



EMPLOYMENT TRIBUNALS

Claimant: Mr W Hoch

Respondent: Thor Atkinson Steel Fabrications Limited

HELD AT: Carlisle

ON: 15 – 18 April 2019

BEFORE: Employment Judge B Hodgson

Mrs C Bowman

Mr C Cunningham

REPRESENTATION

Claimant: Miss L Amartey, Counsel

Respondent: Mr W Lane, Solicitor

JUDGMENT having been sent to the parties on 3 May 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form presented on 23 May 2018 the claimant brought complaints of unfair dismissal and harassment related to the protected characteristic of race
2. Permission to amend the claim to include a further complaint of harassment related to the protected characteristic of sexual orientation was granted at a Preliminary Hearing held on 30 July 2018 ("the PH")

Issues

3. At the PH, the following issues (as to liability) were identified to be determined at the final hearing ("the Hearing"). As will be seen, these issues were refined to a degree within the parties' closing submissions
4. *Unfair dismissal claim*
 - 4.1. Was the claimant dismissed? In order to decide this issue the Tribunal must decide:
 - 4.1.1. did the respondent commit a repudiatory breach of the claimant's contract of employment? The claimant's case is that the respondent's conduct as set out in section 8.2 of the claim amounted to a breach of the implied term of trust and confidence *[this being agreed between the parties at the outset of the Hearing as extended as set out in paragraph 4 of the Amended Grounds of Complaint which post-date the PH]*
 - 4.1.2. did the claimant resign in response to that breach?
 - 4.1.3. did the claimant delay in resigning such that it can be held that the breach was waived and the contract affirmed?
 - 4.2. What was the reason for the dismissal? The respondent does not assert a potentially fair reason if the Tribunal finds that the claimant was dismissed. The Tribunal will therefore hold that any such dismissal was unfair.
5. *Section 26: Harassment related to race*
 - 5.1. Did the respondent engaged in unwanted conduct as set out in section 8.2 of the claim insofar as it comprised racist language? *[this being agreed between the parties at the outset of the Hearing as extended as set out in paragraph 4 of the Amended Grounds of Complaint which post-date the PH]*
 - 5.2. Was the conduct related to the claimant's protected characteristic of race?
 - 5.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
 - 5.4. If not, did the conduct have the effect of violating the claimant's dignity or creating such an environment for the claimant, having regard to: the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?
6. *Section 26: Harassment related to sexual orientation*
 - 6.1. Did the respondent engage in unwanted conduct as follows:
 - 6.1.1. using the terms "Gay", "Gay Cunt" and saying "Get back to your Wendy House" to the claimant;
 - 6.1.2. these words are alleged to have been uttered by Mr Thor Atkinson and Mr Ray Hill

- 6.1.3. The claimant's case is that this behaviour started about a year after his employment began and continued until his resignation
 - 6.2. Was the conduct related to the perception that the claimant was gay? For the avoidance of doubt the claimant informed the Tribunal that he is not gay
 - 6.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
 - 6.4. If not, did the conduct have the effect of violating the claimant's dignity or creating such an environment for the claimant, having regard to: the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?
7. *Time/limitation issues*
- 7.1. The claim form was presented on 23 May 2018. Bearing in mind the effects of ACAS Early Conciliation, any act or omission which took place before 10 February 2018 is potentially out of time, so that the Tribunal may not have jurisdiction
 - 7.2. It will be necessary for the Tribunal to determine in relation to the allegations of harassment when any such act occurred
 - 7.3. Can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
 - 7.4. If not, can the claimant show that it would be just and equitable for time to be extended so that the Tribunal may find that it has jurisdiction?

