that they worked different shifts meaning that under the old system vehicles would be unused for parts of the day. According to the respondent's ET3 and Mr Nailesh Patel's evidence the vehicle's breakdown coincided with a downturn in work which necessitated the making of savings.
19. Reference is made in the ET3 to the claimant being asked to share a company vehicle with Mr Coates as, after a trial of him and Sotos sharing, her hours were found to be a better fit.
20. On the claimant's case according to her ET1 the problem presented by the two cars/three drivers scenario was initially addressed by Mr Coates making an arrangement whereby he used his own car and claimed expenses from the business but an issue arose as his expenses were higher than had been expected, which led Mr Nailesh Patel to decide that he would share a business car with Sotos. However, she says, Sotos was unhappy with this arrangement because within a very short time she came in following a weekend, which she believes may have been the first following the decision for Mr Coates and Sotos to share to be told that they had decided that it was her who would have to share with Mr Coates for the reason that if he was delayed with his deliveries Sotos would have to wait around, which would be less of an issue for her with her slightly later starting time of 13.00. She says further that the arrangement was that she was to take the car home at the end of her shift and that Mr Coates would pick it up from her house the next morning to take account of the parking difficulties in Gatley but that after a few days he became disgruntled that he had to come 1.5 miles out of his way to pick up and then drop off the car after his shift, which led to Mr Kanish Patel informing her that she was to leave the car in Gatley at night for Mr Coates to pick up in the morning.
21. On her evidence, however, she stated that she was mistaken in regard to the duration of the trialing of the arrangement involving Mr Coates picking up and dropping off the vehicle at her home having discovered that she was on sick leave on 30 October 2017 following a period of holiday between 20 and 27 October 2017, which meant that it was only on one occasion on 31 October 2017 that Mr Coates dropped off the vehicle for her at the end of his shift, in support of which there was a text message at page 213 from her to Ginny Davies, the Transport Manager that morning informing her that she was going to be in and needed Mr Coates to drop her car off before 1.00 p.m. In terms of

the instruction given to her to leave the car in Gatley at night after her shift she says that this was given to her by Mr Kanish Patel on 31 October 2017, her first day back and that when she asked where she was to leave it he told her to leave it on the forecourt of the garage at the end of the alleyway running behind the shop. These premises were owned by Mr Scialom but leased out by him. At the end of her shift in accordance with his suggestion she parked up the car on the garage forecourt for collection by Mr Coates the next morning.

22. On 1 November 2017 when the claimant arrived at work at work at 1.00 p.m. she says that Mr Scialom shouted out across the pharmacy "who parked the blue Fiat car on the garage forecourt last night?" She claims that he knew that it had been her and that when she replied that she had he told her that she had no right to do so as he had not given permission, which led her to say that Mr Kanish Patel had told her to park there in response to which he said that he had no right to do that. Such conversation is not disputed by the respondent. Following this verbal exchange the claimant tried to send a text message to Mr Kanish Patel that afternoon stating "Hi K, r u in later. Need to discuss the car situation. this is getting ridiculous!!!! I'm not a happy bunny! I'm not getting at you personally, but we need to have some resolution. I feel that I'm been penalised for something I've not done. Cheers H." The message was not delivered but when she got back from her delivery round she spoke with him in the pharmacy and according to her evidence he told her that he had heard all about it and that in the future she mustn't park there but to find parking in the adjacent streets outside residential properties overnight.
23. By her further evidence she says that the incident of 1 November 2017 was dealt with adding that it was minor and petty on the part of David Scialom in acting completely disproportionately to the offence and that it was a closed matter until he referred to it as a first warning on 9 November 2017. Her reference to this date was in the context of her having parked up the delivery vehicle overnight in the alleyway behind the pharmacy after she says that she had driven around for a considerable while and had been unable to find a parking spot after she finished her shift on the evening of 8 November 2017. The next day when the claimant attended for work at 1.00 p.m. she found that Mr Scialom had written on her delivery sheet in capitals "DO NOT LEAVE CARS PARKED IN THE PASSAGE WAY AT ANYTIME PLEASE (2ND WARNING) (NO EXCUSES)". On her evidence she states that she looked at it and that Mr Scialom said that he had had complaints from the resident to him that morning, in response to which she explained that there had just been nowhere else to park before mentioning that her own car was outside at the back door as she had called into to collect the keys (for the delivery vehicle). This she says caused Mr Scialom to turn ballistic before opening the back door and angrily shouting at her to move her vehicle immediately in front of other members of staff, which she found humiliating. On her return with the business vehicle, which she parked up at the back door to the pharmacy in order to load she claims that Mr Scialom sarcastically remarked "you took your time, where have you been all this time" to which she responded "trying to find somewhere to park my car and find the Fiat" and that he continued to berate her as she was loading shouting at her from the back door despite

seeing how upset she was, which caused her to hold her hand up two or three times and to ask him to stop before driving away.

