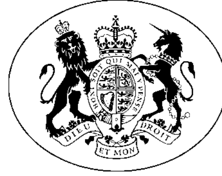

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss F Saiyed		London United Busways Limited

Heard at: London Central

On: 24, 25, 26 and 27 November 2020 (and 30 November and 1 December in chambers)

Before: Employment Judge Stout
Ms Zofia Darmas
Mr Frederick Benson

Representations
For the claimant: Mr Ben Amunwa
For the respondent: Mr Graham Vials

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Respondent did not harass the Claimant in contravention of ss 26 and 40 of the Equality Act 2010 (EA 2010).
(2) The Respondent did not victimise the Claimant in contravention of ss 27 and 39(2)(c) and/or (d) of the EA 2010.
(3) The Claimant's constructive unfair dismissal claim under Part X of the Employment Rights Act 1996 (ERA 1996) is well-founded.
(4) The Claimant's holiday pay claim is dismissed upon withdrawal.

REASONS

1. Miss Saiyed (the Claimant) was employed by London United Busways Limited (the Respondent), latterly as a Project Administrator and Data Co-Ordinator, from 5 October 2015 until her resignation (which is alleged to be a constructive dismissal) on 7 June 2019. By a claim form presented on 15 July 2019, following a period of ACAS Early Conciliation between 10 and 13 June 2019, amended at a Case Management Hearing on 13 December 2019, the Claimant brings complaints of constructive unfair dismissal, sexual harassment, victimisation and unpaid holiday pay. Employment Judge James at the Case Management Hearing described the claim as being essentially about alleged sexual harassment of the Claimant by Mr Bakshi, her application to transfer back to her previous role, her subsequent grievance and her resignation without notice on 7 June 2019. In summary, the Respondent's defence is that the Claimant was not harassed or victimised and she resigned in circumstances that did not amount to a dismissal.

The type of hearing

2. This has been a public hearing in person, although we heard evidence from three witnesses (Mr Aakintoy, Miss Fox and Mr Bakshi) by video (using the Kinly Cloud Video Platform).

The issues

3. At the outset of the hearing the parties agreed that the following issues on liability were to be determined. This list included a minor amendment to the previously agreed list sought by Mr Umunwa at the start of the hearing and agreed by Mr Vials:-

Unfair constructive dismissal

1. C relies on the following conduct as amounting to repudiatory breaches of contract by R:

   a. The allegations against Mr Bakshi:

      i. Mr Bakshi's refusal to train C in the role of Project Administrator and Data Coordinator, due to her late transfer from her previous department;

      ii. On 11 February 2019, Mr Bakshi denigrating and insulting other senior staff using derogatory language to describe them;

iii. On 12 February 2019, Mr Bakshi's shouted and criticised C's emails, told her that she was wasting his time and criticized the layout of her PC desktop. He told her: 'Come on Farzana – don't be stupid, we are working in a corporate world, its contact number first then email address!' and ordered her to 'Learn faster!', but at the same time was telling her she is doing well;

iv. On 14 February 2019, Mr Bakshi reprimanded C stating: 'Today, you have made a stupid mistake, you shouldn't ask [Dennis O'Conner] for reports, everyone's covering each other so don't ask him next time.' Further, he told her to: 'stop asking stupid questions in stupid ways!' and 'you've got your weekends free now so you can do some research!';

v. Mr Bakshi told C that he is responsible for sacking people and that 'If people can't do their jobs, then no problem, we will get rid of them and find someone who can do the job' and that 'all naughty people are sent to him so that he can get rid of them';

vi. Mr Bakshi's tendency to speak to C in whispered tones and not speaking up when she asked him to which resulted in her having to go close to him to hear what he was saying, to the extent that she had to move her headscarf away from her ears to hear him;

vii. Mr Bakshi contacted C after hours by phone and kept sending her emails and messages after working hours late evening and expected the work to be done;

viii. Mr Bakshi responded angrily when informed that C had gone to H.R., questioned her as to why told her 'You report to me, so you come to me, you don't go to H.R.!' and attempted to persuade her to stay in post;

ix. Mr Bakshi insisted that C should inform him of her final decision as to an internal transfer after 4.40pm on 15 February 2019 and persistently required C to specify a genuine reason for leaving the role;

x. On or around 18 or 19 February 2019, C's IT access was blocked by or on the request of Mr Bakshi (alternatively, in co-ordination with Ms Ngoma Knight). Mr Bakshi did this while fully aware that C had resumed duties as a GSA at Hounslow Heath, or recklessly as to that fact.

b. The allegations against R's H.R. and other personnel:

i. On 19 February 2019, R told C to go home as her IT access was denied and also because her role as a GSA was not available due to redeployment of staff in a redundancy programme, despite previous confirmation on 15 February 2019 by Mr Himesh Quessou and Miss Khatera that C should not hand in her resignation letter and would be internally transferred back to her old role, as agreed;

ii. On 19 February 2019, R's Ms Knight informed C that she would need to report back to Mr Bakshi on 20 February 2019;

iii. On 20 February 2019, R's Ms Knight informed C that she would arrange a meeting with C and Mr Bakshi and in default of her attendance she would be subject to R's absence procedure. Ms Knight denied that C's IT account had been blocked;

iv. R denied C a return to her old role which, it claims, was reserved for re-deployment as part of a wider redundancy process;

v. In the grievance outcome dated 29 March 2019, Ms Fox recommended mediation between C and Mr Bakshi and that C return to work with Mr Bakshi, notwithstanding medical and other evidence from C as to the effect of Mr Bakshi's conduct on her health;

vi. In the appeal outcome dated 31 May 2019, Mr Harris recommended mediation between C and Mr Bakshi and that C return to work with Mr Bakshi, notwithstanding medical and other evidence from C as to the effect of Mr Bakshi's conduct on her health.

2. The 'last straw' was allegation 1.b.vi. above.

3. Did R, by their conduct as outlined above, act without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (applying Malik v BCCI [1997] IRLR 462), thus breaching the implied term of trust and confidence?

4. If so, had C affirmed the contract before she resigned on 7 June 2019?

5. If not, did C resign because of those alleged actions of R?

6. If C was dismissed and the reason for the dismissal was a potentially fair one, (which R contends was 'some other substantial reason', namely C's refusal to complete her contractual duties), was the dismissal fair or unfair in all the circumstances in accordance with equity and the substantial merits of the case (section 98(4) ERA 1996)?

The Equality Act 2010 claims

Time limit

7. Have the claims been brought in time pursuant to section 123 of the EA 2010?
   a. ACAS were notified of Early Conciliation on 17 May 2019;
   b. The EC certificate was issued on 13 June 2019;

c. The claim was received by the Tribunal on 15 July 2019;
d. Any act/s complained of which took place on or before 18 February 2019 are out of time unless they were part of a continuing act or acts.

8. C will contend that the conduct complained of on or before 18 February 2019 was part of a continuing act or acts by Mr Bakshi and/or by R.

9. If the claim is (or any of the claims are) out of time, should the Tribunal extend time on a 'just and equitable' basis?

Harassment on grounds of female sex contrary to section 26(1) and 40 of the EA 2010

10. The alleged unwanted conduct was as above at 1.a.i. to x.

11. Was the alleged unwanted conduct related to C's being female?

12. Did the alleged unwanted conduct have either (i) the purpose or (ii) effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C, taking into account her perception, the other circumstances of the case and whether it was reasonable for the alleged unwanted conduct to have the requisite effect.

Sexual harassment contrary to section 26(2) and 40 of the EA 2010

13. The alleged unwanted conduct of a sexual nature was:
a. Mr Bakshi's tendency to speak to her in whispered tones and not speaking up when she asked him to which resulted in her having to go close to him to hear what he was saying, to the extent that she had to move her headscarf away from her ears to hear him;
b. Mr Bakshi contacted C after hours by phone and kept sending her emails and messages after working hours late evening and expected the work to be done.

14. Did the alleged unwanted conduct have either (i) the purpose or (ii) effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C, taking into account her perception, the other circumstances of the case and whether it was reasonable for the alleged unwanted conduct to have the requisite effect.

Harassment due to rejection or non-submission to unwanted conduct, contrary to section 26(3) and 40 of the EA 2010

15. The alleged unwanted conduct of a sexual nature was:

a. Mr Bakshi's tendency to speak to her in whispered tones and not speaking up when she asked him to which resulted in her having to go close to him to hear what he was saying, to the extent that she had to move her headscarf away from her ears to hear him;
b. Mr Bakshi contacted C after hours by phone and kept sending her emails and messages after working hours late evening and expected the work to be done.

16. The alleged unwanted conduct related to C's sex was as outlined above at paragraph 1.a.i. to ix.

17. Did the alleged unwanted conduct have either (i) the purpose or (ii) effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C, taking into account her perception, the other circumstances of the case and whether it was reasonable for the alleged unwanted conduct to have the requisite effect.

18. Did Mr Bakshi treat C less favourably than he would have treated her had she not rejected or submitted to his conduct?

19. The alleged less favourable treatment was that on or around 18 or 19 February 2019, C's IT access was blocked by or on the instructions of Mr Bakshi.

Victimisation contrary to section 27 and 39(4) of the EA 2010

20. The protected acts were:
a. C's complaint against Mr Bakshi's conduct to H.R. or alternatively the Recruitment Department on Friday 15 February 2019;
b. C's written grievance dated 26 February 2019;
c. C's appeal against the grievance outcome dated 15 April 2019.

21. C suffered the following detriments:

a. In respect of her 15 February 2019 complaint, the detriments were:
i. Mr Bakshi responded angrily when informed that C had gone to H.R., questioned her as to why told her 'You report to me, so you come to me, you don't go to H.R.!' and attempted to persuade her to stay in post;
ii. On or around 18 or 19 February 2019, Mr Bakshi or his colleague/s blocked C's IT access;
iii. On 19 and/or 20 February 2019, R ordered C to return to work with Mr Bakshi.

b. In respect of her 26 February 2019 grievance, the detriments were:

i. Rejection of her complaint of harassment against Mr Bakshi in the:

1. March 2019 grievance outcome letter; and
2. 31 May 2019 appeal outcome letter.

ii. Recommendation of mediation between C and Mr Bakshi and that C return to work with him, notwithstanding medical and other evidence from C as to the effect of Mr Bakshi's conduct on her health in the:

1. March 2019 grievance outcome letter; and
2. 31 May 2019 appeal outcome letter.

c. In respect of her appeal dated 15 April 2019, the detriments were:

i. Rejection of her complaint of harassment against Mr Bakshi; and

ii. Recommendation of mediation between C and Mr Bakshi and that C return to work with him, notwithstanding medical and other evidence from C as to the effect of Mr Bakshi's conduct on her health.

22. C contends that the reason for these detriments was, in each case, the respective complaints that she had made as protected acts, set out above.

4. In addition, the parties agreed that as part of this hearing we should also determine:
   a. If C was dismissed, whether she contributed to her dismissal; and,
   b. Whether the C would have resigned in any event even if there were no unlawful conduct by R (a *Polkey*-type argument)?

5. Although the hearing had been listed to determine remedy as well, it was agreed that there was insufficient time in this hearing to do that.

The Evidence and Hearing

6. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle.

7. We explained our reasons for various case management decisions carefully as we went along.

8. We heard oral evidence from the Claimant and the following witnesses on her behalf:

    a. Ola Dimeji Aakintoy (Help Desk Administrator and IT Administrator for the Respondent);
    b. Paul Gooderson (Respondent's Head of Engineering RATP Dev London, Dec 2013-April 2018 and Second Engineering Lead RATP Del London Transformation Team April 2018-Mar 2019);
    c. Stephany D Vivas Gil (Project Administrator/Data Co-Ordinator for the Respondent from January 2018 to December 2018).

9. For the Respondent we heard evidence from the following witnesses:

    a. Mr Kapil Bakshi (Head of Transformation for the Respondent from October 2018 to October 2019);
    b. Ngoma Knight (HR Business Partner for the Respondent since 2014);
    c. Nigel Harris (General Manager of the Respondent's Hounslow and Hounslow Heather garages for the last 15 years);
    d. Rosie Fox (interim Head of Human Resources for the Respondent from December 2018 to September 2019).

The Respondent's disclosure

10. This has been an unusual trial because of the significant shortfall in the Respondent's disclosure. We have not been provided with many of the documents that we would normally expect to be relevant to proceedings such as this. In particular:-

    a. We have not seen any emails or Microsoft Teams messages between the Claimant and Mr Bakshi.

    b. We have not seen the notes of the grievance investigation meetings that Miss Fox held with witnesses other than Mr Bakshi (including the Claimant). Miss Fox gave evidence that she would probably have destroyed her handwritten notes once she had typed them up, but the typed versions were stored on Miss Fox's machine until she left the business in September 2019.

    c. We have not seen any internal emails or communications about the Claimant's grievance, including emails between Miss Fox (who did the first stage grievance) and Mr Harris (who did the appeal). Nor, indeed, have we seen any internal communications concerning the Claimant at all from any point in 2019.

11. The Respondent's position is that all these documents have been deleted. The Respondent's position at this hearing was that this is because when an employee leaves the business, their email accounts are deleted after 30 days, together with their emails as sent to other people's accounts. The

Respondent's position was that this was because this is the policy of the French company that is responsible for the IT of the UK branch.

12. The Respondent has not however produced a witness who is able to give direct evidence of what has happened with the Claimant's emails or Teams messages, Mr Bakshi's emails or Teams messages, or Miss Fox's documents. It has produced various emails which present a confused picture. On 11 March 2020 Jawala Sharma states: *"The fact that there is no backup is actually a CORP company practice backed up by a retention policy 30 days confirmed by CIO and GDPR UK law's requirement (right to be forgotten)."* This is incorrect as GDPR UK law does not require all employee emails to be deleted after 30 days and the right to be forgotten is a right to request erasure not an obligation to delete. Lionel Joffre (Head of IT) on 11 March 2020 also said that *"company policy is 30 days retention for mail, files and sharepoints. France could testify if needed"*. The French Chief Information Officer on the same date, however, states that: *"A good process to keep old personal email data of former employees is what you have done for several people (ie exporting the email data in pst format for potential legal claims)"*. On 12 March 2020 David Bushnell, Head of HR, stated that: *"The group have a clear process that is being adhered to on deletion of the account after 6 months and these are hosted through Microsoft cloud"*.

13. There is also an email from Edward Nuttman, a Partner at the Respondent's solicitors, (on which privilege was waived) which indicates that Ward Hadaway advised the Respondent on GDPR implementation *"and employee documents were supposed to be kept for 6 years"*. However, there is nothing to suggest that in this case steps were taken to ensure that documents were retained once it was clear that proceedings were contemplated, which in this case was at the latest from 17 May 2019 when the Claimant contacted ACAS. This is so even though the Claimant in her grievance appeal of 15 April 2019 and again in her resignation letter of 7 June 2019 specifically requested that the Respondent should preserve all manual and electronic records and correspondence. It is part of a solicitor's duty to ensure that clients appreciate at an early stage of litigation the duty of disclosure and the importance of not destroying documents which might have to be disclosed: see *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd* [1968] 1 WLR 693. However, none of the Respondent's witnesses had been asked to retain documents.

14. It is clear from Miss Fox's evidence that relevant documents on her computer were not retained even though she left employment in September 2019 which was after proceedings had started. It is unclear when the other material was deleted because the emails the Respondent has provided as set out above all date from March 2020 (long after the first round of disclosure which was in December 2019) and are inconsistent as to its policy in any event. No one from the Respondent's IT department has given evidence about when, how or why the deletions occurred.