Facts

8. The parties agreed a bundle of documents and references in this judgment to numbered pages are to pages as numbered in such bundle
9. The claimant gave evidence on his own behalf and also called as a witness Mrs Diane Brady, a former employee of the respondent. The respondent called as witnesses ; Mr Thor Atkinson, Co-Owner and Director of the respondent; Mrs Jemma Atkinson, Co-Owner, Director and HR Manager of the respondent; Mr Ollie Hunter and Mr Ray Hill, both employees of the respondent
10. The Tribunal came to its conclusions on the following facts – limited to matters relevant or material to the issues - on the balance of probabilities having considered all of the evidence before it both oral and documentary
11. Credibility was a significant issue in the course of the Hearing and in the context of the Tribunal's deliberations and conclusions. The Tribunal therefore considers it

appropriate to set out its general conclusions with regard to the credibility of the various witnesses from whom it heard

12. The claimant and Mrs Brady gave their evidence in a coherent, consistent and credible manner. This was, however, not the case in respect of the respondent's witnesses, particularly Mr and Mrs Atkinson
13. Specific issues of credibility will be expanded upon further within this judgment and, notwithstanding its general conclusions as to credibility, the Tribunal looked at the evidence surrounding each aspect of the claims before reaching its conclusions (set out in combination of the facts stated and the Tribunal's conclusions) and did not automatically assume that in every respect the claimant or his witness evidence was to be believed in preference to that of the respondent
14. The Tribunal considers it helpful by reason of clarity to separate out the facts relevant to the various claims owing to them overlapping chronologically. There were many examples given on both sides to seek to illustrate their arguments. The Tribunal does not purport to set out each and every one of those allegations (and denials) within these reasons but did consider the entire evidence produced to it as a whole

General background

15. The respondent is a steel fabrication and quarrying services business with a total staff numbering approximately 120
16. In terms of direct HR support, the respondent previously had no dedicated staff but Mrs Atkinson, who states that she has extensive previous experience of working in HR and is a Chartered Member of the Chartered Institute of Personnel and Development, joined the company as HR Manager in December 2017 although the respondent continued to draw upon external advice and support in this regard
17. The claimant was employed by the respondent as a Buyer from 1 December 2014. The respondent produced to the Tribunal a copy of what is said to be the claimant's signed Statement of Main Terms of Employment (pages 75 – 76). The claimant denies in fact having signed such a document. For reasons which will follow, the Tribunal finds it unnecessary to determine the genuineness or otherwise of the document
18. The claimant's employment ended by reason of his resignation with immediate effect on 30 April 2018 (pages 142 – 143)

Harassment related to race

19. The claimant's evidence was that after about a year of working for the respondent, Mr Atkinson started to address him using racially offensive terms such as "foreign cunt", "nigger/niggur", "wog" and "kaffir/kafer/caffa" and that, right up to the time of his employment terminating, Mr Atkinson would address the claimant using the terms "wog" and "foreign cunt" more often than addressing him by his name. Further, that Mr

Atkinson would often start a discussion with the claimant with the terms "dickhead, foreign cunt" or something similar

20. By way of further example, at a date unknown, the claimant recalls that Mr Atkinson responded to him answering the telephone by using the words "about time you wog, that took long enough to answer"
21. The claimant's evidence also was that he was consistently addressed as "kaffir" rather than his name by work colleagues, Mr Burrows and Mr Moulding, who were not called to give any rebuttal evidence before the Tribunal
22. A number of relevant allegations are by reference to supporting evidence produced to the Tribunal
23. On 10 August 2017, in reply to an exchange with the claimant over 'pet names', Mr Atkinson replied "you have – FOREIGN CUNT" (page 51)
24. On 30 August 2017, Mr Hunter posted a photograph on Snapchat of the claimant's head superimposed onto the body of an emaciated black child (the evidence is that the claimant's girlfriend at the time found this to be funny) (page 151A)
25. On 24 November 2017, in a voicemail message for the claimant heard by the Tribunal, Mr Atkinson simply says "foreign cunt"
26. On 22 January 2018, there was an exchange between the claimant and Mr Hunter, recorded on the claimant's mobile phone and seen by the Tribunal as follows (transcript at page 192)

Hunter Um you know when you bought my laptop

Hoch I don't like the way you're speaking to me Ollie

Hunter Alright you fucking South African fucking kaffir prick

Hoch I don't like the way you are speaking to me

Hunter Fuck you

Hoch I'm going to report you

Hunter Fucking immigrant

Hoch I'm going to report you – no this is fine I'm reporting you

Hunter [Talking over and then starts making a clicking noise with his tongue as Hoch talks]

Hoch Today is the 22 January 2018 at 11.04 am

Hunter Mud Hut, Spear

Hoch I am reporting you [clicking from Hunter again]