24. In relation to this alleged altercation there is a dispute between the parties as whilst Mr Scialom accepts that he did write the message on the claimant's delivery sheet because he did not expect to be around to challenge her directly when she started her shift at 1.00 p.m. and that he did tell her to remove her car from the alleyway immediately he refutes that he said it angrily. In relation to the altercation's alleged continuation when the claimant returned with the business vehicle he also accepts that he did ask her what took her so long as she took an inordinately long time to do so about 30 minutes but he denies that he berated her at all claiming rather that it was the claimant who responded aggressively shouting "I'm not talking to you" and "stop going on at me" in front of other staff and who proceeded to slam doors and chuck things about and that he was quite embarrassed by the commotion which led him to say "fine" before retreating from the situation.
25. During the period estimated by Mr Scialom to be 30 minutes, which it should be said the claimant thought was more like 20 minutes whilst she was parking her vehicle away from the alleyway and locating the business vehicle her phone records at page 204 suggest if Mr Scialom is right that she made three calls to her husband timed at 13:06:03, 13:19:27 and 13:27:17 and one to Mr Coates at 13:28:15 with a combined duration of 11 minutes and 5 seconds. She says that she phoned her husband because she was distressed by Mr Scialom's behaviour towards her, which having regard to the timings of the calls had to relate solely to his requiring her to move her vehicle and Mr Coates to ask if Mr Scialom had ever spoken to him about parking the (business) car to which he said he had not. The records also show that she rang Mr Nailesh Patel at 13:41:34 after according to her ET1 she had set off on her deliveries. On her account she says she asked him if he was aware of the situation and that he appeared to be very surprised to hear about it before asking why Mr Scialom was behaving like that and what had changed over the last couple of weeks before expressing surprise that Mr Scialom had behaved in this manner and stating that he would have a word with Mr Kanish Patel when he got in later that day to find out what the problem was.
26. Upon her return to the pharmacy that evening the claimant says according to her ET1 that Mr Kanish Patel asked her to go upstairs and stated that maybe he had not made himself clear and that we (the drivers) were not allowed to park any of the business vehicles anywhere at the back of the shop or on the forecourt of the garage in the future apart from when we were loading or unloading and that other than that we had to park offsite.
27. On 15 November 2017 on the claimant's arrival in work she says in her ET1 that Mr Scialom asked her if she had anything to say to him, to which she replied that "No, she didn't", which saw him telling her that he needed to speak to her upstairs, where, with a smirk on his face, he asked her who she thought he was, to which she responded that he was a pharmacist on duty. She says that he then asked what she thought he did, to which she responded covering the pharmacy and that he then asked what she thought

the pharmacist job entailed while he was on duty before telling her that he was responsible for the pharmacy on behalf of the company, which included the parking. She says that he then said that she had crossed him a number of times whilst she had worked there in regard to the parking of vehicles and that she shouldn't cross him or she would be sorry before saying that she should apologise for the way she had spoken to him the previous week to which she responded that she wouldn't because of the way that he had spoken to her in front of the other members of staff telling him that this was totally unacceptable. She says that she then asked him why he had written the message across her clipboard, to which he replied to get the message across that she could not park at the back of the shop or in the alleyway as he had had complaints from neighbours saying that the Fiat business vehicle had blocked the alleyway. She says further that she told him that she had spoken to Mr Nailesh Patel and that he wanted to know what he had said, which saw her saying that Nailesh had said that he would speak to Mr Kanish Patel who had then spoken to me about not leaving their car near the pharmacy. She says that Mr Scialom continued on about her not crossing him as he would not want to see him in a bad mood and not to push him any further as it could be very bad for her if she didn't apologise and that he would make her apologise in writing, which caused her to say he could stick the job and saw him say that if she was leaving she was to empty the contents of the vehicle, which she did and that as she was walking out of the back of the pharmacy he was at the backdoor saying that this was gross misconduct and she was not to ask him for a reference for any other job. In her evidence in chief the claimant stated in relation to this encounter at paragraph 12(xxv) that Mr Scialom told her that the purpose of asking her upstairs was to advise her that she must respect the rules and not raise her voice in future and that she was then without provocation supposed to have got angry and said "stuff your job", which in contradiction of her ET1 she claimed she would never say, in response to which she says he advised her to stop and think and discuss the issue but she left in a temper. In relation to the words used by the claimant in resigning she accepted in re-examination that she had said "stick the job" as stated in her ET1.

