THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Mr C Mardner**
Ms S Khawaja

BETWEEN:

Mrs Barbara Thomas

Claimant

And

King's House School Trust (Richmond) Limited

Respondent

ON: **4 & 5 March 2020 and 12 October 2020**
In chambers: 11 November 2020 and 4 January 2021

Appearances:

For the Claimant: In Person
For the Respondent: Ms K Walmsley, Counsel

RESERVED JUDGMENT

1. The equal pay claim is dismissed upon withdrawal
2. The racial harassment claim is dismissed as out of time.
3. The constructive dismissal claim fails and is dismissed.

REASONS

1. By a claim form presented on 21 April 2019, the claimant brought complaints of racial harassment, constructive dismissal and Equal Pay. The Equal Pay claim was withdrawn during the claimant's cross examination. The remaining claims were resisted by the respondent.

2. The claimant gave evidence on her own account. The respondent gave evidence through Kim Golightly, former Bursar, and Mark Turner, Headmaster. The parties presented a joint bundle of documents and reference in square brackets in this judgment are to pages within the bundle.

Issues

3. The agreed issues are set out at paragraphs 3-6 of the case management order of Employment Judge Employment Judge Cheetham QC ~~of~~dated 30 October 2019, save for the matter at 3(v) which relates to the now withdrawn Equal Pay claim. [263-264]. The issues are referred to more specifically in our conclusions.

The Law

4. Section 26 EqA provides that a person (A) harasses another (B) if – A engages in unwanted conduct related to a relevant protected characteristic, or engages in conduct of a sexual nature, and 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.

5. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect.

Burden of Proof

6. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

7. The leading authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258 That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the Claimant. Where such facts are proved the burden passes to the Respondent to prove that it did not discriminate.

8. In the case of Madarassy v Nomura International PLC [2007] IRLR 246 it was held that the burden does not shift to the Respondent simply on the Claimant establishing a difference in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable Tribunal could properly conclude from all the evidence before it that there may have been discrimination."

Harassment -Time Limit

9. Section 123 EqA provides that a discrimination complaint must be presented after the end of 3 months starting with the act complained of or such other period as the tribunal considers just and equitable.

10. The case of Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA makes clear that the discretion of the Tribunal to extend time on just and equitable grounds should be exercised exceptionally and that the burden is on the Claimant to satisfy the Tribunal that there are reasons why the Tribunal should exercise its discretion to extend time.

11. The Tribunal's jurisdiction to extend time on the basis that it would be just and equitable to do so has been held in *British Coal Corporation v Keeble [1997] IRLR 336* to be as wide as that given to the civil courts by section 33 of the Limitation Act 1980. The Court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension and to have regard to all the other circumstances, in particular the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected by 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. However, there is no legal requirement to go through such a list in every case provided of course that no significant factor has been left out of account by the Tribunal in exercising its discretion.

Constructive dismissal

12. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides that an employee shall be taken to be dismissed by his employer where the employee terminates the contract, with or without notice, in circumstances in which he is entitled to do so by reason of the employer's conduct.

13. The case; Western Excavating Limited v Sharp 1978 IRLR 27 provides that an employee is entitled to treat him or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach of the contract or which shows that the employer no longer intends to be bound by one or more of its essential terms. The breach or breaches must be the effective cause of a resignation and the employee must not affirm the contract.

14. The case: Malik v Bank of Credit and Commerce International SA 1997 IRLR 462 provides that the implied term of trust and confidence is breached where an employer, without reasonable or proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

15. In London Borough of Waltham Forest v Omilaju [2005] ICR 481, the Court of Appeal stated that a final straw should be an act in a series whose cumulative effect amounts to a breach of trust and confidence and it must contribute to the breach. An entirely innocuous act on the part of an employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and

confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective.

Findings of Fact

16. The respondent is an independent preparatory school in Richmond, Surrey. The claimant was employed by the respondent between 19 January 2015 and 4 March 2019 as an HR Manager. The claimant was the sole HR Manager; there were no other HR professionals, at any level, within the school. There was no HR department; the claimant was part of the Bursary Team and reported to Kim Golightly (KG) the Bursar. At the relevant time, the respondent employed around 120 staff. Less than 5% of the workforce were from a BAME background.

17. On 15 March 2018, the claimant informed KG that the previous day, a colleague, Lou White (LW), Marketing Manager, was walking towards the door to exit the school but when she saw the claimant outside, turned left into the main hall to avoid her. The claimant said to KG that LW needed to be careful as she had now done this to two people, both of whom were black and that LW's attitude could possibly be misconstrued by others as racist. The claimant made clear to KG that she did not believe that LW was racist. The other black person referred to was Helen Grell (HG), who had informed KG earlier that day that she had paused to say hello to LW but LW had blanked her and marched past stoney-faced. The following day, there was a phone call between the claimant and KG during which the claimant referred to the LW matter again, mentioning racism several times.

18. KG told us that she asked the claimant whether she wanted her to do anything about the matter and that the claimant had said that she wanted her to speak to LW. The claimant denies that she asked KG to speak to LW. Having considered this dispute, we find that the claimant did not expressly ask KG to raise it with LW but KG assumed, not unreasonably in our view, that the claimant wanted the matter addressed. As an HR Manager, the claimant must have known that the respondent could not simply do nothing and she conceded in cross examination that she knew it was going to be escalated to the Head Teacher and the Board of Governors.

19. KG did not raise the matter immediately with LW. She first spoke to the headmaster, M. KG was concerned that LW had become challenging to manage and had friends among the Board of Governors. LW was concerned that the matter be dealt with properly given that this was not the first time the claimant had raised a concern about race. Normally, these matters would be dealt with by the HR manager but that was not possible in this case given that the HR manager was the claimant. KG therefore spoke to Sophie Rees (SR), HR Director of a fellow independent school, St Pauls, for advice.

20. MT advised KG to draft an email to the board of governors [134-135]. KG drafted an email and sent the draft to MT. It is unclear whether it was ever sent to the Board of Governors.

21. On 19 March 2018, KG sent an email to the claimant explaining that she had raised the matter with MT and that he had agreed that the matter needed tackling. She also informed the claimant that the Board of Governors would be told about it. The claimant

responded immediately with "*Great thanks – that is good to know. I just hope it does not make matters worse*".

22. Between end of March and 18 April 2018, the school was closed for the Easter holidays.

23. On 1 May 2018, KG met with LW and informed her of the concerns raised by the claimant and said to her that her actions could be perceived as racist by someone who did not know her. It is fair to say that LW took this badly and on the same day, sent an email to KG expressing deep hurt and upset at the suggestion that she was racist and asked whether the matter was going to be taken further or withdrawn. [146]

24. LW then sent a follow up email on 2 May saying that she wanted the suggestion that she was racist withdrawn before she went on holiday otherwise she would have no alternative but to take legal advice. [145]

25. On 2 May 2018, the claimant went to see MT about the situation and said that she did not want to take matters further but LW was not speaking to her. MT then spoke to KM and suggested she speak to LW and reassure her that no-one was suggesting that she was racist. KM later confirmed by email that she had spoken to LW and smoothed things over [147].

26. LW then went on holiday. On 29 May, the claimant and LW met to clear the air and agreed to draw a line under the issues [150].

27. On 1 June, the claimant sent an email to KG stating that her original conversation with her about LW was in confidence and should not have been disclosed to LW. She expressed disappointment that she was not consulted before the school sought advice elsewhere [151]. The claimant relies on this as an act of racial harassment.

28. The claimant refers to 2 other matters of alleged harassment in her witness statement. The first matter is at paragraph 25, where she claims that on a date in 2018, Julie Jones (JJ), a part time secretary in the Nursery Department, was walking towards her and as they approached each other looked straight ahead and ignored her. The claimant said that she mentioned it to KG and to JJ's manager but no action was taken. The other matter relates to Jane Shalders (JS), School Governor, who the claimant says gave her "the look" when she attended a school safeguarding meeting. The claimant did not provide any further details about these matters or explain why they amounted to harassment.

29. On 1 November 2018, the claimant tendered her resignation, with notice. She did not give a reason but in the letter thanked MT for being so understanding and for the opportunities provided to her. She said that her last day would be the 30 November 2018 [180].

30. In her claim before us, the claimant says that she resigned in response to a number of breaches, which she sets out at in the narrative at paragraphs 25-40 of her particulars of claim [17-20]. Much of this is set out in general terms. Also, the narrative includes matters which are post the resignation and therefore not applicable to the decision to resign. Because of the way these complaints are set out, for ease of reference we have adopted the respondent's grouping of the allegations into 5 categories as per paragraph 42 of its closing submissions. These are: i) Handling of the pay review/job evaluation; ii)

Swearing by KG; iii) Workload iv) Refusal of flexible working; v) failure to support and manage the claimant effectively. Taking each of those in turn:

Handling of pay review/job evaluation

31. On 10 August 2016, the claimant made a formal request that her stand-alone role of HR Manager be re-evaluated as she did not consider that it was in line with her peers. Attached to the request were documents in support. [117]. That request was refused as the respondent felt that her salary had been set at the appropriate level.

32. In September 2018, the claimant again asked for her role to be evaluated. A further review of the claimant's role was carried out in October 2018. On this occasion, the respondent sought the assistance of SR. SR was an HR director of a large school, with responsibility for an HR team. The respondent had sought advice from SR on other matters, including the claimant's recruitment. SR and had been involved in developing the claimant's job description and person specification. She had also been part of the panel that had interviewed the claimant.

33. SR carried out an evaluation of the claimant's role by benchmarking it against other HR roles. On 8 October 2018, SR wrote to KG concluding that the claimant's salary was highly competitive and that the respondent may well be overpaying her for her position [160-163].

34. The claimant's complaint before us is about the manner of the evaluation. She said it was not a true evaluation because the respondent went to SR rather than having it done by somebody independent from the school such as Acas, as she had suggested. The claimant contends that SR's evaluation was biased as she had simply looked at what she was paying her HR team and used that as a benchmark. We don't accept that that was the case as attached to her email of the 8 October 2018 is a table listing 17 other independent schools (including St Pauls), the HR roles and salaries paid and a commentary on the reporting lines for the role. [162]. SR also provided detailed reasons as to why she reached the conclusion she did. Although the claimant knew that SR had been asked to carry out the evaluation, she did not know the outcome at the time of her resignation. Indeed, she says that the final straw was the respondent's delay in dealing with the matter.

Swearing by KG

35. The claimant complains that KG often swore at work. KG accepted that she used expletives in relation to work but never swore at the claimant. The claimant acknowledged that the swearing was not directed at her. The claimant did not tell KG that she was offended by her swearing and accepted that KG was unaware of the offence caused.

Poor Management practices and standards

36. At paragraph 40 of the particulars of claim, the claimant refers to witnessing a number of poor management practices and standards by the respondent. Many of the matters set out do not relate directly to the claimant e.g. how the pay and benefits of certain members of staff was determined. Other matters were general assertions not referred to in the claimant's evidence or not put to the respondent's witnesses in cross examination.

Refusal of Flexible Working

37. On 27 January 2017, the claimant made a flexible working request. Instead of working 35 hour over 5 day, she wanted to work compressed hours, working 3 days in the office and 1 day at home, with Friday off [124]

38. On 7 February 2017, the claimant's proposal was rejected by KG who felt that it would be detrimental to the school having the claimant out of the office for 2 days. Notwithstanding her misgivings, KG put forward a counter-proposal of the claimant working compressed hours over 4 days in the office [127]

39. A trial period of the counter-proposal commenced on 1 March 2017. This was intended to be for 2 months to the beginning of May but was extended to the end of the summer 2017.

40. KG discussed the outcome of the flexible working trial with the claimant at her appraisal in Autumn 2017. The claimant was told that the trial had been reviewed by the senior management team and they had determined that it had been unsuccessful and that they needed an HR manager on site 5 days a week. KG's view was that in a bigger school it might have worked but their school was small and the HR function comprised just the claimant and so her absence had a larger impact. KG also said that typically, the beginning and end of the week were the busiest times and when it was most important to bounce things off HR and the claimant did not work on Fridays. Although the claimant was disappointed by the decision, she did not challenge it, which she was entitled to do under the statutory provisions.

Failure to support and manage the claimant effectively

41. This is essentially a complaint about being over-worked. The claimant said that she often worked late and at weekends to undertake additional work. The additional work related to a specific task that the claimant had been asked to undertake, relating to historical pay for nursery staff. Historically, the nursery staff had been paid 4 weeks annual leave instead of the statutory 5.6 weeks and this needed to be corrected. The claimant was tasked with going through the archives to provide information to the financial accountant. The claimant says that although she informed KG that the volume of work was too much for her, she was told that she just had to get on with it as the work needed to be done. We do not accept that this is an accurate portrayal of the respondent's total response as we accept the evidence of KG in cross examination that when the claimant asked for help with the independent nursery review, she was given additional support from Yinka, who provided the framework for collating the information.

42. Although the claimant refers to having to work on Saturdays, she accepted that this was her choice and that she only did this once.

43. Turning to the claimant's resignation, shortly before her notice period was due to expire, the claimant was asked by MT whether she would stay on temporarily until a suitable replacement had been found. The claimant agreed and at the same time negotiated revised pay of £35 per hour, working as and when required. The claimant agreed because she did not want to leave the respondent in the lurch as she knew that a school inspection was due to take place in January 2019. In the event, the inspection was delayed until February.

44. In February 2019, a report created by SR came to the claimant's attention as it was included, by mistake, in recruitment papers for the claimant's successor. The claimant reviewed these papers which recommended that the successor role be downgraded to HR Officer at a lower salary. The claimant was upset by what she had read and went to speak to MT about it.

45. In her skeleton argument, the claimant says that after discovering these papers, she could no longer work for the respondent. Yet she remained on the payroll until 4 March 2019 when her employment eventually came to an end. [182].

Submissions

46. Subsequent to the hearing and as ordered, the respondent sent in its closing submissions. The claimant chose to rely on her skeleton argument handed up at the hearing. These have been read by the panel and taken into account.

Conclusions

47. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the issues:

Racial Harassment

48. The alleged act of racial harassment i.e. KG telling LW about her conversation with the claimant act occurred on 1 May 2018. The claimant was aware of the conversation by 2 May 2018, as is clear from KG's email of the same date [147]. Any claim relating to this matter should therefore have been presented by 2 August 2018. The claim was presented on 21 April 2019, more than 8 months out of time.

49. The alleged incident involving JJ (para 28) is not dated, except that it occurred some time in 2018. We cannot be satisfied that it was presented in time. The same applies to the alleged incident involving JS which is not even dated by year.

50. As an HR professional, the claimant would have recognised that she had a potential claim. She should also have been aware of the tribunal process and the relevant time limits. When asked in cross examination why she had not brought the claim earlier, she said that she could have brought it earlier but working in HR, she knew what happened to people when they did that sort of thing. That suggests that the claimant made a conscious decision not to present her claim within the time limit. In those circumstances, there are no just and equitable reasons for us to exercise our discretion to extend time. It follows that the Tribunal has no jurisdiction to hear the racial harassment claim and it is accordingly dismissed.

51. In the alternative, if we are wrong and do have jurisdiction to hear the claims, we are satisfied that KG disclosing her conversation with the claimant to LW was unwanted conduct. We also find that it was loosely connected to race as the reason it was escalated was because it was a potential race complaint and the respondent felt that it had to be taken seriously. On whether it amounted to harassment, the claimant's case is that KG had used her race to cause distress to LW and as a result, she (the claimant) had felt violated. However, that is not apparent from the claimant's email of 1 June in which the only emotion that the claimant expresses is disappointment [151]. That falls far short of the effect required for harassment. The claimant knew the matter was being

escalated and should have expected that LW would be spoken to about it. Indeed, raising these matters at the most senior management level without bringing them to LW's attention, thereby depriving her of the opportunity to respond would have been wholly unfair. As an HR professional, the claimant should have appreciated that. The claimant should also have known that the school could not ignore a potential allegation of harassment and had to take it seriously. It was therefore unreasonable for her to complain when they did so and unreasonable for her to feel violated as a result.

52. In relation to the other allegations, the claimant has not provided sufficient particulars of these allegations and they are therefore no made out on the limited information provided.

53. Therefore, had the harassment claims been in time, they would have been dismissed on their merits.

Constructive Dismissal

Failure to support and manage the claimant effectively

54. This refers to the matters at paras 41 and 42 above. Being over-worked is a fact of working life. The reality is that in roles of responsibility, employees are often expected (or choose) to go the extra mile to get the job done. That is different from being excessively overworked, which can amount to a breach of trust and confidence if it has a detrimental effect on an employee's well-being and the employer is aware of it and fails to do anything about it. From the evidence, we did not get the sense that the claimant was excessively overworked. Her complaints about workload related to a specific period of time and a specific task that needed to be dealt with as a matter of priority. When she asked for support in relation to that task, it was provided. The claimant accepted that she chose to work evenings and was not required to do so. She also accepted that her weekend working comprised of working on a Saturday on only one occasion. The claimant has not provided any details of the number of hours she worked over and above her normal working hours. If her workload had been that much of an issue, we would have expected to see reference to this in her appraisal. Instead, at the appraisal, the claimant asks for more responsibility. Although the claimant refers at paragraph 45 of her statement to having to have counselling, we saw no evidence that this was related to work. We find no evidence of a breach of contract on the respondent's part.

Flexible Working

55. This refers to the matters at paras 37- 40 above. At paragraph 31 of her written skeleton, the claimant contends that the respondent's refusal does not fall within any of the grounds set out at s.80G(1)(b) of the Employment Rights Act1996. We disagree. The reason for refusing the claimant's request was the detrimental effect that her not working on a Friday had on the demand for HR advice. That falls within the remit of grounds listed under the section.

56. Whilst we are of the view that the difficulties identified by the respondent could have been overcome by them exploring with the claimant adjustments to the flexible working arrangement, we nevertheless find that the respondent's concerns were genuine and that its actions were not calculated or likely to destroy the relationship of trust and confidence. The respondent did not dismiss flexible working out of hand; it allowed the claimant to trial it, beyond the period agreed, so that it could measure its effectiveness.

Swearing by KG

57. Based on our findings at paragraph 35, we find that KG's conduct was not calculated or likely to cause a breakdown in the relationship of trust and confidence. How a person responds to swearing by others is a subjective matter. We accept that the claimant was offended by the swearing and considered it inappropriate in a school setting. Those feelings were valid. However, KG could not reasonable have foreseen the claimant's offence as the claimant, for some inexplicable reason, chose not to share this with her. There is no breach of contract here.

Handling of the pay review/job evaluation

58. This is dealt with at paragraphs 31-34 of our findings. We consider that the respondent dealt with the claimant's request reasonably for the reasons already stated. We find no breach of contract in the approach taken.

The last straw act

59. The claimant says that the last straw was the lack of communication about the pay review/job evaluation. However, there is no reference to this in the claimant's particulars of claim. The issue that the claimant has focused on in evidence is the contents of the review and the fact that it was carried out by SR. This is dealt with extensively in her witness statement and in her particulars. However, as the claimant only became aware of this post resignation, it cannot be part of the reason for her resigning. The claimant said in cross examination that she did not chase the matter before resigning because she thought the respondent was not doing anything about it. It is not lost on us that without this last straw, the issue of affirmation would have been a live prospect in relation to any earlier breaches found. For all of these reasons, we are not convinced that this was a last straw.

60. However, even if we are wrong about the last straw, we find that none of the matters individually or cumulatively amount to a breach of the implied term of trust and confidence.

61. Even if we had found there to be a breach of trust and confidence, we would have gone on to find that the claimant affirmed the breach by agreeing to extend her employment for a further 3 months after her notice period should have expired.

Decision

62. The unanimous decision is that:

    a. The Equal pay claim is dismissed upon withdrawal
    b. The racial harassment discrimination complaint is dismissed as out of time
    c. The constructive dismissal claim fails and is dismissed

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Employment Judge Balogun
Date: 14 January 2021