Hunter Lion lion lion

Hoch Carry on, carry on

[clicking noises are said by the claimant to be an attempt to imitate the sound made in the South African Xhosa language]

27. On 24 January 2018, Mr Hunter posted a photograph of the claimant's head superimposed on the body of a black African man stood next to a black African woman carrying a child with the message "Congratulations Wayne on the newborn" (page 53)
28. On 25 January 2018, in the course of a group text conversation involving the claimant and produced to the Tribunal (page 55), Mr Atkinson refers to the claimant as "caffa cunt" to which Mrs Atkinson replies "Seriously!!!! You need to stop that!!!". Mr Atkinson's reply is "which bit"
29. On 6 March 2018, Mr Hunter says to the claimant, recorded on video, "I am not making a brew for a foreigner"
30. On 15 March 2018, Mr Jake Burrows (a work colleague) sent the claimant an e-mail stating "the internet isn't working cafa" (page 57)
31. On 4 April 2018, Mr Hunter sent a text to the claimant stating "that's fine kaffa" to which the claimant replies "I don't appreciate you calling me that I'm going to report you" (page 59)

Harassment related to sexual orientation

32. The claimant's evidence was that in the early part of his employment with the respondent, he was subjected to offensive behaviour by Ms Anita Atkinson (a cousin of Mr Atkinson who then worked for the respondent) based upon a perception that he was gay (from the fact that he had used her umbrella) which he raised with the then Office Manager, Mrs Brady. Mrs Brady also had serious concerns as to Ms Atkinson's general behaviour towards the claimant and having taken external advice, Mrs Brady wrote to Ms Atkinson (page 84) setting out those concerns as to the manner in which Ms Atkinson was communicating with the claimant
33. Mrs Brady also gave evidence that she had had sight of e-mails from Mr Atkinson to the claimant using terms such as "pretty boy", "immigrant" and "gay boy" and when she challenged Mr Atkinson on these his reply was that the claimant "needed to get a fucking grip and man up"
34. The claimant's evidence was that also from around the beginning of 2016, Mr Atkinson began to address the claimant in what the claimant describes as offensive terms, calling him "gay" or "gay cunt" and telling him to "get back to my Wendy House". Mr Atkinson additionally at that time began the habit of calling the claimant to Mr Hill's office (Mr Hill being a foreman with the respondent) with the words "come here you gay cunt" which led to the claimant being regularly teased, up to the time of his departure, by members of staff (specifically Mr Hunter, Mr Burrows and Mr Moulding) as to his manner of dress and haircut
35. The claimant's evidence was that Mr Hill himself regularly used homophobic abuse towards the claimant including what are described as gay gestures and using phrases such as "what are you doing gay boy, get back to your Wendy House" and "what are you doing in your office, are you polishing your nails?"

36. Mrs Brady supported the claimant in this regard with her evidence that she herself had witnessed Mr Hill refer to the claimant as "princess", a term Mr Hill generally used to address female members of staff

Constructive dismissal

37. In addition to the allegations of harassment, the claimant also alleges that the manner in which he was treated in a more general sense amounted to a breach of the implied term of good faith relying on the following allegations
38. The claimant's evidence was that colleagues – and in particular Mr Atkinson – would regularly address him, in what may be termed excessively robust language, in addition to those comments referred to above related to race and sexual orientation
39. The nature of the claimant's job was such that he was often required to work at out of office hours. In this regard the respondent sought to rely on the content of the document headed "Statement of main terms of employment" (pages 75 – 76) which states that "you will be paid an extra 5 hours a week so you agree to be contacted out of work hours to answer questions if needed, this can be retracted at any time by either party by giving notice in writing" and "you may be required to work overtime when necessitated by needs of the business". As indicated, the claimant challenged the validity of this document. The evidence before the Tribunal however was that these terms in any event reflected the custom and practice of the manner in which the claimant worked (being the reason why he was provided with a company mobile and a home PC) and, as a consequence, would form - whether expressly or otherwise - part of his contractual terms
40. Additionally, it is accepted by the claimant that, this being a family business – and he having the skills to be employed as a "buyer" – he would be called upon not infrequently to assist Mr and Mrs Atkinson with regard to purchasing personal items and items connected with their other business interests
41. The key issue with regard to the claimant's workload was whether or not the actual workload required of him was reasonable. The claimant considered the extent of the tasks being required of him were, towards the end of his employment, becoming unrealistic and excessive
42. As a result of his concerns over his work environment, the claimant had placed his CV on a website and was contacted in February 2018 with the offer of an interview which resulted in a job offer. This was a job at a lower status and a lower rate of pay than he had with the respondent. The prospective employer required an immediate decision from the claimant. The claimant was hesitant to accept but also at that stage not clear whether he could continue working for the respondent given the circumstances surrounding him at work
43. He was due to have an extended holiday with his family in South Africa in April and therefore agreed to take the job on the basis that he was able to agree a deferred start date until after his return from holiday, the intention being to talk matters through with his family before making a final decision
44. It is alleged that, in the intervening period, there was an incident which distressed the claimant when, in an apparent reaction to the claimant's demeanour at work suggesting he was particularly down, Mr Atkinson addressed him with "What's up with you, fucking cunt, what you being moody again for? Having your period? And sulking

