EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms E Roseman **V** **Promo Concepts Limited**

Heard at: London Central
(by Cloud Video Platform)

On: 30 November, 1, 2, 3, and 4 December 2020 and 7 December 2020 (for judgment)

Before: Employment Judge Joffe
Mr J Carroll
Mr D Schofield

Representation

For the Claimant: In person

For the Respondent: Mr J Gilbert, consultant

JUDGMENT

1. The respondent was in breach of section 26 (2) of the Equality Act 2010 because it subjected the claimant to unwanted conduct of a sexual nature as follows:
    a) In 2017, Mr Taylor on several occasions miming spanking the claimant with a ruler or his hand, stating 'I wish I could';
    b) Mr Taylor saying to the claimant on several occasions 'I bet you are into bondage, I can imagine you being a dominatrix';
    c) On occasions in 2017, Mr Taylor looking the claimant up and down, saying 'you look nice ' or 'that's a nice top' when the claimant was wearing a lowcut top;
    d) Mr Taylor flirting with other employees when that was unwelcome;
    e) Mr Taylor suggesting the claimant do a pole dance on stage at a Christmas party in December 2013.

2. The acts of harassment were conduct extending over a period ending some time in 2017.

3. The complaints of harassment were not presented in time but it was just and equitable to extend time under s 123 of the Equality Act 2010.

4. The respondent unfairly constructively dismissed the claimant.

5. The claimant's dismissal was unlawful sex discrimination.

6. The claimant's remaining claims are not well-founded and are dismissed.

REASONS

Claims and issues

1. An oral judgment was given at the hearing, with reasons. Written reasons were requested by the claimant at the end of the hearing and are accordingly provided.

2. The issues as set out at a preliminary hearing before Employment Judge Hodgson on 24 August 2018 and as further discussed and refined with the parties at the outset of the hearing, are as follows:

<u>Jurisdictional Issues – Equality Act Claims Time Limit: Equality Act 2010 ("EqA 2010"), s123(1), (3) and (4)</u>

1. When is the act or omission treated as having happened?
2. Is there a continuing act or omission over a period?
3. Are any of the claims out of time?
4. If so, is it just and equitable to extend time in the circumstances?

Direct Discrimination – Sex & Religion (s13 EqA)

5. Did the respondent treat the claimant less favourably than it would treat a person in materially the same position as the claimant, save that the person does not share the same protected characteristic as the claimant?

   The alleged acts of less favourable treatment are as follows;

   a. The constructive dismissal was an act of discrimination (**sex & religion**)
   b. Mr Taylor distributing to Mr Charlie Bayliss, shortly after commenced employment with the Respondent in 2015, some of the Claimant's clients. (**sex only**)
   c. Mr Taylor's refusing the Claimant's request to be placed on the same commission structure as Ms Joelle Taylor. The Claimant's request being made by email in April 2017 and confirmation of the refusal by the Respondent on 11 July 2017. (**religion only**)

6. If so, was that treatment because of the claimant's sex and/or religion?

Harassment – Sex (s26 EqA)

7. Did the following acts occur and if they did, do these acts amount to unwanted conduct and if so, is such conduct of a sexual nature?

   a. Mr Taylor allegedly miming sexual acts, including mimicking sexual intercourse to the claimant, stating 'I wish I could'. It is alleged that whilst making these comments Mr Taylor would pretend to spank the applicant.
   b. Mr Taylor making crude sexual remarks such as 'I bet you are into bondage, I can imagine you being a dominatrix'

   c. Mr Taylor allegedly pressurising the claimant into making sales saying: 'do whatever it take to get business' with innuendo that the claimant should use sex to obtain business
   d. Mr Taylor allegedly commenting on the claimant's appearance when she wore certain outfits with a sexual innuendo
   e. Mr Taylor allegedly positioning the security camera in the office to point at women in the office

f. Mr Taylor allegedly flirting with employees even though such conduct was plainly unwelcomed
g. Mr Taylor allegedly insisting that the claimant do a pole dance on a stage at a Christmas party approximately three years ago from the date of the Claimant's second ET1 claim form - 1 September 2017