28. This encounter on 15 November 2017 between Mr Scialom and the claimant was another area of dispute between the parties. On Mr Scialom's evidence in chief he says that this day was his next encounter with the claimant after the commotion of 9 November 2017, when it should be said he wrongly attributed this to the claimant having left the pharmacy vehicle on the garage forecourt overnight rather than in the alleyway and that when she arrived for work on the 15th he approached her and asked her if she had something to say to him, to which she replied "No, why?" and which led him to say "Well, I have got something to say to you, can we go upstairs please?, where upon acceptance of his invitation he said to her "Helen, you were very rude to me; you undermined my authority in front of everybody and I expect an apology, unless we cannot move forward. I am the pharmacist in charge here and it is my job to direct you, including where not to park. The way that you screamed at me is totally unacceptable and I demand an apology." He went on to say that he did not remember how the conversation progressed from that point but that his final contribution was something like "Ok, let's leave it like that then"

and that he then recalled her saying "I am not apologising to you, you can stuff your fucking job!" and tossed the Fiat's keys towards me, his reaction to which was to try to calm the situation by saying "please be aware of the consequences of your actions", which was as far as he could remember the last of it and the claimant then left the premises.

29. The claimant upon leaving the premises telephoned Mr Nailesh Patel at 13:12:16 according to her phone records and in a conversation lasting 1 minute and 26 seconds informed him according to her ET1 that she had quit her job with immediate effect as the situation had become untenable as she could not stand to work there any more as Mr Scialom's behaviour had become threatening and aggressive and that she thought that he may have some personal grievance or vendetta against her as every time he was in the pharmacy his behaviour towards her was always challenging and that it was a personal attack, in response to which he said he was sorry to hear that and that he would have a word with Mr Scialom to find out what had been going on and would phone her back.
30. On Mr Nailesh Patel's account as given in his evidence in chief he acknowledged that the claimant had called him and had said that David (Mr Scialom) would not let her park on site and that she was not having that and that he asked her why she had not called him before resigning, in response to which she did not answer but began to cry and said that she would call him back later, which she never did. He says further that he telephoned Mr Kanish Patel to ascertain what had happened and that he suggested to him that if the claimant was serious about resigning she should do so in writing.
31. On the respondent's case according to its ET3 Mr Kanish Patel did contact the claimant on 16 November 2017 to see if she was ok and to ask for written confirmation of her resignation, which she failed to supply. The only further communication by the respondent with her was in response to a text that she sent to Mr Nailesh Patel on 17 November 2017, by which she asked if she would be getting paid for the work that she had done from 1 to 15 November 2017 and about any outstanding holiday pay, in response to which he confirmed by text that she would be getting paid and that this would be done at the end of the month, which saw her supplying Mr Kanish Patel with her hours in response to a call from him on or about 22 November 2017.
32. Following her resignation a claim to the Employment Tribunals was subsequently presented by the claimant on 20 February 2018 after an Early Conciliation (EC) request was made on 19 January 2017 and an EC Certificate was issued on 26 January 2018, which was responded to by the respondent within the prescribed period on 21 March 2018.

Law

33. In regard to the constructive unfair dismissal complaint the relevant law is to be found in the Employment Rights Act 1996 (the 1996 Act). Section 95 (1)(c) provides that an employee is dismissed by his employer 'if the employee terminates the contract under which he is employed (with or without notice) in

circumstances in which he is entitled to terminate without notice by reason of the employer's conduct'. The conduct of an employer giving rise to a constructive dismissal must involve a repudiatory breach of contract i.e. a serious breach going to the root of the contract of employment which shows an intention no longer to be bound by one or more essential terms of that contract.