you fucking foreigner". When the claimant declined to reply, Mr Atkinson continued "Everyone's noticed, come on you fucking big baby what's up with you now?"

45. As a consequence of the way he was feeling as a result of his treatment at work, the claimant consulted his GP initially by telephone and then at a consultation in person. The GP notes (page 155) indicate the claimant referring to the events at work, making specific reference to Mr and Mrs Atkinson, and the effect they were having upon him
46. Prior to his departure on holiday, the claimant sought to put in place appropriate cover arrangements. Notwithstanding, Mr Atkinson entered into an e-mail exchange with the claimant whilst he was on holiday on 8, 9 and 10 April, in which the claimant endeavoured to explain the preparations he had arranged, to which Mr Atkinson's response ultimately (pages 184 - 186) was "so you FORGOT to show someone your job knowing you were going to be away for 3 weeks. Good to see how lightly you take your job role"
47. The claimant, in discussion with his family, decided that he was not prepared further to tolerate the treatment he was receiving at work and that accordingly he had to resign and take the alternative employment that was available to him
48. Upon his return from holiday, the claimant sent an e-mail of resignation with immediate effect dated 30 April (page 142). This was addressed to Mr Atkinson and included the statement that "I frequently receive unwanted conduct directly from yourself, which I find threatening, abusive, degrading, racist, and a violation of my personal self. The way in which you constantly address me and have done so over a prolonged period of time, had made me ill to the point I have had to seek medical attention"
49. The respondent's reaction was to offer a grievance hearing to be conducted by Mrs Atkinson (page 144) which, following a further exchange, was declined by the claimant who suggested that there was a conflict of interest in Mrs Atkinson conducting such a hearing and that "you cannot without bias, conduct any meeting where your husband and yourself are held as the cause". The respondent's reply was to offer as an alternative that the meeting be conducted by a friend of Mrs Atkinson who the claimant was aware had recently been employed the company as a cleaner. This was also declined by the claimant (pages 145 – 146).

Law

Harassment

50. Section 26 of the Equality Act 2010 states that:

(1) 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.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), 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

(5) the relevant protected characteristics are –

...

Race;

...

Sexual orientation

Burden of proof

51. The burden of proof in a discrimination claims rests initially with the claimant but section 136 of the Equality Act provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has acted in a way that is unlawful, the Tribunal must uphold the complaint unless the respondent shows that it did not so act
52. The Court of Appeal in **Igen Ltd v Wong** [2005] ICR 931 gave initial authoritative guidance as to the application of the equivalent burden of proof provisions under the Sex Discrimination Act 1975. It is not necessary to set out that guidance in full but in essence, it outlines a two-stage process. First, the complainant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the complainant. That means that a Tribunal acting reasonably could properly so conclude from all the evidence before it. The second stage, which only applies when the first is satisfied, requires the respondent to provide that it did not commit the unlawful act. However, it is not necessary for the burden of proof rules to be applied in an overly mechanistic or schematic way (see **Laing v Manchester City Council** [2006] ICR 1519)

