EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Nailard	**v**	**Unite the Union**

Heard at: Watford **On**: 22 – 26 July 2019

Before: Employment Judge Manley
Mrs S Low
Mr C Underwood, MBE

Appearances

For the Claimant: Mr J Wynne, counsel
For the Respondent: Mr O Segal QC, counsel

RESERVED REMEDY JUDGMENT

1. The respondent is liable for the unwanted conduct of Mr Murray and Mr Hughes which conduct amounted to harassment under Equality Act 2010.

2. Mr Kavanagh did not harass or discriminate against the claimant.

3. There were acts of potential misconduct by the claimant before the end of her employment and, if the respondent had known about these, there was a 30% chance that she would have been lawfully dismissed.

4. The claimant would have been likely to remain in the respondent's employment as a Regional Officer until January 2017 when she would have found equivalent work. We do not find that she would have left earlier as a result of any lawful transfer.

5. The job the claimant commenced on 4 January 2017 with Network Rail breaks the chain of causation and any financial losses that she recovers from the respondent will be calculated to that date.

6. The second stage of the remedy hearing is listed between 9 to 17 December 2019 and a case management preliminary hearing will shortly be arranged to prepare for that hearing.

REASONS

Introduction and Issues

1. This was a matter where the tribunal determined liability in April and June 2015. By a reserved judgment sent to the parties on 1 July 2015, the claimant succeeded in her claims for constructive unfair dismissal and harassment related to sex. She failed in relation to a claim for victimisation or unjustifiable discipline or dismissal because of trade union activities. A remedy hearing was pencilled in for later in July 2015 but there have been appeals and cross appeals to the EAT and Court of Appeal so that the matter came back to us today after case management preliminary hearings in May and June 2019.

2. At those case management preliminary hearings, a list of issues was discussed. I agreed that it was sensible for there to be a first stage hearing with a second stage (if needed) listed in December. Reasons for that decision are set out in the case management summaries.

3. The issues as recorded at the preliminary hearing of 3 June 2019 are as follows:-

Remitted Issues

1 *So far as it is decided the issue remitted to the tribunal should be heard, the issue remitted is:*

"The question whether the respondent is liable by reason of direct discrimination or harassment on the part of the paid officers" (see EAT order of 9 November 2016)

2 *The respondent argues that the determination of the issue may be relevant in two ways (1) to the consideration of the prospects, and for how long, the claimant would have remained employed by the respondent had there been no unlawful harassment by the lay representatives, before leaving for a non-discriminatory reason [issue 5.2 below] and (2) the level of any award for injury to feelings, but has no impact on any other matter.*

Remedy

3 *What basic award is the claimant entitled to?*

4 *What sum should be awarded for loss of statutory rights?*

5 *What would the claimant have expected to earn had she not been discriminated against by the respondent? To take into account:*

5.1 *The chance that the claimant would have been dismissed for a lawful reason, namely;*

5.1.1 *Emailing herself allegedly confidential information.*

5.1.2 *Covertly recording a discussion between herself and Howard Beckett;*

5.1.3 *Speaking about Howard Beckett in the way she did following that covertly recorded discussion to a fellow officer of the respondent, and, in particular, the use of potentially discriminatory language in the material context;*

5.2 *The chance the claimant would lawfully have been required to leave her "allocation"*

5.3 *The likely period of her employment with the respondent, and/or any successor employer;*

5.4 *The amount of her earnings over any part of that period, including earnings increased due to wage increases and/or promotion.*

6 *In so far as material, does the claimant taking up employment with network Rail in February 2017 break the chain of causation as regards any compensable loss of earnings beyond that date?*

The Hearing

4. The bundle of documents was extensive partly because there was a further copy of the five lever arch files from the previous liability hearing which we did not need to consider, the liability judgment from the 2015 hearing being sufficient for any findings we needed to consider. There were then five further lever arch files, but the tribunal only needed to look at a very few of those documents. Significantly, we did read a transcript of a recorded conversation in September 2013 which we will refer to later in the facts. We also looked at Mr Kavanagh's cross examination from the liability hearing and a limited number of documents.

5. The witnesses at this hearing were the claimant, who had prepared a detailed witness statement running to 101 paragraphs and a supplementary statement of some 43 paragraphs. For the respondent, Mr Beckett and Mr Kavanagh had prepared short statements. All those witnesses gave evidence and were cross-examined. There are limited extra facts and we refer to those in our fact finding below.

Facts

6. These facts supplement those in the liability judgment and are only relevant to the issues as set out above. To put matters into context though, it is worth recording some of the background now.

7. The claimant worked as cabin crew for British Airways (BA) between around 1997 and 2008 when she then worked for BA in Human Resources. She worked for the respondent from May 2012. As set out in the liability judgment, there was a long history of conflict between elected officials at Heathrow (HAL) and regional officers of the respondent. As we found in that judgment, this included treatment of the claimant which extended to gender related comments and what we found to be sexual harassment. Mr Kavanagh was the claimant's direct line manager and he decided to transfer her from Heathrow in August 2014. The claimant then resigned. We found that to be, along with other matters, sufficient to amount to a fundamental breach of contract and the claimant therefore succeeded in her claims for constructive unfair dismissal and sexual harassment.

New facts relevant to the issues for this hearing

Covert recording

8. On 17 April 2015 a covert recording which had been made by the claimant of a conversation between herself and Mr Beckett, who is the assistant general secretary of the respondent with responsibility for legal services, on 25 September 2013, was disclosed to the respondent's solicitors in the course of the tribunal proceedings. It is possible that it was believed to be relevant to something in the claimant's rather lengthy witness statement. In any event, the recording was made by the claimant without the permission of Mr Beckett.