34. Individual actions by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining trust and confidence. In this claim the claimant relies upon this implied term as having been breached. In this regard a fundamental breach of contract will occur if the employer, without reasonable and proper cause, conducts itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties'. In assessing whether there has been a breach of this implied term the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.
35. In order to claim constructive unfair dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning so that he did not affirm the contract and lose the right to claim constructive dismissal.
36. The relevant law for the purposes of the discrimination complaints is to be found in the Equality Act 2010 (the 2010 Act). Section 4 lists 'sex' as being among the protected characteristics.
37. Section 13(1) defines direct discrimination as follows: '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.' It therefore involves the requirement for a real or hypothetical comparator to whom the relevant protected characteristic does not apply and for the purposes of the comparison, pursuant to section 23(1), there must be 'no material difference between the circumstances relating to each case'.
38. Section 136(2) and (3) dealing with the burden of proof provides that, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred, unless A shows that he or she did not contravene the provision.
39. Section 26(1) defines harassment as follows: 'A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B'. Where the conduct is intentional i.e. it is carried out with a purpose referred to in sub-section (1)(b) considerations of reasonableness do not arise. In deciding, whether in the absence of intention,

the conduct has the effect referred to in sub-section (1)(b) section 26(4) provides that each of the following must be taken into account – (a) the perception of B (b) the other circumstances of the case (c) whether it is reasonable for the conduct to have that effect.

Conclusions

40. Applying the law to the facts as found the Tribunal considered first of all the complaint of direct sex discrimination. In order for such a claim to succeed there has to be less favourable treatment as compared to others not sharing the claimant's protected characteristic and who are not in materially different circumstances from her. The acts and/or omissions upon which she relies as clarified with her by Judge Aspden at the CMO in support of this complaint are those set out in paragraph 2 above involving her being criticised unjustly by Mr Scialom for the way in which she parked up the business vehicle overnight on 1 and 9 November 2017 on the forecourt of the garage and in the alleyway at the rear of the pharmacy respectively and Mr Kanish Patel failing to support her after she spoke to him on the first occasion and Mr Nailesh Patel and Mr Kanish Patel both failing to support her after she spoke to Nailesh on the second occasion. Her case is that the other two male drivers, Sotos and Mr Coates were not subjected to the same criticism and in the alternative she says that they would not have treated a hypothetical male comparator in the same way.
41. In terms of her actual comparators i.e. Sotos and Mr Coates we considered that the claimant was in some difficulty in relying on them as, whilst they did not share the claimant's protected characteristic of her sex there was a material difference between the circumstances relating to their responsibility for the overnight parking of the business vehicles in the vicinity of the pharmacy in that neither of them had this responsibility with Sotos taking his vehicle home with him and Mr Coates leaving his vehicle for the claimant to collect at the end of his morning shift. Quite simply under the new practice of the second car being shared by Mr Coates and the claimant with effect from 31 October 2017 the responsibility was uniquely the claimant's with the consequence for her that any complaint based on them as comparators is misconceived and has to fail.
42. In addition we did not consider that her alternative argument that a hypothetical male comparator would not have been treated in the same way as her was made out by her as there was nothing put to the respondent's witnesses in support of this contention and no evidence before us to show that had she been male and left the business vehicle in the two locations that had provoked the criticism from Mr Scialom that such a hypothetical male driver would have been treated any differently and escaped criticism.
43. Accordingly we concluded that her complaint of direct discrimination on the grounds of the protected characteristic of sex was not well-founded.
44. Turning next to her complaint of harassment the claimant says that the above-mentioned acts and/or omissions also constitute this head of complaint as

amounting to unwanted conduct related to the relevant protected characteristic of sex and that the conduct had the purpose or effect of (i) violating her dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Had the incidents on 1, 9 and 15 November 2017 involving Mr Scialom happened in the way that the claimant has claimed we considered that they could have had such effect but we were unconvinced that they unfolded in quite the way that she described.