Constructive unfair dismissal

53. The claimant has a right not to be unfairly dismissed (section 94 of the Employment Rights Act 1996 ("ERA")) and under section 95(1)(c) of the ERA a constructive dismissal is capable of being a dismissal
54. The seminal case in determining whether the claimant is entitled to terminate his contract is **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221 – there has

to be a fundamental breach going to the root of the contract which is the reason for resignation and that the employee has acted upon such fundamental breach in a timely fashion

55. The Tribunal has been referred to, and has taken full note of, the further guidance in this regard in the cases of ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 and ***Waltham Forest LBC v Omilaju*** [2004] EWCA Civ 1493

Submissions

56. The respondent's representative produced helpful written submissions to which he spoke and which the Tribunal does not propose to repeat in terms
57. Additionally, the respondent's representative confirmed orally that he was no longer taking a time point and accepted, given the evidence, that the claims were in time (subject only to the potential for the Tribunal to conclude that all allegations upheld relate to matters said to have occurred prior to the three-month time limit, despite the clear evidence and admissions as to the facts). He further conceded that, again given the evidence, the burden of proof had passed across to the respondent (submitting that the respondent had met that burden)
58. The claimant's representative also produced helpful written submissions to which she spoke and, again, which the Tribunal does not propose to repeat in terms

Conclusions

59. The race discrimination claim is somewhat surprising in nature on its face given that the claimant is white but he is South African by nationality and it is conceded that the comments made or alleged to have been made amount in principle to harassment related to race
60. The Tribunal has referred above essentially to the claimant's evidence but there is no material denial on behalf of the respondent that the various phrases and terminology were indeed used (much of which is evidenced in any event by the documentation produced to the Tribunal). To the extent that there is a denial of comments that are not supported by documentation, the Tribunal accepts the claimant's evidence in this regard, given its conclusions on credibility but also the consistency with the documentation produced, and in combination with the evidence of Mrs Brady
61. That is not the end of the matter, however, because the claim is contested in two alternative ways other than on the facts as follows:
- 61.1. all comments were part of office banter and therefore not uninvited or unwanted;
- 61.2. they were not intended to create and cannot reasonably be said to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant
62. Although these arguments need to be viewed in their separate specific legal contexts, they do overlap

63. Essentially what the respondent is saying is that the claimant invited or encouraged the comments and they were part of workplace banter in which the claimant willingly participated
64. It is noteworthy, although clearly not determinative in any way other than in terms of credibility, that this is not the case put forward by the respondent either in the response form or at the PH, it being consistently denied that any such racist language or behaviour occurred. See for example, at paragraph 13 of the Tribunal's reasons for allowing the amendment at the PH (namely well through the process) (page 35), that "The respondent's case is a bare denial that offensive language was used to the claimant. It is asserted that he was treated with respect"
65. Although not directly relevant to the specific issues before the Tribunal, it is also worthy of note in terms of overall perception and credibility that Mrs Brady gave evidence that the respondent had previously had its bank account closed following Mr Atkinson calling a bank employee, with whom he was having a telephone conversation, a "foreign cunt" – this was not denied on behalf of the respondent
66. The Tribunal's attention was drawn to the case of **Evans v Xactly** UKEAT/0128/18 which clearly illustrates that comments which on the face of matters may appear to amount to harassment can in the circumstances of any particular case be deemed to be part of office banter. This is duly noted by the Tribunal
67. Given the nature of the comments, however, the Tribunal accepts the claimant's argument that in the case of such extreme language it would take clear, or at the least very persuasive evidence, for the respondent to be successful in its argument
68. The respondent seeks to rely on the following as examples by way of illustrative evidence of "banter" and a good working relationship:
 - 68.1. Having apparently searched back historically through the claimant's Facebook records, one reference was found in 2012 to the claimant saying "English pricks" (page 77).
 - 68.2. In a text exchange in June 2016 the claimant uses the phrase "Scottish bastard" (page 128).
 - 68.3. Mr Hunter has gone back over his text records and has been able to produce three texts from the claimant said to indicate a friendly relationship (pages 110, 113 and 114).
 - 68.4. The claimant has referred to himself as "the South African" and used an 'emoji' of the South African flag in written exchanges
 - 68.5. More recently in October 2017, he refers to a third party as "wog mate" (page 122).
69. All of these references caused the Tribunal a degree of concern and were looked at carefully, particularly the final comment. The claimant says that this is the phrase used by Mr Atkinson to describe a supplier of Kenyan origin so he put his reference to that individual in that identifiable form. The Tribunal does not find that an attractive proposition. However, in relative terms, these comments are more minor, both as to extent and extremity, in comparison to the phrases used to the claimant