9. Mr Beckett's evidence was that he was trying to agree a confidential settlement for some historical matters involving BA during a particularly contentious strike some time earlier. Although he told us his view was that the claimant's case was not a strong one at all, she was included with others in the deal and would receive a payment. Mr Beckett had been clear that this was to be a private meeting and we have seen emails to that effect. The claimant had asked if she could be accompanied and he had indicated that she could. In the event she attended alone.

10. The respondent trade union has no written policy about recording conversations, covertly or otherwise. The claimant's explanation for the need to record the interview was that she had been told by colleagues that she should not trust Mr Beckett and had been advised by a colleague to record the conversation.

11. There was therefore discussion at the meeting about the proposed settlement and payment. It is clear from the transcript that matters became heated. Mr Beckett stated that the claimant was now an officer of the trade union and said that she was "*going off to Never Never Land*". He

told us that he was frustrated by her attitude because he was trying to broker a settlement that involved everyone. She was the last person he was meeting with about the settlement and he considered some of their e-mail exchange to have been bizarre. He was frustrated and set out what he believed was the right position. He replied to something the claimant said by saying "*bollocks*" and "*absolute bollocks*" more than once. Although the claimant told us that he was shouting, it is denied, and we make no finding on this. As stated, matters became heated and the claimant left the room abruptly. We also cannot find whether the claimant is in tears or not. She said she was; Mr Beckett said that she was not.

12. In any event, the claimant, probably by mistake, continued to record the next conversation which she had which was a telephone call to a colleague, Mr King. It is obvious from the transcript that the claimant was very upset by the discussion she had just had with Mr Beckett. There is a considerable amount of swearing, directed towards Mr Beckett, although he was not present. She suggested that she might make a grievance but then said she wouldn't. The parts which the respondent say are particularly troubling read as follows:

"He's a fucking creep you know"……….Fucking Northern Irish git"

13. As indicated, the respondent was unaware of that recording until April 2015 when it was disclosed in the course of these proceedings. Mr Beckett's evidence was that, had he known that such a recording had been made, he would have taken it very seriously. He believes that it is a breach of the duty of mutual trust and confidence, particularly in light of the nature of the discussion that they were having. He also takes offence at the language the claimant used, referring to his ethnicity as he was born and brought up in Northern Ireland. The claimant says that she meant no offence by the phrases used. She was upset and had found his behaviour bullying and intimidating but the reference to his nationality was not deliberately discriminatory. She says the comments were made in the heat of the moment.

<u>E-mails</u>

14. At some point shortly after the claimant left the respondent's employment, it was discovered that she had sent around 460 e-mails from her work e-mail address to her personal address on Saturday 2 August between 15:52 and 19:05. The claimant had met with Peter Kavanagh the day before to be told that she would be moved from Heathrow and the claimant had spoken to a lawyer who had advised her to transfer those e-mails to her personal account. The claimant resigned on 4 August.

15. The respondent's view, as explained by Mr Beckett, is that sending work emails to a personal address would be gross misconduct and summary dismissal "*would have been well within the range of possible responses open to the union*". The claimant says that she had spoken to a lawyer about the possibility of resigning in light of the transfer and had been

advised to send the e-mails which might contain evidence of any claim she might bring. It is not disputed that the e-mails contained some matters relevant for these proceedings. They were not disseminated in any way and have only been used for the purposes of this litigation. Although the tribunal have been told that the e-mails were confidential or contained confidential information, we have not been told any detail about that.

16. Mr Beckett's evidence was that he had not believed the respondent trade union had a written policy on sending e-mails to personal addresses but then he had been told by another senior officer of Unite at this hearing that there was such a policy. If there is one, it was not before the tribunal and Mr Beckett accepted that the claimant would be unlikely to be aware of it as he had been unaware of it. There was no training or indeed any mention of this policy made to the claimant. The claimant was asked questions during cross examination on the policy with respect to e-mails when she was with BA but she explained that BA's system was completely different and one could not send/forward matters to personal accounts or to accounts outside BA without express permission to do so. Her evidence is that she did not believe that there was any misconduct in the action she took.

17. Mr Beckett was asked about the respondent's disciplinary process at this hearing. There was no copy of any written disciplinary policy before the tribunal, but we were told that there was one. We also did not see a copy of any written equality policy. Mr Beckett told the tribunal that the policy required a senior officer at his level to investigate. Mr Beckett agreed that he would not have investigated the covert recording incident as it involved him. He then told us something which had not been mentioned before, which was that any misconduct which could lead to a dismissal of a regional officer, would be decided by the general secretary, who would hold a hearing. We have not heard from the general secretary, nor do we know what his opinion on such misconduct as might be made out would be.

18. Rather towards the end of Mr Beckett's evidence, in response to questions from the tribunal, he told us that he was aware of similar incidents where he said one person had been dismissed and another was suspended pending investigation. We do not know the details of those cases. Nor do we know the dates when they occurred.

The transfer of the claimant from Heathrow

19. This aspect is covered between paragraphs 14.1 and 14.16 of the liability judgment. Mr Kavanagh gave further evidence on this decision at this hearing. In particular, he said it was to "*protect a colleague from unacceptable treatment from a few of the lay reps for whom she was responsible as part of her allocation*". He said it was also the "*anticipated damage to the relationship between Sally and a much wider group of lay reps and members at HAL and BA based at Heathrow. This emanated from the DVD, as described to me, which I had been warned was to be distributed through social media or otherwise, if Sally were not moved from*

Heathrow". The evidence about the DVD was explained in detail in the liability judgment. In short, it contained footage of a television interview in 1997 which shows the claimant dressed as a BA stewardess where she made comments which were interpreted by Mr Kavanagh and perhaps by others as "*discouraging the industrial action*" which was being pursued at that point by BASSA. It was the BASSA reps who had apparently made the threat in 2014 through the general secretary and Mr Turner. This evidence from Mr Kavanagh is very much in line with what we heard at the last hearing. We summarised it then as him having "*mixed reasons*" for the decision to transfer the claimant and that is very much what he explains in his witness statement for this hearing. He maintained that the decision was his alone and we accept that it was, although it followed conversations with the general secretary and other senior officers.

20. In the liability judgment, we did not impute any discriminatory motive on Mr Kavanagh for that decision but found that it was tainted by discrimination because of the background of the sexual harassment which formed at least part of the unacceptable treatment that he described.

The claimant's employment with Network Rail

21. The claimant's witness statement contains detailed evidence about her search for employment after she left the respondent; financial problems that she faced; her relationship breakdown and her health. She went to considerable efforts to find work from September 2014, applying for seven jobs in November 2014 and five in December 2014. She made several job applications during 2015 and claimed job seekers allowance between October 2014 to April 2015. She was signed off as sick between October 2015 and March 2016 and had periods of ill health during 2016. The tribunal is satisfied that the claimant made serious attempts to find alternative work after the end of her employment with the respondent up to January 2017.

22. The claimant explained the position with respect to the new job she took at Network Rail. She said she had been contacted by a former ex-colleague of HAL, who had taken up a job as Head of Industrial Relations at Network Rail, in September 2016. He advised her that they were going to be advertising an industrial relations role. He contacted her again in October. She applied, was interviewed on 14 November and was told on 23 November 2016 that she had been successful. The starting salary was £56,250 per year, which was higher than the salary that she had received from the respondent. There was a subsidy for travelling by rail and the post was in Milton Keynes.

23. The claimant told us that she was "*delighted to have finally found a job*". She had been signed off as sick at various times since October 2015. She said that she saw her GP who had some reservations about her starting work but signed her as fit for work. She was offered the opportunity to start in February 2017 but decided to start on 4 January 2017. She found the travel from her home in Fleet to Milton Keynes difficult and expensive.

She explained that she felt stressed and was anxious about the commute, but she decided to take the job. Very shortly after she started, she had a conversation with the Head of Industrial Relations about the cost and length of the commute. The Head of Industrial Relations was, she said, "*very understanding*" and he suggested a reduction in hours, so she went part-time on a temporary basis, reducing to four days per week. She began to drive to Milton Keynes which is a distance of about 77 miles. This meant that she was working long days. However, she said that moving to a four-day week "*helped a lot*". She returned to full time hours and it was agreed that she could work four days a week in Milton Keynes and one day either in the Basingstoke office or at home. Basingstoke was much closer to her home. She told us that Network Rail was very flexible with working hours so she could choose when she got to work to try and miss some of the bad traffic. In April/May 2017, the claimant had shingles and flu and was off work for six weeks. She was referred to Occupational Health who recommended that she returned on reduced hours, which she did before she reverted to five days a week.

24. Part of the claimant's job at Network Rail involved meetings with people from trade unions as well as industrial relations managers and so on. She said that she enjoyed the maintenance section she worked in and that she had good working relationships. She met one trade union officer from another trade union whose behaviour she found difficult to deal with and reminded her of some of the matters which had occurred whilst she was working for the respondent. She said that most of the senior managers were very welcoming but recorded an incident where she felt there had been a "*snub*" with respect to women in the room. She also gave another example of the meeting of senior male managers, where she felt there had been "*aloofness*". She added: "*I must stress that most of the people that I came into contact with whilst working there were very professional and friendly, Network Rail worked very hard to promote inclusiveness and respect and certainly did not shy away from investigating or disciplining those who bullied or discriminate against others*". She said that she met people who knew about her employment tribunal case and she was worried about it being discussed.

25. From August 2017 she took on the project of writing an Industrial Relations training programme and she was allowed to work from home for most of the time. She said that she spent little time at Milton Keynes. At some point, although she did not say when, the Head of Industrial Relations suggested that it might good for her to attend the Milton Keynes more often. She said that she did not want to "*create issues*" so she started commuting twice a week to Milton Keynes. Because she was not there as regularly, she lost the use of a desk and sometimes had to find a desk that she could use, although the Head of Industrial Relations said that she could use his when he was not there.

26. In April 2018 a son of a close friend offered her a job with a new start-up company called Credit Card Compliance Limited (CCC Ltd). This was the position of Managing Director and is based in Kent, where she has friends

she could stay with. She decided to take this job and gave her notice to Network Rail in April 2018, leaving on 2 July 2018. She works some of the time from home and is still working with CCC Ltd taking a salary usually of £45,000 per annum although she has had some months on less. She is considering working three days per week rather than full time.

27. The claimant said that, if she had stayed at the respondent, she would have stayed until she was 65 or 67. She can draw her BA pension at 65 or earlier at 60. Given the relatively short period of the claimant's employment with the respondent before she resigned and her unhappiness with a number of matters there, as shown in the recording after her meeting with Mr Beckett in 2013, we think it is highly unlikely that she would have stayed for another 15 years.

28. The claimant claims that she might also have been promoted but we heard very little evidence from her about that. We know that there would have to be an application process and have insufficient evidence to say when a promotion would have occurred, if at all.

29. The claimant asked the tribunal to consider a report dated May 2016 which sets out the experience of women officers in Unite. It is said that this report, "Women Officers in Unite" produced in May 2016, identifies a culture of sexual harassment and discrimination at the respondent. Obviously, the document was produced after the claimant left her employment with the respondent. We took note of the report, but find that it has little or no evidential value for this claim.

Law and Submissions

<u>The remitted issue</u>

30. As indicated above, there have been appeals and cross appeals arising from the liability judgment. For the purposes of this hearing, we are only dealing with one remitted issue as set out above. That is whether the respondent is liable for any sex discrimination or harassment by paid officers (Messrs Kavanagh, Hughes & Murray). The tribunal made detailed findings about these paid officers in the liability judgment and described what we found to be the reasons for their actions. Neither the EAT or the Court of Appeal seemed to believe that any further evidence would be needed but we have heard limited further evidence in accordance with the case management order of 6 June 2019 with respect to Mr Kavanagh's decision to transfer the claimant from Heathrow. We found, in the liability judgment, that the actions by those paid officers were discriminatory and/or harassment primarily because of the link to the sexual harassment as found. We now consider whether the reasons for decisions that these people took were because of, or related to, the claimant's sex.