15. Notwithstanding the above, Mr Vials in his written closing submissions stated: *"The Tribunal will note there are no documents or written evidence to support*

the Claimant's allegations [against Mr Bakshi] *and the Claimant accepts this."* There are two problems with this submission:-

16. First, it is not true that the Claimant accepted this. She has from the point at which she raised her grievance onwards maintained that there were emails and messages from Mr Bakshi that supported her case. She specifically requested on 15 April 2019 and 7 June 2019 that this evidence be preserved. She maintained under cross-examination that this evidence would have supported her case.

17. Secondly, Mr Vials' submission (which was repeated orally) is that, despite the deficiencies in disclosure, the Tribunal had enough documents to fairly determine the case against the Claimant on the basis that her account is not supported by the documents. We disagree. There are very significant gaps in the Respondent's disclosure in this case, which are wholly the fault of the Respondent. If we were to determine the case on the basis that the documents the Claimant says existed did not exist, the trial would not be fair.

18. It is for this reason that the normal course in such circumstances is to draw adverse inferences against the party who has failed in its disclosure obligations, so as to redress that balance. We are not, of course, bound to do so even in a case such as this and we invited Mr Vials in his closing submissions to address us on why we should not draw adverse inferences. His response to this was that we should not do so because the disclosure failures had been unintentional.

19. We have considered Mr Vials' submission, but we do not accept that the disclosure failures were unintentional since we have not heard evidence from anyone with relevant knowledge of this at the Respondent. Having heard evidence from Miss Fox and Mr Harris, we can accept that they did not intentionally delete any relevant electronic data, although Miss Fox did deliberately destroy her handwritten notes of the grievance investigation interviews. What is clear is that there was at the very least a corporate failure on the part of the Respondent to take reasonable care to comply with its disclosure obligations. There may also have been a failure on the part of the Respondent's solicitors to comply with the *Rockwell Machine Tool* duty in respect of advising their clients. We make no finding on that as we have not heard evidence (or received any representations) from the solicitor who had conduct of the case at the relevant time.

20. In any event, even if the disclosure failures were unintentional, we do not consider that it makes any difference to the question of whether inferences should be drawn in this case. It is just as unfair to conduct the trial on the basis that the lost documents do not exist if their loss was unintentional as it is if it was intentional.

21. Mr Vials did not advance any other reason why we should not draw adverse inferences where documents are missing and we see no reason either. This is not a case where the Claimant has proved to be a wholly unreliable witness such that there is no reason to think that the missing documents would not

have assisted her case. On the contrary, we have generally found her to be a reliable witness.

22. In the circumstances, in our findings of fact below we have accepted the Claimant's evidence as to the emails and messages she received from Mr Bakshi. We have also exercised great caution in relation to the instances where the Respondent has invited us to reject evidence in the Claimant's witness statement or oral evidence because it was not mentioned in the grievance process. Given that the Respondent has lost the notes of the Claimant's grievance interview with Miss Fox, it seems to us that in some (but not all) cases it is not fair to find that she did not mention things previously as it may be that these details would have been mentioned to Miss Fox in that grievance interview.

THE FACTS

23. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

24. The Respondent operates public passenger transport bus services across central, west and south London under contract with Transport for London (TfL).

25. The Claimant commenced employment with the Respondent on 6 October 2015. She worked initially as a Garage Support Assistant (GSA) in the Engineering department at Hounslow Heath. From December 2017 the Claimant also took on a second role as Relief Allocations Supervisor, which she did alongside her GSA role. The Claimant is a single parent to a primary school-aged child and she also worked two days per week at Tesco to supplement her income.

26. Most of the people working with the Claimant were male. The Claimant felt she worked well with her colleagues before the events that are the subject of this claim, and there has been no suggestion from the Respondent that the Claimant was anything other than a good worker and a respected colleague prior to the incidents that are the subject of these proceedings.

The Project Administrator and Data Co-Ordinator role / Mrs Vivas' evidence

27. In around April 2018 there were discussions about a new role in a new team that was being set up, the Transformation Team. Mr Gooderson (Head of Engineering) was leading that team (and, indeed, was the second most

important person in the business at that time). He identified the need for a Transformation Administrator and Data Handling role. A job description was drawn up and the role was discussed with the Claimant, but she did not wish to take the role on as it was based at Fulwell which would have been a difficult drive for her. She was asked to start collecting data from the garages while someone permanent was identified. Mr Gooderson gave evidence that the Claimant did this in her own time and even devised a more automated way of collecting the data. Mrs Stephanie Vivas (who had been working for the Respondent since January 2018 in another role) then applied for the permanent role (now called Project Administrator and Data Co-Ordinator), to which she was appointed after interview.

28. Some time after Mrs Vivas started in post, Mr Kapil Bakshi joined the Respondent. This was in around October 2018. Mrs Vivas described how her role became essentially that of personal assistant to Mr Bakshi. She said that he seemed nice at first for about a week, but then she realised that he was *"evil"*. She said that was not a term that she used lightly (indeed she apologised for it) but she remained firm under cross-examination that she considered it to be the appropriate word to describe Mr Bakshi. Mrs Vivas gave evidence, which she maintained under cross-examination, that Mr Bakshi would say nice things, and offer to be flexible (for example, saying that she could work from home), but he also started to tell her that other people (eg Mr Gooderson) was not good at his job. He told the Claimant to refuse to do work for Mr Gooderson, but not to tell him that and instead to say that she was working for Mr Bakshi. She became very anxious because she felt she had to make excuses for not doing other people's work and must appear to them to be no good at her job. She said that he humiliated other members of staff. She gave a particular example of Paul Hetherington and how after questioning to Mr Hetherington's face why he did not know how to do his job, after he had left the room he said *"This is the type of people we don't need, we should sack him, we should let him go because this is not the type of people that we need in this company"*. Mrs Vivas said that he often referred to older (male) members of the team as *"stupid"* or *"an idiot"* and even called someone an *"imbecile"* in front of her. She said that he asked her to do IT tasks that she did not feel competent to do. She said that he did not seem to care about her normal working hours and would put pressure on her to finish work. She described how the point came when she had to breathe deeply several times to conquer the feeling of dread before going into the office.

29. One morning in early December 2018 Mrs Vivas attended the doctor and received some bad news related to her son. This was very upsetting for her and she forgot to do a travel booking that Mr Bakshi had asked her to do which meant that the company had to pay £1,000 extra for the ticket. She said that Mr Bakshi went *"ballistic"*, that he said that kind of mistake was unacceptable and he was derogatory about her performance. Mr Bakshi gave evidence that Mrs Vivas was confused in her witness statement because he thought she was saying she had to book a ticket for him to travel, when in fact she was *"supposed to book for some visiting students for French universities"*. We do not think anything turns on the question of who the tickets were for: Mrs Vivas' statement is non-specific. It was apparent from what Mr Bakshi

said that there was an incident when Mrs Vivas failed to book tickets she should have done, but he denies that he was angry about this. He said that he was very supportive of her, that he had said she could work from home when she needed to, and he had stood up for on one occasion when an engineer mistreated her. Mrs Vivas agreed that Mr Bakshi had said that she could work from home, although she did not believe she had ever done that until 17 December 2018. She also agreed that he had stood up for her in relation to the engineer. However, Mrs Vivas also said that following the incident regarding the travel booking that Mr Bakshi told her that when he did her performance review with his line manager (Catherine Chardon, the Managing Director), he would tell her that Mrs Vivas did not want to perform. Mrs Vivas felt threatened by this. She said that Mr Bakshi *"would put you in the fire and would say you jumped into it voluntarily"*. She felt that he had made her life unbearable and that she was forced to leave the job.

30. Mrs Vivas handed in her resignation letter on 10 December 2018, giving a month's notice. Although we have not seen the resignation letter itself, the accompanying emails make it clear that Mrs Vivas did not in that complain about Mr Bakshi, but thanked him for everything. The chronology of events from Mrs Vivas after this was confused, but what she was clear about was that on 17 December 2018 she felt that she could not face coming into work with Mr Bakshi given the difficulties in her personal life and so she decided to work from home (something she understood Mr Bakshi to have permitted, although she had not utilised that option previously). She went to the GP and was so upset that the GP signed her off sick for 15 days. In a phone conversation with Mr Bakshi that day she said that she told him she had a sick certificate, but that he still said she had to come into work or resign with immediate effect and that she would not get her notice pay. Mrs Vivas submitted what she described as a grievance about this phone conversation on 17 December 2018. We have this in the bundle (p 345) as Mrs Vivas had given a copy of this to the Claimant at the time of her grievance appeal, which the Claimant then shared with Mr Harris (the appeal manager). Mrs Vivas gave evidence that Mr Bakshi then cut off her access to the Respondent's IT system.

31. Mr Bakshi disputed Mrs Vivas' account. He said that on the phone Mrs Vivas had told him that she had had an argument with her husband and that is why she could not come to work because she had no one to look after her baby. In answer to supplementary questions about this, he said: *"I said that if she wants she can work from home, I said she could log in from home and work and I then talked to Catherine and I mentioned that Stephanie is not able to come to work and she cannot continue work and she wants to put in her two weeks holiday and Catherine said that she needs to come to work or give us a final decision"*. He also said: *"Catherine wants to know when you stop working, if it's right now, put in your notice"*. He said that he told her clearly that she could work from home, but that she was upset when he gave her Catherine's message. He said he was clear to her it was Catherine's message and he said he did not remember anything about sick leave. He denied having cut off her access to the IT system and that her emails were still working months after she left, although what he said about that was confusing

because he said that it was impossible for him to cut off her access to the IT system because Robin Newby was Head of IT systems at that time, when we know as a matter of fact from the Claimant's own case (see further below), it is possible to block someone's access to the IT system.

32. Mr Gooderson in his evidence to us provided some further detail in relation to this incident which essentially confirmed Mrs Vivas' version of events. He told us that Mr Bakshi had come to him to tell him that he had told Mrs Vivas that if she would not come into work she had to resign and would not get paid for her notice period. He said that Mr Bakshi seemed to think that if Mrs Vivas was sick she should not get paid. He said that he realised that this was not right, and told Mr Bakshi so. He then went to Catherine Chardon to tell her this needed to be sorted out and Mrs Vivas was entitled to her notice pay. Mr Bakshi denied having a conversation along those lines with Mr Gooderson, but he accepted that in the end Mrs Vivas was paid her full notice to 7 January 2019.

33. The Respondent argued that it was the issue about working her notice which was the only thing that had concerned Mrs Vivas about Mr Bakshi. This was denied by Mrs Vivas who said that she had not wanted to raise anything before because she did not want to make life difficult for herself. She said that her family and friends had said that she should have raised a grievance before resigning, but she said she had not felt able to because she felt it would have drawn attention to her mistake with the ticket booking and Mr Bakshi had made her feel so bad about that that she could not take it. Her priority at this point was to cease being a 'working mum' and to spend more time caring for her son.

34. Mr Gooderson also gave evidence that he had on a number of occasions had to speak to Mr Bakshi ("gentleman's words" he said) about his style and approach to workplace issues. Mr Bakshi denied having any such conversations with Mr Gooderson. He suggested that Mr Gooderson had a motive for lying to the Tribunal and/or otherwise giving evidence against because Mr Bakshi had when he joined the Respondent effectively been brought in above Mr Gooderson in the hierarchy and/or because Mr Gooderson had ultimately been made redundant.

35. We should record at this point that the Claimant had no contact with Mrs Vivas prior to the appeal stage of her grievance in or around April 2019.

36. In relation to the conflict of evidence between Mrs Vivas / Mr Gooderson and Mr Bakshi, we prefer the evidence of Mrs Vivas and Mr Gooderson. Their evidence is supportive of each other. We do not consider that Mr Gooderson had any reason to come to the Tribunal to lie to assist the Claimant. He was a very senior manager and did not seem particularly aggrieved about the fact that he had been made redundant by the Respondent. He struck us as being genuinely supportive of the Claimant and as having been genuinely concerned during employment about Mr Bakshi's treatment of employees. We find that this wholly explains his motivation for providing a witness statement and attending Tribunal.

37. In addition, it is significant that Mr Bakshi accepted that ultimately Mrs Vivas had been paid her full notice period, which contradicts his position that he was acting on an instruction from Ms Chardon in seeking to get her to resign immediately. It is, however, consistent with Mr Gooderson's evidence that he had to intervene by telling Ms Chardon what Mr Bakshi had done and the matter was then sorted out. Further, Mrs Vivas' evidence as to the conversation on 17 December is consistent with the grievance she submitted and it is apparent from that that she had not understood Mr Bakshi to be saying that he was delivering a message from Ms Chardon even though he said that he made that clear. In the circumstances, we do not accept Mr Bakshi's evidence on this point.

38. We also accept Mrs Vivas' evidence as to the way that Mr Bakshi treated her during her employment. In this respect, we also found Mrs Vivas' evidence credible. It is understandable that she chose to resign rather than raise a grievance about this. On the other hand, having resigned, it is also understandable that she was willing to raise a specific grievance to ensure that she was paid until the end of her notice period as she gave evidence that her financial circumstances were precarious at that time.

39. We do not consider that Mrs Vivas and the Claimant have colluded on their evidence. On the contrary, it seems they did not really meet while employed and had no contact at all until the appeal stage of the Claimant's grievance. Even since, there is nothing to suggest that they had colluded. We therefore accept Mrs Vivas' evidence, including in particular as to the key points about Mr Bakshi calling her and other employees stupid, as to his general management style and as to his cutting off her IT access.

<u>The Claimant and the new role</u>

40. After Mrs Vivas left, the Project Administrator and Data Co-Ordinator role was advertised again, this time to be based at Stamford Brook. Although the Claimant had not worked with Mr Bakshi before, or had any significant contact with him, Mr Gooderson had suggested to him that the Claimant would be very good for the role and he approached her about it and suggested that she should apply for it. The Claimant was interested in the role, which represented a promotion for her. She applied and was invited to interview. At the interview the Claimant was asked by Khatera Bosty (a member of the Respondent's recruitment team) whether she had worked before with Kapil Bakshi. Ms Bosty said that he had a different style of working. The Claimant said that she had not worked with him before but it would be fine as she had worked with many different managers for the Respondent. She said *"How hard can it be?"*. The Claimant added in oral evidence that Ms Bosty said that Mr Bakshi was 'bossy'. We do not accept that Ms Bosty said this at the time because the Claimant did not mention it in the grievance appeal and it also does not sound like the sort of thing that someone would say at interview, but we reject the Respondent's submission that this is evidence of the Claimant being willing to lie. This is precisely the sort of minor detail that frequently changes in

someone's evidence and about which it is plausible a person may be mistaken rather than lying.

41. The Claimant was in contact with Mr Bakshi by text message around this time and he texted at 7pm in the evening of 20 December 2018 to ask her how her interview went, to which she replied that it was okay and that she was still at work trying to finish everything off before going on annual leave; indeed she thought she would be at work until at least midnight that evening but would give him a call the following evening. He texted that they would be making a decision the next morning and wanted to know her thoughts, so she texted *"ok I can give you a call now if you like"*. The Claimant was then offered the job and texted to thank Mr Bakshi on Saturday 22 December at 9am. She told him her son had an asthma attack the previous day so she was busy with him but would call Mr Bakshi later that day. At 9.51pm she texted again to say that she had only just finished work and so would call in the morning.

42. The text messages show that the Claimant accepted the role formally by emailing Khatera on 29 December 2018. On 13 January 2019 Mr Bakshi texted to enquire whether there was any update on her joining date. On 15 January Mr Bakshi texted at 8pm asking her to call him whenever she was free, to which she replied at 6.41am the next day to say she was awake and he could call any time when he was up. On 29 January it was confirmed that the Claimant would move to the new role on 11 February and she let Mr Bakshi know. On the Sunday 10 February 2019 before she was due to start in the new role the Claimant attended Hounslow Heath to finish off work that she was doing there. She sent a WhatsApp message to her Manager Mr Ranson there that day saying that she had tried to finish off what she could and she would come back the following weekend to finish off (p 322).