45. Taking the incidences in turn the claimant's issue with Mr Scialom asking on 1 November 2017 who had parked the Fiat on the garage forecourt overnight was that he had done this gratuitously as he knew she had done it. We considered however given that Mr Scialom only worked periodically in the pharmacy and that the new practice of the Fiat being shared between Mr Coates and the claimant had only begun the day before that it was certainly possible that his enquiry was a genuine one and not designed to target the claimant.
46. Turning to 9 November 2017 the real dispute between the parties lies not in the claimant being reprimanded for a second time about the manner of her overnight parking and her being asked to remove her private vehicle from behind the pharmacy immediately, which Mr Scialom accepts he did but in the way in which he conducted himself after she returned to the shop to load up the business vehicle. It is her case that he continued to berate her and stood shouting at her from the backdoor despite seeing that she was upset and that she held up her hand three or four times asking him to stop. Such version of events is however denied by Mr Scialom and rather it is his evidence that the claimant was aggressive towards him shouting "I'm not talking to you" and "stop going on at me" in front of other staff in the shop. It was suggested in submissions by the respondent that the key to which version is accurate may be found in what the claimant says in her witness statement dealing with 15 November 2017 when she says at paragraph 12(xxiv) that her heart sank and her stomach turned over when she saw his car as she drove into work because she knew that he would not let it go. Given that on her case she was the innocent party such apprehension on her part it was submitted made no sense. It was also submitted that a further indication of what had happened on 9 November 2017 was to be found in the contents of the claimant's ET1 where she stated that Mr Scialom said that she should apologise for the way she had spoken to him the previous week but that she said that she would not because of the way in which he had spoken to her in front of other members of staff, which it was submitted pointed to the claimant having something to apologise for and which was reinforced by the claimant's description of the conversation Mr Scialom had with her on 15 November 2017 where he sought her understanding of his position and responsibility which was consistent with his feeling that she had spoken disrespectfully to him previously. We considered that these points derived from the claimant's own evidence were suggestive of Mr Scialom's evidence being more reliable than that of her in the way matters unfolded on 9 November 2017.
47. Dealing finally with the incidence of 15 November 2017 the claimant's issue with this as set out in her ET1 was related principally to Mr Scialom's demand

for an apology and his threat that if she did not provide one he would make her apologise in writing, which led her to say that he could stick the job. Aside from claiming that Mr Scialom warned her against crossing him and stated that she would be sorry if she did, which claim was not repeated in her witness evidence there is nothing in her version of events up to the point of her verbally resigning that suggested that he was in any way angry or aggressive towards her and rather she acknowledges on her own evidence that she left in a temper.

48. We did not consider therefore that the claimant had been subjected to a course of conduct constituting sexual harassment as the treatment she received in the form of the reprimand for parking in the alleyway and the requiring of an apology from her were not related to her sex but to her failing to adhere to a legitimate instruction regarding the parking of the business vehicle overnight and her behaviour on 9 November 2017 when the evidence suggested she was not prepared to accept Mr Scialom's authority regarding pharmacy matters.
49. We next considered her complaint of constructive unfair dismissal. As stated this was based on an alleged breach of the implied term of mutual trust and confidence. Her case in this regard is that the acts and/or omissions outlined at paragraph 2 above cumulatively amounted to such a breach. In this regard for the reasons stated above we did not accept that the incidences of 9 and 15 November 2017 happened as claimed by her and having regard to the fact that the claimant had breached Mr Kanish Patel's instruction given on 1 November 2017 to find parking in the adjacent streets outside residential properties by parking in the alleyway behind the shop on the evening of 8 November 2017 and was not accepting of Mr Scialom's authority to take this up with her such as to require him to seek an apology from her for her behaviour on 9 November 2017 we were unable to accept that Mr Scialom's actions in requesting this, which triggered her resignation were calculated or likely to destroy or seriously damage the relationship of confidence and trust.
50. Thus, whilst we considered that the overnight parking arrangements for the business vehicle used by the claimant could perhaps have been handled more sensibly by the respondent given that it appeared that only one of the three spaces behind the pharmacy would have been taken after 6.00 p.m. by the tenant of 13 Church Road and that it must have been frustrating for the claimant to have to trawl round what was accepted to be a busy area to try to find a suitable parking space at the end of her shift over the period in question we were unable to find that the respondent in requiring her to do so and taking matters up with her when she failed to comply with its instruction before requiring her to apologise for her disrespectfulness towards Mr Scialom had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. This is, it has to be said, a very high threshold to be surmounted by an employee and we did not consider on the evidence before us that the claimant had surmounted it.
51. We therefore concluded that she had failed to establish that she was

constructively dismissed and that her complaint in this regard is not well-founded.

Employment Judge Wardle

24 June 2019

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

28 June 2019

.....
.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS