EMPLOYMENT TRIBUNALS

Claimant: Mrs Lynn Hodgkinson

Respondent: Empire Services Club (Preston) Limited

Heard at: Manchester **On:** 27-29 January 2020 and in chambers 15 September 2020

Before: Employment Judge McDonald
Mrs C Linney
Ms V Worthington

REPRESENTATION:

Claimant: Mr R Lassey (counsel)
Respondent: Mr J Searle (counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint that she was unfairly dismissed succeeds.

2. The claimant's complaint that Alleged Incidents 4, 6, 7, 11-18 were acts of age-related harassment in breach of section 26 of the Equality Act 2010 succeeds.

3. The claimant's complaint that Alleged Incident 19 was an act of direct age discrimination in breach of section 13 of the Equality Act 2010 succeeds.

4. The case will be listed for a one-day hearing to decide the appropriate remedy for the successful complaints.

REASONS

1. The respondent in this case is a social club ("the Club") which is run by a committee. The claimant and her husband were employed as the Steward/Stewardess of the Club. That primarily involved running the Club bar. The claimant claims that the respondent unfairly constructively dismissed her in August 2018 by a series of incidents from July 2017 onwards. She also says that some of the Alleged Incidents were acts of age-related harassment or, in the alternative, direct age discrimination.

Preliminary matters

2. We heard the evidence in this case on 27-28 January 2020 and submissions from the parties' barristers on the 29 January 2020. There was not enough time for us to finish our deliberations on the afternoon of 29 January 2020. We were due to reconvene to make out decision on the 27 March 2020. It was not possible to do so due to the impact of the Covid pandemic on Tribunal hearings. The difficulties in finding a date when all the members of the Tribunal were available meant that we did not reconvene to finish our deliberations until 15 September 2020. We apologise to the parties for the delay in providing them with the judgment in this case.

The Alleged incidents

3. The incidents relied on as the basis for the claimant's case were set out in three Scott Schedules, one for each complaint. Those for the Direct Discrimination and the Harassment complaints were included in the Tribunal bundle ("the Bundle") (pp.82-86). The Scott Schedule setting out the alleged breaches of contract relied on by the claimant in the Unfair Dismissal complaint were not included in the Bundle. Copies of that schedule were provided at the hearing and having had an opportunity to consider it on the first morning of the hearing Mr Searle confirmed the respondent had no objection to it.

4. There is a significant amount of overlap between the three Scott Schedules. To simplify our fact-finding when the Tribunal convened to make its decision in chambers we created a single list of alleged incidents based on the Schedules. That combined list of incidents is set out in the Annex to this judgment. In this judgment we have referred to the incidents on that list as "the Alleged Incidents" and used the numbering for those incidents used in the Annex.

5. In the Scott Schedules the date of the meeting between the claimant, her daughter and Ms Murphy (Alleged Incident 16) is given as 24 April 2018 but it is clear the meeting took place on 27 April 2018 (see pp.152-153) so we have corrected that in the wording of Alleged Incidents 16 and 17.

Witness statements and evidential documents

6. For the claimant we heard evidence from the claimant and from her daughter, Mrs Meloney Hafeji ("Mrs Hafeji"). Each provided a written witness statement, was cross-examined by Mr Searle and answered questions from the Tribunal.

7. The claimant also provided a written witness statement from Thomas Kershaw ("Mr Kershaw") who was President of the respondent's committee from 2016 to April 2018. However, Mr Kershaw was not called to give oral evidence. Although we have read his statement the weight that we can attach to his evidence is not as great as if he had been the subject of cross examination.

8. Although the bundle of witness statements also included a statement from Sonja Holmes the claimant decided not to call her evidence. Her statement was removed from the bundle and we did not read it.

9. For the respondent we heard evidence from Mr Geoff Foy ("Mr Foy") who was employed by the respondent as Treasurer and also sat on its committee. He provided a written witness statement, was cross-examined by Mr Lassey and answered questions from the Tribunal.

10. The respondent also provided a written witness statement from Denise Hunter, a barmaid at the club. However, Mrs Hunter was not called to give oral evidence. Although we have read her statement the weight that we can attach to her evidence is not as great as if she had been the subject of cross examination.

11. Although many of the Alleged incidents involved Mikaela Murphy ("Ms Murphy"), who was the respondent's Secretary, we did not hear evidence from her. We understand she left the respondent's committee at the end of 2018.

12. The agreed bundle of documents ("the Bundle") consisted of 398 pages. References in this judgment to page numbers are to page numbers in the Bundle. Two documents were added to the Bundle without objection during the hearing. They were the letter dated 31 January 2018 confirming the claimant's husband's dismissal (p.146A) and an email from Mrs Hafeji to Lancashire Constabulary dated 8 August 2018 (p.161A).

13. The Bundle also included a disc with footage from the CCTV at the club bar which related to the theft from the Club by the claimant's grandson. We were not referred to the CCTV clips and did not watch them. There was also an audio recording of a conversation between the claimant's solicitors and Lancashire Constabulary regarding a Data Subject Access Request. There was a transcript of the conversation in the Bundle (p.183) and given its contents we did not need to listen to the audio of the conversation on which it was based.

14. There was also an audio recording of the meeting between the claimant, Mrs Hafeji and Ms Murphy on the 27 April 2018. The transcript of that recording was exhibited to Mrs Hafeji's witness statement (pp.32-34 of the Witness Statement bundle). Having listened to the recording we were satisfied that the transcript was an accurate record of what was said and base our findings on it.

Complaints and Issues

15. The complaints and issues in this case were clarified at the preliminary hearing conducted by Employment Judge Barker on 19 July 2019. At that hearing the claimant withdrew her complaints of marital status discrimination and unlawful deduction from wages. At that hearing the claimant's application to amend her

complaints of direct age discrimination and age-related harassment were allowed in part. Employment Judge Barker refused to allow the claimant to amend her complaint of unfair dismissal to introduce a primary dismissal date of 30 January 2018 (pp.92-98).

16. The incidents relied on as the basis for each of the three complaints were set out in three Scott Schedules, one for each complaint. Those for the Direct Discrimination and the Harassment complaints were included in the Bundle (pp.82-86). The Scott Schedule setting out the alleged breaches of contract relied on by the claimant in the Unfair Dismissal complaint were not included in the Bundle. However, having had an opportunity to consider it on the first morning of the hearing Mr Searle confirmed the respondent had no objection to it.

17. There is a significant amount of overlap between the three Scott Schedules. To simplify our fact-finding when the Tribunal convened to make its decision in chambers we created a single list of alleged incidents based on the Schedules. That combined list of incidents is set out in the Annex to this judgment. In this judgment we have referred to the incidents on that list as "the Alleged Incidents".

18. In the Scott Schedules the date of the meeting between the claimant, her daughter and Ms Murphy is given as 24 April 2018 but it is clear the meeting took place on 27 April 2018 (see pp.152-153) so we have corrected that in the wording of Alleged Incidents 16 and 17.

19. As a result of those decisions, the matters to be determined at the final hearing of this case were identified by Employment Judge Barker as:

(i) Whether the claimant was constructively unfairly dismissed in August 2018; ("the Unfair Dismissal complaint")

(ii) Whether the claimant suffered direct age discrimination for a period between September 2017 and August 2018; ("the Direct Discrimination complaint")

(iii) Whether the claimant was subjected to incidents of harassment related to her age between September 2017 and August 2018 ("the Harassment complaint").

20. That list of issues did not specifically refer to time limit issues. It was not clear to what extent any time limit issues had been decided at the preliminary hearing. In his oral submissions at the end of the case Mr Searle submitted that each alleged incident of harassment or discrimination was a separate, discrete incident rather than forming a single continuous act. Given that Employment Judge Barker at the preliminary hearing would not have heard evidence about those incidents and so not been in a position to decide that issue we concluded that the issue was a live one for us to decide. We have recorded our findings and conclusions on the issue at paras 239-241 below.

21. At the time of the Alleged Incidents the claimant was either 61 or 62 years' old. Her direct age discrimination complaint was based on having been treated less

favourably than a hypothetical comparator who was under 50 years old (para 50 of the amended particulars of claim (p.80).

Relevant Law

The Equality Act 2010 ("the 2010 Act") complaints

22. The complaints of direct age discrimination and age-related harassment were brought under the 2010 Act. Section 39(2)(d) prohibits discrimination against an employee by subjecting them to a detriment. S.39(2)(c) prohibits discriminating against an employee by dismissing them. S.40(1)(a) prohibits harassment of an employee. A detriment exists "if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment" but does not extend to an unjustified sense of grievance (**Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**). Conduct which constitutes harassment cannot also constitute a "detriment" (s.212(1)), meaning that it if it amounts to an act of harassment it cannot also be an act of direct discrimination.

23. In **Timothy James Consulting v Wilton [2015] ICR 764** the Employment Appeal Tribunal ("EAT") decided that a constructive dismissal cannot be an act of harassment for the purposes of the 2010 Act. However, s.39(7)(b) of the 2010 Act confirms that a dismissal in s.39(2)(c) includes a constructive dismissal. The EAT in **McLeary v One Housing Group Limited (UKEAT/0124/18/LA)** confirmed that a constructive dismissal can be an act of direct discrimination.

Direct age discrimination

24. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:

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

25. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

26. It is well established that where the treatment of which the claimant complains is not overtly because of a protected characteristic (in this case age or sex), the key question is the "reason why" the decision or action of the respondent was taken.

27. In **Khalid Tabidi v British Broadcasting Corporation [2020] EWCA Civ 733** the Court of Appeal endorsed the comments of Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] ICR 337** that although the definition in section 13 (1) on its face incorporates two elements - (a) whether A has treated B "less favourably than" he or she treats or would treat others, and (b) whether he or she has done so "because of the protected characteristic" - the

two questions are intertwined and it will often be simpler for a Tribunal to approach the "reason why" question first.

28. As the Equality and Human Rights Commission's Statutory Code of Practice on Discrimination in Employment ("the EHRC Code"") explains, 'the [protected] characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause' — para 3.11. The question is whether the protected characteristic was an "effective cause" of the les favourbale treatment.

29. Although s.13(2) of the 2010 Act provides an objective justification defence to a claim of direct age discrimination Mr Searle confirmed that the respondent was not seeking to argue that such a defence applied in this case.

Harassment

30. The definition of harassment appears in section 26 of the 2010 Act which so far as material reads as follows:

"(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 sub-section (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."

31. In this judgment we refer to the purpose and effect defined in s.26(1)(b) as the "harassing purpose" and "harassing effect".

32. The EHRC Code explains (at para 7.8) that "'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment."

33. The EHRC Code also gives more detail on the factors relevant in deciding whether conduct has a harassing effect at paragraph 7.18:

"7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

The Burden of Proof in cases under the 2010 Act

34. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

35. It is well established that where the treatment of which the claimant complains is not overtly because of a protected characteristic (in this case age or sex), the key question is the "reason why" the decision or action of the respondent was taken.

36. The Employment Appeal Tribunal summarised the proper approach to the facts in cases under the 2010 Act in **Talbot v Costain Oil, Gas & Process Ltd and others [2017] I.C.R. D11:**

> "(1) It is very unusual to find direct evidence of discrimination;
>
> (2) Normally the Tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;

> (3) It is essential that the Tribunal makes findings about any "primary facts" which are in issue so that it can take them into account as part of the relevant circumstances;
>
> (4) The Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;
>
> (5) Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there are a number of allegations of discrimination involving one personality, conclusions about that personality are obviously going to be relevant in relation to all the allegations;
>
> (6) The Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors which point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;
>
> (7) If it is necessary to resort to the burden of proof in this context, section 136 of the Equality Act 2010 provides in effect that where it would be proper to draw an inference of discrimination in the absence of "any other explanation" the burden lies on the alleged discriminator to prove there was no discrimination."

Remedies for claims under the 2010 Act

37. Where a claimant succeeds in a claim of discrimination, s.124 of the 2010 Act gives the Tribunal three options (though not mutually exclusive) when deciding on an appropriate remedy for a claimant:

- to make a declaration as to the rights of the complainant and the respondent (s.124(2)(a))
- to order the respondent to pay compensation to the complainant (s.124(2)(b)), and/or
- to make an appropriate recommendation (s.124(2)(c)).

38. Most commonly the Tribunal will award compensation, the amount of which corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (s.124(2)(b) and (6) combined with S.119(2) and (3) of the 2010 Act). This means that there is no upper limit on the amount of compensation that can be awarded for discrimination, unlike, for example, compensation for unfair dismissal. Compensation can include compensation for injury to feelings and personal injury in addition to compensation for financial loss.

Time limits in cases under the 2010 Act

39. A claim concerning work-related discrimination or harassment must usually be made to the Tribunal within the period of three months beginning with the date of the act complained of (S.123(1)(a) of the 2010 Act). However, The Tribunal may accept a claim outside that usual time limit if it is made within such other period as it considers just and equitable. The three-month time limit is also extended in most circumstances to take into account the steps involved in complying with the Early Conciliation procedure.

40. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed. Section 123(1)(a) of the 2010 Act says:

> **"(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

41. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** the Court of Appeal confirmed that in deciding whether there was a continuing act:

> 'The focus should be on the substance of the complaints … was there an ongoing situation or a continuing state of affairs in which officers … were treated less favourably? The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'.

42. In considering whether separate incidents form part of a continuing act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents' **Aziz v FDA 2010 EWCA Civ 304, CA**.

43. Acts which the Tribunal finds are not established on the facts or are found not to be discriminatory cannot form part of the continuing act: **South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19**.

44. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, 'there is no presumption that they should do so…a tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

45. In **British Coal Corporation v Keeble [1997] IRLR 336** the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. Those factors are in particular: the length of, and

reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

46. In **Southwark London Borough Council v Afolabi [2003] ICR 800, CA**, the Court of Appeal confirmed that, while that checklist in S.33 provides a useful guide for tribunals, it need not be adhered to slavishly. It went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

The unfair dismissal complaint

47. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by his employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

48. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

49. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section [98(4)] may be satisfied."

Remedy for unfair dismissal

50. S.118(1) ERA says that:

> **"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—**
>
> **(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and**

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).”

51. The basic award is calculated based on a week’s pay, length of service and the age of the claimant.

52. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

53. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd** referred to above).

54. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

55. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Constructive dismissal

56. Section 95(1)(c) provides that “an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct”. This is known as “constructive dismissal”. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment entitling the employee to resign: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761**.

57. The claimant says that Alleged Incidents 1-18 either separately or together amount to a breach of the implied term of trust and confidence. The existence of that implied term of mutual trust and confidence was confirmed by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**. It confirmed that the obligation on each party is that it will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

58. The question is whether, objectively, there has been a breach of the implied term. For the implied term to be breached the conduct must be such as, objectively, is calculated or likely to undermine the duty of trust and confidence and must be conduct for which there is, objectively, no reasonable and proper cause (**Bradbury v BBC [2015] EWHC 1368 (Ch)** and **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121**).

59. If the employer is found to have been guilty of such conduct, that is something which goes to the root of the contract and amounts to a repudiatory breach, entitling the employee to resign and claim constructive dismissal (**Morrow v Safeway Stores [2002] I.R.L.R. 9**).

60. A breach of that implied term can result from the cumulative conduct of the employer rather that one repudiatory act. In many cases there can be a final act or "last straw" before the resignation.

61. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R. 35** the Court of Appeal explained that the final act (the so called "last straw") in a series of actions which cumulatively entitled an employee to repudiate his contract and claim constructive dismissal need not be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of had to be more than very trivial and had to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach

62. The Court of Appeal clarified the correct approach for the Tribunal to take in such cases in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, para 55:**

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the employee's right to resign even if there was a previous affirmation).
>
> (5) Did the employee resign in response (or partly in response) to that breach?"

63. If the "last straw "conduct of the employer which tips the employee into resigning could not contribute to a breach of the implied duty of trust and confidence, the claim of constructively dismissed must fail if (a) there was no prior conduct by the employer amounting to a fundamental breach; or (b) there was, but it was affirmed. But if, in such a case, there was prior conduct amounting to a breach which was not affirmed, and which also materially contributed to the decision to resign, the claim of constructive dismissal will succeed (**Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] I.R.L.R. 589**).

64. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp1978 ICR 221, CA**, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

65. The leading case on the doctrine of affirmation as it applies where an employer is in fundamental breach of an employee's contract is **W E Cox Toner (International) Ltd v Crook [1981] IRLR 443**. Mr Justice Browne-Wilkinson in his judgment said so far as it material:

> "13. … Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: **Allen v Robles [1969] 1 WLR 1193**. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation …"

66. In **Mari v Reuters Ltd EAT0539/13** the EAT concluded that there is no absolute rule that in deciding whether an employee has affirmed a contract after breach acceptance of sick pay is always neutral; rather, the significance to be afforded to the acceptance of sick pay will depend on the circumstances. At one extreme, an employee may be so seriously ill that it would be unjust and unrealistic to hold that acceptance of sick pay contributed to affirmation. At the other, an employee may continue to claim and accept sick pay when better and when seeking to exercise other contractual rights.

Findings of Fact

67. In this section of the judgment we set out our findings of fact relevant to the issues we need to decide. Those findings are based on the evidence we heard from the claimant and the respondent's witnesses and on the documents we read in the Tribunal Bundle. Where the parties disagreed about what happened we have explained whose evidence we preferred and why.

68. This section of the judgment is divided into the following subsections:

- Background facts
- What happened up to November 2017 (Alleged Incidents 1-8)

- What happened from December 2017 to the end of February 2018 (Alleged Incidents 9-13)

- What happened from March 2018 to the claimant's resignation in August 2018 (Alleged Incidents 14-18)

- The claimant's resignation/constructive dismissal with effect from 31 August 2018 (Alleged Incident 19)

- Our other findings of fact relevant to age discrimination.

69. Although the claimant relies on the Alleged Incidents as the basis for her claim we have also made findings of fact about the facts which form the background and context to those Alleged Incidents. We have done so because they are relevant in placing the Alleged Incidents in context. They are also relevant other issues we need to decide including in particular whether the claimant did resign in response to the Alleged Incidents or (as the respondent says) in response to other incidents which happened towards the end of July 2018.

70. Before setting out our findings of facts we set out our findings on the relative credibility and reliability of the witnesses whose evidence we heard.

Credibility of the witnesses we heard from and the reliability of their evidence

71. The two main witnesses we heard from were the claimant and Mr Foy. We found the claimant to be a credible witness and although she was occasionally confused about the dates of events we found her evidence about particular incidents to be reliable. Mr Foy was unable to give direct evidence about all the matters in dispute because he was not present on all occasions, e.g. the meeting between the claimant, Mr Murphy and Mrs Hafeji on 27 April 2018 (Alleged Incident 16). There was conflicting evidence within his witness statement (see para 133 below). Where he was able to give direct evidence his recollection of events was not clear. Where there was a direct conflict of evidence between the claimant and Mr Foy as to events we preferred the claimant's evidence. We found Mrs Hafeji to be a credible witness who gave reliable evidence.

Background facts

The claimant's employment

72. The claimant worked at the Empire Services Club Preston ("the Club") from 1999 onwards. The Club is a substantial business. At the time of the Alleged Incidents it had an annual turnover in excess of £500,000 and an annual profit of approximately £25,000. It is a VAT registered business and at the relevant time employed around 9 employees.

73. The contract of employment dated 1 March 1999 (pp.122-127) employed "the Steward/Stewardess" and "his/her married partner". From 1999 the claimant's husband was employed as Steward and she as his married partner. They were provided with rent free accommodation by the respondent ("the House"). Their

primary role was to run the Club bar. On termination of employment the House had to be vacated within one month of notice being given (clause 1.4 on p.122). The contract provided that the respondent could summarily dismiss the Steward/Stewardess and his/her married partner if either him/her or his married partner was guilty of serious misconduct (clause 2.3 on p.124).

74. From July 2010, the claimant took over as Stewardess after her husband had a stroke. She was not issued with a new contract of employment. The committee decided that the contract originally issued to Mr Foy was sufficient to cover the claimant's role as Stewardess (p.142).

75. From 2010 the claimant worked 48 hours per week plus overtime with her husband working 16 hours per week. In 2015 the claimant was diagnosed with Lupus. In light of the impact on her health she and her husband and the respondent agreed to reduce her working hours and increase her husband's. We find that from 2015 it was agreed that the claimant would work 40 hours a week and Mr Hodgkinson would work 24 hours a week.

76. The incidents giving rise to the claimant's complaints begin in July 2017. However, there are some incidents which happened before then which are relevant to the case. They relate to a "shortfall" of moneys at the bar of the Club which had been an ongoing issue for some years prior to July 2017.

77. Every Sunday after she took over as Stewardess the claimant would provide Mr Foy, as Club Treasurer, with an account of that week's takings. The contract of employment required that the Stewardess pay all takings to the Treasurer by 11 a.m. on each Sunday morning (clause 3.5 on page 125) so the Treasurer could then deposit it at the bank. However, from approximately 2014-15 Mr Foy and the claimant had agreed that she would only give him that part of the takings which took the form of bank notes each Sunday. She would keep any takings in the form of coins and give Mr Foy an IOU for the amount represented by those coins. Those coins were kept in the Club safe ("the Safe") until the claimant had a chance to take them to the bank to change the coins into bank notes. She would then give those bank notes to Mr Foy to deposit at the bank. Although the logic of that approach is not entirely clear to us we accept that that is what happened in practice.

78. What also happened in practice is that the money held in the Safe was dipped in to for various purposes by the claimant and others. This included paying staff wages in cash and making up shortfalls in the float available for paying out winnings for the Club lotto and the fruit machine in the Club bar. That meant that when the coins were converted into bank notes and given to Mr Foy not all of the IOU amount was paid off. In or around early April 2017 the claimant reported to Ms Murphy that there was a shortfall in the cash in the Safe as against the IOU. On 10 April 2017 a bar meeting was held to discuss the shortfall. The minutes of that meeting were in the Bundle (p.138). It was attended by the claimant, Mr Foy, Ms Murphy, Mr Kershaw and By J Hilton (the Club's Vice-President at the time). At the meeting (and in his evidence to the Tribunal) Mr Foy confirmed that he was not blaming the claimant for the shortfall. He also acknowledged that the claimant and her husband were not the only people who had a key to the Safe. At that bar meeting in April 2017

it was agreed that a solution was needed which would enable the IOU to be cleared. Various steps were suggested including increasing the floats for the lotto and fruit machine, ensuring no staff were paid in cash and arranging for the tills to be serviced. We find it was agreed that the first step was to establish the amount of the shortfall.

79. By August 2017 it had been established that the shortfall was around £3,000. We accept Mr Foy's unchallenged evidence that because of the amount involved Ms Murphy and Mr Foy had taken advice from the police who suggested instructing a forensic auditor to establish what had happened. We accept that no allegation was made to the police of criminal activity by the claimant at this point or later (p.183 and exhibit LH1 to the claimant's witness statement). The auditors appointed on the police's advice reported that it was not clear when and how the shortfall had arisen and that the best approach was to write off the shortfall. On or around 19 August 2017 the claimant provided Mr Foy with a final IOU for £3190 and that amount was subsequently written off. From 19 August 2017 the claimant began giving Mr Foy the whole of the weekly takings (including coins) rather than just the bank notes.

What happened up to November 2017 (Alleged Incidents 1-7)

80. In the first week of July 2017 Ms Murphy asked the claimant whether the issue of retirement had come up between the claimant and her husband. She made a comment about Mr Hodgkinson's age (Mr Hodgkinson was 65 in October that year) and how long he and the claimant had been at the Club and living at the House. The claimant told Ms Murphy that she and Mr Hodgkinson would be there for a long time and were still going strong (Alleged Incident 1).

81. In the last week of July 2017 the claimant was doing some admin paperwork in the Club bar. Ms Murphy made a comment about how tired the claimant looked, that everyone was worried about her and said she should seriously consider retirement. The claimant laughed off Ms Murphy's comments but was worried by them (Alleged Incident 2).

82. On 3 September 2017, the first Sunday of the month, Ms Murphy, Mr Foy and Mr Kershaw held a Club committee meeting. There were no written notes of that meeting in the Bundle. We prefer the claimant's evidence about what happened at the meeting to the evidence given by Mr Foy. Although we can give it little weight because he did not attend the Tribunal to be cross-examined, we note that Mr Kershaw's evidence about this meeting corroborates the claimant's version of what happened.

83. We accept that the claimant was called into the meeting in the middle of her shift at the Club bar. The three committee members were sitting on one side of a table and she was asked to sit down on the other. The claimant perceived the meeting as a formal one.

84. The claimant was asked whether she and her husband were planning to retire or had thought of retirement. The claimant was taken aback and asked what had brought this on. Mr Foy said that Mr Hodgkinson was coming up to 65 and that he wanted to know when the claimant and Mr Hodgkinson would retire. The claimant said that just because someone has reached retirement age does not mean that they

must retire and that she and her husband had not given too much thought to the possibility of retirement because they did not feel there was any rush. Mr Foy asked her to think about it and to "speak to [Mr Hodgkinson]". The claimant said that they were due to be going on holiday in a month's time and they would give them a response on their return. The claimant was then told she could leave the meeting and did so.

85. The claimant was uneasy about the meeting and the committee's raising the issue of retirement and age. The claimant discussed what happened at the meeting with her husband that evening and they agreed they would discuss the issue of retirement with their extended family during their month off in October-November that year. That was an extended family holiday in Tenerife to celebrate Mr Hodgkinson's 65th birthday.

86. On the following day, Monday 4 September 2017 Ms Murphy and Mr Foy again called the claimant into a meeting (Alleged incident 4). There were no written notes of that meeting. We prefer the claimant's evidence about what happened at that meeting to Mr Foy's evidence. We accept that Mr Foy told the claimant that she was responsible for the £3000 shortfall because it happened under her management of the bar. We also accept that he told her that the respondent was thinking of getting the police involved and that there may be consequences for her and her husband's reputation in and outside the Club. We accept the claimant's evidence that Mr Foy told her that if she were to retire and convince her husband to do the same then the respondent would consider not reporting the matter to the Police. The claimant's response was to ask Mr Foy to go ahead and call the police. She told Mr Foy that her answer in relation to retirement was the same as given the previous day, i.e. that she and her husband had not thought of retirement.

87. We accept the claimant evidence that at that meeting she was very upset by what Mr Foy said and became teary. We also accept her evidence that she felt intimidated because Mr Foy made it clear that unless she and her husband retired the matter would be reported to the police. We find that from that meeting on the claimant lost trust in the Club committee and believed they were looking for a reason to get rid of her or to get her to take retirement earlier than she wanted.

88. It was part of the respondent's case that in September 2017 Mr Hodgkinson did indicate that he intended to retire when he reached the age of 65. There were two pieces of evidence which the respondent said supported that case.

89. First, in her written witness statement, Denise Hunter said that in mid-September 2017 when she was working as a barmaid at the Club Mr Hodgkinson said that both he and his wife would be retiring in the near future and she should look to apply for the job as Stewardess. We can give that statement little weight because Mrs Hunter did not attend the Tribunal to be cross examined. Even if we accepted her evidence, there was no suggestion that she mentioned what Mr Hodgkinson said to her to anyone until mid-2018. That is when Mr Foy in his evidence said Mrs Hunter mentioned the conversation to him.

90. Second, it was said that on a Club bowling green trip Mr Hodgkinson had told others on the trip that he and the claimant would be retiring soon. There was no suggestion that the claimant was on that trip. The evidence consisted of Mr Foy

reporting a conversation he had had with someone who was on the trip about something which the claimant's husband had told others on the trip. We can, therefore, have no certainty what the claimant's husband actually said. What is clear, however, is that whatever he said it was during a chat in a social context. There was no suggestion that Mr Hodgkinson had notified the respondent as his employer of an intention to retire nor had the claimant done so.

91. Mr Foy accepted in his evidence that as at 4 September 2017, neither the claimant nor her husband had given any indication to the respondent that they wanted to or intended to retire. Instead, we find that it was the respondent (in the persons of Ms Murphy and Mr Foy) who raised the issue of retirement with the claimant.

92. On 8 September 2017 the claimant was in the kitchen of the House. We accept her evidence that she overheard a conversation between Mr Foy and Ms Murphy. Ms Murphy asked, "what would we do if they want to say on" to which Mr Foy responded, "if they decide to stay on we will deal with it at that stage" (Alleged Incident 5). She reported the conversation to her husband who told her not to worry because worrying was making her health worse. We do not find that there was any intention on the part of Ms Murphy and Ms Foy that the conversation be overheard.

93. On 17 September 2017 the Club held a special general meeting (Alleged Incident 6). It was attended by 20 members of the Club including committee members. Mr Foy and Ms Murphy attended. Neither the claimant nor her husband attended.

94. The minutes of the meeting were in the Bundle (p.139-140). They are headed "The Conclusion of the business "Shortfall"". There was a discussion about the shortfall with Mr Foy explaining to the meeting that the police had advised instructing auditors and they had advised taking the deficit out of the bar takings. He reassured the meeting he was receiving all the takings and that they had been carrying out Safe checks and that "so far there had been no problems". We also accept that at the meeting Mr Foy made the point that it was not only the claimant and her husband who had access to the Club money and the Safe.

95. The minutes then record that "with regards to the retirement of the Steward and Stewardess it had been brought to the Committee's attention that the they intend to retire by the end of the year. This had not been received in writing. The Stewardess has asked for a letter to confirm that they were not responsible for the "shortfall" behind the bar" (p.139). We accept the claimant's evidence that she had not asked for any such confirmation. We have also accepted the claimant's evidence that at this point she had not given any indication that she was intending to retire. It seems to us that the reference to potential retirement "being brought to the committee' attention" can only refer to comments made by Mr Hodgkinson on the bowling green trip. We find that no one from the Club's committee had approached either Mr Hodgkinson or the claimant to ask about these comments. The only communication about this issue between the respondent and the claimant had been at the meetings on the 3 and 4 September 2017. At those meetings the claimant had made clear she and her husband would give the committee an answer to their

question about their retirement when they came back from their holiday in Tenerife which was due to happen the following month.

96. At the meeting, Mr William Freeman, a former secretary of the Club proposed that if the claimant and her husband retired then as a quid pro quo the Club would not continue its investigation into the shortfall (p.140). That proposal was not voted on. There were similar proposals by other members. Discussion then turned to the House. Another member, C Crompton, expressed concern that the claimant and her husband might not leave the House when their notice expired and it was agreed that Ms Murphy, as Club secretary, would seek legal advice "regarding the [House] which the situation arises". There was also a discussion about generating revenue by renting out the House once it had been vacated by the claimant and her husband.

97. Mr Foy's evidence was that minutes of meetings were always put up on the Club notice board. However, in this case the final entry in the minutes before "meeting closed" is "Minutes to be displayed on board subject to the outcome of the meeting with the Stewardess" [our underlining] (p.140).

98. We find that no such meeting (or any communication with the claimant) took place before the summary notes of the meeting were displayed on the Club noticeboard the following day, 18 September 2017 (Alleged Incident 7).

99. Those summary notes consisted of 6 short paragraphs (p.141). The body of the text follows a heading in capitals: "THE CONCLUSION OF THE BUSINESS "SHORTFALL". The first 5 paragraphs then set out what Mr Foy told the meeting, specifically that:

- the deficit had been taken from the bar takings on the advice of auditors "after speaking to the Police, the club had been asked to seek the advice of Auditors";
- the Treasurer now received every penny from the bar, that safe checks were being carried out and "since those changes there had been no problem with money being exchanged form the bar";
- all money within the Club went through the Treasurer who keeps a record of everything;
- staff rotas would be reviewed and the Committee would have the final say on the revised rota.

100. The final paragraph said:

> "re: Retirement of Steward and Stewardess, The Stewardess has asked for written confirmation, she had no responsibility in the shortfall behind the bar. This was undecided at the meeting; the members would like confirmation in writing that the Steward and Stewardess do intend to retire. A follow up meeting will be held when this is confirmed to discuss replacing the Steward/Stewardess and what will happen to the house".

101. There is no reference in the summary to Mr Foy having acknowledged at the meeting that it was not just the claimant and her husband who had access to the Club money.

102. As we noted above, the claimant was not told in advance that the summary was going to be put on the Club notice board despite its contents bearing directly on her. That is despite her being present working in the bar when Ms Murphy put it up. We accept the claimant's unchallenged evidence that she saw more and more members read the notice Ms Murphy had put up on the Club notice board. Some of them then came over to the bar and told her they were sad she was leaving and that neither she nor her husband had mentioned retirement. The claimant then went to read the notice herself and we accept she was shocked to discover that the summary announced that she and her husband were retiring. We also accept her evidence that she felt humiliated because the summary also referred to the issue of the shortfall. We accept her submission that the wording of the Summary encouraged (or at the very least failed to stop) speculation about the claimant's involvement in the shortfall. That seems to us particularly true of the last paragraph where the reference to the claimant's request for written confirmation that she had no responsibility for the shortfall is followed by this being "undecided at the meeting". That could easily be read to imply that the respondent did not accept the claimant had no responsibility for the shortfall.

103. In mid-October 2017 the claimant and her family went on the planned extended holiday in Tenerife to celebrate Mr Hodgkinson's 65 birthday. During that holiday they discussed the issue of retirement. They agreed that they wanted to carry on working to save some more money before retiring. They decided they would tell the Club that they would not retire yet but would be happy to revisit the decision in 12 months' time. The claimant told Ms Murphy that this was their decision when she returned to work in November 2017. We accept the claimant's evidence that Ms Murphy did not seem pleased by the decision and that from then on the atmosphere in the Club got worse. We find it plausible that the Mr Foy and Ms Murphy had fully expected the claimant to confirm her retirement (and that of her husband) on her return from Tenerife and were disappointed when that was not their decision.

104. The claimant's evidence was that in November 2017, Ms Murphy, Mr Foy and Mr Kershaw called the claimant into a meeting with no notice. At that meeting she was told that if she was not going to retire she would have to revert to the hours she was working prior to 2015, i.e. 48 hours per week with Mr Hodgkinson doing 16 hours per week (Alleged Incident 8). Mr Foy said he could not recollect this meeting but we prefer the claimant's evidence. The claimant was not given a reason for this change of hours and reminded the committee members that she had reduced her hours for medical reasons, i.e. her Lupus diagnosis. Nothing more was said about this change of hours after the claimant confirmed that she would ask her doctor to provide confirmation of the position in writing. The claimant subsequently handed a letter to Ms Murphy from her GP confirming the position.

<u>What happened from December 2017 to the end of February 2018 (Alleged Incidents 9-13)</u>

105. In addition to Lupus, the claimant suffered from various health problems including back and hip pain. In September 2017 the claimant had been diagnosed with osteoarthritis of her left hip and received a steroid injection in October 2017 to make her more comfortable while she was on holiday (p.236). On 27 November 2017 her consultant agreed she should proceed with hip replacement surgery which was booked for the 20 February 2018 (p.245). On 2 November 2017 she was diagnosed with moderative chronic obstructive pulmonary disease (p.301)

106. Early in the morning of 21 December 2017 the clamant was admitted to the Coronary Care Unit at Blackpool Teaching Hospital with a suspected heart attack. After tests (including an ECG) were carried out she was assessed as stable and fit enough to be discharged into local care and was discharged at 17:30 of that same day. She was signed off sick, initially from 20 December 2017 to 8 January 2018 due to “chest pain - under investigation” (p.300). On 9 January a further “chest pain” fit note was issued signing her off until 4 February 2018 (p.299).

107. On 26 January 2018, while the claimant was off sick, the respondent wrote to her husband inviting him to attend a disciplinary hearing (Alleged Incident 9). Mr Foy confirmed that the allegations were that on 4 January 2018 Mr Hodgkinson had “coughed in an unhygienic manner over his hands and floor” in the Club’s concert room and then rubbed the phlegm into the carpet and that on 8 January 2018 he urinated in the club cellar. The first incident was witnessed by a committee member and the second by a member of the bar staff. We accept Mr Foy’s evidence that allegations were brought to the committee’s attention and that after investigation the committee decided that they warranted inviting Mr Hodgkinson to a disciplinary hearing.

108. The disciplinary hearing took place on 29 January 2018. It was attended by various committee members including Mr Foy, Mr Kershaw and Ms Myers. The claimant attended with her husband. The notes of that meeting (p.145) record that the allegations were put to Mr Hodgkinson who provided his version of events. He accepted he did sometimes have coughing fits and in relation to the second incident denied urinating but accepted he had unzipped his fly in the cellar because of an itch. He suggested that the 8 January allegation arose out of a vendetta against him. One of the attendees, Mr Gildert agreed this could be a vendetta and that those kind of things did seem to escalate within the Club.

109. The meeting did not reach a decision but agreed that Ms Murphy as Secretary should seek legal advice with regards to disciplinary procedures. It was further agreed that a final meeting would be held the following day at 9.30 a.m. At that meeting (which lasted 30 minutes) the committee dismissed Mr Hodgkinson. The claimant alleges that the respondent did not allow the claimant’s husband to present his case properly at the disciplinary hearing, indicating that the respondent had pre-determined the outcome of the hearing (Alleged Incident 10).

110. The notes of the meeting (p.146) record Mr Hilton (the Club Vice-President who was chairing the meeting) as saying that the cellar incident and the coughing incident raised concerns about hygiene, that the Club was responsible for Health and Safety and that the committee had decided to give notice with 28 days to leave the House. The claimant asked “both of us?” and Mr Hilton replied “yes, you were employed as

a couple" (Alleged Incident 11). Ms Murphy said "you have a right to appeal against any decision made" and the claimant said "we will be doing".

111. On 31 January 2018 the respondent wrote to Mr Hodgkinson to confirm his dismissal giving the reason for dismissal as "the Committee believe there is cause for concern over hygiene issues". The letter said his last date of service was 30 April 2018 and "this will also apply to your accommodation". It said that an inspection of the House would take place at a later date and that "will be organised with you closer to the time of you vacating the premises"(p.146A). It said Mr Hodgkinson had a right to appeal in writing within 5 days (Alleged Incident 12).

112. It is accepted that no equivalent letter was sent to the claimant so that she was not given a right of appeal (Alleged Incident 11). Mr Foy's evidence was that a couple of days after the hearing the respondent realised that it should not have dismissed the claimant. His evidence was that Ms Murphy was instructed to tell the claimant she had not been dismissed and that this is the reason she did not have to appeal her dismissal (Mr Foy's witness statement para 35). We accept the claimant's evidence that she did not do so.

113. Mr Foy's evidence on this point is not consistent with the appeal meeting notes (p.147). They record Mr Hilton at the start of the appeal hearing responding to a question from the claimant asking whether she and her husband were both dismissed by saying they were "hired as a couple" and if either one was dismissed this leading to "both retiring from their posts" (Alleged incident 13). We find that the claimant was not given a right of appeal and that at the appeal hearing the respondent reiterated that both she and her husband were both dismissed.

114. The appeal hearing was attended by Mr Kershaw, Mr Foy, Ms Murphy, Mr Hilton and 2 other committee members. The claimant attended with her husband. The notes suggest the meeting was brief. Mr Hodgkinson was questioned by Mr Kershaw about his grounds of appeal. The focus was on whether Mr Hodgkinson's conduct was "unhygienic". Towards the end of the meeting Ms Murphy asked what the best outcome would be for the claimant and her husband because the respondent "would like to get this issue resolved for both parties". The claimant said she wanted a letter of apology on the Club notice board and some compensation. She also added "you want us out. You couldn't get us on ill-health and then these letters appear". Mr Kershaw then told them the committee would make a decision after reviewing what Mr Hodgkinson had told them at the meeting.

115. On 16 February 2018 Ms Murphy wrote to Mr Hodgkinson to inform him that "the decision to dismiss you still stands" and that the decision was final (p.148). It is accepted that no equivalent letter was sent to the claimant nor any other explanation of her position in light of the decision to uphold her husband's dismissal.

<u>What happened from March 2018 to the claimant's resignation in August 2018 (Alleged Incidents 14-18)</u>

116. As at the start of March 2018 we find that the position as the claimant understood it was that she had been dismissed along with her husband and they had been given notice to vacate the House by 30 April 2018 (p.147, confirmed by the

appeal dismissal letter at p.148). At that time she was still off sick, her latest fit note dated 4 February being due to expire on 4 March 2018 (p.299).

117. We do not accept Mr Foy's evidence that Ms Murphy had at some point told the claimant she was still employed. He was not able to give details of when such a conversation happened and we prefer the claimant's evidence that she had no communication with Ms Murphy or Mr Foy between the 13 February 2018 meeting and the beginning of March.

118. On 4 March 2018 the claimant wrote a letter to the Club's committee (p.149). In it she said that she had met with her GP and that her GP saw no issue with a return to work after "this month's sick note". That fit note was issued on 5 March 2018 for "chest pains" and signed her off as unfit to work until 18 March 2018 (p.298).

119. The claimant did not respond to the claimant's letter until 19 April 2018 (p.150) (Alleged Incident 14). We accept the claimant's evidence that in the intervening period the claimant thought her employment was due to come to an end on the 30 April 2018. The respondent suggested that the claimant continuing to file sick notes indicated that she was treating her employment as continuing. We prefer the claimant's evidence that she understood her employment to be coming to an end on 30 April 2018 but until her notice expired she was required to file fit notes if she was to receive sick pay. We also accept her evidence that when she wrote to the respondent on 4 March she was envisaging her period of sickness coming to an end before her notice period expired so that she would need to return to work for that part of her notice period which remained after her then current fit note expired (i.e. 19 March 2018 to 30 April 2018). The claimant's evidence seems to us to be corroborated by the entry in her medical records of 14 March 2018 (p.298) which refers to her as "stressed relating to work with tribunal relating to dismissal" and to "husband sacked as well" and by the fact that on 29 March 2018 she contacted ACAS to begin early conciliation (p.1).

120. On the 14 March 2018 the claimant was signed off for a further 2 months (until 14 May 2018 due to "chest pain").

121. On 19 April 2018 Ms Murphy wrote to the claimant inviting her for an "informal chat" (Alleged Incident 15). Unfortunately, the copy of the letter in the Bundle (p.150) was more or less illegible. It does refer to "expiration of your sick note" and based on the claimant's reply (p.151) we accept that it probably referred to a discussion of what would happen on expiration of her fit note on 18 March 2018.

122. On 24 April 2018 the claimant responded (p.151). She agreed to meet away from the Club premises and suggested meeting at a Starbucks on 27 April 2018. In her letter the claimant said "firstly I was a little surprised at the invite as this is the first one I have concerning my sickness since it started in December and secondly I am still waiting for written confirmation that contrary to what I was told during the meeting of 30th January that I was on notice of dismissal, I am still employed by the company". We find that accurately reflected the claimant's understanding of the position.

123. The respondent did not reply to the claimant's letter of 24 April 2018 but the meeting with Ms Murphy went ahead on the 27th April (Alleged Incident 16). It was attended by the claimant, Ms Murphy and Mrs Hafeji. Mrs Hafeji had recorded the meeting on her phone and a transcript of that recording was exhibited to her statement as exhibit "MH1". The respondent did not raise objection to that transcript and we base our findings about what happened at the meeting on it. Ms Murphy had produced minutes of the meeting which were in the Bundle (p.152-153). The transcript and the minutes do not differ markedly but where they do we relied on the transcript, providing as it did a verbatim account of what happened at the meeting.

124. The meeting was a brief one. Ms Murphy opened it and confirmed that she was representing the committee and that "obviously you've written a letter that you'd like to go back to working". She said that the advice was to send it by the solicitor and "they [which we understand to mean the committee] didn't want come so I am here to do their dirty work". She said that the meeting was "just a quick 10 minute chat" and went on to tell the claimant that there was going to be a whole new committee in 7 days. She then asked the claimant whether there was anything the claimant wanted to ask her.

125. The claimant said there was and pointed out that after being told at the meeting in January that she "was terminated" she had not had written confirmation that she was still employed. Ms Murphy replied "No you haven't that's right yes". The claimant said "will I get one" to which Ms Murphy replied "will you get written confirmation? Well I'd have to speak to them but you would think so, yeah". She went on to say "You would think so wouldn't you? Well if that is the case and if that is the road they are taking that you are still definitely still employed, then I would expect you to get a written confirmation and I'd bring that up with them".

126. Ms Murphy then asked whether the claimant was intending to return to work and the claimant said her GP did not think she needed to have a phased return so "It could be business as usual after the 14th". By that we find she was referring to the 14 May 2018 when her then current fit note expired.

127. Ms Murphy then said "if you are staying in employment with us then by all means you are entitled to keep [the House] and [Mr Hodgkinson] obviously is entitled to stay there with you". She continued "Everything I assume, well I shouldn't assume Everything will be normal for you if you do return to work, I'm saying that as how it should be however this committee pending the new committee might make drastic changes I don't know."

128. There was then a brief discussion about what Ms Murphy referred to as a "cock up with the wages" which meant the claimant did not get paid sick pay for a week. The claimant then asked again about returning to work saying "I do need to know if I'm coming back to work don't I?" to which Ms Murphy said she did need to know and they would need to arrange another meeting but it would have to wait until after they (presumably the new committee) had changed the whole rule book which was going to take 7-10 days "so will have to be in two weeks' time". The claimant's response was "ok, yeah that's fine".

129. Ms Murphy then asked the claimant whether she had a date for her hip operation (which had been postponed from February) and said she was sorry for all the claimant had had to go through. The claimant said "it's alright don't worry about it" and in response to Ms Murphy asking if she was alright said "yeah, absolutely, fantastic, yeah".

130. Mr Searle put it to the claimant that her words at the end of the meeting ("fantastic" etc) were completely inconsistent with the meeting having had a harassing effect or being conduct contributing to a breach of the implied term. We accept the claimant's evidence that these were casual, passing remarks at the end of an informal meeting rather than a genuine acceptance on the part of the claimant that the situation she was in was "fantastic". We do accept that the tone of the meeting was friendly.

131. The respondent did not get in touch with the claimant to set up the further meeting suggested by Ms Murphy at the meeting on 27 April 2018 (Alleged Incident 17). She and her husband continued to live at the House. On 11 May 2018 the claimant was issued with a further fit note until 25 June 2018 with "Chest pain with stress relating to work" (p.298). A further fit note for the same reasons was issued on 21 June 2018 until 17 September 2018 (p.297). In July 2018 the claimant had her hip replacement surgery (p.296). She was discharged from hospital on Sunday 15 July 2018 (p.297). Over the next few days her leg began to swell and she was was referred to the DVT clinic to rule out the possibility of DVT (p.296).

132. On 7 July 2018 NEST wrote to the claimant to inform her that it had reported the respondent to the Pensions Regulator because it had failed to pay her pension contributions for the period 23 March 2018 to 29 March 2018 (p.154). On 14 July 2018 NEST wrote again to tell the claimant that it had reported the respondent to the Pension Regulator for failing to pay her pension contributions for the period 30 March 2018 to 5 April 2018 (p.155). Both letters from NEST said that they had reported the respondent to the Pension Regulator "after several reminders". The claimant's evidence, which we accept, was that she saw these letters some days after return from hospital after her hip operation. We find that the earliest date that could have been was the 15 July 2018. Given she was then on post-surgery medication and suffered post-op complications involving referral to a DVT clinic it seems to us more plausible that the earliest she would have been in a state to fully engage with those letters and consider her response to them would have been some days later.

133. Mr Foy in his witness statement (para 45) asserted that the respondent at all times paid all pension payments. However, in the following sentence he contradicted himself saying that "where certain payments were missed by mistake this was always made up in the following payments". He also suggested they only stopped when the claimant's sick pay stopped. However, the claimant's sick pay stopped in July 2018 and the NEST letters (though sent in July) referred to failures to make payments relating to March and April 2018. Given the NEST letters we find that the respondent had not paid the claimant's pension contributions for 23 March 2018 to 5 April 2018 (Alleged Incident 18) and that was not because the claimant's sick pay had stopped. It was also not because the claimant's employment had ended

because even had the dismissal in January 2018 taken effect, the claimant would still be working her notice when those pension contributions were due.

The claimant's resignation/constructive dismissal with effect from 31 August 2018 (Alleged Incident 19)

134. The claimant resigned by a letter dated 1 August 2018 (pp.157-160). It said she resigned as "partner to the steward" and gave one month's notice so that her employment terminated on 31 August 2018. It referred to the fact that she was still signed off sick with work related stress and that her GP had confirmed the stress was work related. On the second page of the letter (p.158) the claimant set out her reasons for resignation. In brief, those reasons were:

- That the respondent had failed to treat her as an individual but instead sought to take out issues they had with her husband against her rather than treating her as an employee in her own right.

- That the respondent had breached the implied term of trust and confidence by dismissing her and then failing to confirm that her employment was "safe".

135. Mr Searle correctly pointed out that the letter did not refer to age discrimination nor did it refer to the NEST letters. Instead the "last straw" referred to (at para 4 on p.159) was the work-related stress she was feeling. However, we accept the claimant's evidence that it was the NEST letters which prompted her resignation. We also accept her explanation that when she wrote the letter of resignation she was "all over the place", suffering from stress and still recovering from her hip operation. We find that the claimant's medical records support her evidence on this point.

136. The respondent sought to argue that the claimant had resigned not in response to that final breach recorded in the NEST letter but rather for three other reasons. The first was that her statutory sick pay had run out. The second was that she was simply not well enough to return to work due to ill-health. The third alleged reason was embarrassment at her grandson having been found to have stolen from the bar till.

137. The claimant's employee pay record (p.397) shows that she was paid Statutory Sick Pay of £89.94 on 28 July 2018 (p.388-389 and p.397) but not on 4 August 2018. The claimant's evidence was that she was not aware that her SSP entitlement had come to an end when she resigned on 1 August 2018. There was no evidence that she was notified by the respondent by 1 August that her SSP entitlement had come to an end. On the 10 August 2018 the claimant wrote to the respondent querying why her SSP had stopped. Ms Murphy replied on 31 August 2018 to explain that the SSP entitlement of 28 weeks "has now been exhausted" (p.166). That seems to us to support the claimant's evidence that she was not aware that her SSP entitlement had been exhausted until after she resigned on 1 August 2018 and we accept her evidence that that was the case.

138. Turning next to the respondent's submission that the claimant's ill-health was the real reason why she resigned. As we have already found, the claimant did suffer

from various health problems and in July had undergone hip replacement surgery. At the time she resigned she was signed off until 17 September 2018 with "Chest pain with stress relating to work" (p.297). Other than the stress issue, the medical evidence does not suggest a worsening of the claimant's health around the time she resigned other than potential DVT in the immediate aftermath of the hip replacement surgery. If anything, it seems to us, having had her hip replaced made her better placed to work than before she had that operation. This was not a case where her fit note was coming to an end imminently, effectively forcing her to return to work. We accept the claimant's evidence that she did not resign on 1 August 2018 because her health was such that she was not well enough to return to work

139. In relation to her grandson's theft, CCTV footage showed him taking money from the Club safe on 19 July 2018. He returned the money and resigned. The theft was reported to Lancashire Constabulary on 25 July 2018 (p.179). The claimant's cross examination evidence, which we accept, was that her daughter did not tell her about this incident until after Mrs Hafeji had been to the police station with her son. That attendance at the police station was on the 21 August 2018 (p.180). We accept the claimant's evidence that she did not know about this matter until after she resigned and that it was not the reason she resigned on 1 August 2018.

140. We find that the letter of resignation had almost certainly been drafted prior to her receiving those letters but that it was those letters which prompted her to send it. The claimant told us that she had had help in drafting it. It seems to us probable she simply sent it without updating it to refer to the NEST letters. We found her evidence that those letters were the "last straw" reliable and we accept it.

Our other findings of fact relevant to age discrimination.

141. The respondent submitted that the age of the bar staff employed by the Club undermined her claim that her treatment was because of her age. It submitted that some of the staff retained were actually older than she was. We find that although the Club did employ a cellarman who was aged 67 when the claimant resigned, the person who took over running the bar, Dave Stephenson, was aged 45. The claimant's direct replacement, therefore, was significantly younger than the claimant.

Discussion and conclusions

142. In this section of the judgment we apply the law to our findings of fact. Most of the Alleged Incidents are said to be acts of direct age discrimination or age-related harassment in breach of the 2010 Act and acts contributing to a breach of the implied term of trust and confidence. Alleged Incident 19 is the alleged constructive dismissal which is said to be an act of direct discrimination or age-related harassment. Below we therefore:

a) set out our conclusions in relation to each of Alleged Incidents 1-18;

b) set out in discussing Alleged Incident 4 (chronologically the first incident alleged to be age-related harassment or direct age discrimination) our general conclusions about whether the respondent's treatment of the claimant was because of her age;

c) set out our conclusions on Alleged Incident 19 which is the allegation that the claimant was constructively dismissed;

d) summarise our conclusions on the age discrimination and harassment complaints;

e) set out our conclusions on time limit issues in relation to the discrimination and harassment complaints;

f) set out our conclusions on the unfair dismissal complaint.

143. Having summarised our decision, at the end of the judgment we set out next steps.

Our conclusions in relation to Alleged Incidents 1-18

144. For each of Alleged Incidents 1-18 we considered whether they in themselves breached the implied term of trust and confidence ("the implied term") entitling the claimant to resign or could contribute to a cumulative breach of that term. In deciding whether each Alleged Incident was a breach of the implied term the test we applied was whether, viewed objectively, it involved conduct by the respondent calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant employer for which there is no reasonable and proper cause.

145. The Alleged Incidents which the claimant relied on as acts of direct age discrimination or age-related harassment were Alleged Incidents 4, 6, 7, 11-19. Conduct which we find to be harassment cannot also amount to a detriment for the purposes of a direct discrimination complaint. For each Alleged incident we therefore first considered whether it amounted to age-related harassment and, if not, whether it was less favourable treatment because of age.

In July 2017 Mikaela Murphy asking the claimant whether she and her husband had considered retirement. (Alleged Incident 1)

146. Although we accept the claimant's evidence about this incident we do not find that in itself it was a breach of the implied term. We do not think it could be characterised as conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. However, we do find that it was an incident which could contribute to a cumulative breach of the implied term, raising out of the blue the possibility of the claimant's retirement.

147. It was not part of the claimant's case that this incident was one of direct age discrimination or age-related harassment.

In July 2017 Mikaela Murphy stating to the claimant that she should seriously consider retirement. (Alleged Incident 2)

148. Although we accept the claimant's evidence about this incident we do not find that in itself it was a breach of the implied term. We do not think it could be characterised as conduct in itself calculated or likely to destroy or seriously damage

the relationship of trust and confidence between employer and employee. However, we do find that it was an incident which could contribute to a cumulative breach of the implied term, with Ms Murphy actively suggesting that the claimant consider retirement despite the claimant having made it clear in Alleged Incident 1 that she and her husband were intending to be at the Club for a long time.

149. It was not part of the claimant's case that this incident was one of direct age discrimination or age-related harassment.

On 3 September 2017 Mikaela Murphy, Geoffrey Foy and Thomas Kershaw calling the claimant into a meeting and (a) asking when she and her husband intended to retire (b) stating that she and her husband should consider retiring. (Alleged Incident 3)

150. Although we accept the claimant's evidence about this incident we do not find that in itself it was a breach of the implied term. We do not think it could be characterised as conduct in itself calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. However, we do find that it was an incident which could contribute to a cumulative breach of the implied term, making it clear to the claimant that the respondent viewed her as someone who should be actively considering retirement because of her age and that of her husband's.

151. It was not part of the claimant's case that this incident was one of direct age discrimination or age-related harassment.

On 4 September 2017 Mikaela Murphy and Geoffrey Foy calling the claimant into a meeting and (a) stating that she was responsible for a £2000 shortfall in bar takings (b) threatening her with police involvement (c) stating that if she did not retire she would be subject to a criminal investigation. (Alleged Incident 4),

152. We have accepted the claimant's evidence about what happened at this meeting. That means that we have found that the respondent threatened her with police involvement if she and her husband did not retire. When that meeting was held, neither the claimant nor her husband had given any indication of intending to retire. In fact, the indication given by the claimant was they had not considered doing so (Alleged Incidents 1-3). We accept it would be legitimate for an employer to tell an employee that they were referring a matter to the police (and to do so) where a significant amount of money was unaccounted for.

153. However, in this case we find that the respondent was seeking to use the threat of such a referral as a means of pressurising the claimant to retire. As the claimant submitted, the evidence showed that the matter was not referred to the police in September 2017 or thereafter. That, we find, does support her case that this was a case of an employer using the referral to the police as a threat rather than simply notifying an employee that that is what they were intending to do.

154. We find that the respondent's conduct at this meeting was in itself a breach of the implied term, involving conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the

employee. Breach of the implied term is a repudiatory breach (**Morrow**). We therefore find that by 4 September 2017 the respondent was in repudiatory breach of the claimant's contract of employment.

155. If we are wrong about that, we find that the respondent's conduct at the meeting was conduct which could contribute to a cumulative breach of the implied term.

156. The claimant also said this conduct was age-related harassment or direct age discrimination. We considered first whether the incident was an act of age related harassment under the 2010 Act.

157. We are satisfied that the conduct did have the purpose of creating an intimidating and hostile environment for the claimant. She was being threatened with police action unless she and her husband retired. We therefore find that it had a harassing purpose. We are also satisfied that it had a harassing effect. We accept the claimant's evidence that she was upset and teary at the meeting. We find it was reasonable for the conduct to have the effect of creating an intimidating and hostile environment for the claimant. She was being threatened with the police unless she left her job and he home.

158. To be unlawful harassment within the definition in s.26 of the 2010 Act the conduct in this case also has to be related to age. We find that it was. On the facts as we have found them, the conduct complained of consisted of the respondent seeking to pressurise the claimant to retire by threatening to refer a matter to the police. It seems to us that conduct was intrinsically linked to her age.

159. We have to have regard to "the totality of the relevant circumstances" in deciding what inference to draw (**Talbot**). We therefore stepped back and viewed this incident in the context of our findings about the course of events in the Alleged Incidents up to this point. We have found that from July 2017 the respondent began raising with the claimant the question of retiring (Alleged Incidents 1 and 2). We have found that it raised the issue with the claimant before she or her husband had given any indication of retiring (Alleged Incidents 1, 2 and 3). We have found that before the claimant or her husband had given any indication of retiring the respondent threatened to report the matter of the shortfall to the police unless the claimant retired (Alleged Incident 4).

160. Taking those incidents in the round, our conclusion is that from September 2017 the respondent started to put active pressure on the claimant to retire and that was because of her age. The respondent suggested that there were other relevant issues such as the concerns about the shortfall at the bar. However, Mr Foy's evidence is that those had been resolved by September 2017.

161. In reaching our decision we have also taken into account the suggestion by the respondent that the claimant's successor was actually older than she was. However, we found that the claimant's successor running the Club bar, Dave Stephenson, was aged 45 so was significantly younger than the claimant. We find that his appointment tended to support, rather than undermine, the claimant's case that her age was an effective cause of her treatment.

162. We are therefore satisfied that the respondent's conduct in Alleged Incident 4 was age-related and that it amounted to unlawful harassment of an employee in breach of s. 40 of the 2010 Act.

163. We have not found it necessary to apply the two-stage process in the burden provisions but have instead adopted a "reason why" approach to reaching our conclusion. If we were applying the two-sage test, we are satisfied that the claimant has proved facts (Alleged Incidents 1-4) from which we could conclude that the respondent's conduct was age related. On that basis the burden would pass to the respondent to provide a non-discriminatory explanation for its treatment of the claimant. For the reasons given in paragraph 160 we did not find that it had provided such an explanation.

164. We are satisfied, therefore that the claimant was subjected to age-related harassment. Conduct which is harassment cannot also be a detriment for the purposes of a direct age discrimination complaint. However, in case we are wrong about the conduct amounting to age related harassment, we have considered whether the respondent's conduct at the meeting would amount to less favourable treatment because of age.

165. We find that being threatened by the police unless she retired was a detriment. As we have said, we have found that the reason the claimant was threatened with the police at the meeting was because of the respondent's wish that she retire. That was intrinsically linked to her age and we find that someone under 50 (the hypothetical comparator) would not have been subjected to that treatment.

166. We are therefore satisfied that if the respondent's conduct in Alleged Incident 4 was not age-related harassment it was direct age discrimination and a breach of s.39(2)(d) of the 2010 Act.

On 8 September 2017 Mikaela Murphy and Geoffrey Foy discussing the claimant's refusal to retire and stating that if the claimant and her husband decided not to retire they would "deal with it" upon their return from holiday. (Alleged Incident 5).

167. This incident involved a conversation between Mr Foy and Ms Murphy which was overheard by the claimant. We do not find that in itself it was a breach of contract. However, we do find that it was an incident which could contribute to a cumulative breach of the implied term, reinforcing the claimant's belief that the respondent was determined that she and he husband should leave their jobs one way or another.

168. It was not part of the claimant's case that this incident was one of direct age discrimination or age-related harassment.

On 17 September 2017 the respondent's committee members holding a special general meeting during which they discussed (a) retiring the claimant and her husband (b) how they could force the claimant and her husband to vacate the property they occupied and (c) what they would do with it once it was vacant. (Alleged Incident 6)

169. We have accepted the claimant's version of events in relation to this meeting. We considered whether this behaviour amounted in itself to a breach of the implied term. We have concluded that it did. As we have said, our findings are that at this point neither the claimant nor her husband had notified the respondent of an intention to retire. At most there had been some gossip or tittle-tattle about it arising from the bowling green trip. There had been no attempt to talk to the claimant or her husband about the issue after that trip. There was no evidence to suggest that anyone from the committee had told the claimant or her husband that the issue was to be discussed at the meeting on the 17th or any suggestion that they had been invited to that meeting. So far as the claimant was aware, the position after the meeting on 3 September 2017 (Alleged Incident 3) was that she and her husband would be discussing the issue on their holiday in Tenerife and letting the committee know their decision when they returned. It seems to us that discussing the claimant's retirement in the terms they were discussed at the meeting does clearly fit the definition of conduct calculated (or at the least likely) to have the effect of destroying or seriously damaging the employment relationship and this breached the implied term. We do find that the impression given to the meeting was that the retirement was all but certain, merely waiting for confirmation in writing. On our findings of fact that was far from the actual position.

170. We also accept the claimant's submission that the respondent at the meeting discussed how they could remove the claimant and her husband from the House if they did not leave voluntarily and what they would do with the property once it was vacant. We did consider specifically whether our findings based on the minutes of the meeting (pp.139-140) support the allegation that the committee discussed how they could "force the claimant and her husband to vacate the property". We have decided that they do. They clearly refer to taking legal advice in the context of C Crompton expressing concern that the claimant and her husband might not leave the House voluntarily. It is clear to us therefore that the respondent at that meeting was discussing how they could force the claimant to vacate the House with her husband if they refused to do so voluntarily. That seems to us to reinforce the breach of the implied term arising from the discussion of the claimant's retirement.

171. We decided that the fact that some of the points and proposals at that meeting were made by members of the respondent rather than committee members does not make a difference to our conclusion. It is clear to us that it was the committee which held the meeting and controlled the matters discussed at it. There is no suggestion that it was the members who raised the issue of the claimant's retirement rather than the committee. Even if it was a member who raised the question of taking legal advice about how to remove the claimant and her husband form the House if they refused to leave voluntarily, it was the Committee who agreed to take that action forward by seeking legal advice.

172. If we are wrong that this incident itself breached the implied term we are satisfied that it could have contributed to a cumulative breach of that term.

173. When it comes to whether the conduct amounted to age-related harassment, we find that it was conduct which had a harassing purpose in the sense that it was intended to create a hostile and humiliating environment for the claimant. We find that the meeting was part of a series of acts by the respondent to put pressure on

the claimant to retire. We also find it had harassing effect. Her retirement was being discussed in her absence with members of the Club who were her customers at the Club bar. We gave our reasons why we considered the respondent's conduct in this case to be age related in our conclusions in relation to Alleged Incident 4, and the same reasoning applies to this incident.

174. We are therefore satisfied that the respondent's conduct in Alleged incident 6 amounted to unlawful harassment of an employee in breach of s. 40 of the 2010 Act.

175. If we are wrong about the conduct amounting to harassment we are satisfied that it would nonetheless amount to less favourable treatment because of age and therefore direct age discrimination. We are satisfied that the conduct in Alleged Incident 6 amounted to subjecting the claimant to a detriment. We are also satisfied that it was less favourable treatment because of age. Our reasons are the same as those set out in relation to Alleged Incident 4, i.e. that the claimant's age was an effective cause of the respondent's conduct and that a person under 50 would not have been subjected to the same detriment.

176. We are therefore satisfied that if the respondent's conduct in Alleged Incident 6 was not age-related harassment it was direct age discrimination and a breach of s.39(2)(d) of the 2010 Act.

On 18 September 2017 Mikaela Murphy implementing a decision of the respondent's Committee Members by putting up a poster on the notice board that (a) insinuated that the claimant was responsible for a £2000 shortfall in bar takings (b) gave the impression that the claimant and her husband had decided to retire. (Alleged Incident 7)

177. We have recorded our findings of fact about the content of the notice at para 99-101 above. We accept the claimant's submission that the wording did insinuate that the claimant was responsible for the shortfall in the takings. We did consider carefully whether it could be said that the wording also "gave the impression that the claimant and her husband had decided to retire". Although the wording does not explicitly say that, there is, however, a clear link of retirement with the shortfall, and it seems to us that the more accurate characterisation of the notice is that it gave the impression that the claimant and her husband were being made to retire. What we do find is that the impression given by the notice was that the claimant's retirement (and that of her husband) was imminent. That was certainly what the members who discussed the notice with the claimant after it was put up took it to mean (para 103).

178. We find that the public nature of the notice, its giving the impression of imminent retirement and the insinuation of a link between retirement and the shortfall mean that putting it up amounted in itself to a breach of the implied term. It seems to us that there was some recognition of the impact on the claimant in the stipulation (which was ignored) that the notice would not be put up until there had been a meeting with the claimant.

179. It was also alleged this was an act of age-related harassment. We do find that the notice was put up with a harassing purpose, i.e. it was intended to put further

pressure on the claimant to retire by embarrassing and humiliating her. We are also satisfied that it had a harassing effect. We accepted the claimant's evidence about the shock she felt on reading the notice. We also accept it was reasonable for it to have a harassing effect. The claimant's customers were being given the impression that she was retiring and that her retirement had something to do with the bar shortfall. We find that harassment was age related for the reasons given in relation to alleged incident 4.

180. We are therefore satisfied that the respondent's conduct in Alleged Incident 7 amounted to unlawful harassment of an employee in breach of s. 40 of the 2010 Act.
181. Once again, we are satisfied that if the conduct did not amount to harassment it did amount to a detriment, was less favourable treatment, and that that was because of the claimant's age. Again, we have set out our reasons for that in relation to alleged incident 4.

182. We are therefore satisfied that if the respondent's conduct in Alleged Incident 7 was not age-related harassment it was direct age discrimination and a breach of s.39(2)(d) of the 2010 Act.

In November 2017, Mikaela Murphy, Geoffrey Foy and Thomas Kershaw calling the claimant into a meeting and (a) asking whether she and her husband had decided to retire and (b) stating that, as the claimant had decided not to retire, she must resume a forty-eight hour working week despite the fact that she was suffering from Lupus. (Alleged Incident 8).

183. We accepted the claimant's version of events in relation to this meeting. The claimant had been allowed to reduce her hours to 40 hours per week because of a medical condition, lupus. The respondent was clearly aware of that medical condition and it seems to us that by pressurising her in that meeting to increase her hours the respondent was acting in a way which was intended, and certainly likely to have the effect of destroying or seriously damaging the employment relationship. Mr Searle submitted that the incident did not have that effect because it was not "followed though". We accept that there was no evidence that the respondent after this meeting made the claimant work those extended hours. However, it seems to us that the threat to increase the hours made at the meeting was in itself a breach of the implied term. If we are wrong that this was in itself a breach of contract we find that it was an incident which contributed to a cumulative breach of contract on the part of the respondent.

184. This incident was not alleged to be an act of age related harassment or direct age discrimination.

On 26 January 2018, the respondent writing to the claimant's husband and inviting him to attend a disciplinary hearing without proper cause. (Alleged Incident 9)

On 30 January 2018, the respondent not allowing the claimant's husband to present his case properly at a disciplinary hearing, indicating that the respondent had pre-determined the outcome of the hearing. (Alleged Incident 10)

185. Both of these incidents are alleged by the claimant to be breaches of her contract of employment. However, they involve the respondent writing not to the claimant but to the claimant's husband inviting him to attend a disciplinary hearing and, according to the claimant's case, not allowing her husband to present his case properly at that hearing, indicating that the outcome was predetermined. We did not hear detailed evidence about what happened at the hearing.

186. We have considered carefully whether that behaviour could amount to a breach of the implied term of trust and confidence in the claimant's contract of employment. We can see how taking action against the claimant's husband could put further pressure on the claimant to retire. However, it does seem to us that the conduct in alleged incidents 9 and 10 are directed at the claimant's husband, not at the claimant. No disciplinary proceedings were brought against her and so we do not find that the actions were a breach of (or could contribute to a cumulative breach) the implied term in her contract of employment. In relation to Alleged Incident 9 it also seems to us that there were allegations which an employer was entitled to investigate through disciplinary proceedings.

187. Neither of these incidents were alleged to be acts of age related harassment or direct age discrimination.

On 30 January 2018 dismissing the claimant alongside her husband and providing no right of appeal. (Alleged Incident 11)

188. The respondent at the disciplinary hearing said the claimant was dismissed because she and her husband were hired as a couple and therefore they would be fired as a couple. Mr Foy in his witness statement accepted that this dismissal was wrong. We find that dismissing the claimant in these circumstances was in itself a breach of the implied term. We accept that the contract of employment entitled the respondent to dismiss the Steward/Stewardess and their married partner if there was misconduct by either but it does not seem to us it obliged it to do so. We find that the respondent had to exercise that power in a way which did not breach the implied term. In this case we find it did not do so – the claimant was dismissed even though she had not been guilty of any alleged misconduct. No consideration was given to a lesser sanction.

189. If we are wrong about that, and the dismissal itself was not a breach of the implied term, we find that the dismissal and the failure to provide the claimant with a right of appeal were incidents which could contribute to a cumulative breach of the implied term.

190. When it comes to harassment, we find that the dismissal and the failure to provide an appeal had a harassing purpose. We view the dismissal in the context of the earlier Alleged Incidents. We find that the respondent took the opportunity provided by the allegations against the claimant’s husband to pursue its aim of removing her from post because of her age. We also find the dismissal and failure to provide an appeal had a harassing effect on the claimant in that it violated her dignity her by dismissing her in circumstances where she was the Stewardess but was being dismissed despite not being guilty of any misconduct. If we are wrong about that we find the dismissal had the effect of creating (or contributing to an already

created) hostile, and humiliating environment for the claimant. We find that harassment was age related for the reasons given in relation to alleged incident 4.

191. We are therefore satisfied that the respondent's conduct in Alleged Incident 11 amounted to unlawful harassment of an employee in breach of s. 40 of the 2010 Act.

192. If we are wrong about that we find this was an act of direct age discrimination. We are satisfied that, seen in context, the dismissal was less favourbale treatment because of age for the reasons given in relation to alleged incident 4. We find that age was an effective cause of the decision to dismiss the claimant alongside her husband and deny her a right of appeal even if the claimant's husband's conduct also played a part in the decision. It seems to us that the respondent took advantage of that conduct to achieve its ultimate aim of ensuring the retirement/removal of the claimant and her husband from their posts due to their age. It is accepted that this dismissal was not effective and it seems to us that it amounted to an act of detriment under s.39(2)(d) rather than a dismissal under s.39(2)(c).

193. We are therefore satisfied that if the respondent's conduct in Alleged Incident 11 was not age-related harassment it was direct age discrimination and a breach of s.39(2)(d) of the 2010 Act.

On 31 January 2018 writing to the claimant's husband and stating that both he and the claimant must vacate the property by 30 April 2018. This is said to be a breach of the implied term of trust and confidence and a breach of clause 1.2 of the claimant's contract of employment which permitted her to occupy the property. (Alleged Incident 12).

194. There was a suggestion by the respondent that the letter of 31 January 2018 (p.146) did not apply to the claimant. It is addressed to the claimant's husband. However, it clearly refers to "vacating" the House which must, to our minds, mean leaving it empty. By definition, that means that the claimant was also being told that she must leave the property. Given that she was being told to vacate her House in circumstances where she had not been guilty of any misconduct and had not been provided with any right of appeal against her dismissal, we do find that that was conduct which could contribute to a breach of the implied term.

195. We also find that it was conduct with harassing purpose. We find it was intended to create a hostile and humiliating environment for the claimant. We find that the conduct did have a harassing effect-the claimant was being told to leave her home even though she had done nothing wrong. That seems to us to be conduct which it was reasonable to have a harassing effect. For the reasons given in relation to alleged incident 4, we do find that the harassment was related to the claimant's age. We accept that the incident was not overtly about age in that there was in the case of this incident no reference to the claimant's retirement. However, we find that it was a continuation of the respondent's ongoing campaign to remove the claimant form post because of her age.

196. We are therefore satisfied that the respondent's conduct in Alleged Incident 12 was unlawful harassment of an employee in breach of s. 40 of the 2010 Act.

197. If we are wrong that this was an act of age-related harassment we find it was an act of less favourable treatment because of the claimant's age. Viewed in the context of the previous incidents and our overall conclusion set out in relation to Alleged Incident 4 we are satisfied that the claimant's age was the "reason why" this conduct occurred and that a younger person in the same circumstances would not have been treated in the same way as the claimant was.

198. We are therefore satisfied that if the respondent's conduct in Alleged Incident 12 was not age-related harassment it was direct age discrimination and a breach of s.39(2)(d) of the 2010 Act.

On 13 February 2018, stating that, as the claimant and her husband had been hired as a couple, the claimant would be dismissed alongside her husband (despite the fact that she had done nothing wrong). (Alleged Incident 13).

199. Our reasoning in relation to Alleged Incident 11 also applies to alleged incident 13 when the dismissal of the claimant was confirmed. For the reasons given in relation to that Alleged Incident we find this to be a breach of the implied term or (if we are wrong about that) conduct capable of contributing to a cumulative breach of that term.

200. For the reasons given in relation to Alleged Incident 11 we find that the respondent's conduct in Alleged Incident 13 was an act of age related harassment in breach of s.40 of the 2010 Act or (if we are wrong about that) less favourable treatment because of age ion breach of s.39(2)(d) of the 2010 Act.

From 4 March 2018 onwards, failing to respond to the claimant's handwritten letter in which she sought confirmation of whether she had been dismissed. (Alleged incident 14).

201. We have found that the respondent did fail to respond to the claimant's letter of 4 March 2018 until 19 April 2018. We have considered whether this was a breach of the implied term or even an adverse act given that the claimant did not in her letter specifically ask whether she was still employed. When it last communicated with the claimant on 13 February 2018, the respondent had told the claimant she was dismissed. We find that there was no communication with the claimant after that, and that the communication which took place on 19 April 2018 by way of the letter from Ms Murphy was triggered by the claimant taking the initiative and writing to the respondent. There was no evidence of a proper cause for the respondent's delay in responding to the 4 March letter. Our view is that the onus at this point was on the respondent to remedy the situation. It had told the claimant that she was dismissed but (as Mr Foy accepted in his witness statement) that was clearly wrong. Leaving the position as it was does seem to us to be conduct which was likely to further damage the employment relationship between the respondent and the claimant. We do not think it was serious enough to amount to a breach of the implied term in itself, but it was in our view certainly sufficiently adverse to contribute to a cumulative breach of that term.

202. We have considered whether the failure to respond to the 4 March 2018 letter could be an act of harassment. It seems clear to us that when it comes to a

harassing environment, a failure to act can be just as much an act of harassment as a proactive or positive act. The position as at February was that the respondent had made clear to the claimant that she was dismissed and would have to leave her job and home on 30 April 2018. It seems to us that the continued failure to let the claimant know whether she was had a job (and by extension a home) was conduct with a harassing effect in that it continued to create a hostile environment for the claimant. Viewed in the context of our findings about earlier Alleged Incidents we also find it had a harassing purpose. We find it was a continuation of the respondent's attempts to pressure the claimant into leaving her post. The reasons given for finding the harassment in Alleged Incident 4 to be age related applies here.

203. We are therefore satisfied that the respondent's conduct in Alleged Incident 14 was unlawful harassment of an employee in breach of s. 40 of the 2010 Act.

204. Once again, if we are wrong that this was an act of age related harassment we are satisfied that it was less favourable treatment due to age. We considered whether the respondent's failure to clarify the claimant's employment position could amount to a detriment in the **Shamoon** sense and decided it did. It was a disadvantage to the claimant to be left in uncertainty about whether she was employed or not (and had a home or not). The reasons why we found that treatment to be less favourable because of age are those given in relation to Alleged Incident 4.

205. We are therefore satisfied that if the respondent's conduct in Alleged Incident 14 was not age-related harassment it was direct age discrimination and a breach of s.39(2)(d) of the 2010 Act.

On 19 April 2018 writing to the claimant and asking her to attend an informal meeting to discuss her return to work, thus attempting to create the impression that the claimant had not actually been dismissed. (Alleged Incident 15).

206. The letter dated 19 April 2018 from Ms Murphy was very brief and asked the claimant to attend an informal meeting to discuss her return to work. We considered carefully whether this could be an act which breached the implied term given that on one view it seemed to be recognising that the claimant was still employed. We think, however, that the act must be viewed in the context of what had happened previously. As we say in relation to alleged incident 14, the respondent had told the claimant (twice) that she was dismissed. It had done nothing since 13 February 2018 to make it clear that that was no longer the case. It seems to us completely insufficient in those circumstances for the employer to simply send a brief letter inviting the claimant to a meeting without confirming that she was indeed still employed and that her dismissal had been an error. The meeting to which she was being invited was due to take place within the notice period (ending 30 April 2018) so it taking place was no indication that employment was to continue after 30 April 2018. We think the onus was clearly on the respondent in this case to reverse the damage to the employment relationship which its previous conduct had caused. It did not do so and we find that although not itself a breach of the implied term, the letter was an act which contributed to some small measure to a cumulative breach of the implied term.

207. We also find Alleged Incident 15 to be an act of age-related harassment. We are conscious that the incident itself might not fit the usual type of incident thought of as an act of harassment. However, we view it in the context of the preceding events. The respondent's failure to confirm whether the claimant's employment was continuing left her in limbo, her overriding impression from the previous Alleged Incidents being that the respondent wanted her out because of her age. We find that amounted to a hostile and humiliating environment, in particular since the last communication from the respondent told her that her employment was at an end and she would not be allowed to stay in her home beyond 30 April 2018. We do find that Alleged Incident 15 contributed to the continuation of that environment. As we have recorded in relation to Alleged Incident 4 above, we find that the respondent's conduct did have the purpose of creating a harassing environment for age-related reasons and also had that effect.

208. We are therefore satisfied that the respondent's conduct in Alleged Incident 14 was unlawful harassment of an employee in breach of s. 40 of the 2010 Act.

209. If we are wrong about that, then we also find in the alternative and for the reasons given in relation to Alleged Incident 14 that this was a detriment and for the reasons given in relation to Alleged Incident 4 that this was less favourable treatment because of the claimant's age.

210. We are therefore satisfied that if the respondent's conduct in Alleged Incident 14 was not age-related harassment it was direct age discrimination and a breach of s.39(2)(d) of the 2010 Act.

The conduct of Mikaela Murphy during the meeting on 27 April 2018 (evidenced by the claimant's audio recording). (Alleged incident 16).

211. We think it is important this meeting is seen in context. As we have set out above, the claimant had at that point had no confirmation that her dismissal had been revoked, that she was indeed still employed by the respondent and so would not be having to leave her home on the 30 April 2018. The claimant raised the issue of her employment in her letter to Ms Murphy of 24 April 2017. Ms Murphy was specifically asked more than once at the meeting whether the respondent would confirm in writing that her employment continued but would not unequivocally confirm that that was the case. At best she was evasive and talked in conditional terms about the claimant's continued employment ("if you are staying in employment with us").

212. We do not think this in itself was a breach of the implied term. However, we do think it was conduct which could contribute to a cumulative breach of the implied term. It left the claimant still in limbo about whether her employment was continuing. The respondent submitted that some of the things said at the meeting clearly implied that the claimant's employment was going to be continuing beyond the 30 April 2018. In particular, there was discussion of her returning to work when her current fit note ran out on 14 May 2018 and to a meeting in two weeks (which would again take matters into May 2018). We see some force in that argument but on balance think those references are overridden by the conditional way in which Ms Murphy referred to the claimant's future employment at the meeting. We do not think (particularly

given the context) that they were sufficient to reassure the claimant about her position.

213. It was alleged that Ms Murphy's conduct at the meeting was an act of harassment. We accept the evidence that the tone of the meeting was friendly. Given that, we considered carefully whether it could have had a harassing purpose or effect. We have come to the conclusion that it did have that purpose. We think it is important that the incident is seen in the context of the previous incidents which we have found were instigated by a desire on the part of the respondent to pressurise the claimant to retire because of her age. We find that the events since then (though not all overtly hostile in tone) were a manifestation of Mr Foy and Ms Murphy's decision in September 2017 (Alleged Incident 5) that they would "deal with" with the retiring of the claimant if she did not do agree to retire. We find that refusing to unequivocally confirm the claimant was still employed, leaving the claimant in limbo over the status of her employment (and her home) was conduct with the purpose of maintaining the humiliating and hostile environment for the claimant created by the respondent's previous conduct. That is so even though the tone of the meeting itself was not explicitly hostile. We also find it had a harassing effect and that it was reasonable for it to do so. We gave our reasons why we thought the harassment was age related in alleged incident 4.

214. We are therefore satisfied that the respondent's conduct in Alleged Incident 16 was unlawful harassment of an employee in breach of s. 40 of the 2010 Act.

215. If we are wrong that this was age related harassment we are satisfied that it an act of detriment and was less favourable treatment because of age. As we say above, we are satisfied that continuing to leave the claimant in limbo about her job and home was the continuation of implementation of Mr Foy and Ms Murphy's decision in September 2017 to "deal with" with the retiring of the claimant if she did not do so voluntarily. We find that it subjected the claimant to a detriment. We find that a younger person would not have been treated in the same way for the reasons given in relation to Alleged Incident 4.

216. We are therefore satisfied that if the respondent's conduct in Alleged Incident 16 was not age-related harassment it was direct age discrimination and a breach of s.39(2)(d) of the 2010 Act.

Failing to communicate further with the claimant after the meeting with Mikaela Murphy on 27 April 2018 (Alleged Incident 17).

217. We accept the claimant's version of events in relation to this incident. As we explained in relation to Alleged Incidents 14, 15 and 16 we think the onus was clearly on the respondent to confirm the claimant was no longer dismissed and was in fact still employed. They clearly did fail to do so. We find that that omission was contributory conduct towards a cumulative breach of contract.

218. For the reasons given in relation to alleged incidents 14, 15 and 16 we also find that the failure to communicate was an act of age related harassment in breach of s.40 of the 2010 Act or (if we are wrong about that) direct age discrimination in breach of s.39(2)(d).

Failing to contribute towards the claimant's pension from March/April 2018 onwards. The claimant only became aware of this breach in or around late July 2018. The claimant says this is both a breach of the implied term of trust and confidence and a breach of an express terms of her contract that the respondent make monthly contributions to her pension. (Alleged Incident 18).

219. We find that the respondent did fail to contribute to the claimant's pension. The respondent's explanation, which is that this was as a result of the claimant's statutory sick pay running out, does not make sense. The letters from NEST (pp.154 and 155) refer to a failure to pay in March and April 2018 but we found that statutory sick pay for the claimant did not run out until July 2018.

220. In terms of whether the failure was deliberate or an oversight, we noted that NEST said it had sent the respondent "several reminders" (page 154-155). We conclude that the failure to pay pension was indeed deliberate. We find that that was in itself a breach of the implied term entitling the claimant to resign in that it was conduct intended to destroy or seriously damage the employment relationship. If we are wrong that in itself it was a breach of the implied term we find it was an act capable of contributing to a cumulative breach of the implied term.

221. We also find that it was breach of an express term of the claimant's contract that the respondent make contributions to her pension. We find that that was also a repudiatory breach of contract. The pension contribution formed part of the claimant's reward for working for the respondent. A failure to make such a payment in our view struck at the root of the contract.

222. We also find it was an act of age-related harassment. We find it was a further act intended to contribute to the humiliating and hostile environment which the respondent's previous conduct had created for the claimant which (for the reasons explained in relation to Alleged incident 4) was related to age. In the alternative we find it had a harassing effect in continuing the humiliating and hostile environment created by the respondent's previous conduct.

223. We are therefore satisfied that the respondent's conduct in Alleged Incident 18 was unlawful harassment of an employee in breach of s. 40 of the 2010 Act.

224. If we are wrong that this was age related harassment we are satisfied that it was less favourable treatment because of age. As we say above, we are satisfied that this was a deliberate act. We are also satisfied that it was the continuation of implementation by the respondent of Mr Foy and Ms Murphy's decision in September 2017 to "deal with" with the retiring of the claimant if she did not do so voluntarily. We find that a younger person would not have been treated in the same way. We have explained our reasons when discussing Alleged Incident 4.

225. We are therefore satisfied that if the respondent's conduct in Alleged Incident 18 was not age-related harassment it was direct age discrimination and a breach of s.39(2)(d) of the 2010 Act.

<u>Our conclusions on Alleged Incident 19 - that the claimant was constructively dismissed on 31 August 2018</u>

226. In deciding this issue we apply the approach set out by the Court of Appeal in **Kaur**.

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, her resignation?

227. We find that the last event which triggered the claimant's resignation were the letters from NEST informing her that the respondent had not paid her pension contributions in March and April 2018 (Alleged Incident 18). The failure related to the period when the claimant was still employed by the respondent even if the dismissal in January had taken effect. Although the "acts" took place in March and April 2018 we found that the claimant first became aware of them some time after she returned from hospital after her hip operation on 15 July 2018.

(2) Has she affirmed the contract since that act?

228. For the respondent, Mr Searle submitted that there was a delay in resigning - the letters from NEST were mid-July and the claimant's resignation was two weeks' later on 1 August 2018. We accept the claimant's case that she was had been in hospital and therefore there is some doubt as to when exactly she saw the letters from NEST and, more importantly, be in a state to fully engage with them. We found that at the very earliest it was 15 July 2018 when she was discharged from hospital. Taking the earliest date of 15 July 2018 that means a maximum delay of 16 days or just over two weeks from the claimant seeing the letters to her sending the letter of resignation.

229. As **W E Cox Toner (International) Ltd v Crook** makes clear, mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract. Prolonged delay in resigning may be evidence of an implied affirmation. **Mari v Reuters Ltd** makes it clear that accepting sick pay does not of itself amount to affirmation. In this case we accept that during some of those 16 days the claimant was not well, being on post-surgery medication and suffering sufficiently serious post-op complications as to justify a referral to a DVT clinic. There was no evidence that she positively affirmed the contract during that period and we do not accept that a delay of just over two weeks is sufficient to imply affirmation. We find that she did not affirm the contract following Alleged Incident 18.

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

230. As we have recorded above, we found that Alleged Incident 18 was in itself a breach of the implied term. A breach of the implied term is a repudiatory breach of contract (**Morrow**). We also found it was a breach of the express term that the respondent would pay pension contributions and that was also a repudiatory breach of contract.

*(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation, because*

the effect of the final act is to revive the employee's right to resign even if there was a previous affirmation).

231. Given our finding that Alleged Incident 18 was itself a repudiatory breach of contract we do not need strictly need to answer this question. However, in case we are wrong in our answer to question (3) above we confirm that we found that Alleged Incident 18 was a part of a course of conduct comprising of several acts and omissions which cumulatively would have amounted to a breach of the implied term.

(5) Did the employee resign in response (or partly in response) to that breach?"

232. As we recorded at paras 134-140 above, we found that the claimant did resign in response to that breach.

Our conclusions on whether the claimant was constructively dismissed

233. We therefore find that the claimant was constructively dismissed.

Our conclusions on whether the constructive dismissal was an act of age-related harassment or direct age discrimination

234. Following **Wilton**, the constructive dismissal cannot be an act of harassment. However, as **McLeary** confirms, it can be an act of direct age discrimination. Was it in this case? We have decided it was. The claimant's resignation was in response to Alleged Incident 18 which we have found to have been an act of age-related harassment. More generally, as we explained in relation to Alleged Incident 4 and those subsequent incidents said to be acts of age-related harassment or age discrimination, we found that age was an effective cause of the respondent's treatment of the claimant. We find that the respondent did treat the claimant less favourably in breach of s.39(2)(c) of the 2010 Act by constructively dismissing her and that the reason for that dismissal was her age.

<u>Summary of our conclusions our conclusions on the age discrimination and harassment complaints;</u>

235. We found that Alleged Incidents 4, 6, 7, 11-18 were acts of age-related harassment.

236. We found that Alleged Incident 19 (the claimant's constructive dismissal) was an act of direct age discrimination.

237. Alleged Incidents 1-3, 5, 8-10 were not alleged to be acts of direct age discrimination or age-related harassment.

238. For the sake of completeness we record that although the respondent in its Response pleaded that it had taken all reasonable steps to prevent breaches of the Equality Act 2010 and so could rely on the defence in s.109 of that Act it put forward no evidence to support that contention. We find it did not take such steps.

<u>Our conclusions on the time limits issues in relation to the discrimination and harassment complaints</u>

239. At the final hearing we discussed with the parties' representatives whether the issue of time limits had been decided at the preliminary hearing when the claimant was allowed to amend to include various harassment and discrimination complaints. Because no written reasons were requested at that preliminary hearing it was not clear what exactly had been definitively decided. For the avoidance of doubt, we record our findings on this issue.

240. We find that the Alleged Incidents 4, 6, 7 and 11-19 did constitute 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'. A relevant factor in our decision is that the same individuals (and centrally Mr Foy and Ms Murphy) were involved in those incidents' (**Aziz).** As will be apparent from our findings above our view is that the Alleged Incidents formed part of a continuing campaign with the aim of ensuring the claimant was either removed from or retired from her job as Stewardess. The last incident was the constructive dismissal of the claimant which took effect from 31 August 2018. Our conclusion is that the complaints under the Equality Act 2010 were brought in time.

241. If we are wrong about that then we would have found that it was just and equitable to extend time for bringing the 2010 Act complaints. The reason for that is that (as will be apparent from this Judgment) the evidence required to deal with the unfair dismissal claim (which was in time) was the same as that required to deal with the discrimination complaints. It seems to us, therefore, that there was no prejudice to the respondent in allowing the discrimination complaints other than the very fact that they would have to deal with those complaints. On the other hand, the prejudice to the claimant of not allowing her to bring those complaints would be substantial depriving her potentially of the remedy of injury to feelings which is key to recognising the harm done by harassment and discrimination.

Our conclusions on the unfair dismissal complaint

242. We have found that the claimant was constructively dismissed. Was that dismissal unfair? The respondent did not seek to argue that if the claimant was constructively dismissed it was nonetheless a fair dismissal. We find that the claimant's constructive dismissal was an unfair dismissal.

Next Steps

243. The case will be listed for a remedy hearing with a time estimate of one day. The parties will be asked to provide their dates to avoid so the date for that hearing can be set. Once the date is set the Tribunal will make directions for the steps to be taken by the parties preparation for that hearing.

244. Based on our findings of fact, as a Tribunal we feel that the respondent's treatment of the claimant in this case was frequently appalling. We think it important to bear in mind that although a social club, this was a substantial business. Its turnover was significant and it had employees. In the circumstances, it seems to us that it was incumbent on it as an employer to ensure that it adhered to standards of practice which could be expected of a business of its size. This includes, for example, ensuring that contractual documentation is up-to-date. In this case, the claimant was not even issued with a new contract of employment when she took

over as the stewardess of the bar. That seems to us to be poor practice on the part of the respondent. There was no suggestion that its committee members had received training in employment or equality issues.

245. Since the claimant has left the respondent's employment we will not at the remedy hearing be able to make recommendations in this case. However, we think it would be prudent for the respondent to review the way it approaches employment and equality matters and ensures those members of its committee with responsibility for dealing with them are properly trained and equipped to deal with such matters.

Employment Judge McDonald

Date: 15 November 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 November 2020

FOR THE TRIBUNAL OFFICE

Annex – List of Alleged Incidents

The letters in brackets after each incident refer to the three Scott Schedules:

1. UDL refers to the Scott Schedule setting out the breaches of contract relied on by the claimant in her unfair dismissal complaint.
2. DAD refers to the Scott Schedule setting out the incidents relied on by the claimant as acts of direct age discrimination.
3. AHW refers to the Scott Schedule setting out the acts relied on by the claimant as acts of age-related harassment.

The number after those letters is the number of the alleged incident in the relevant Scott Schedule, e.g. DAD3 refers to incident no.4 in the Direct Discrimination Scott Schedule, i.e. Dismissing the claimant and her husband and providing no right of appeal.

Alleged Incidents

1. In July 2017 Mikaela Murphy asking the claimant whether she and her husband had considered retirement. (UDL1)

2. In July 2017 Mikaela Murphy stating to the claimant that she should seriously consider retirement. (UDL2)

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3. On 3 September 2017 Mikaela Murphy, Geoffrey Foy and Thomas Kershaw calling the claimant into a meeting and (a) asking when she and her husband intended to retire (b) stating that she and her husband should consider retiring. (UDL3)

4. On 4 September 2017 Mikaela Murphy and Geoffrey Foy calling the claimant into a meeting and (a) stating that she was responsible for a £2000 shortfall in bar takings (b) threatening her with police involvement (c) stating that if she did not retire she would be subject to a criminal investigation. (UDL4, DAD1, AHW1).

5. On 8 September 2017 Mikaela Murphy and Geoffrey Foy discussing the claimant's refusal to retire and stating that if the claimant and her husband decided not to retire they would "deal with it" upon their return from holiday. (UDL5).

6. On 17 September 2017 the respondent's committee members holding a special general meeting during which they discussed (a) retiring the claimant and her husband (b) how they could force the claimant and her husband to vacate the property they occupied and (c) what they would do with it once it was vacant. (UDL6, DAD2, AHW2).

7. On 18 September 2017 Mikaela Murphy implementing a decision of the respondent's Committee Members by putting up a poster on the notice board that (a) insinuated that the claimant was responsible for a £2000 shortfall in bar takings (b) gave the impression that the claimant and her husband had decided to retire. (UDL7, DAD3, AHW3)

8. In November 2017, Mikaela Murphy, Geoffrey Foy and Thomas Kershaw calling the claimant into a meeting and (a) asking whether she and her husband had decided to retire and (b) stating that, as the claimant had decided not to retire, she must resume a forty-eight hour working week despite the fact that she was suffering from Lupus. (UDL8).

9. On 26 January 2018, the respondent writing to the claimant's husband and inviting him to attend a disciplinary hearing without proper cause. (UDL9).

10. On 30 January 2018, the respondent not allowing the claimant's husband to present his case properly at a disciplinary hearing, indicating that the respondent had pre-determined the outcome of the hearing. (UDL10)

11. On 30 January 2018 dismissing the claimant alongside her husband and providing no right of appeal. (UDL11, DAD 4, AHW4).

12. On 31 January 2018 writing to the claimant's husband and stating that both he and the claimant must vacate the property by 30 April 2018. This is said to be a breach of the implied term of trust and confidence and a breach of clause 1.2 of the claimant's contract of employment which permitted her to occupy the property. (UDL12, DAD5, AHW5).

13. On 13 February 2018, stating that, as the claimant and her husband had been hired as a couple, the claimant would be dismissed alongside her husband (despite the fact that she had done nothing wrong). (UDL13, DAD6, AHW6).

14. From 4 March 2018 onwards, failing to respond to the claimant's handwritten letter in which she sought confirmation of whether she had been dismissed. (UDL14, DAD7, AHW7).

15. On 19 April 2018 writing to the claimant and asking her to attend an informal meeting to discuss her return to work, thus attempting to create the impression that the claimant had not actually been dismissed. (UDL 15, DAD8, AHW8).

16. The conduct of Mikaela Murphy during the meeting on 27 April 2018 (evidenced by the claimant's audio recording). (UDL16, DAD9, AHW9).

17. Failing to communicate further with the claimant after the meeting with Mikaela Murphy on 27 April 2018 (UDL17, DAD10, AHW10).

18. Failing to contribute towards the claimant's pension from March/April 2018 onwards. The claimant only became aware of this breach in or around late July 2018. The claimant says this is both a breach of the implied term of

trust and confidence and a breach of an express terms of her contract that the respondent make monthly contributions to her pension. (UDL18, DAD11, AHW11).

19. Constructively dismissing the claimant on 31 August 2018 (DAD12, AHW 12).