43. The Claimant made what she described in her witness statement as *"many sacrifices"* to take up the new role, including changing her son's after-school swimming and football to later times and putting extra childcare arrangements in place. She also took three months' unpaid leave from her second job (working 2 days per week at Tesco) in order to allow herself to focus on the new job. She intended to give up the Tesco role if the new job worked out.

44. The new job was based at Stamford Brook which is a longer journey for the Claimant (45 minutes, she said in her witness statement) than her old job at Hounslow Heath (which was 10-12 minutes). The Respondent argued that the travel time must have been a problem for her because the Claimant had previously not wanted to do the job when it was at Fulwell because of the travel and Fulwell is only 4.4 miles from her home whereas Stamford Brook is 6.3 miles. In oral evidence, however, the Claimant was clear that the travel time was not an issue for her and that it was an easy drive straight down the A4. She said that 45 minutes was the maximum time it took. Googlemaps indicates the journey time was about 24 minutes. We accept the Claimant's evidence that the travel was not an issue for her. She was well aware of the travelling involved and accepted the job on that basis. We consider that it was unfortunate that the Respondent at the hearing sought to make so much of this point, especially given that Mr Harris concluded at the appeal stage that

it was the role and Mr Bakshi's working methods and behaviour that had upset the Claimant and not the travel.

45. The Claimant negotiated a higher salary than that originally offered (£30k, rather than £26-28k) and was a substantial uplift on her salary in the GSA role (which was £20,420pa when she started in 2015 and about £24,000 or £25,000 by 2019). She mentioned this salary to her Hounslow Heath Manager, as a result of which she was asked by Khatera Bosty to come to a meeting at the Stamford Brook Office with her and Mr Bakshi in which she was warned that her pay was confidential and she was not to discuss it with anyone. The Claimant confirmed that she agreed and understood this.

<u>The GSA redundancy exercise</u>

46. Following the Claimant's appointment to the Project Management and Data Co-ordinator role her old GSA role had been identified by Mrs Knight (Human Resources Business Partner for the Respondent) as being potential suitable alternative employment for GSAs at Park Royal Garage who were subject to a redundancy exercise. The proposal was to reduce the number of GSAs at Park Royal from three to two. That exercise was being carried out confidentially.

47. On 24 January 2019 one of the affected employees (Employee A, who has a mobility disability) expressed an interest in the Hounslow Heath GSA role because *"it would be closer to my home"*. The notes of a consultation meeting on 29 January 2019 indicate that one of the affected GSAs at Park Royal had seen an advert for a GSA at Edgware, and Employee A asked if the GSA role at Hounslow Heath was still available and asked for a copy of the job description. The notes state that Mrs Knight asked the employee to review this and let her manager know if she was still interested in the role by Friday (which would have been 1 February). There is no disclosure as to any further communication from Employee A at this point. Mrs Knight in her witness statement said that at this stage she agreed to reserve that role for that employee, but that degree of certainty is not reflected in the notes of the meeting or in the emails that follow. Mrs Knight emailed the Recruitment team (including Himesh Quessou and Khatera Bosty) after the meeting on 29 January asking to be sent copies of the adverts and job descriptions for the two GSA roles that were then advertised because *"I need to give these to some GSAs who are at risk of redundancy"*. She added: *"Also, please can you hold off from making any appointments for any GSA or Allocations posts at the moment. I will let you know once we have completed the consultation process and we no longer need to hold them."* Mr Quessou then sent Mrs Knight *"2 adverts"*, and on 1 February Mrs Knight asked again for the Hounslow Heath GSA advert. On 8 February Mrs Knight emailed again saying it seemed to be the wrong job description and asking *"Is it possible to send me the correct advert as I need it for redeployment purposes for a GSA that is at risk of redundancy"*.

48. Mrs Knight was not cross-examined on her evidence about the redundancy position at this point, and (in the light of our ultimate conclusions on the issues that we have been asked to decide at this hearing) we do not make any findings about the position. However, we observe that it appears from the emails and consultation meeting notes that as at 15 February 2019 there can have been no certainty that the Claimant's GSA role at Hounslow Heath was needed for another employee as there were at that point two GSA vacancies within the company and only a need to make one GSA redundant from Park Royal. We do, though, accept that Mrs Knight had communicated to Mr Quessou and Ms Bosty that they should hold off from making any appointments to GSA posts at that time. There is no evidence to suggest that this had been communicated any more widely at that point, or that managers at Hounslow Heath had been informed that the Claimant's old role was anything other than vacant.

49. The emails in the bundle indicate that it was not until Wednesday 6 March 2019 that Employee A confirmed in a consultation meeting with Mrs Knight that she wished voluntarily to transfer to Hounslow Heath to the Claimant's old role. Even after that, options remained to be discussed and our understanding from the evidence given at the hearing was that Employee A did not start in the Claimant's old post until much later, possibly after the Claimant had resigned.

<u>Overview of events of 11-15 February 2019</u>

50. The Claimant worked with Mr Bakshi for just one week between 11 and 15 February 2019. There is no dispute that by the end of that week she had asked Tom Ranson (her manager at Hounslow Heath) if she could return to her old role, and also Himesh Quessou and Khatera Bosty in the Respondent's Recruitment Department. There is a dispute about what they said (which we deal with later), but there is no dispute that on Monday 18 February 2019 the Claimant did return to her old role in Hounslow Heath and she worked there on 18 February and then again on 19 February until around lunchtime when her IT access was blocked and she was unable to continue working. On the instructions of Mrs Ngoma Knight (Human Resources Business Partner) the Claimant then went home for the rest of the day. Mrs Knight realised that there had been a mistake as the Claimant should not have been permitted to return to her old role as she had ring-fenced it as alternative employment in the GSA redundancy exercise. She arranged a meeting between herself, the Claimant and Mr Bakshi for Thursday 21 February. However, at around 5pm on 20 February the Claimant had a car accident and could not attend the meeting. She did not return to work at all thereafter, but raised a grievance on 26 February 2019.

51. The Claimant has consistently said, since raising her grievance on 26 February 2019, that during the week of 11-15 February 2019 Mr Bakshi mistreated her, creating a sense of intimacy as if he owned her, *"as if I was his partner"* and that *"his constant encroaching into my personal life added to this feeling"*. By the end of the week she says she was fearful, anxious,

distressed and trembling and *"These four/five days nearly cost me my life, my son's life and my home and everything I have worked for, not to mention my most important asset of health, peace of mind and wellbeing."*

52. In addition to the specific events of each day that week (set out below) the Claimant found Mr Bakshi spoke so quietly that it was difficult to hear him. She described in oral evidence (as she did to Mr Harris at the appeal) how she had to get up from her seat and go close to him in order to hear what he was saying. She wears a headscarf and sometimes had to move her scarf away from her face to hear him. The Respondent accepts that Mr Bakshi does often speak softly. This is also the experience of Miss Fox and Mr Harris and Mr Gooderson. Mr Gooderson said that he had asked him to speak up on a number of occasions and he did for a bit, but then he reverted to his normal level of speaking. The Claimant gave evidence in her witness statement that she had asked him to speak up, but he did not change his volume, although he was capable of shouting (and did shout, she says) on other occasions. This is also what she is recorded as saying in Mr Harris's notes of the appeal meeting (p 222). In oral evidence she maintained she had asked, and added that when she asked Mr Bakshi to speak up he said that it was an open plan office so he needed to speak quietly. Mr Bakshi denies that she ever asked him to raise his voice or said that she could not hear him. On this point, we accept the Claimant's evidence as it is consistent with that of other witnesses that she did have difficulty hearing him, she did ask him to speak up but he did not, and that she had to get up and move closer to him and rearrange her headscarf. On the latter, we accept the Claimant's evidence as to the details because it came across as being a very vivid memory. There are also a number of points later in this judgment where we have been able to find that Mr Bakshi was clearly not telling the truth (in particular about his conversations with the Claimant on 14 July and his blocking of her IT access). While we have not assumed that because he lied about those matters, none of his evidence should be accepted, it does give us a further reason to accept the Claimant's evidence in relation to this allegation.

53. The Claimant has consistently said (from her grievance onwards) that it was Mr Bakshi's habit of talking in whispers *"together with his evening phone calls and messages that made me feel this strange feeling of being in a relationship with him"* (p 154). During the grievance process, and in oral evidence, she likened it to a domestic violence relationship. She said he would 'blow hot and cold', one minute telling her she was doing well and suggesting that they 'grab a lunch', the next saying that she was making stupid mistakes. We accept the Claimant's evidence in this regard, which is consistent with the picture given to us by Mrs Vivas and with the other evidence we have heard.

54. In terms of communications between the Claimant and Mr Bakshi, with the exception of text messages these have all been deleted by the Respondent. The evidence we have as to their existence is as follows:

    a. The Claimant in her grievance referred (p 154, para 7) to *"evening phone calls and messages"* and (p 161) to the *"constant messaging and communication after working hours"*. She did not provide any

examples with her grievance, but she could not do so because she no longer had access to her IT. In oral evidence, she confirmed by by *"messaging"* here she meant Teams messages (Teams having been installed on her laptop on Tuesday 12 February 2019).

b. Miss Fox in her witness statement said that she had looked at the Claimant's emails and messages as part of the grievance investigation, but in oral evidence she was clear that she meant by this only the ones that the Claimant had shown her and two emails that Mr Bakshi showed her on his mobile. The Claimant did not in fact show her any as she did not have access to her IT (save that she did offer to show one example of an email where she said that Mr Bakshi had criticised the format). Miss Fox did not check either emails, texts or Microsoft Teams.

c. In the grievance appeal the Claimant complained that she had *"mentioned several calls and emails to [Miss Fox] and she chose to dwell only on one example of Wednesday at 6.30 which she could use to favour [Mr Bakshi]. I have several other emails and texts which are on my log in – I was not asked to produce them – this would have enabled a fuller enquiry"*. Despite this, Mr Harris did not look for any emails or texts as part of the appeal process either.

d. The Claimant in her witness statement suggests (p 22) that both Miss Fox and Mr Harris accepted that Mr Bakshi did call and send several emails and use Office Teams (work chat), and this is what she said in her resignation letter as well (p 239), but there is no specific reference to Teams in the grievance or appeal outcome letters. What the grievance outcome does say (para 7) is that *"Kapil acknowledges that he was not aware you felt uncomfortable receiving calls or messages outside of your normal finish time and that there was no expectation from him to answer or complete work at this time"*. It seems that at least at the time of her resignation (and still) the Claimant understood Mr Bakshi's reference to *"messages"* to be a reference to *"Teams messages"*. Mr Bakshi in his witness statement accepted that on two or three occasions he sent the Claimant emails after 5pm with instructions for work the next day. He said that he did not expect her to read them that night or respond (and he said that she did not respond).

e. The notes of the Claimant's meeting with Mr Harris include the following (p 220): *"Kapil contacted me at 18.00 and he did call me after I had left for home on 3 occasions out of the 4 days that I had worked for him: I was on the phone only once the other 3 occasions were emails"*. Our understanding of the Claimant's evidence on this point is that by *"3 occasions"* she did not mean just three emails, but three evenings out of the four days. She also stated in the grievance appeal letter *"You will see from the emails when they are eventually disclosed that Kapil poses questions and does expect a reply"*.

f. Mr Vials says that the Claimant said for the first time in oral evidence that Mr Bakshi had called her *"stupid"* on a Teams message, but that is not our note of the Claimant's evidence. Our note is that it was Mr Vials who first said this. Around 12 noon on Day 2 he put to the Claimant that she had no documentary evidence to support that Mr Bakshi called her stupid on Microsoft Teams. It seems he may have thought she had said this earlier in her cross-examination, but we find she did not. Mr Vials' question at this point had little connection with his preceding line of cross-examination about why the Claimant did not complain to her GP or Himesh Quessou about lack of training, and the Claimant answered it as if it was a generic allegation that she did not have documentary evidence to support her allegations by saying *"there is not, but I am the evidence and in terms of documentation and Microsoft Teams all of that evidence I would have had … I don't have this because I gave my laptop back"* (and the Respondent subsequently deleted everything). The Claimant never positively asserted that Mr Bakshi called her stupid on Microsoft Teams and we did not understand her response to this point being put to her by Mr Vials' to be her adopting his suggestion that Mr Bakshi had called her stupid on Teams. She was simply giving a generic response to Mr Vials' assertion that she had no documentary evidence by saying that she was the evidence, and she would have had documentary evidence had the Respondent not kept her laptop and deleted the evidence.

g. We have the Claimant's phone records in the bundle (p 338ff) which show outgoing calls by her to Mr Bakshi, but not incoming calls from him.

55. In the circumstances, we find that there were multiple messages and emails between the Claimant and Mr Bakshi during this week and that on three out of four days these continued into the evening. The Respondent has deleted all of them so we cannot see their contents. Mr Bakshi said that he had no expectation that the Claimant should respond after working hours, whereas the Claimant's evidence was that the messages from Mr Bakshi at least by implication were asking her to work in the evening. We further accept that although the Claimant was not required to open her laptop in the evenings to receive these messages, she had in her previous role been a conscientious worker, willing to do extra (and long hours) and so it was reasonably to be expected that she would open her laptop in the evenings. There is a difference, however, between an employee voluntarily taking her laptop home in order to finish off bits of work that she wishes to finish off and a manager contacting her after hours to ask her to do work that evening. This is what the Claimant considered Mr Bakshi was doing and as noted above she said that emails would show that he was asking her to do things that evening. The Claimant said that this happened on three evenings out of four she was with Mr Bakshi. Further, at least on the Wednesday evening, her evidence was that he was asking her to do things in the evening which could have waited until the next day. Given that the Respondent has deleted the evidence, we

accept what the Claimant says about these emails, and other messages (including Teams messages), and their contents.

56. In terms of the impact of events on the Claimant, Mr Harris (who ultimately heard her appeal against her grievance) recognised that she was still very distressed and that something had had a lasting effect on the Claimant. He considered that the Claimant had found that the new role was not suitable for her and that she *"found [Mr Bakshi's] working methods and behaviour very different to what you have experienced before and this has [had a] marked effect on your well-being".* The Respondent's case in these proceedings, however, has been that the Claimant did not complain about Mr Bakshi's conduct until after she had been told that she could not return to her old role, that the main problem with the new role was the travel to it and that her sole purpose in raising the grievance was to get her old role back.

57. We reject the Respondent's case in relation to the Claimant's feelings and motivations. The Claimant's evidence as to what she felt and why is, we find, genuine and consistent with such contemporaneous documentation as there is. We accept that she genuinely took a rapid dislike to Mr Bakshi and his management style. She felt a strong adverse reaction to him. She genuinely perceived the way that he behaved towards her as being akin to an abusive domestic relationship. The Claimant's evidence as to the strength of her feelings in this respect is supported by the fact that her case against Mr Bakshi has remained consistent in all material respects from her grievance through to this hearing. It is strengthened by her WhatsApp messages to Mr Hanson during that week, by her emotional appeal to Himesh Quessou and Khatera Bosty, by her text messages with Mr Aakintoy and by Mr Aakintoy's evidence about her behaviour in the office on Friday 15 February 2019 (as to all of which see further below). The Claimant's evidence is also supported by what she told her GP on 20 February 2019. We do not consider that her slight delay in visiting the GP undermines this. It is plausible, given her feelings in relation to Mr Bakshi, and fear of him (as the second most powerful person in the business), and the fact that (so far as she was aware) her old role was still available, that she should try to arrange as she did for a return to that old role without confrontation with Mr Bakshi rather than going down the route of submitting a formal grievance.

58. That is our overview of the period 11-20 February 2019. We now deal with the detail.

<u>11 February 2019</u>

59. On Monday 11 February 2019 the Claimant attended at Stamford Brook to start the new role. She was there from 8.20am to 6.45pm.

60. Mr Bakshi was already aware from previous contact with the Claimant that she was a single parent with childcare responsibilities. He also knew that she had been working at Tesco at the weekends, but that she intended to give

that up once she had settled into the new role. At the start of the week she explained that she would need to leave early on a Wednesday to take her son to football.

61. On the morning of 11 February she was provided with a statement of terms and conditions which she signed, although she did not pay much attention to what they said as they looked very much like those for her previous role and she trusted the company. The terms and conditions included two points on which the Respondent relies. First, it states that *"Your hours of work will be 35 per week, together with such other hours as may be reasonably required for the proper performance of your duties. Attendance patterns will be agreed with your manager locally. The nature of your work may, on occasions, require you to work outside normal working hours."* The Claimant said this is what her old role had said too. It also stated that the new role was subject to a probationary period and that *"if the probationary period was terminated for any reason, it is not possible to guarantee a return to your previous job or location"*.

62. When the Claimant got to the office at 8.20am, she called Mr Bakshi and he came to meet her and showed her the office. He told her that there would be a meeting with IT staff at 9am in Robin Newby's office and they went to that room. There is a dispute about what happened next. She gave evidence that she sat down and he was standing with a whiteboard marker in his hand. He asked her which engineering managers she had worked with and she said Paul Tavener, Tom Ranson, Tony Francis, Martin Shade, Mark Hegarty and Nick Hargreaves. He said *"No – only name the ones who are still working for the company now"*. He then wrote all the names (apart from Mark Hegarty and Nick Hargreaves who no longer work for the Respondent) on the white board and asked her to grade them out of 10. The Claimant said this made her feel uncomfortable as she did not have the training or expertise to grade senior managers. She graded Tom Ranson as 9.5, Tony Francis as 9.75, Paul Tavener as 8 and Martin Shade as 7. Mr Bakshi then graded them all lower (6, 6, 4 and 2 respectively" and said *"I am being nice because you have worked for them",* implying that he would have graded them even lower than that otherwise. She also said that he was denigrating other staff while doing this, for example saying about Tony Francis *"He is a rubbish rubbish man and so stupid"*. The Claimant's account of what Mr Bakshi said about managers at this meeting is slightly different in her grievance than in her witness statement, but we do not find the differences to be material. The essence of her account is consistent. She maintained this account under cross-examination, making clear that when this conversation happened neither she nor Mr Bakshi had a laptop open.

63. Mr Bakshi denies this. He said in his witness statement *"I did give her an exercise, asking her to rate the garages out of 1-10 based on their performance figures. That will have involved a discussion of which garage was performing best and worst using objective figures. This tested her existing knowledge in accessing the figures from the system, and her data analysis skills in comparing them. As part of the transformation team, we needed to identify what factors made a good and poor garage to improve*

efficiencies and performance. This is not insulting behaviour but factual critique of garages, not individuals. It is also based on data and key performance indicators. It was her role to collate it and assess it." In cross-examination he accepted that he was at the whiteboard, but also said he thought they had laptops as he takes his laptop to every meeting and the Claimant had turned up with her previous manager's laptop.

64. On this issue, we prefer the Claimant's evidence. It has been consistent in all material respects from the point at which she raised the grievance. The Claimant has been able to provide a lot of detail as to the scene and what happened, whereas Mr Bakshi's response is devoid of detail and he was unclear in cross-examination as to how the Claimant might have done the exercise that he says he gave her, especially in just a half hour before an IT meeting at 9am. In addition, the Claimant's account in this respect is supported to an extent by Mrs Vivas', who also described Mr Bakshi as frequently denigrating other managers and saying that they were *"stupid"*.

65. The Claimant also said that during this first meeting on 11 February 2019 and on other occasions during the week Mr Bakshi said words to the effect that if people cannot do their jobs they should be sacked. In particular, she said that he said *"If people can't do their jobs, then no problem, we will get rid of them and find someone who can do the job"* and *"all the naughty people are sent to me so that I can get rid of them"*. She also said that he told her that she was not to do any work for Mr Gooderson and only to work for him, which we note echoes Mrs Vivas' evidence. Mr Bakshi denies saying most (but not all) of this. He says that his role is not popular because transformation is about changing things, improving performance, comparing performance between garages and identifying problems and making cost savings. He said in his witness statement that *"if people are not able to do their jobs, then we may need to find someone who can, when discussing the role of our transformation department"*. He said he had never dismissed anyone at the Respondent and *"Any discussion in that context would have been clearly about our department and not specific to her"*. The notes of his grievance interview with Miss Fox indicate that to her he denied saying that if people cannot do their jobs they will be replaced, but that is actually inconsistent with what he now says in his witness statement. In the circumstances, we prefer the Claimant's evidence as to the matters in this paragraph, which has been consistent in all material respects since she raised her grievance. It is also consistent with Mrs Vivas' evidence, and supported by that of Mr Gooderson who considered that Mr Bakshi was not good at interpersonal skills.

<u>12 February 2019</u>

66. The Claimant worked from 8.30am to 7.45pm on 12 February 2019.

67. The Claimant alleges that Mr Bakshi shouted and criticised her emails, telling her that she was wasting his time and criticising the layout of her PC desktop. She says that he said: *"Come on Farzana – don't be stupid, we are working in a corporate world, its contact number first then email address!"*. The

Claimant responded *"Well maybe I am stupid then, I'm learning"* and Mr Bakshi shouted at her to *"Learn faster!"*. Mr Bakshi denies this, although he did accept in his witness statement that he *"may have made suggestions as to the format of emails as part of the initial introduction to the work – but that is very different to the suggestion that I criticised her work (which implies fault)."* He also said: *"There was a set company format for emails, which I showed her and asked her to follow. In fact, I showed this to several people because we had some junior project managers who also needed to see the format. I did not tell her not to be stupid or say that we live in a corporate world or tell her to learn faster. I do not speak like that …".* We again prefer the Claimant's evidence on this issue to that of Mr Bakshi. Again, Mr Bakshi actually accepts that he would have asked her to follow a set company format for emails, so the context is agreed. We further find that he did say the things the Claimant said he said (and shout, or at least, raise his voice). On these points, too, the Claimant has been consistent since the outset and again her allegations are supported by the similar evidence of Mrs Vivas.

68. Microsoft Teams was installed on the Claimant's laptop on this Tuesday. Mr Bakshi was out of the office for most of Tuesday afternoon. At 3.44pm Mr Bakshi texted the Claimant *"What time are you leaving today?"* The Claimant did not reply by text, but her phone records show her calling Mr Bakshi at 6.08pm (for 2 minutes) and at 6.55pm (for 16 minutes). We find, however, that, consistent with the Claimant's evidence that Mr Bakshi was messaging her frequently, she called him because he had messaged or emailed her.

<u>13 February 2019</u>

69. On 13 February the Claimant attended the office from 8.30am to 4pm. Mr Bakshi was out of the office. The Claimant had previously explained to Mr Bakshi that she would have a short lunch break and leave early at 4pm to take her son to football, which she did.

70. The Claimant's phone records show her calling Mr Bakshi on 13 February 2019 at 11.43am (for 14 Minutes), and trying to call him four times between 3 and 4pm when he texted *"Sorry, I can't talk right now"*. At 5pm the Claimant texted him *"I will be finished at 6.30 then I can talk I managed to talk to Joshua and I'm so glad I was present"*. Mr Bakshi replied *"Ok I am still at fulwell Will be around AV at 6.30".* The Claimant responded *"ok do you have meetings at Hounslow this evening too?"* to which Mr Bakshi responded at 6.01pm *"I am available to talk now"*. The Claimant then called Mr Bakshi at 6.03pm and the call lasted 29 minutes.

71. The Claimant in her grievance and in her witness statement for these proceedings maintains notwithstanding the above records showing that it was she who called Mr Bakshi that it was Mr Bakshi who wanted to talk to her 'after working hours' on this day. She said in her witness statement that when they spoke at 6pm she explained that she could not divert her mind to work then because she had to take care of her son and could not work on his calendar and other tasks. She stated that, *"regardless of this, he persisted in*

sending messages on office team chat including a message at 9.15pm and told me he wanted me to carry out various tasks which involved using my laptop expecting the work to be done before the morning". She said *"I felt like I was being stalked – it could easily have waited and been done during the following day".* This detail about messages continuing to 9.15pm was not in the Claimant's grievance or grievance appeal. The notes of her meeting with Mr Harris include the following (p 220): *"Kapil contacted me at 18.00 and he did call me after I had left for home on 3 occasions out of the 4 days that I had worked for him: I was on the phone only once the other 3 occasions were emails"*. Mr Bakshi does not deny having spoken to the Claimant at around 6pm on 13 February, nor does he deny sending her messages out of normal office hours, but he says that there was no expectation that she needed to do the work out of hours. On this point we accept the Claimant's evidence to this Tribunal, notwithstanding its inconsistencies. We accept that in her mind it would have felt like it was Mr Bakshi calling her when she in fact called him because (given the Respondent's deletion of documents) we accept her evidence that he was messaging her asking her to do things. We further accept the additional details that she gave in her witness statement of messages up to 9.15pm. We are not prepared to find that this is the first time that the Claimant has mentioned this detail because the Respondent has deleted the notes of her grievance investigation interview where we might have expected this detail to have been given (even if it did not appear in the outcome letter).

72. The Claimant was very upset by Mr Bakshi's treatment of her and felt that she would not be able to please Mr Bakshi and that he wanted her to work every hour of the day. She said in her grievance that she began to shake and found she could not do a simple task like holding a computer mouse. (In her witness statement, she said the shaking started a day earlier, but we prefer the more contemporaneous account in the grievance.)

73. That evening the Claimant sent a WhatsApp message to Mr Ranson at 7.52pm saying *"im going to be sinking or swimming"*. Mr Ranson replied 20 minutes later *"Hello Farzana x sorry I didn't reply x I need to talk to u face to face rather than by text, how is the new job?"* The Claimant replied *"yes that's why I texted you on here. Delete everything. I can only talk face to face"*. Mr Ranson replied immediately: *"No it's fine I meant I wanted to thank you personally face to face for everything u have done to help me."* The Claimant then replied *"no it's ok. was my job"*. Mr Ranson then asked *"So are u enjoying the new job?"*, to which the Claimant replied *"im not sure yet" "im going to swim or sink. I will either be here for the next 3 Months but if I can't manage I will leave straight away"*. Mr Ranson asked: *"is it hard then?"*. The Claimant replied to Mr Ranson's WhatsApp message the next morning (14 February) *"no it's not hard. I can't say anything"*. Mr Ranson asked at 7.52am on 14 February: *"What do u mean?"* The Claimant did not reply to this message until the end of the working day on 14 February.

74. The Claimant was asked about the above exchange by the Tribunal but said that she could not remember why she had said *"delete everything"* and in fact we are satisfied looking at the whole exchange that this comment had nothing

to do with anything with which we are concerned in these proceedings. We also find that her communications with Mr Ranson as set out above clearly indicate that she was feeling very uncertain about working with Mr Bakshi, but was not sure what she could tell Mr Ranson about what she was experiencing.

<u>14 February 2019</u>

75. On 14 February 2019 the Claimant was at Stamford Brook from 8.30am until 2pm and Mr Bakshi was there too. He then had a meeting elsewhere and then they both made their own way to Hounslow Heath for further meetings between 2pm and 5pm.

76. When she arrived at the office on the morning of 14 February 2019 the Claimant says that Mr Bakshi asked her to produce a report about the 24 hour sheets on the VOR Portal, so she emailed another employee (Denis O'Conner) to ask for help with this to ensure that she did not waste time. The Claimant alleges that Mr Bakshi reprimanded her for this saying *"Today, you have made a stupid mistake, you shouldn't ask [Dennis O'Conner] for reports, everyone's covering each other's [arse] so don't ask him next time."* (The word in square brackets was added in the Claimant's witness statement but was not in the original grievance.) The Claimant said that this made her feel *"straitjacketed for trying to use my initiative – I felt humiliated, degraded, undermined – he made me lose the confidence I had gone in with"*. Mr Bakshi denies that he said this, putting in his witness statement: *"I would never speak to someone in that way."* He said that he did sometimes say that he had done a stupid or silly mistake, but he would not use that term towards someone else. Again, on this point we accept the Claimant's evidence, including on the extra word added in her witness statement (where she would have wished to put her complete evidence even if she sanitised the comment at the time of her grievance). Her evidence is consistent with that on other occasions that we have also accepted, as well as similar to that of Mrs Vivas. As noted previously, we have also found the Claimant generally to be a more reliable witness than the Claimant.

77. At Hounslow Heath in the afternoon, the Claimant asked Mr Bakshi if she could shadow employees at Fulwell Garage to gain insight into best practice, but Mr Bakshi said *"No, what they do is only 30% of this job"* and said *"You lost the chance of getting training as you didn't push your engineering managers to release you quick enough"*. The Claimant said that she was alarmed to hear this and that she asked him if the role was for her. She said that he told her to *"stop asking stupid questions in different ways!"* and *"you've got your weekends free now so you can do some research!"* Mr Bakshi could not remember any exchanges with the Claimant on that Thursday afternoon. He accepted in his witness statement that as a matter of fact he regarded her as having transferred late as a result of issues at the Hounslow Heath garage. He said in oral evidence that the first two weeks were supposed to be induction. He said that he did often say that research is a good thing to develop knowledge and capability and this is something he thinks it is important for employees to do in their own time to keep up to date.

78. In relation to this incident, we accept the Claimant's evidence as to what was said on that Thursday afternoon. We do not think however that it follows that the Claimant was 'refused training because she transferred late from her old job'. There is no evidence that any training was planned. This was, rather, a 'put down' remark by Mr Bakshi intended only to indicate that he was not going to arrange for her to shadow other colleagues as she requested.

79. The Claimant said, and we accept, that Mr Bakshi's words that afternoon rang in her ear and she felt that she could not tolerate his behaviour any further. She said she needed to go home to collect her son for his swimming lesson. She says that Mr Bakshi walked out of the bus garage with her giving her further jobs to do that evening for the next morning although she had no pen and paper to make a note of what he was saying. In her witness statement she added to her grievance that he also through Microsoft teams sent her further tasks to do that evening (booking meetings) which she did as it had to be done for the next morning. The Claimant says that she could not sleep that night thinking about this piece of work. Mr Bakshi says that he does not recall any contact with the Claimant while at Hounslow Heath that afternoon, although as already noted, he accepts sending emails to her after normal working hours with tasks for the next day. With regard to what happened as they were leaving Hounslow Heath that afternoon, we accept the Claimant's evidence, including that she was upset about not having a pen to make notes as she was anxious during the hearing always to have a pen and paper to make notes.

80. At 5.42pm the Claimant messaged Mr Ranson on WhatsApp *"are you busy? I will call first thing in the morning"*. Later that evening at 9.18pm the Claimant messaged Mr Ranson again *"I'm going to hand in my resignation tomorrow around midday. I will also give it into HR. Is there anything else I need to do? I will call you soon as I do it. He will probably send me home. Please don't share any of my messages. I haven't told anyone what I'm going to do."* Mr Ranson replied *"Ok, you should tell him you are unhappy but will happily go back to [Hounslow Heath]"*. The Claimant replied *"he will destroy what is left of my job"*, *"I will send you what I'm going to write let me know if there is anything I should add. Do I have to tell him I should write I will happily go back to [Hounslow Heath] if the position is available? Shall I put it like that"*. Mr Ranson replied *"Yes exactly like that. And ur right he is going to destroy the whole company the man is an idiot"* (sic). The Claimant then sent Mr Ranson the text of a proposed resignation letter to Mr Bakshi. This thanked Mr Bakshi, but said that her knowledge, skills and experience were more aligned to her old role. Mr Ranson approved the text.

<u>15 February 2019</u>

81. On the morning of 15 February 2019 the Claimant went into the office at 7.45am and collected her belongings. She wanted to do this before Mr Bakshi saw her because she was feeling sick and scared. She then went to what she

thought was the Respondent's Human Resources department, but what was in fact the Respondent's Recruitment office. She thought that this office was Human Resources because they handled recruitment and also because when she had been invited to the informal disciplinary meeting about breaching confidentiality in relation to her salary (referred to above), that was where she had gone and Khatera Bosty had conducted that meeting.

82. At the office the Claimant spoke to Himesh Quessou. We have two main accounts of this conversation, one from the Claimant and one from Mr Quessou. In addition, we have a one-line comment on it from Ms Khatera, and a text message from Mr Hanson at 10.51am (p 138) which, together with Miss Fox's second-hand account of what Ms Bosty and Mr Quessou told her in the grievance investigation, and notes of Mr Hanson's interview with Mr Harris at the appeal stage, complete the picture. Mr Quessou's account (which has the wrong date on it), and Ms Bosty's comment, were provided in an email from Ms Bosty (his line manager) in response to the subsequent accusation from Miss Fox (of Human Resources) that recruitment had improperly become involved in an HR matter (as a result of Mrs Knight's prior communication about reserving the GSA role for the redundancy process). The interviews with Ms Bosty, Mr Quessou and Mr Hanson in the course of the grievance and grievance appeal were also given in that context. Given the context, their comments are somewhat defensive and guarded and they were perhaps not as frank as they might have been had it not been suggested that they had done something wrong. Ms Bosty, Mr Quessou and Mr Hanson have not given evidence in these proceedings. Despite the defensiveness of the later accounts, however, they are, we find, broadly consistent and, putting them together, we conclude as follows:-

83. On that Friday morning the Claimant was tearful and upset. Mr Quessou's account does not state explicitly that the Claimant had said she could not work with Mr Baksi, but it does say that the Claimant was not happy in her current role and that she started going on about why she thought Mrs Vivas must have left. Given that she had not spoken to Mrs Vivas at this point, we find this to be a reference to the Claimant trying to tell Mr Quessou that she felt mistreated by Mr Baksi. The Claimant told Mr Quessou that she could not work with Mr Baksi and that she wanted to return to her old role. She offered her resignation letter. Mr Quessou understood that her old role was still available, although there was a temp (called Dulce) in the position. He went to another room to phone Mr Ranson to check whether the permanent vacancy was still 'live'. Mr Ranson confirmed that it was and that he was willing to have the Claimant back and Mr Quessou relayed this to the Claimant. This part of the conversation is confirmed by Mr Hanson's later text to the Claimant at 10.51am in which he states: *"I have told the people in HR u are welcome to come back"*. Mr Quessou then called Ms Bosty and Ms Bosty said (audibly to the Claimant) that the Claimant did not have to hand in her resignation as it could be an internal transfer and the temp could be moved to another office. Mr Quessou confirmed to the Claimant what Ms Bosty had said and the Claimant then tore up the unread letter of resignation and put it in the recruitment office shredder. Mr Quessou's account states that

he advised the Claimant to let Mr Bakshi know of the situation and the Claimant then went to speak to Mr Bakshi.

84. The effect of the above exchange is, we find, that Mr Quessou, Ms Bosty and Mr Hanson had all agreed that the Claimant could return to her old role. We are fortified in our conclusion in this respect because this is (now) also Mrs Knight's understanding of the position. She told us in evidence that she understood that Mr Quessou had agreed the Claimant could return to her old role if her line managers (by which she said she meant Mr Hanson and Mr Shade) agreed, and of course they had agreed. In normal circumstances, Mr Quessou, Ms Bosty and Mr Hanson would have had the authority to make that decision since (as Mrs Knight confirmed in evidence) it was for recruitment and line management to decide who should be offered positions within the company. The problem here, so far as the Respondent and Mrs Knight was concerned, was that there was a redundancy process ongoing and Mrs Knight had as we set out above previously emailed Mr Quessou and Ms Bosty asking them to "*hold off from making any appointments for any GSA or Allocations posts at the moment"* as they may be needed for employees who were at risk of redundancy. However, Mr Quessou and Ms Bosty had evidently forgotten this when speaking to the Claimant (or had perhaps not appreciated that Mrs Knight had meant her email to apply to the Claimant's old role). They accordingly agreed to the Claimant returning to her old role without any qualification that it needed to be approved by HR (or anyone else). That this is the position is confirmed by Mr Shade's later email of 19 February 2019 at 12.56 to Mr Quessou (copying in Mr Ranson) formally confirming that he has agreed to have the Claimant back as GSA at Hounslow Heath and asking Mr Quessou to prepare the necessary paperwork to formalise this, with retrospective effect from 18 February 2019. This shows that Mr Shade and Mr Ranson thought that they had authority to agree to the Claimant returning and that it was for Mr Quessou/Recruitment to prepare the paperwork (and not HR).

85. We should add that there is nothing in the notes of Mr Ranson's conversation with Mr Harris at the grievance appeal stage to contradict the above account. Given the sequence of events as is now apparent to us from Mr Ranson's communications with the Claimant and with Recruitment (who he also regarded as being "HR" as is clear from his text to the Claimant at 10.51am), what he meant by *"I said to her she could still come back, but it was not for me to say this if she was already at another department"* was that this was the position he had taken with the Claimant before she had spoken to "HR" (i.e. Mr Quessou and Ms Bosty). Once they had all had that conversation, however, it was agreed. Mr Ranson may not have been explicit on this with Mr Harris because by that time he knew how unhappy Mrs Knight was about the *"mistake"* that had been made (as she put it in evidence to us) and was likely trying to distance himself from that. The same reason explains Ms Bosty's slightly different account as understood by Miss Fox at the grievance stage. In any event, we prefer the Claimant's version of Ms Bosty's role in the conversation as we have heard evidence from her.

86. We therefore reject the Respondent's pleaded case that the Claimant returned to her old role *"without any agreement or approval"*. The return to the old role was agreed by those with authority (or, at least, apparent authority) to agree it. We also find as a matter of fact and law that the Claimant did not resign on the Friday. She offered to resign, but that resignation was not accepted by Ms Bosty and Mr Quessou and instead what happened was in effect an agreed variation to her contract so as to permit her to return to her old role.

87. As Mr Quessou had said she should, the Claimant then went to speak to Mr Bakshi to inform him of the situation. This was at about 9.30am. She told him that she had been to HR and had let them know that she wanted to leave. The Claimant gave evidence that Mr Bakshi was angry about this and said *"you have already been to HR"* and asked why and said *"You report to me, so you come to me, you don't go to HR!"*. The Claimant then explained that she had wanted to ask them about the prospect of returning to her old role before making any decision. Mr Bakshi then calmed down and tried to persuade her to stay. He said he could adjust the hours, that she could leave at 4.30pm if she needed, that she had done more work in 4 days than the IT department had done in 6 months, that he would do what she wanted and would catch up with her in the evening to tell her how well she was doing. The Claimant wanted to leave on good terms and so did not feel that she could say very much to Mr Bakshi about her reasons, but she did say that she felt scared to come to work and scared to ask questions, but she could not tell him that it felt like she was in a relationship with him. At some point during this conversation they moved from outside Robin Newby's office down to the car park. The Claimant insisted that she needed to go home because she was physically shaking and could not cope with being in his company. She said that she would message him later, but he insisted that she should not message but should meet with him in person. He said he would only accept her decision on the basis that she had a genuine reason. The Claimant left the office about 10.55.

88. At 11.46am the Claimant messaged *"thank you Tom he tried to persuade me for an hour. I said I'm not in a state to work I need to go home. So I left. He said come back later for a coffee and lunch – I said I will see but I'm firm in my decision so please respect it. He said I will if it's genuine. I have never felt this shaken before." "I'm not even allowed to talk to HR because I report to him so I should tell him first. But I've told Himesh because I needed HR advice".* Mr Ranson replied *"No problem Farzana. I would never betray your trust. He is very unprofessional and shouldn't carry on like it"*, to which the Claimant responded *"thank you. His leadership style is autocratic in my opinion! I feel sorry for his partner!"* Mr Ranson replied *"I think he's a complete wanker tbh"* and the Claimant responded *"I agree"*. Then at 12.41 the Claimant asked Mr Ranson to call her later.

89. Mr Bakshi in his witness statement gives a very different account of this conversation with the Claimant in the morning. He said that the Claimant told him she was not enjoying the work or being in Stamford Brook because of the travel, that she said the team worked at a fast pace and she was not used to

that. He denied requiring her to give a reason and he denied insisting that she come back to speak to him later. We reject Mr Bakshi's account, not only because it is inconsistent with the Claimant's (which is largely supported and confirmed by her contemporaneous messages to Mr Hanson), but also because it is inconsistent with what he told Miss Fox in the grievance investigation. Miss Fox understood Mr Bakshi to have accepted that he questioned the Claimant about why she went to HR and that he said *"You report to me, so you come to me, you don't go to HR!"* although he said that this was because of his belief that any member of team should approach their line manager in the first instance to discuss any possible move and the reasons for them. He failed to include any of this in his witness statement. Miss Fox also records him as having confirmed *"that he asked you more than once why you wanted to leave as he didn't clearly understand from the conversation why you wanted to leave after such a short period of time"*. This makes clear that when he said in his witness statement that the Claimant told him she wanted to move because she was not enjoying the work and the travel, he was not telling the truth since if she had said that he would not have had to ask her more than once why she wanted to leave, or been left in any doubt as to the reasons for it. Miss Fox also records him as saying that he *"felt it was more appropriate to have a face to face conversation at the end of the day as opposed to a message"*. This is thus consistent with the Claimant's evidence that it was him who insisted she should return at the end of the day on Friday when she wanted just to send him a message. It is also inconsistent with his witness statement where he says that he did not ask her to let him know the position by the end of the day.

90. Mr Ola Aakintoy was someone with whom the Claimant had previously had occasional, friendly contact in the work context. Mr Aakintoy saw the Claimant in the office on that Friday and saw that she was very upset. They spoke briefly. He texted her at 3.12pm *"How are you feeling? Are you coming back today."* She responded *"I will be back for 4.30 to have a coffee and something to eat with him. Ola I am shaking I do not even want to come back to work."* She asked him to call her, but when he did she did not answer the call. He then texted at 4.09pm *"Hi Farzana, Sorry I did not know it's that bad. You got to considered Yourself and if You are going to drive back here."* (sic)

91. On the afternoon of 15 February the Claimant returned to the office. She texted Mr Bakshi at 4.14pm *"I'm on my way in 30 mins"*. The Respondent suggested that she would not have returned that day if she was really scared of Mr Bakshi and could no longer tolerate him. We reject that argument. It is plain from the Claimant's own evidence, supported by that of Mr Aakintoy and her messages to Mr Hanson and Mr Aakintoy that she was really upset, shaking and desperately did not want to return to talk further with Mr Bakshi. She did return because he insisted and she was scared of him and wanted to leave without upsetting him given that they would (if she returned to her old job) still be working in the same company.

92. During this conversation in the afternoon the Claimant remained firm that she wished to leave and she told Mr Bakshi that she was pursuing the possibility of returning to her previous role as she had already spoken to HR. She did

not, however, tell Mr Bakshi that she had already spoken to Mr Hanson and that it was all agreed. She deliberately did not tell him the truth when he asked her that question. The Claimant's message to Mr Hanson the next morning gives some detail: *"He wants me to do 4 more weeks with him … because he waited 2 months for me. He also said he needs to speak to you. He asked me if I had spoken to you. I said no I haven't. he asked if tom and martin will take me back, I said I don't know if Tom will take me back and if Tom can't then I will resign."*

93. The Claimant has from the outset been very frank about this lie to Mr Bakshi, and we find that it is the only occasion in these proceedings where she deliberately did not tell the truth. There is a reason for it, however, and it was because she was scared to tell Mr Bakshi that she had already got agreement to returning to her old role. She did add some further detail in relation to this conversation in her witness statement, which is that Mr Bakshi had already by this time given thought to replacing her and had someone in mind (she thought he mentioned the name 'Raisa') who could start in four weeks' time. The meeting ended with Mr Bakshi saying that he would call Mr Ranson on Monday to let him know that she was coming back. We accept the Claimant's account of this conversation as given in her witness statement, both because it is consistent (or, at least, not inconsistent) with her message to Mr Hanson the next day and because, for the reasons already set out, we have found the Claimant's evidence about these conversations to be more reliable than that of Mr Bakshi.

94. The Claimant texted Mr Aakintoy again at 4.54pm *"Ola he has pulled me into the small meeting room I swear if he makes this into a formal thing"*. Mr Aakintoy thought that this was the last communication he had had with the Claimant that day.

<u>The weekend of 16/17 February 2019</u>

95. At 8.38am on Saturday 16 February the Claimant messaged Mr Ranson. In addition to the portion of this message already set out above, she wrote: *"I am not working for him anymore because he is going to trick me, I will make mistakes he will then tell Catherine I'm shit. Im not giving him the opportunity to do that. Himesh said I can go back to [Hounslow Heath] on Monday?"*. The Claimant was thus at this point seeking to confirm whether Mr Ranson agreed with what she had understood Himesh to say, which was that she could start back at Hounslow Heath on the Monday. There were further WhatsApp messages between the Claimant and Mr Ranson on Sunday.

<u>18 February 2019: return to GSA role</u>

96. On Monday 18 February 2019 the Claimant went back to work at Hounslow Heath in the GSA role and did a full day's work with no objections from anyone. We infer therefore that, whether there was a phonecall between her and Mr Ranson over the weekend or not (the Claimant did not give evidence

about that), he had at some point either on Sunday or Monday confirmed to her he did agree to her returning immediately to her old role.

97. Mr Bakshi in his witness statement said that following the conversations on Friday he fully expected the Claimant to attend work the following week, but that *“on Monday, [the Claimant] did not attend work or call in sick. The same on Tuesday”*. He said that he had initially presumed that *“she had simply decided not to come back”* and that he had therefore told Mr Hetherington in IT, who was working on migrating the email accounts of employees of the Respondent, to put her account on hold for migration so as to ensure that £17 was not spent on unnecessarily migrating the Claimant’s email account if she was not coming back.

98. When it was suggested to Mr Bakshi in cross-examination that a supportive manager would have been concerned at the Claimant’s absence and tried to contact her, Mr Bakshi accepted suggestions from Mr Umunwa that he tried to call her once on Monday and once on Tuesday and that he ‘would have left a voicemail’ on both occasions. None of this was in Mr Bakshi’s witness statement and we do not accept it. It is exactly the sort of information that we would have expected to be in the statement if it was true. It was clear to us that these were details that Mr Bakshi invented when it was suggested to him that this is what a supportive manager would have done. We find Mr Bakshi made no attempt to contact the Claimant.

99. The Claimant’s understanding was that Mr Hanson had spoken to Mr Bakshi on the Monday. Mr Bakshi accepted that he did usually speak to Mr Hanson each day, but he did not recall having spoken to him about the Claimant. This is inconsistent with Mr Hanson’s evidence at the time of the appeal where he said *“I spoke to Kapil, I said to him that she works for you and that it was for him to sort it out and he needed to resolve it with her”*. Unfortunately, although the Claimant has consistently argued that Mr Bakshi knew where she was on the Monday and Tuesday of this week because he had spoken to Mr Hanson (and that Mr Bakshi had subsequently victimised her by blocking her IT access), this point was not investigated either by Miss Fox or Mr Harris so Mr Hanson was not asked whether he had told Mr Bakshi where the Claimant was on this Monday. However, we accept that Mr Hanson must have told Mr Bakshi in this call as it is implausible that the call proceeded without this information being conveyed. This is especially so given that Mr Bakshi had himself indicated he was going to call Mr Hanson on Friday to discuss the Claimant returning to her old role. It was because Mr Bakshi knew where the Claimant was that he did not call her or seek to contact her on Monday or Tuesday.

<u>19 February 2019</u>

100. On 19 February 2019 the Claimant attended Hounslow Heath again and worked in the morning but in the afternoon her IT access was denied. The Claimant sent a text message to Mr Ranson at 12.50pm *“in confidence: we*

need to speak to you urgently. They have locked me out the system". Her immediate thought was that Mr Bakshi had done this deliberately.

101. Martin Shade logged a 'help' call on her behalf at 12.51 stating that she had been logged out of the system and was unable to log back in. At 12.56 Mr Shade also emailed Mr Quessou and Mr Ranson to confirm that he was willing to have the Claimant back as the GSA at Hounslow Heath and asking Mr Quessou to complete the necessary paperwork. He stated *"Her pay will revert back to what she was on previously, this will need to take affect from the 18th February 2019"* (sic). Mr Quessou forwarded this on to Mr Bakshi at 3.15pm that day.

102. We find that the Claimant's IT access was blocked by or on the request of Mr Bakshi and that this was done vindictively and without justification, probably because he was upset that she had left and returned to her old role without getting his agreement as to a leaving date. In this respect, we accept the evidence of Mr Aakintoy that Mr Bakshi came to him on Monday 18 February, looking annoyed and angry, and (in a whisper) asked him to block the Claimant's IT access. Mr Aakintoy felt that this was not a normal request because as far as he was aware the Claimant had not left, and there is a protocol to be followed in such cases and Mr Bakshi was not following it. However, he did not want to get in trouble with Mr Bakshi for not following instructions, so he politely told him to put his request by email to Robin Newby (IT manager) and to him. He said that he needed to use the relevant forms. In the morning of Tuesday 19 February an IT colleague of Mr Aakintoy's, Paul Hetherington, told him that the Claimant's email access had been blocked and that *"if she needs access she needs to go to Kapil"*. Later that day Mr Aakintoy was on the IT helpdesk when the Claimant called and he told her the he had been told not to unlock the account. This latter detail was not in Mr Aakintoy's statement because he had forgotten it, but we accept it happened as it is consistent with what the Claimant told Miss Fox at the grievance stage. Miss Fox also spoke to Mr Aakintoy during her grievance investigation. This was an informal conversation in the corridor, not a proper interview, and to Miss Fox he simply said that *"there had been a request to temporarily stop [the Claimant's] account and he was not aware of the reason why"*. He did not say who had made the request and it appears that, despite the Claimant's allegation that Mr Bakshi had done this deliberately, Miss Fox did not ask. As such, the very first time that Mr Aakintoy told anyone that it was Mr Bakshi who had made the request was in his witness statement in these proceedings. Nonetheless, we accept his evidence. We can understand why he did not name names when asked about this by Miss Fox in the corridor. There is nothing to suggest that he colluded with the Claimant on this point as there is no reason for us not to accept his evidence that he had no contact with the Claimant between 20 February and the point at which he was contacted by the Claimant's solicitors about a month ago to ask if he would be willing to provide a statement in these proceedings.

103. We reject Mr Bakshi's account in his witness statement of how the Claimant's IT access was stopped accidentally because Paul Hetherington misunderstood his instruction to put a hold on the process of migrating the

Claimant's emails. That account is inherently implausible given that there is no evidence that the Claimant's email was imminently due to be migrated and in any event there could have been no urgent need to save £17 per month. More significantly, his account is inconsistent with the evidence of Mr Aakintoy and also with Miss Fox's notes of her interview with Mr Bakshi in the grievance investigation and with her conclusion in the grievance that *"the account was blocked on the specific instruction of Kapil"*. It is also apparent from the notes of Miss Fox's interview with Mr Bakshi that when first asked about the IT access he lied to her saying that he had not stopped it. In the grievance outcome Miss Fox also added that when she asked Mr Bakshi if stopping the account was appropriate, he accepted that it was premature and said (untruthfully, given our findings) he had done it because he was not aware of where the Claimant was or whether she had left the business.

104. On the afternoon of Tuesday, 19 February the Claimant spoke to Mrs Knight. Their accounts of the conversation are broadly consistent. The Claimant told Mrs Knight she was locked out of IT and Mrs Knight said that if she could not get any work done she should go home and come back the next day. It was in this conversation that Mrs Knight learned that the Claimant had gone back to her old role in Hounslow Heath. She was out of the office on her mobile at that point and could not have an in-depth conversation but she told the Claimant that her old role had been locked down for redundancies and that she was working for Mr Bakshi and should go back there the next morning. The Claimant told her that she did not want to go back as she was scared of Mr Bakshi. Mrs Knight was surprised by this and asked what he had done but the Claimant did not give details. She said that the Claimant should go home and they would arrange to discuss concerns. She said that the Claimant could take the day off the following day. This was to give her time to work out what was going on. The Claimant returned her laptop to Mr Shade and Mr Gooderson and went home.

105. At 4.25pm the Claimant texted Mr Ranson *"I'm not going to be in a job now am I?"* Mr Ranson could not talk but provided the Claimant with Mrs Knight's email address at her request.

<u>20 February 2019</u>

106. On 20 February 2019 the Claimant stayed at home. She was suffering palpitations and trembling and at about 8am she made an appointment to visit her GP later that day.

107. At 9.14am Mrs Knight emailed Mr Bakshi, Mr Quessou, Mr Ranson and Mr Shade stating *"Please can we hold from taking any action as this position was actually on hold for a possible redeployment"*. Her view at this point, as set out in her witness statement, was that Mr Shade/Mr Hanson had improperly and without authority arranged for the Claimant to transfer to another garage. She was unaware at this stage of the involvement of Mr Quessou and Ms Bosty. She also thought that she had locked down the role and needed to safeguard Employee A and Mr Shade *"could not overrule that"*.

108. At 11.07am the Claimant messaged Mr Ranson saying that she was going to send her account of events to Mrs Knight and *"this man is going to get me sacked and I don't have a job"*.

109. At 11.20am the Claimant emailed Mrs Knight from her Hotmail account to say that she was waiting for her to contact her and was putting together a summary of events that she would send her in due course. Mrs Knight then phoned the Claimant and they spoke. Mrs Knight said that she would arrange a meeting between the Claimant and Mr Bakshi the next day and if she did not attend she would be subject to the Respondent's absence procedure. Mrs Knight denied threatening the Claimant with the absence procedure, but she accepted she had made it clear to the Claimant that she had a duty to report back to the Transformation team and she did not want her to be treated as if she was 'absent without leave', and we find that the effect of what she said was reasonably understood by the Claimant as threatening her with the absence management procedure. Mrs Knight said that the Claimant had verbally resigned on the Friday and that she could not go back to her old role because it was reserved for those being made redundant. The Claimant asked why her IT account was blocked, but Mrs Knight said that it was not blocked. This was because Mr Bakshi had told her that he had not done anything with the Claimant's IT access. This was not true and Mrs Knight in cross-examination accepted that Mr Bakshi had not told her the truth when she asked him this question.

110. At 11.53am the Claimant messaged Mr Ranson again *"I need to speak to you urgently. I am not allowed to come back to [Hounslow Heath] I have to go back to my normal position"* and *"the position at [Hounslow Heath] is on hold because of redundancies in the company"*.

111. At 1.43pm Mrs Knight emailed the Claimant saying that following the conversation she was *"writing to reiterate the next steps"* which she set out as follows:

- I have arranged for you to meet with Kapil tomorrow at 10am. I will be in attendance at the meeting. Please wait for me in the canteen and I will collect you from there.
- The information you were given by the recruitment team relating to returning to the GSA HH Engineering position was incorrect. You are employed with RATP DEV London in the transformation team.
- Although you did not put your resignation in writing, you verbally resigned last week. At the meeting tomorrow I would like us to discuss the issues you are having that led to your decision to resign.
- Finally you said that you were being bullied. I told you that this is a very serious allegation and the company takes this very seriously. If you feel you are being bullied please can you put this in writing so we can investigate this. Please note as part of the investigation you will be asked to give examples/evidence of when bullying took place.

112. We find that, although Mrs Knight had no malicious intent toward the Claimant, her actions in her communications with the Claimant over these two days were guided principally by her view that the Claimant returning to her old role had been an unauthorised mistake that needed immediately to be corrected. This was her personal view reached without any investigation as

to the true position. As a result, her conversation with the Claimant and subsequent email were threatening. She was requiring the Claimant to meet with Mr Bakshi even though she knew that the Claimant had alleged that he had bullied her and before she had had an opportunity to put her account in writing. She asserted that recruitment had been incorrect and that she could not return to her old role. She made clear that she regarded the Claimant as having resigned.

113. At 1.47pm the Claimant messaged Mr Ranson again asking to speak and sending a crying emoji.

114. At 2.28pm the Claimant visited her GP. The GP records state as follows: *“History: since last week – palpitations, feels weak, stressed, tearful, angry, can’t sleep over last few days, never felt this way before, in new employment for 4 days – felt intimidated by supervisor, shaky when using computer so requested to move to old job in same company, works for bus garage, they agreed but now threatening to lay off as they have understood she has resigned. Worried, scared, single mother with 5y at home, doesn’t know what to do. Would like sick note to record symptoms, how feeling. Not depressed. Not suicidal/self harm thoughts. Would like something to calm down, sleep and sick note. Has rung union”* The GP provided a sick note.

115. At 5pm that day the Claimant was involved in a car accident, which she attributes to the stressed condition that she was in. It was a serious accident in that the car was badly damaged and a ‘write off’. The Respondent suggested in cross-examination of the Claimant that she overstated the effect of this car accident as she described her upper body whiplash injury in slightly different ways at different times, the airbags in the car did not operate and was only given paracetamol in the ambulance and not taken to hospital. We do not consider there are any material inconsistencies in what the Claimant said and we would have accepted even without seeing the photographs that the accident was ‘serious’ in the sense that the Claimant (even if she did not require any specific treatment) was hurt in a way that took her some time to recover as confirmed in the subsequent sick notes from her GP which still mention the whiplash injury in April 2019. As it is, we have seen the photographs and there is no doubt that the car was also badly damaged.

116. The Claimant dictated a letter to her uncle late that night to inform the Respondent of the position. This letter shows that she understood that Mrs Knight had arranged a meeting for her and Mr Bakshi and Mrs Knight for the next morning, and says that she will not now be able to attend that meeting. It also states: *“I am firm about the allegation of bullying I have mentioned and I do not expect to have a meeting with the perpetrator so please be aware that when this meeting is rescheduled, I do not expect to share the same air space as him under any circumstances.”* She also wrote, consistent with her evidence in these proceedings, *“I went back to my old position with the full permission of my previous manager and also clearance from Himesh in Recruitment that I could return (he had checked it with Tom and Khatera …). Miss Khatera had stated clearly on the phone to Himesh, that I did not have to hand in my resignation, that this would be treated as an internal transfer*

and that Dulce [the temp] could be placed at Hounslow [i.e. not Hounslow Heath] as there is a need for a GSA there. She said, 'Tell Farzana not to worry, it's okay'". She said that she would be submitting a grievance in due course and also a sicknote.

117. Following this the Claimant was signed off work with both work-related stress and whiplash. She later received counselling to help her deal with the psychological effect that Mr Bakshi had had on her. She did not return to work prior to her resignation and did not have access to her work emails or the Respondent's IT after it was blocked on 19 February by Mr Bakshi as set out above.

The Claimant's grievance

118. The Claimant submitted a grievance on 26 February 2019. This grievance has formed the basis of the Claimant's claims in these proceedings. In the grievance the Claimant asked *"for a grave wrong to be put right by reinstating me to continue in my GSA job as was already approved by HR/Recruitment and the previous manager"* and *"to use whatever measures necessary whether disciplinary/training to protect the Company from Managers like Mr Bakshi who will inevitable endanger employees' health through their behaviour if unchecked"*.

119. Miss Fox (Interim Head of HR) was appointed to hear her grievance.

120. Miss Fox met with the Claimant and her trade union representative, Dave Beardsley, on 1 March 2019. As noted above, Miss Fox took handwritten notes of this meeting and then typed them up. She destroyed the handwritten notes and the typed notes were subsequently deleted. She did not share either version of the notes with the Claimant. She was not sure whether she had provided them to Mr Harris for the purposes of the appeal, but we find she did not as Mr Harris does not recall having seen them and we do have the one set of notes that she is sure she did provide to Mr Harris, which are those of her meeting with Mr Bakshi.

121. During this meeting Miss Fox asked the Claimant whether she regarded Mr Bakshi's conduct towards her as 'sexual'. The Claimant accepts and, indeed, affirms in these proceedings that she was very clear with Miss Fox that Mr Bakshi had not done anything overtly sexual towards her and had not touched her, but that she did feel that he created a strange and unwanted feeling of intimacy that was as if she was in a relationship with him. Miss Fox in the grievance outcome letter recorded this as being that the Claimant *"confirmed that you did not believe that there was any kind of sexual or unwanted connotation behind this"*. This appeared to be suggesting that the Claimant had withdrawn the allegation that Mr Bakshi's conduct was 'unwanted', but on questioning Miss Fox it was clear that what she had taken from this was that the Claimant had confirmed that she did not consider sex was a factor. As such, we find that she misunderstood the Claimant's point, which was that the

unwanted intimacy and feeling that she was in a relationship with him was related to her sex even if it was not overtly sexual.

122. The Claimant in her grievance had named six potential witnesses to the incidents about which she complained, but Miss Fox did not interview any of them. She had no explanation for this. In cross-examination of the Claimant it was suggested by Mr Vials that the Claimant had no witnesses to any of her allegations and that it was convenient that there were no witnesses (thus implying that she was making up the allegations). The Claimant did not at this point recall that she had in her grievance identified several possible witnesses and she accepted in general terms that although there were other people around in the office, she did not recall anyone being around to witness the specific matters about which she had complained. This is not surprising given that what she complains about are a set of intimate, 1:1 interactions between her and her line manager. Further, while there may in an open plan office have been people who saw or overheard some of what went on (which is no doubt why the Claimant mentioned six possible witnesses in her grievance), as Miss Fox did not interview any of those people, it is also not surprising that the Claimant is now under the impression that there were no witnesses. Had Miss Fox interviewed the witnesses suggested by the Claimant at the time, the picture might have been quite different.

123. Miss Fox did interview Mr Bakshi, Mr Quessou, Ms Bosty, and Mrs Knight and she spoke briefly in the corridor to Mr Aakintoy. Her choice of witnesses indicates that she was focusing on what had happened about the Claimant going back to her old role than on what had happened between her and Mr Bakshi. Any written notes of those conversations she destroyed after typing them up. The only typed notes that have been retained by the Respondent are those of Mr Bakshi. These are incomplete in the sense that of the 12 major incidents or issues about which the Claimant complained in her grievance, the notes only show Mr Bakshi being asked about 4 of them. The grievance outcome letter purports to contain Mr Bakshi's evidence about all 12 issues, however. Miss Fox said that she did this from memory. Miss Fox did not share the notes of any of her interviews with the Claimant.

124. On 29 March 2019 Miss Fox met with the Claimant and informed her that her grievance was not upheld. The outcome letter states that the Claimant's former GSA role is not available because the post was still on hold subject to the completion of a redundancy process at another garage. The letter also states: *"Whilst I understand for a number of different reasons that your first week within your role in the transformation team didn't go as expected, it is my belief that the differences that occurred during the five days can be rectified and my recommendation is that you attend a mediated session with Kapil to talk through the issues and concerns encountered"*. The letter stated that the Claimant should therefore resume her role in the transformation team.

125. Given that the Claimant had been signed off sick with work-related stress since 20 February 2019 because of Mr Bakshi's conduct, we consider that it was not reasonable for Miss Fox to recommend mediation without at least

seeking advice from Occupational Health or obtaining some other independent health assessment.

The grievance appeal

126. The Claimant appealed on 15 April 2019. The character of the appeal is different to that of the original grievance. The Claimant had received legal advice from her trade union and there is quotation of specific legislation. Despite this, there is consistency between the original grievance, the points made by the Claimant in her appeal and her evidence at this hearing. The grounds of appeal pointed out a number of deficiencies in Miss Fox's investigation, including that she had not interviewed Mr Ranson or Mr Shade about what had happened about her returning to her old role. The Claimant also reiterated her allegation that Mr Bakshi had deliberately blocked her IT access knowing that she had resumed her old role. She made clear that she considered this to be a deliberate and malicious act of victimisation. She also complained that Miss Fox had failed to look at the written communications between the Claimant and Mr Bakshi and that she had ignored the effect of Mr Bakshi's behaviour on her. She maintained that mediation was inappropriate given that she was still undergoing counselling and cognitive behaviour therapy as a result of her treatment by Mr Bakshi. She also said that if the Respondent needed an independent medical report, she was willing to have one. She asked again to be permitted to return to her old job. She asked for compensation.

127. The appeal was heard by Mr Nigel Harris (General Manager West).

128. He met with the Claimant and Mr Beardsley on 15 May 2019. The Claimant at that meeting gave Mr Harris a copy of Mrs Vivas' email of 17 December 2018 that Mrs Vivas had given to her, and which we have seen in these proceedings. The Claimant urged Mr Harris to investigate what happened with Mrs Vivas, but he did not do so. He just read her letter as being that of a person distressed by domestic issues. He did not look into the allegation that Mr Bakshi had insisted that she resign immediately when she was sick during her notice period. The Claimant had first spoken to Mrs Vivas in April or May 2019. The Claimant at that meeting was still very emotional and Mr Harris found it difficult to get clear answers from her. She did, however, say at the outset that she was willing to take the claim to Tribunal if necessary.

129. Mr Harris also interviewed Mr Ranson, Miss Fox and Mrs Knight as part of the appeal. He did not investigate or deal with her complaint that Mr Bakshi had deliberately victimised her by blocking her IT access when he knew she was at Hounslow Heath. This seems to have been because in his mind there had been nothing wrong with Mr Bakshi doing this given that she had 'left' and it would be a reasonable action to protect confidential information. As well as being a failure to investigate a significant allegation, it was also a failure to appreciate Miss Fox's finding at the grievance stage that Mr Bakshi himself accepted he had acted inappropriately in blocking the Claimant's IT access.

130. Despite the above deficiencies, the appeal outcome was overall more sympathetic to the Claimant in that Mr Harris accepted the very significant effect that Mr Bakshi had had on her, even though he did not conclude that Mr Bakshi had acted improperly. Nonetheless, he maintained the recommendation for mediation, and return to her old role. Given that the Claimant had made clear that she was undergoing and counselling and cognitive behaviour therapy to deal with the effects of Mr Bakshi's treatment, it was in our judgment not reasonable to maintain this recommendation without obtaining medical evidence as the Claimant had suggested. However, having heard Mr Harris cross-examined, we do accept that he genuinely considered that mediation was appropriate and might succeed as he had experiences of it working in other cases. The outcome letter also added that a search could be made for other suitable employment, although there was no guarantee any could be found. The appeal outcome letter was sent to the Claimant on 31 May 2019.

<u>Resignation</u>

131. The Claimant resigned on 7 June 2019. Her resignation letter sets out and complains about everything that has happened from 11 February through to the appeal outcome and insistence on mediation as being her reasons for resigning. In cross-examination, however, she identified the 'last straw' for her as being when Mr Bakshi blocked her IT access and she said that from 19 February onwards she was just following the company's procedures and nothing could have been done to rectify the situation. In answer to questions from the Tribunal she was clear that, by the grievance appeal stage, there was nothing that could have persuaded her back. She had lost all trust by that stage. In our judgement, however, what the Claimant said in cross-examination reflects how things have come to seem in hindsight. The blocking of her IT access was clearly a very significant moment for her, but when one looks at the events of later on 19 February and 20 February, it is clear that her interaction with Mrs Knight was also very significant for the Claimant at the time, since it is the communications from Mrs Knight that lead to her messaging Mr Hanson to say that she feels she is now out of a job. We also consider that when she raised the grievance on 26 February that was done at the time in the genuine hope that the Respondent might investigate it properly and she might still get her old job back, or at least be 'vindicated' in some sense. It seems to us that what the Claimant said about complete loss of trust reflects her mindset once she got the grievance outcome from Miss Fox and that it was the appeal stage of the grievance process that was in a sense futile because the reality is that by that point she was not going to come back in any event.

132. The Claimant was contacted by Jawal Sharma of HR after her resignation who wanted to know if any help or support could be offered.

Contact with ACAS and these proceedings

133. The Claimant contacted ACAS. It was unclear whether she did this once or twice, but we find that she probably had an initial telephone call with ACAS at some point before she contacted them to initiate the early conciliation process on 17 May 2019. She said that she was advised to wait for the outcome of the internal process and that there was a time limit of three months less one day, which she did not really understand.

134. The ACAS Early Conciliation period finished on 13 June 2019 and the Claimant commenced these proceedings on 15 July 2019. She instructed solicitors shortly prior to the Preliminary Hearing on 13 December 2019.

CONCLUSIONS

Harassment

The law

135. Section 40 of the EA 2010 prohibits an employer from harassing its employees. Harassment is defined in section 26. It provides, so far as relevant:-

> **26 Harassment**
>
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to [sex], 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.
>
> (2) A also harasses B if—
> (a) A engages in unwanted conduct of a sexual nature, and
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if—
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to … sex,
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

136. The Claimant in this case puts her harassment claim in four ways:-
    a. Harassment related to sex (s 26(1) EA 2010);
    b. Sexual harassment (s 26(2) EA 2010);
    c. Harassment due to rejection or non-submission to unwanted conduct of a sexual nature (s 26(3) EA 2010);
    d. Harassment due to rejection or non-submission to unwanted conduct related to sex (s 26(3) EA 2010).

137. Section 26(3) (relied on for types of harassment c. and d in the list above) is in substance an anti-victimisation provision, prohibiting less favourable treatment of someone who has rejected or not submitted to harassment.

138. Each of the forms of harassment requires there to be:

    a. Unwanted conduct that is either sexual in nature or related to sex; **and**,
    b. The conduct must have **either** the purpose **or** the effect of violating the complainant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

139. In deciding whether conduct has that latter effect, sub-section (4) specifically requires the Tribunal to take into account all the circumstances, including the complainant's perception and whether it is (objectively) reasonable for the conduct to have that effect.

140. In *Land Registry v Grant* [2011] EWCA Civ 769, [2011] ICR 1390 at paragraph 47 Elias LJ focused on the words of the statute (*"violating … dignity … intimidating, hostile, degrading, humiliating … offensive"*) and observed: *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment"*. As the EAT explained at paragraph 31 in *Bakkali v Greater Manchester Buses (South) Ltd* [2018] ICR 1481, harassment involves a broader test of causation that discrimination which requires a *"more intense focus on the context of the offending words or behaviour".* In contrast to a discrimination case, in a harassment case the mental processes of the putative harasser are relevant but not determinative: conduct may be 'related to' a protected characteristic even if it is not done 'because of' a protected characteristic', either consciously or subconsciously.

141. Whether or not conduct is 'of a sexual nature' is to be determined as a matter of fact. An act or comment may be 'of a sexual nature' even if it is not motivated by sexual desire.

142. The burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected

characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at paragraph 56). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The evidence to be considered at this stage includes all the relevant evidence, including that from the Respondent: *Madarassy* ibid at paras 72-77. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931, recently affirmed in *Efobi v Royal Mail Group Ltd* [2019] EWCA Civ 18, [2019] ICR 750.

143. In all discrimination cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at paragraph 32), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 *per* Mummery J at 874C-H and 875C-H. This is particularly important where, as in this case, there is alleged to be a course of conduct amounting to harassment.

Conclusions on the individual acts of harassment

144. As set out in our findings of fact above, we have accepted the Claimant's evidence as to Mr Bakshi's treatment of her. However, for her harassment claims, the logical first question for us to ask ourselves is whether any of the conduct about which she complains was related to sex, or (in the case of the whispering or the out-of-normal-office hours contact) whether it was sexual.

145. We find that it was not. We do not consider that the fact that Mrs Vivas, who is also a woman, was treated similarly by Mr Bakshi means that any of his conduct towards the Claimant was related to sex. None of the conduct was overtly related to sex. The statute does not require us to consider the perception of the Claimant when considering whether the conduct is related to sex (as distinct from whether it was hostile/intimidating etc), but we nonetheless do take into account her perception in assessing whether the causal link with sex is present here. However, we do not consider that the fact that the Claimant perceived the conduct as creating an unwanted intimacy akin to an (abusive) personal relationship means the conduct was related to sex. One can have an unwanted intimacy and/or abusive personal relationship with persons of either gender (at least where there is no sexual conduct involved). Nor does the fact that the Claimant felt she had to adjust her headscarf (something only a woman would wear) in order to hear Mr Bakshi mean that the conduct was related to sex. It would have been if there was evidence that Mr Bakshi spoke softly in order to get her to come closer and draw back her headscarf, but there is no such evidence. On the contrary, the evidence is that several of the Respondent's employees (male and female) experienced Mr Bakshi as speaking softly and Mr Gooderson had also had the experience of having to ask Mr Bakshi to speak up and finding that he failed to do so for anything more than a short time.

146. Further, the picture of Mr Bakshi that we have gained in these proceedings is that he is a person who is often nasty towards work colleagues of both genders. Both Mrs Vivas and the Claimant gave multiple examples of him behaving in a nasty, and often manipulative, way towards male colleagues. In the circumstances, we are not satisfied that the Claimant has adduced sufficient evidence from which we could conclude that his conduct related to sex. On the balance of probabilities, we consider that Mr Bakshi would have been just as nasty and manipulative towards a male in that role.

147. For the avoidance of doubt, we also do not consider that the matters alleged to be unwanted sexual conduct were sexual. The whispering and out-of-hours contact were not overtly sexual and we find there was no sexual element to them for the reasons set out above.

Victimisation

<u>The law</u>

148. Under ss 27(1) and s 39(2)(c)/(d) EA 2010 and s 39(2)(c)/(d), the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by subjecting her to a detriment because she did, or the Respondent believed she had done, or may do, a protected act.

149. A protected act includes (so far as relevant in this case) bringing proceedings under this Act or making an allegation (whether or not express) that a person has contravened this Act (ss 27(2)(a) and (c)). In considering whether an act is a protected act, we must remember that merely referring to 'discrimination' in a complaint is not necessarily sufficient to constitute a protected act as defined. The EA 2010 does not prohibit all discrimination, it only prohibits discrimination on the basis of a proscribed list of protected characteristics. The Tribunal must determine whether, objectively, the employee has done enough to convey, by implication if not expressly, an allegation that the Act has been contravened. In *Durrani v London Borough of Ealing* UKEAT/0454/2012/RN, that was not the case where the employee, when questioned, explained that the 'discrimination' complaint was really a complaint of unfair treatment, not of less favourable treatment on grounds of race or ethnicity. The EAT, the then President, Langstaff P, observed as follows at paragraph 27:

> This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act. All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground. However, here, the Tribunal was entitled to reach the decision it did, since the Claimant on unchallenged evidence had been invited to say that he was alleging discrimination on the ground of race. Instead of accepting that invitation he had stated, in effect, that his complaint was rather of unfair treatment generally.

150. In deciding whether the reason for the treatment was the protected act, the Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at para 29 *per* Lord Nicholls). The protected act must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at paras 78-82).

151. A claim of victimisation cannot succeed unless the alleged victimiser is at least either aware of the protected act, or believes that a protected act has been done (or may be done). In *South London Healthcare NHS Trust v Dr Bial-Rubeyi* (UKEAT/0269/09/SM), the EAT found that there was no evidence from which the Tribunal could have concluded that the alleged victimiser was aware that the claimant had made a complaint of discrimination. In those circumstances, the EAT (McMullen J) substituted a finding that the Respondent did not victimise the Claimant.

152. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 per Lord Hope and at paras 104-105 per Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.)

153. Again, the burden of proof is on the Claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not unlawful. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at para 32 per Lord Hope.

<u>Conclusions on the acts of victimisation</u>

154. The Claimant relies on the following as being protected acts:

a. C's complaint against Mr Bakshi's conduct to H.R. or alternatively the Recruitment Department on Friday 15 February 2019;
b. C's written grievance dated 26 February 2019;
c. C's appeal against the grievance outcome dated 15 April 2019.

155. We accept that the Claimant's grievance and appeal were protected acts within the meaning of the statute, but we do not accept that her complaint to Mr Quessou and Ms Khatera on 15 February 2019 fulfilled the statutory definition. Even though we have accepted the Claimant's own evidence of that conversation, she did not on 15 February say anything that could reasonably have been construed as constituting an allegation of contravention of the EA 2010.

156. It follows that the only alleged detriments that we need to consider are the rejection of her harassment complaint at grievance and appeal stages and the recommendation for mediation and return to work.

157. We have found very significant failings in the Respondent's conduct of the grievance process, including Miss Fox's failure to interview witnesses named by the Claimant, the failure both by Miss Fox and by Mr Harris to investigate whether Mr Bakshi had known where the Claimant was when he cut off her IT access, and the failure by Miss Fox and Mr Harris to look at any emails or other messages between the Claimant and Mr Bakshi during 11-15 February. This sort of unreasonable conduct is conduct from which we could infer victimisation, but we do not consider that it would be right to do so in this case. We consider that the reason why Miss Fox and Mr Harris failed properly to investigate the Claimant's allegations, and the reason that they did not uphold her complaint and recommended mediation, was not because she had complained about a contravention of the EA 2010, but because they were highly sceptical about her claims. We infer that they did not consider it to be credible that anything so significant could have happened in just one week, in which the Claimant and Mr Bakshi spent limited time in each other's company. We so find not only because that was part of what they both said in the outcome letters, but also because it was our own initial reaction to the Claimant's case when we considered the bare outline facts. Miss Fox and Mr Harris also both approached the Claimant's case on the basis that her returning to her old role was not authorised or approved and that she accordingly had no legitimate 'claim' to that role, which in any event, the Respondent was set on offering to Employee A. All of this coloured their approach and led to their failure properly to investigate her allegations and to uphold her complaint. We further find that the recommendation for mediation was also not made either by Miss Fox or Mr Harris because the Claimant had complained about a contravention of the EA 2010. It was because they did not accept the Claimant's case, and (at least in Mr Harris' case) because he had experience of mediation being successful in other cases and he genuinely considered it might work (notwithstanding his acceptance of the significance of the impact on the Claimant of what had happened).

Time limits

158. As we have found that the Claimant's claims of harassment and victimisation do not succeed, we do not need to decide whether these claims were in time. However, it may assist if we record that if we had had to determine this

question, we would have concluded the harassment claims were in time since Mr Bakshi's act of cutting off her IT access on the 19 February (which was in time) was in our judgment a continuing act with his course of conduct in the previous week.

Constructive unfair dismissal

The law

159. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be 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"*.

160. It is well established that: (i) conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; (ii) the breach must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

161. Not every breach of contract is a fundamental breach: the conduct of the employer relied upon must be *"a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract"*: *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761. The assessment of the employer's intention is an objective one, to be judged from the point of view of a reasonable person in the position of the claimant. The employer's actual (subjective) motive or intention is only relevant if *"it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person"*: *Tullett Prebon v BGC Brokers LLP and ors* [2011] EWCA Civ 131, [2011] IRLR 420 at para 24 per Maurice Kay LJ, following Etherton LJ in *Eminence Property Development Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All ER (Comm) 223, at para 63.

162. In this case the Claimant claims breach of the implied term recognised in *Malik v Bank of Credit and Commerce International* [1998] AC 20 that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important: conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract because the essence of the breach of the implied term is that it is (without justification) calculated or likely to destroy or seriously damage the relationship: see, for example, per Browne-Wilkinson J in *Woods v WM*

Car Services (Peterborough) Ltd [1981] ICR 666, 672A and *Morrow v Safeway Stores* [2002] IRLR 9.

163. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978 [2019] ICR 1 the Court of Appeal held (at para 55 per Underhill LJ, with whom Singh LJ agreed) that, in the normal case where an employee claims to have been constructively dismissed as a result of a breach of the implied term of trust and confidence 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 of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation because the final act revives the employee's right to resign in response to the prior breach.)
(5) Did the employee resign in response (or partly in response) to that breach?

164. In determining whether a course of conduct comprising several acts and omissions amounts to a breach of the implied term of trust and confidence, the approach in *Omilaju v Waltham Forest LBC* [2004] EWCA Civ 1493, [2005] ICR 481 is to be applied: see *Kaur* at para 41. The approach in *Omilaju* is that a breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so, and the 'final straw' may be relatively insignificant, but must not be utterly trivial. Where prior conduct has constituted a repudiatory breach, however, the claim will succeed provided that the employee resigns at least in part in response to that breach, even if their resignation is also partly prompted by a 'final straw' which is in itself utterly insignificant (provided always there has been no affirmation of the breach): *Williams v The Governing Body of Alderman Davie Church in Wales Primary School* (UKEAT/0108/19/LA) at paras 32-34 *per* Auerbach J.

165. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal. In *United First Partners Research v Carreras* [2018] EWCA Civ 323 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons. It is not necessary, as a matter of law, that the employee should have told the employer that he is leaving because of the employer's repudiatory conduct: see *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425, at 431 per Pill LJ.

166. Although the Court of Appeal's decision in *Kaur* limits the role for the question of 'affirmation' in a constructive dismissal case, it remains the case that, in

accordance with ordinary contractual principles, an employee who affirms the contract in response to a fundamental breach (or series of incidents amounting to a fundamental breach) loses the right to resign and claim unfair dismissal. The general principles set out by the EAT in *WE Cox Turner (International) Ltd v Crook* [1981] ICR 823 remain good law: "*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 may be evidence of an implied affirmation... 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 affirm 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, in the employment context an employee will not necessarily affirm a contract by remaining in post and not resigning immediately. As the EAT stated in *Quigley v University of St Andrews* UKEATS/0025/05/RN at paragraph 37:

> "…in the case of an employment contract, every day that passes after the repudiatory conduct will involve, if the employee does not resign, him acting in a way that looks very much like him accepting that the contract is and is to be an ongoing one: if he carries on working and accepts his salary and any other benefits, it will get harder and harder for him to say, convincingly, that he actually regarded the employer as having repudiated and accepted the repudiation. The risk of his conduct being, as a matter of evidence, interpreted as affirmatory will get greater and greater. Thus, if he does stay on for a period after what he regards as repudiation has occurred he would be well advised to make it quite clear that that is how he regards the conduct and that he is staying on only under protest for some defined purpose such as to allow the employer a chance to put things right. It needs also, however, to be recognised that even that might not work if it goes on too long; it is all a matter of assessing the evidence."

167. It is also important in this case to remember that once there has been a fundamental breach, it cannot be 'cured' by any action by the employer: *Bournemouth University Higher Education Corp v Buckland* [2010] EWCA Civ 121, [2011] QB 323. Further, it was accepted in that case (see para 43, which cites the judgment of the EAT in *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823), that an employee does not affirm the contract by giving the employer an opportunity to affirm a fundamental breach, although the Court of Appeal in *Buckland* emphasised that an employee who delays resignation *after* an offer of amends has been made may be taken to have affirmed the contract.

168. Finally, if the employee establishes that the resignation was in law a dismissal, then it is for the employer to show a reason for the dismissal, which can feel like an artificial exercise in the context of constructive dismissal case. The Court of Appeal addressed this problem in *Berriman v Delabole Slate Limited* [1985] ICR 546 where the Court said that, in the case of a constructive dismissal, the reason for the dismissal is the reason for the employer's breach of contract that caused the employee to resign. This is determined by analysis of the employer's reasons for so acting, not the employee's perception (*Wyeth*

v Salisbury NHS Foundation Trust UK EAT/061/15). If the employer establishes a potentially fair reason, the Tribunal must then consider whether dismissal was fair in all the circumstances within s 98(4) ERA 1996.

Conclusions on constructive unfair dismissal

169. In our findings of fact, we have largely accepted the Claimant's evidence and it follows that we have accepted that most of the conduct of Mr Bakshi and other employees of the Respondent that the Claimant relies on for her constructive unfair dismissal claim happened as a matter of fact. There are a few respects, however, in which the facts we have found do not quite match up with the list of issues and about which we must say something further before setting out our conclusions in relation to this part of the Claimant's claim. In particular:

    a. We do not find that Mr Bakshi refused to train the Claimant in the role of Project Administrator and Data Co-Ordinator due to her late transfer from her previous department. We accept that this is what Mr Bakshi said to the Claimant on the afternoon of Thursday 14 February, but we find that he said this only as a 'put down' remark intended only to indicate that he was not going to arrange for her to shadow other colleagues as she requested.

    b. We do not find that *"Mrs Knight informed C that she would arrange a meeting with C and Mr Bakshi and in default of her attendance she would be subject to R's absence procedure"*. We did find that Mrs Knight threatened the Claimant with the absence procedure if she did not report back to the Transformation team, but she did not specifically link this with attendance at the meeting. She did however arrange a meeting for the Claimant with Mr Bakshi even though she knew that the Claimant alleged he had bullied her.

170. We are satisfied that, cumulatively, the matters relied on by the Claimant were likely to destroy or seriously damage the relationship of trust and confidence that should exist between employer and employee.

171. Mr Bakshi treated the Claimant between 11 and 15 February 2019 in a way that was likely to damage that relationship. There was no 'just and proper' cause for Mr Bakshi's conduct. There was no good reason for him to be rude or angry, or denigrate other employees or the Claimant. There was no proper reason for him to message/email/require the Claimant to phone him after normal working hours expecting work to be done before the next morning. Although the Claimant's contract required her to work outside normal working hours *"on occasions"*, this does not mean that she was required to do so as a norm or on three out of four occasions in the first week. For the reasons set out in our findings of fact, we reject Mr Bakshi's evidence that he did not expect her to open and work on the emails in the evenings. On that point, we accepted the Claimant's evidence that the deleted emails would have shown

that he was asking her to do things in the evening (even when these were things that could have waited until the following day).

172. We stop short of saying that Mr Bakshi's conduct in the period 11-15 February 2019 was likely to *seriously* damage the relationship only because it took place over such a short period and because it was not sufficient of itself to cause the Claimant to lose trust and confidence in the Respondent *qua* corporate employer because she was willing to go to the people she believed to be the Respondent's HR for help and to return to her old role working for the Respondent.

173. The Respondent (acting through Mr Quessou, Ms Bosty and Mr Hanson who had at least apparent authority in this respect) agreed to her internally transferring back to her old role, but then (acting through Mr Bakshi and Mrs Knight) unilaterally reneged on that agreement. Reneging on that agreement was itself likely seriously to damage the relationship of trust and confidence in the circumstances, but there may have been just and proper cause for it given that Mr Quessou and Ms Bosty ought to have remembered the instruction from Mrs Knight about holding the role for redundancies and the needs of Employee A. However, the Claimant does not rely on the mere reneging on the agreement, she relies on the way it was done.

174. The Claimant was treated as if she had done something wrong. In effect, the first that the Claimant knew of the reneging was when Mr Bakshi cut off her IT access. There was no just and proper cause for that because he knew where she was and he acted vindictively. We find that this act tips the balance and the Respondent had by this point acted in a way that was without just and proper cause seriously likely to damage the relationship of trust and confidence. From this point, things got worse. Mrs Knight then insisted that the Claimant should immediately return to the Transformation Team, backed with a threat of absence management procedures. She also said that the Claimant had 'verbally resigned', intending to suggest that the Claimant had resigned from the Respondent. There was no just and proper cause for this treatment. The Claimant had not resigned because the Respondent had not accepted her resignation and instead agreed to vary her contract. There was no one permanent in the Claimant's old role at that point and she could easily have continued working in that role for months while what had happened was investigated and consideration given to what should happen next. That should have included considering whether she should be permitted to stay in that role or be 'bumped' out of it to enable the redeployment of Employee A, or whether there were other alternatives available either for the GSAs affected by the Park Royal redundancy situation (such as the Edgware role that had been advertised) or for the Claimant. Mrs Knight also required the Claimant to attend a meeting with Mr Bakshi even though she had alleged that he had bullied her. There was no just and proper cause for that either because once the Claimant had alleged bullying and said in her email of 11.20am on 20 February 2019 that she was going to submit a statement setting out events, Mrs Knight should have given her time to do that rather than inviting her to meet the very next day with the person who she was saying had bullied her.

175. We further accept that the failure to uphold her grievance and the recommendation for mediation was also conduct likely seriously to damage, indeed destroy, the relationship of trust and confidence. There was no just and proper cause for this because of the significant failings in the investigation of the Claimant's grievance (i.e. in particular, the failure to interview witnesses named by the Claimant in her grievance, the failure to look at emails/messages between the Claimant and Mr Bakshi, and the failure properly to investigate her allegation about Mr Bakshi blocking her IT access) and recommending mediation notwithstanding the medical evidence presented by the Claimant and without obtaining Occupational Health or other independent medical advice.

176. We therefore find that the Respondent had, by 19 February 2019, breached the implied term of trust and confidence, and continued to breach it thereafter.

177. Whether the 'last straw' in response to which the Claimant resigned was (as she said in cross-examination) Mr Bakshi blocking her IT access or (as we find it to be in fact) the dismissal of her grievance by Miss Fox, she was constructively dismissed. There was no potentially fair reason for that. There was nothing that the Claimant had done that could give a potentially fair reason for dismissal.

178. For the avoidance of doubt, the Claimant did not affirm the contract by delaying her resignation while she pursued the grievance process. The case law we have set out above makes clear that an employee does not affirm the contract merely by remaining employed while giving the employer an opportunity to remedy the breach. That is what happened in this case. The Claimant was signed off sick after 20 February and did not return to work. We find she did nothing to affirm the contract.

Contribution

<u>The law</u>

179. Section 122(2) ERA 1996 provides that:

> "Where the tribunal considers that any conduct of the complainant 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."

180. Section 123(1) ERA 1996 provides that, subject to the provisions of that section (and sections 124, 124A and 126) *"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"*.

181. Section 123(6) further provides:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

182. It should be noted that while s 123(6) requires an element of causation before a deduction can be made under that section, there is no such requirement in relation to the reduction of the basic award under s 122(2). Nor is there any such limitation on the Tribunal's 'just and equitable' discretion under s 123(1) as to what compensation, overall, is appropriate.

183. Reductions can, therefore, be made to both the basic and compensatory awards for conduct which did not causally contribute to the dismissal, such as may be the case where misconduct occurring prior to the dismissal is discovered after dismissal: see *W Devis and Sons Ltd v Atkins* [1977] ICR 662 and *Soros v Davison* [1994] ICR 590. In every case, however, it must be established that there has been culpable or blameworthy conduct on the part of the employee in the sense that, whether or not it amounted a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances: see *Frith Accountants v Law* [2014] ICR 805. Conduct may be blameworthy even if it is inadvertent, although the nature and extent of the conduct will be relevant to the Tribunal's decision as to the degree of reduction that is just and equitable: *Sanha v Facilicom Cleaning Services Ltd* (UKEAT/0250/18/VP) at para 37 *per* Auerbach J. In *Frith Accountants*, though, Langstaff J also observed (para 9) that it would be unusual for a reduction for contributory fault to be made in a constructive dismissal case where the employer has been found to have breached the implied term of mutual trust and confidence (because that will involve a finding that there was no reasonable or proper cause for the employer's conduct).

<u>Conclusions</u>

184. As the case law above makes clear, it is unlikely that a finding of contributory fault will be appropriate in a constructive dismissal case and we do not consider that this is a case in which it would be appropriate. In this respect, we have considered all the circumstances of the case, but we gave particular consideration to two possible contributory elements:-

185. First, we considered whether there was anything culpable or blameworthy about the rapidity with which the Claimant concluded that she could not work with Mr Bakshi, or the extreme nature of her reaction. After all, Mrs Vivas as the previous incumbent of the role had managed to put up with two or three months of Mr Bakshi's conduct before she left. However, we do not consider that it can be right to say that a greater fragility of personality (or a stronger instinct for self-preservation) constitute culpable or blameworthy conduct. In effect, the 'egg-shell skull' rule that applies in tort applies equally in a constructive dismissal context. If an employer has acted without just and

proper cause in a way likely to damage trust and confidence, it can be no defence (or partial defence) that another employee might have been more resilient.

186. Secondly, we considered whether the fact that the Claimant lied to Mr Bakshi by not telling him on 15 February that she had already spoken to Mr Hanson (and was thus definitely going back to her old role) contributed in any way to her constructive dismissal or was culpable or blameworthy. However, we do not consider that it was sufficiently culpable or blameworthy given how scared of Mr Bakshi she had become, and in any event it did not contribute to her constructive dismissal because by the time Mr Bakshi cut off the Claimant's IT access, he knew where she was anyway.

187. We do not therefore consider there should be any reduction for contributory fault.

Polkey

The law

188. If the Tribunal concludes that the dismissal was unfair but is satisfied that if a fair procedure had been followed (or that as a result of some subsequent event such as later misconduct or redundancies) the employee could or might have been fairly dismissed at some point, the Tribunal must determine when that fair dismissal would have taken place or, alternative, what was the percentage chance of a fair dismissal taking place at the point: the *Polkey* principle as explained in *Contract Bottling Ltd v Cave* [2015] ICR 46. In a constructive unfair dismissal case, the same principle can be applied but by reference to the question of when the employee might have resigned in circumstances not amounting to constructive dismissal.

Conclusions

189. Applied to the facts of this case, we consider that the relevant question to ask ourselves is what would have happened had the Respondent not breached the implied term of trust and confidence, in other words, what would have happened if the Respondent had allowed her to remain in her old role beyond 19 February 2019 and not blocked her IT access and required her to return immediately to the Transformation team. The question is whether the Claimant would have ended up resigning in any event, either because Mr Bakshi was still in the business, or because the Respondent would still have placed Employee A in the Claimant's old role and had no other suitable alternative employment to offer the Claimant. As already noted, this will require consideration of whether there were other alternatives available either for the GSAs affected by the Park Royal redundancy situation (such as the Edgware role that had been advertised) or for the Claimant.

190. We do not feel that it would be fair for us to determine the *Polkey* issue without giving both sides an opportunity to adduce evidence to address the issue as we have now framed it. This will therefore be an issue for the remedy hearing on 9 February 2021.

OVERALL CONCLUSION

191. The unanimous judgment of the Tribunal is:

    (1) The Respondent did not harass the Claimant in contravention of ss 26 and 40 of the EA 2010.
    (2) The Respondent did not victimise the Claimant in contravention of ss 27 and 39(2)(c) and/or (d) of the EA 2010.
    (3) The Claimant's constructive unfair dismissal claim under Part X of the ERA 1996 is well-founded.
    (4) The Claimant's holiday pay claim is dismissed upon withdrawal.

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Employment Judge Stout

Date: 07/12/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

7/12/20..

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FOR THE TRIBUNAL OFFICE