70. No evidence has in fact been produced, despite the apparent exhaustive searches on the part of the respondent, to suggest any support for the contention that the claimant encouraged or instigated matters in any direct way.
71. The Tribunal has, for example, as indicated, seen and heard the video footage of the exchange on 22 January 2018. This is said to be an example of an exchange being started or encouraged by the claimant. Such a contention is not borne out by what has been listened to and seen by the Tribunal
72. The respondent, through Mrs Atkinson, argues that the claimant deliberately 'set the scene' for this claim up by goading his colleagues into their comments over the last three to four months of his employment. Her contention was that the claimant's conduct and attitude changed during that period in that respect. In fact, on this point, Mrs Atkinson's evidence is contradicted by the respondent's own evidence, for example of Mr Hunter who said that the exchange of "banter" (as he sees it) remained constant and unchanging from approximately early 2017.
73. Mrs Atkinson is said to be CIPD qualified and has held an HR role for over 20 years. She says that she did not intervene in the use of racist language because she did not witness it or know anything about it. The Tribunal has seen the content of the text message (page 55) which shows her seeing a message from her husband (an example of Mr Atkinson using extreme racist language without any introduction or encouragement to do so) and in fact acknowledging that such language was utterly inappropriate. Mrs Atkinson's text reads "Seriously!!!! You need to stop that!!!!". On the face of matters, this is clearly indicative of both awareness of this being ongoing conduct and also that it is totally inappropriate. Mrs Atkinson sought to explain this away by alleging that this extract of the text exchange was in some way fabricated but produced absolutely no evidence whatsoever to support such an extreme contention. Further, no such allegation is set out in her witness statement. The text exchange is accepted by the Tribunal as factually correct on its face
74. Mrs Atkinson also says that other employees complained about the claimant's change in behaviour. This is in fact again not supported by any evidence given by Mr Hunter or Mr Hill, who both gave oral evidence, or any other documentary evidence produced. Mrs Atkinson said that she noted both the complaints and her actions in writing, intending to follow such complaints up. She did not, however, produce any such documentation at all to the Tribunal and could give no cogent explanation as to why, having taken written notes of such important matters, somebody with her significant HR experience should somehow misplace them
75. Overall, taking account also of the hesitant manner in which she gave her evidence, the Tribunal found Mrs Atkinson to be totally lacking in any credibility
76. It is also said, in support of the respondent's contention, that the claimant could have challenged the alleged conduct. On the face of matters, he did not do so, certainly there was a lack of any formal grievance. The claimant's answer to this is that when he raised matters informally he was quickly and abruptly knocked back by both Mr and Mrs Atkinson particularly as, on many occasions, it was Mr Atkinson himself who was responsible for the comments. The Tribunal accepts this evidence as a reasonable explanation
77. In all the circumstances the Tribunal rejects the argument that the exchanges could be said to amount to nothing more than "office banter"

78. The next question is whether the conduct was intended to or had the effect of creating the statutorily described environment
79. Despite the constant or regular use of the language in question, the Tribunal, looking at the situation overall, was not prepared to go so far as to conclude that there was a deliberate campaign to create such an environment. On balance, the Tribunal was prepared to accept that the individuals involved were not necessarily seeking deliberately to attack or deflate the claimant but, at the very least, were ignorant as to the effect they were having upon him
80. The Tribunal in this regard looks at the following:
 - 80.1. the nature and extent of the comments themselves;
 - 80.2. the finding that it was not invited;
 - 80.3. the claimant's evidence as to the serious adverse effect the conduct had upon his mental and physical well-being;
 - 80.4. the claimant's GP notes (see page 155).
81. The Tribunal is absolutely clear on the evidence that, taking account of all the relevant factors, it cannot be said that the conduct did not have that effect and this argument is also rejected
82. The conduct on the part of the respondent therefore amounts to harassment as defined and the Tribunal's conclusion is that this allegation is well founded
83. Turning to the sexual orientation harassment claim, this is again slightly unusual as the claimant is and is accepted on behalf of the respondent to be heterosexual but the claim is based on perception and no point in this regard is taken on behalf of the respondent
84. The argument in this respect is more straightforward in that all comments are denied. The issue therefore turns totally on a finding as to whether or not the comments were made. The evidence of the claimant in this regard is supported by the evidence of Mrs Brady. The respondent sought to discredit her evidence by effectively saying that she left under a cloud with an axe to grind as it were against the respondent. The respondent suggests that Mrs Brady resigned because she was under investigation for misconduct – Mrs Brady denies having any knowledge of any such investigation at the time of her resignation and the respondent has not referred the Tribunal to any documentation which might rebut this. In fact, in terms of motive, it is noteworthy in passing that the respondent only wrote to Mrs Brady formally setting out a legal claim to a substantial sum of money from her several months after her resignation and only after she was identified as a potential witness at the PH. As far as the Tribunal's assessment of Ms Brady as a witness was concerned, she did not seek in any way to dissemble and was willing to make concessions whenever it was appropriate to do so. Overall she was found to be a very credible witness
85. Mr Hill simply denied everything put to him. Again such denial led to a conclusion on the part of the Tribunal that he lacked any credibility. He stated in evidence that he never witnessed any of the racist comments. Mr Hunter's evidence was that what he regarded as office banter happened almost on a daily basis when a group of employees (including Mr Hill) met in the morning for a cup of tea. Mr Hill accepted that he was present in a relatively small office each morning at tea time when Mr Hunter

says these incidents occurred so regularly but as indicated denied ever having witnessed any such conduct. The only conclusion the Tribunal can properly draw is that Mr Hill was simply intent on denying everything, regardless of the truth of matters

86. To the extent that Mr Atkinson denies the allegations, and where there is no supporting evidence, the Tribunal given its overall conclusions as to the relative credibility of Mr Atkinson and the claimant, accepts the evidence of the claimant
87. Finding on balance, therefore, in the light of the evidence, that the alleged comments were made, the Tribunal's clear conclusion is that this claim is also well founded
88. With regard to the claim of constructive unfair dismissal, there was no argument pursued by the respondent of a reason for dismissal and accordingly, were the Tribunal to find that the claimant had been constructively dismissed, then such dismissal would be unfair
89. The claimant's case is that the respondent has breached the implied term of good faith culminating in a last straw, namely the email of 10 April from Mr Atkinson (page 184)
90. The claimant's contention is that the term of good faith has been breached in two ways, firstly the harassment to which he was subjected and, secondly, the general approach to him personally and also his workload with particular reference to excessive workload including significant out of hours contact
91. As indicated, there is an issue over the validity of the contract that has been produced but custom and practice in any event was that the claimant's work extended beyond his contractual hours. This is clear from the claimant's own evidence. It is also said to be the reason why the claimant was supplied with a home computer and mobile phone.
92. However, the issue is the extent to which the claimant was required to work beyond his standard contractual hours and whether this was at an unacceptable level. That it was indeed at an unacceptable level was in fact acknowledged by the respondent's own evidence. Mrs Atkinson accepted that the claimant had what she described as a "heavy perhaps too heavy" workload and needed assistance. In an e-mail just prior to the claimant's holiday (dated 4 April at page 141), she accepts that this was the case and was looking to seek to address matters. There then however followed the email exchange when the claimant was on holiday dated 8, 9 and 10 April 2018
93. Aside from the comments related to race and sexual orientation, there is also the allegation of general intimidating conduct and comments by Mr Atkinson, the owner, which the Tribunal accepts on the evidence as having been made out (such allegation being supported by documentation as well as the evidence of Mrs Brady)
94. These matters need to be considered in combination. The serious allegations of harassment have been upheld. This is coupled with the pressure placed upon the claimant derived from his heavy workload and the more general abusive comments. The Tribunal regards the harassment findings to be the most serious of these matters and which, of themselves, would amount to breach of the implied term of good faith but, undoubtedly in the Tribunal's view, this is reinforced by the extent of the workload and the attitude towards the claimant including abrasive and abrupt comments from the owner Mr Atkinson. The claimant credibly described himself as "terrified" of Mr Atkinson. Mr Atkinson suggested in his evidence that he has used extreme terms such as "cunt" to employees but only if they have instigated that type of language with him first. The Tribunal totally rejects that contention – that employees should use such

language direct to the owner and Managing Director of the company without him first using it to them flies in the face of any accepted industrial behaviour in the experience and considered view of the Tribunal

95. The Tribunal's conclusion therefore is that a breach of the implied term of good faith has been made out over a continuing period which culminated in the last straw, namely the email of 10 April (page 184)
96. The respondent's representative seeks to argue that such an email is "entirely innocuous". This contention in fact is contradicted by the evidence of the respondent's own witnesses. Mr Atkinson accepted in cross-examination that, in hindsight, the email was not appropriate. Mrs Atkinson accepted in cross-examination that an appropriate description of it was "a rant". In the Tribunal's view, having considered the evidence, it cannot reasonably or objectively be considered as 'entirely innocuous' and the Tribunal is therefore satisfied it is properly made out as a last straw
97. There are, however, two further matters to be considered before any final conclusion can be drawn as to whether or not the constructive unfair dismissal claim succeeds, namely:
 - 97.1. whether or not the contract was affirmed
 - 97.2. whether or not the breach was the cause of the claimant's resignation
98. On the question of affirmation, it is correct that the last straw is found to have occurred on 10 April and it was some 20 days later that the claimant resigned. The respondent's representative contends that this is confirmation that the claimant continued and was happy to continue working under his contract of employment. The period is relatively short but certainly not such as to be, in itself, determinative. The fact, however, is that the claimant was on holiday at the time of receiving the e-mail of 10 April and resigned immediately upon his return. He cannot therefore, in the Tribunal's view, sensibly be described as having affirmed his contract beyond the date of the last straw. On the evidence produced to the Tribunal, there was no further contact between the claimant and the respondent during that period until his return and resignation. The Tribunal concludes therefore that there was no affirmation
99. As to the cause, it is correct on the evidence that the claimant did have another job to go to. The respondent's argument is that that opportunity was the true reason the claimant resigned
100. There are elements of the relevant facts which are not in dispute or subject to challenge. The claimant did have his CV on a website and he was contacted with a job offer early in March 2018. He was given 24 hours to accept or reject. This job was at a lower status with a lower rate of pay. In order to secure the option and give himself the opportunity to take up the new post, he agreed to accept provided there was an extended time before starting, namely deferred until after his holiday. The intention was to give himself time to think and a chance to consider matters with his family before making a decision to accept a lower paid, lower status position
101. In the meantime, the abuse and harassment continued leading to his GP consultations on 20 and 22 March (page 155). There was then the last straw which occurred on 10 April. In discussion with his family he decided in the circumstances that it was in his best interests to leave his employment with the respondent and he resigned immediately upon his return

102. If the respondent's argument is correct then, for no ulterior reason whatsoever, the claimant left his job for a lower paid, lower status job. This is not a credible argument
103. In all the circumstances, the Tribunal is clear that it was the events at work as described that led to – were the effective cause of - the claimant's decision to resign
104. Finally, the Tribunal has considered also the subsequent offer of a grievance process. The Tribunal's conclusion is that it was entirely reasonable on the part of the claimant to reject this given the circumstances. It was clearly wholly inappropriate that such a grievance be conducted by Mrs Atkinson and also by a person employed as a cleaner when the issues arising involved both Mr and Mrs Atkinson. Mrs Atkinson's evidence in fact was that her own view - with her HR background - was that the grievance should more appropriately have been handled externally but that such an option was overruled by the respondent's HR advisors
105. In all the circumstances, the Tribunal's conclusion is that the claim of constructive unfair dismissal is also well founded.
106. Following the Tribunal giving its judgment orally, the matter was listed for a Remedy Hearing with consequential Orders made

Employment Judge B Hodgson

Date 27 July 2019

REASONS SENT TO THE PARTIES ON

2 August 2019

FOR THE TRIBUNAL OFFICE