31. The liability judgment sets out the principles for deciding a claim for sexual harassment or sex discrimination between paragraphs 16 and 20 and we will not repeat them now. We remind ourselves that we must first decide

what facts have been shown, if any, which show unwanted conduct related to sex or less favourable treatment because of sex. If we find such facts, for the harassment claim, we consider whether the conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating etc environment for her, taking into account her perception and other circumstances. The burden of proof provisions under section 136 EQA, require us to then look to the respondent's explanation for the conduct or treatment.

32. We were referred, by the claimant's representative, to the case of Nagarajan v London Regional Transport 1999 ICR877 in the House of Lords. Mr Wynne asked us to pay particular attention to the paragraph on sub-conscious motivation and it is probably worth quoting it now. It reads:

> *"All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why it rejected an application had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference, the tribunal must first make findings of primary fact from which the inference may properly be drawn."*

33. The tribunal considered the evidence which we heard on the last occasion from Mr Murray and Mr Hughes. We also considered Mr Kavanagh's evidence at the liability and this hearing.

34. Mr Segal, for the respondent submitted that we should not conclude that there was sex harassment or discrimination, partly because of what was said in the liability judgment about the lack of discriminatory motive. In particular, he reminded us of paragraph 14.16 of the liability judgment which reads:

> *14.16 We say here for completeness and will confirm in our conclusions that the decision to transfer the claimant itself amounted to unwanted conduct that was related to sex (because of the background of harassment related to sex) and had the effect of violating her dignity and of creating a hostile and intimidating environment. Although Mr Kavanagh was not guilty of any discriminatory motive, it cannot be said that the decision to transfer which was made, against the wishes of the employee, part of which was because of sexual harassment, was itself free of any discrimination. The decision to transfer the claimant was tainted by*

discrimination. It was also unwanted conduct related to sex which had the effect of violating her dignity.

35. Mr Segal also pointed to our comments about the level of support given to the claimant by Mr Kavanagh, which the claimant agreed in cross examination was considerable, save, she said, for the decision to transfer her from Heathrow. Mr Segal, for the respondent, reminds the tribunal of the occasions upon which the liability judgment stated that there was no discriminatory motive and says that should lead us to decide that there was therefore no discrimination or harassment under EQA.

36. As far as the remitted issue is concerned, Mr Wynne asks us to pay attention to the analysis of sub-conscious motivation as set out above in Nagarajan. There is no other significant dispute on the legal tests for the remitted issue.

37. The claimant relies on the act of discrimination and harassment as identified by the tribunal in the liability judgment and reminded us of what we said, particularly at paragraphs 71 -76, 86 and 101, 102, 104, 109 and 133 – 137. It was submitted that the burden of proof shifted to the respondent. The claimant's case is that there is sufficient evidence to show that her treatment was because of or related to her sex.

Remedy issues

38. There has been no appeal to the claimant's successful claim of constructive unfair dismissal and the tribunal understands that she has been paid an interim sum which covers any remedy for that claim. We are therefore only concerned with remedy with respect to the discrimination as found by us. The hearing in December will deal with outstanding matters. Available remedies for successful discrimination claims are covered by section 124 EQA. No further declarations and/or recommendations have been suggested as being sought.

39. The remedy we are concerned with is that provided in section 124 (2)(b) EQA, which is an order that the respondent pay compensation. It is said to be by section 124(6) should "*correspond to the amount which could be awarded by the County Court*". We are considering what level of damages is appropriate in the circumstances. For the purposes of this hearing, we are considering the length of time for the calculation of financial loss flowing from the discrimination as found.

40. We understand that we do not need to make any findings on basic award and loss of statutory rights as these figures have been agreed.

41. The first issue at this hearing, therefore, is the period of time over which the claimant would have been likely to have been employed by the respondent, absent this discrimination. This includes whether she would have been dismissed at a point in the future lawfully, such as to bring to an end any financial loss claim. Questions of mitigation, any personal injury

and injury to feelings, pension loss etc, will be dealt with in December if not agreed earlier.

42. First, the tribunal is required to decide what chance there was that the claimant would have been dismissed for a lawful reason, namely the alleged gross misconduct. Secondly, we assess the chance that the claimant would lawfully have been required to leave her allocation by reason of transfer for a non-discriminatory reason. The respondent argues that the claimant would have resigned then for reasons such as travel difficulties etc. Thirdly, we are also to determine the likely period of her employment with the respondent and the amount of her earnings including any earnings increase and/or promotion. Lastly, we decide whether the start of the Network Rail job breaks the chain of causation for financial loss calculation.

43. We need to consider the facts of the alleged misconduct and the evidence about how that might have been treated by the respondent if it had known about it whilst she was still employed. We should assess the chance there was of the respondent dismissing the claimant lawfully for that misconduct. The parties have referred us to cases which may assist us with these considerations.

44. As for the covert recording, we have been referred to the case of Phoenix House Limited v Stockman UK EAT 0284/17. In this case the EAT decided that the employment tribunal had not erred in making a reduction to the claimant's compensatory award on an unfair dismissal claim, with respect to a covert recording she had made of an internal meeting, which the respondent had been unaware of before her dismissal. The employment tribunal, in that case, found that the claimant did not make the recording for the purposes of entrapment or attempted entrapment and made a reduction of 10% for the circumstances relating to the covert recording.

45. We were asked to consider Abbey National plc & another v Chagger [2009] IRLR86 where there was discussion on the question of whether the employee in that case would have been dismissed on legitimate grounds, leading to a reduction in compensation. This was a case where there had been a discriminatory dismissal.

46. With respect to the e-mails being forwarded to the claimant's personal email account, we have been referred to Brandeaux Advisers (UK) Limited & Others v Chadwick [2011] IRLR 224. This is a High Court case where the employee was the defendant. Briefly, the facts are that she was senior employee involved in investment advice to a linked company in the British Virgin Islands. That employee had been the chief executive officer, was then the chief compliance officer and, after some difficulties, she became a director and internal interim compliance officer. She suffered from work related stress and became concerned about her position in the company. Her contract of employment contained several clauses with respect to confidential information, the retention of confidential information by the

company and to her duty of care to protect sensitive and confidential information (quoted at paragraph 15 of the judgment). When the employee was informed that her role was at risk of redundancy, and that she was to be dismissed, she was put on "*garden leave*". Before her dismissal took effect, the company investigated her e-mail account and found that there had been substantial moving of confidential information to her personal e-mail account. It was said to include "*a huge volume of material*", took place outside working hours and over a period of some months. She did nothing with those emails apart from send them to her solicitor.

47. Mr Segal, for the respondent, relied on that decision which was that the claimant had breached her contract of employment in sending confidential material to her private e-mail address. The High Court held (according to the head note):-

"It is doubtful if the possibility of litigation with an employer could ever justify an employee in transferring or copying specific confidential documents for his own retention which might be relevant to such a dispute. If such a dispute arises, in the ordinary course the employee must rely on the court's disclosure processes to provide the relevant documents. Even if the employee is distrustful about whether the employer will willingly meet its disclosure obligations, he must rely on the Court to ensure that the employer does".

The court went on to decide that the company had been entitled to dismiss the employee summarily, having discovered the emails had been forwarded to Ms Chadwick's personal email address.

48. Mr Wynne, for the claimant submits that there was no misconduct; that the tribunal has not seen any relevant policies or heard about anything from the relevant officer with power to dismiss and there is insufficient evidence for the tribunal to find that the claimant would have been dismissed. It is submitted that the claimant did not commit any breach of trust.

49. We were referred to Hill v Governing Body of Great Tey Primary School [2013] UK EAT which states that a tribunal should determine, in these sorts of cases, -

"*how likely it was that, acting fairly, the employer would have dismissed the employee; that, in so doing, a tribunal was not deciding what it would have done if it was the employer but assessing the chances of what the actual employer would have done, through a spectrum ranging from the extremes of certainty that the employer would have dismissed and certainty that he would not;"*

50. The respondent submitted that there were three acts of unlawful conduct and that the claimant would therefore have been lawfully dismissed.

51. It is also submitted by the respondent that there was a high chance that the claimant would have left the respondent is she had been transferred for non-discriminatory reasons. The respondent was entitled to move officers; this happened regularly, and the claimant would have resigned rather than being required to move. The respondent submits that the claimant's employment with the respondent would have been "minimal" after August 2014.

52. For the claimant, it is submitted that the tribunal cannot find that she would have resigned because of being moved for a lawful reason purely based on what we know about her response to being transferred in 2014. It was also suggested by Mr Wynne that Mr Kavanagh had made it clear that the transfer decision was made by Mr McCluskey and Mr Turner but that is not in accordance with the facts as found by us.

53. Very short submissions were made with respect to issues 5.3 and 5.4 which relate to the length of time the claimant would have remained in employment with the respondent or in similarly well-paid employment until her retirement in 67 and that she might well have been promoted.

54. Issue 6 has proved to be rather contentious. Mr Wynne, for the claimant, says that this issue should be read literally, and it would be properly dealt with along with other matters at the December hearing under the heading "Mitigation". We were asked to consider Dench v Flynn & Partners [1998] IRLR 653. The Court of Appeal, in this case, stated that compensation does not necessarily cease when a claimant gets employment "*of a permanent nature at an equivalent or higher salary than the employee previously enjoyed*". It will depend upon the circumstances of the case. It is submitted by the claimant that taking up the Network Rail job should not bring to an end any calculation of financial loss. It is submitted that the tribunal needs to analyse these matters in their full context, including medical and expert financial evidence.

55. With respect to the question of how long the claimant might be employed by the respondent if she had not been discriminated against, we were asked to consider Wardle v Credit Agricole Corporate & Investment Bank (2011 EWCA CIV545) in which the Court of Appeal stated that it would be "*a rare case*" where we would be assessing compensation over a career lifetime, which is the claimant's case.

56. The respondent's case is that the tribunal can decide Issue 6 from the evidence at this hearing. Mr Segal also presented some supplemental submissions which dealt with the scope of Issue 6. He submitted that the tribunal can certainly decide that losses should not continue beyond the date the claimant took up the Network Rail job on 4 January 2017. She continued in that job until her resignation in April 2018.

57. Mr Segal reminded the tribunal that the issues upon which the employment tribunal had agreed to have split remedy hearings was to enable the parties to know the scope of the claimant's losses so that the scope of the December hearing, including what expert evidence might be required,

would be clear. It is agreed that the relevant law was considered in the Dench case and that case, it is submitted, confirms that securing permanent employment at a same or better remuneration generally brings the period of loss to a close.

58. Quoting Judge Peter Clark in Whelan v Richardson [1998] IRLR 114 as follows:-

"As soon as the applicant obtains permanent alternative employment paying the same or more than his pre-dismissal earnings, his loss attributable to the action taken by the respondent employer ceases. It cannot be revived if he then loses that employment either through his own action or that of his new employer. Neither can the [respondent employer] rely on the employee's increased earnings to reduce the loss sustained prior to taking the new employment. The chain of causation has been broken".

the Court of Appeal found the statement "*needs qualification*" (paragraph 19), in that such an event will not always put an end to the attribution of loss. It is submitted that the Dench case only makes the point that there may (exceptionally) be a case where a tribunal can calculate losses beyond that new open-ended employment.

59. Mr Segal asked the tribunal to pay account to what he argued was unreliable evidence from the claimant with respect to her health and/or financial issues with respect to having taken up the employment or indeed having left it. He referred in particular to the details of the flexible working arrangements as set out above.

CONCLUSIONS

The Remitted Issues 1 and 2

60. Our conclusion is that the respondent is liable by reason of harassment on the part of Mr Hughes and Mr Murray but not Mr Kavanagh. We considered this matter with considerable care. We read several of the relevant paragraphs in the liability judgment and considered them again. Particularly in the light of Mr Kavanagh's evidence we re-considered our findings again. There was no new evidence with respect to Mr Murray or Mr Hughes.

61. We first consider the question of whether there was harassment related to the claimant's sex by Mr Hughes and/or Mr Murray in the period of time from the claimant's complaint on 17 March 2014 to the central decisions taken thereafter by Mr Hughes and Mr Murray which are set out between paragraphs 13.14 and 13.40 of the liability judgment.

62. At paragraph 13.16 it was recorded that Mr Kavanagh suggested that the elected representatives (Mr Sani and Mr Coxhill) should be suspended but Mr Murray did not agree. Mr Murray was the person who wrote to Mr Sani

and Mr Coxhill advising of them of the investigation Mr Hughes was to undertake. He made no mention of the allegation of gender discrimination when he wrote to Mr Sani. This is even though the claimant's complaint stated on several occasions that she believed his treatment of her was "*on the grounds of my gender*". Mr Murray did inform Mr Coxhill that there was an allegation of having made "*remarks of a derogatory and sexual nature about another colleague*". Both were warned of the possibility of discipline under the Union rule book.

63. Mr Murray's evidence as set out in paragraph 13.18 was that he did not believe that the "*school headmistress*" remark had a gender element and he was therefore not clear that allegations with respect to Mr Sani were allegations of sex discrimination though he understood that Mr Coxhill's comments were.

64. Mr Hughes, as paragraph 13.21 onwards sets out, began his investigation and spoke to several people. We did not see the notes that he took with respect to that investigation. He did recollect that the claimant raised her belief that there was gender discrimination by Mr Sani when he met with her on 16 May.

65. Paragraph 13.28 records that Mr Sani said: "*I don't have a problem because she is a woman. I do have a problem with her competence*" in answer to a direct question about whether the problem was because she was a woman. It does not appear that further details of why the claimant believed there was discrimination on the grounds of gender by Mr Sani were put to him. It seems that Mr Hughes (and therefore Mr Sani) was unaware of the particular concern about the "*school headmistress*" and *"that woman off the airport*" comments. Mr Hughes' conclusion with respect to Mr Sani is recorded at paragraph 13.29 and that is that there was no case to answer. We record at paragraph 13.30 that we were surprised that this was his conclusion and stated: "*the finding does not seem a reasonable one".*

66. We then recorded at paragraphs 13.32 onwards how Mr Hughes dealt with the Mr Coxhill complaint. Because Mr Coxhill did not initially co-operate his union credentials were suspended. He then agreed to be interviewed. We recorded some of his response in paragraph 13.33. We recorded Mr Hughes' finding in relation to the Mr Coxhill matter in paragraph 13.34 setting out his recommendation.

67. We also set out at paragraph 13.35 that Mr Murray saw that report, but it appears no-one else did. We then set out the contents of a letter which purports to be an apology at paragraph 13.35. At paragraph 13.37 we recorded that Mrs Coxhill, on her husband Mr Coxhill's behalf, asked for reinstatement of Mr Coxhill's credentials and Mr Murray's reply is recorded at paragraph 13.37. We comment at paragraph 13.38 that Mr Murray did not accurately reflect Mr Hughes' report and decided to lift the suspension without knowing whether the claimant had accepted the apology. The claimant only found out about the outcome of the investigation through a

discussion with Mr Kavanagh, as reported at paragraph 13.39, and she immediately made it clear that she did not accept the apology.

68. We recorded parts of Mr Murray's cross-examination about his decision to lift the suspension and restore Mr Coxhill's credentials at paragraph 13.40. We also set out there the claimant's lack of knowledge of the recommendations of the Hughes report.

69. We now consider whether those matters amount to facts from which we could conclude that there had been unwanted conduct related to the claimant's sex that had the purpose or effect of violating her dignity or creating an intimidating etc environment for her, taking into account her perception and other circumstances of the case.

70. We have concluded that there were serious failings in the way in which the respondent, through Mr Murray and Mr Hughes, dealt with the complaint. As set out between paragraphs 73 to 76 of the liability judgment, given the clear evidence of gender specific language which the respondent was charged with looking into, we find that either consciously or sub-consciously, those decisions and the failure to adequately investigate or carry out the recommendations as suggested by Mr Hughes are facts from which we could conclude the conduct related to the claimant's sex. Our reasons for this are all set out in detail in paragraph 74 of the liability judgment. We accept that the conduct had the effect of violating the claimant's dignity and it created an intimidating etc environment for her. We do not accept that the respondent's explanation for the unwanted conduct leads us to the conclusion that there was no harassment. Mr Murray and Mr Hughes either overlooked or ignored the concerns raised by the claimant that her treatment by Mr Sani was based on gender. They also failed to take appropriate action in relation to Mr Coxhill's actions. We find that the treatment by Mr Murray and Mr Hughes in relation to the concerns raised by the claimant amounted to harassment related to sex.

71. We then turn to the question of Mr Kavanagh's interactions with the claimant. There is no question that there was any element of sex discrimination or harassment on the part of Mr Kavanagh up to the decision to transfer the claimant. Before that, she agreed and we have found that he was entirely supportive of her and recognised the serious difficulties she faced, some of which related to her gender.

72. The question therefore for us now is whether those facts which do include an element of sex discrimination or harassment because of the gender specific language used by Mr Sani and Mr Coxhill, of which Mr Kavanagh was aware, was itself the motivating factor, either consciously or sub-consciously, for his decision to transfer the claimant.

73. We have considered this anew with the evidence before us last time and at this hearing. We admit to not entirely understanding the level of concern the respondent's officers seem to have over the threat to release the DVD, but we accept that that was the primary motivating factor. We also accept that Mr Kavanagh was concerned to protect the claimant's health. Looking

at matters in the round, and bearing in mind that Mr Kavanagh had moved other officers because of similar problems, we do not infer that there was unwanted conduct which related to her sex which had the purpose or effect of violating the claimant's dignity when Mr Kavanagh took the decision to transfer her from Heathrow. Nor do we find that it was less favourable treatment because of sex. It goes without saying this does not mean that our findings with respect to the fact that there was a fundamental breach of contract do not still apply. There was still a significant amount of other sexual harassment and discrimination by the lay officials and by other paid officials to create a situation with other matters that led to a fundamental breach of contract in response to which the claimant was entitled to resign.

Remedy Issues

74. We turn then to consider the question of what chance there is that the claimant would have lawfully been dismissed for the three alleged aspects of misconduct. We have considered each in turn.

75. As far as the covert recording made on 25 September 2013 is concerned we had some immediate concerns about this because it appears that the respondent could not and would not have been aware of this recording had it not been for the fact that the claimant brought her employment to an end. It is possible that it might have still been revealed if the claimant had pursued a claim for discrimination whilst remaining in employment and neither representative seemed to believe that you could take too much notice of that fact. The respondent did know about the emails as they were discovered around the time of the claimant's resignation.

76. As far as the covert recording is concerned, we accept Mr Segal's submissions that we should pay attention to the kind of meeting being held at the time the recording was made. There was a dispute between the parties as to whether the claimant was in attendance as a member of the union who had a grievance before she became an officer or whether she was there as an officer. It seems to the tribunal that she was attending that meeting in both capacities. To a large extent she was there as a member seeking the advice, guidance or assistance of the main legal officer with respect to a potential claim. On the other hand, by the time she went to the meeting, she was also an officer and employee of the respondent so that could be relevant to any issues of conduct. In either capacity, the claimant had been told the meeting was confidential.

77. We take account of the fact that the respondent has no written policy with respect to covert recordings; that the recording was disclosed in the context of this litigation; was not disseminated and the claimant was advised to make a recording by another officer of the respondent. We do not accept that it would automatically amount to a breach of trust to make such a recording. However, we have formed the view that the claimant, while she might have been led to think that this was an appropriate action, should have realised that it would have concerned Mr Beckett. She would

be aware that it was possible that it would have amounted to misconduct and she might have to explain her actions and those explanations may or may not have been accepted.

78. Turning then to the language used in the second part of the covert recording, we find that there is no question that this is language which would amount to race discrimination and/or harassment. Although Mr Beckett did not hear it at the time, we do not doubt that he was offended when he did hear it. Any direct reference to a person's nationality or ethnic origin, particularly when that is in the context of the strongly stated and negative remarks would lead us to that finding. We are surprised that we have still not seen an equality policy, but we do not know that that would necessarily make us feel any differently. The tribunal finds that the claimant, who is well aware of equality and diversity issues, would know at the time she made this comment that it amounted to discriminatory language. She says that the comments were made in the heat of the moment but that does not really excuse it and cannot be justified. She also refers to Mr Beckett's use of inappropriate language and we accept that that might be a mitigating factor and we do accept that his language was also inappropriate. It seems to us that this is likely to be found to be misconduct but again there may well have been some mitigating factors.

79. We now consider the emails being sent from the work address to the claimant's email address. The tribunal is more than a little surprised by the fact that there appears to be a policy on this which even Mr Beckett did not know about until he attended this tribunal. The tribunal did not see a copy of any such policy and the claimant was not aware of it. She had had no training at the respondent with respect to it. The Brandeaux case is difficult because it appears to suggest that, in all circumstances, sending emails which could be confidential from a work address to a personal address would be a breach of trust. We are not sure that we agree that that is a correct reading of it. We must look at the different circumstances in this case. In the Brandeaux case, Ms Chadwick was working in a very different industry where it would appear that the emails, which were sent over many days, and contained highly sensitive information about overseas financial investments. The claimant was in a very different position. The claimant was a regional officer for the respondent trade union, and we have no evidence about what information was contained within those emails. Whether the legal advice the claimant received was right or wrong, she relied upon it. The respondent has suggested there was some confidential information contained in those emails, but we have had no evidence of the sort of confidences which were contained therein, nor the extent of them.

80. The tribunal does not accept that any forwarding of work emails to a personal email address would amount to a breach of trust so that a person might face dismissal for it. If that was the case, relying on our collective knowledge of things that people do at work, there would be many such breaches on a daily basis. What is more, the most significant difference between Ms Chadwick's situation and the claimant's, is that Ms

Chadwick's contract had clear unequivocal clauses which related to client information and she was a senior officer with fiduciary duties. The claimant had worked in another organisation where such forwarding of emails was not possible, but the respondent did not have such a system. Bearing all those matters in mind, we find that the sending of emails to a personal address could be considered to be misconduct. It might well have led to an investigation and possibly a disciplinary hearing, but the claimant's explanation might well have been sufficient for the claimant not to have been dismissed.

81. We consider all three matters which the respondent says, taken together, would have been likely to lead to dismissal. The problem for the respondent is that it has taken the view that we did not need to see the disciplinary procedure. This might well, as is usual, refer to misconduct which might be considered to amount to gross misconduct and contain the procedure which would have been used in disciplinary matters. Some of the evidence about that was only elicited on cross-examination and questions by the tribunal of Mr Beckett. Nor did we have very much information on sanctions with respect to anybody else in similar circumstances. This was only given again towards the end of Mr Beckett's evidence. It appears that Mr Beckett, in any event, would not have been the person to take the decision on what sanction, if any, to impose on this claimant. We do not know, because the general secretary did not come to tell us, what view he would have taken of these events.

82. We have decided that there is sufficient evidence on the basis of all three of these matters that, had the respondent known about them, they may well have carried out an investigation which might have led to disciplinary action. In the light of the very slight evidence we have about similar cases; what processes would be followed; what the dismissing officer might have thought and what matters he would have weighed in the balance, we have decided, in the circumstances, that there was a 30% chance that the claimant would have been dismissed. Roughly speaking, we assess the likelihood of dismissal for the discriminatory remarks about Mr Beckett at 20% and the other two at 5%.

83. We turn then to issue 5.2, which is whether the claimant would have been lawfully required to leave her allocation without any discriminatory element. We have now decided that Mr Kavanagh did not discriminate or harass her when he took the decision to move her from Heathrow. However, that is not the only discrimination which the claimant had faced whilst at the respondent and that was clearly tied to her decision to resign. She dealt with it specifically in her letter of resignation referring to the months of harassment and what she considered to be the trade union's failure to protect her. What we are being asked to do is to ignore those aspects and make an assumption that, if there had just been the 1997 DVD and that had been the reason for the claimant to be asked to move, she would not have agreed to do so and would have resigned. This is a very difficult task to carry out because that is clearly not the factual background. We have been given very little information on when decisions to transfer would be

made, although we heard some evidence from Mr Kavanagh on the last occasion. The claimant had made it clear that she wanted to be at Heathrow, some of that was about travel but it also included the fact that she had a teenage daughter at home. There is insufficient evidence upon which to base a finding that either a transfer decision based only on the DVD or a hypothetical transfer would have led to her resignation.

84. As for the likely period of employment at issues 5.3 and 5.4 we have taken the view, which we will explain under Issue 6, that the likely period of employment for the claimant is up to January 2017. We do not accept that it would have been likely that she would have stayed at the respondent until aged 65 or 67 because she was clearly not happy there for several reasons, including her stated unhappiness with Mr Beckett which is shown by the 2013 covert recording. The claimant had been with the respondent for a short period of time and we find she would have remained as regional officer with any increases of wages applicable to that post no later than January 2017. We have insufficient evidence that she would have been promoted because there is no evidence about whether there were any vacancies during 2015 and 2016.

85. We turn then finally to Issue 6. The first thing we had to decide was whether we could decide this issue on the evidence before us at this hearing. We were encouraged by Mr Wynne to delay such a finding until we had further evidence at the December hearing as he submitted it is closely aligned to the question of mitigation at Issue 9. He submitted that the medical evidence would assist. We have had limited medical evidence at this hearing, which was extracts of medical records, but we did not consider them in any detail. We have formed the view that this is a matter which we can determine at this hearing having heard considerable evidence on the Network Rail post. The claimant provided a detailed witness statement about the Network Rail job which she sets out in the 20 paragraphs between paragraphs 59 and 79 and she gives there a number of reasons for taking the post and leaving it. We know that the most common effect at a remedy hearing of a claimant having secured open-ended employment at a better salary is that, in most cases, that fact would bring the calculation of financial losses to an end or, as is said in issue 6, "*break the chain of causation*".

86. The evidence in this case has not led us to a different conclusion from that which would normally be made where open ended employment at the same or higher salary is taken up. The claimant's situation is very different from that in the Dench case where there was a very short period between the claimant's dismissal and the new job which was then only of two months duration. We are of the view that there is plenty of information before us now that means that we can decide this point. We cannot imagine what evidence would be in front of us which would make us decide this point differently, given the best evidence on this is, of course, that which comes from the claimant herself.

87. The claimant resigned in August 2014 and she has set out her searches for employment between that date and September 2016 when she was approached by an ex-colleague about a possible job with Network Rail. The claimant was certainly well enough when she took the job. The doctor was prepared to sign her as fit for work even though he was reportedly concerned about that. The claimant has provided considerable detail about the work she did, the length and the cost of her commute, the flexibility that she was allowed, so that for a considerable amount of her working time there, she was working from home. Whilst we appreciate the claimant had some difficulties when she met with certain officers or trade unionists, we do not accept that this was the reason why she gave up that job. She may well have had health issues, but she continued to work for an organisation which she described in glowing terms until she was offered another job in April 2018. She did not stop working for Network Rail until July 2018. This is sufficient evidence for the tribunal to make a finding about whether the claimant taking up that employment broke the chain of causation.

88. We find that taking up that employment did break the chain of causation. It was open ended employment which she stayed in for almost 18 months. It is clear to us that this is a job which the claimant took willingly and eagerly and the reasons for her deciding to resign and take up another job were many and various. It would not be right for the respondent to be liable for financial losses after she started that job and any calculation for such losses will to be up to 4 January 2017.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The parties should inform the tribunal what dates they will not be available for a telephone preliminary hearing in September and October 2019 by **13 September 2019.**

2. The claimant will send an updated schedule of loss to the respondent by **27 September 2019**.

3. The respondent will send an updated counter schedule of loss to the claimant by **11 October 2019**.

4. The parties will agree a joint bundle of documents for the December remedy hearing by **25 October 2019**.

5. Any further witness statements must be exchanged by **8 November 2019.**

6. The parties will exchange outline legal arguments and send them to the tribunal by **2 December 2019**.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

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Employment Judge Manley

Date: …5 September 2019…………..

Sent to the parties on: ....

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For the Tribunal Office