8. If so, was that conduct unwanted?

9. If so, did the conduct have the purpose or effect of: violating the claimant's dignity; creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Unfair (Constructive) Dismissal – S94, 98 & 99 Employment Rights Act 1996 ("ERA")

10. Which of the following allegations are established on the evidence?

a. Mr Taylor allegedly miming sexual acts, including mimicking sexual intercourse to the claimant, stating 'I wish I could'. It is alleged that whilst making these comments Mr Taylor would pretend to spank the claimant.

b. Mr Taylor making crude sexual remarks such as 'I bet you are into bondage, I can imagine you being a dominatrix'

c. Mr Taylor allegedly pressurising the claimant into making sales saying: 'do whatever it take to get business' with innuendo that the claimant should use sex to obtain business

d. Mr Taylor allegedly commenting on the claimant's appearance when she wore certain outfits with a sexual innuendo

e. Mr Taylor allegedly positioning the security camera in the office to point at women in the office

f. Mr Taylor allegedly flirting with employees even though such conduct was plainly unwelcomed

g. Mr Taylor allegedly insisting that the claimant do a pole dance on a stage at a Christmas party approximately three years ago from the date of the Claimant's second ET1 claim form - 1 September 2017

h. Mr Taylor distributing to Mr Charlie Bayliss, shortly after commenced employment with the respondent in 2015, some of the claimant's clients

i. Mr Taylor's refusing the claimant's request to be placed on the same commission structure as Ms Joelle Taylor. The claimant's request being made by email in April 2017 and confirmation of the refusal by the Respondent on 11 July 2017
j. Mr Taylor shouting at the claimant and other employees and making them cry
k. The last straw described by the claimant in her claim form: On 10 August 2017 the claimant met with Mr Taylor to discuss her concerns in respect of her employment … At this meeting the claimant explained that the difference in the commission structure between the claimant and Ms Joelle Taylor was unfair as their roles with the company were not materially different. The claimant highlighted that Ms Joelle Taylor was being remunerated almost twice as much as her and this was unfair as the claimant did the same job as her and had in fact worked hard to build up her account portfolio whereas Ms Joelle Taylor had inherited a lot of her accounts. In response to the claimant's concerns, Mr Taylor said that there was nothing he could do.

11. Do any of the proven matters, individually or cumulatively, amount to a breach of the implied term of mutual trust and confidence?

12. If so, did the claimant affirm the contract following the breach?

13. If not, did the claimant resign in response to the breach?

14. If so, was the constructive dismissal unfair?

Findings of fact

<u>The hearing</u>

3. This has been a remote hearing, which format was not objected to by the parties. The form of remote hearing was video, by Cloud Video Platform. A face to face hearing was not held because it was not practicable to do so. There were no material issues with technology and we were satisfied that all participants were able to participate appropriately.

4. We were provided with a bundle of documents of some 200 plus pages. We were provided with witness statements as follows:

   For the claimant, from herself, Ms Ellie Murphy, Ms Lily van Leer, Ms Sophie Cox and Ms Laura Kelleher. Ms Kelleher did not attend to give evidence.

For the respondent, from Mr Stephen Taylor, Mrs Joelle Taylor, Mr Charlie Baylis and Ms Laura Kay.

5. At the outset of the hearing, Mr Gilbert explained that Mrs Taylor would not be giving evidence as she had left the respondent's employment and felt daunted by the prospect of appearing. However, on the penultimate day of the hearing, we were told that Mrs Taylor could be available for a single hour on that day between 11:45 and 12:45 am. We canvassed the matter with the claimant, who told us that she had not retained her handwritten notes of questions for Mrs Taylor and would need some time to be ready for Mrs Taylor. We decided that we would hear from Mrs Taylor that afternoon or the following day when the claimant had been allowed appropriate time to prepare. Mrs Taylor was not able or willing to attend at any other time and we did not hear from her.

6. The claimant objected to Ms Kay giving evidence as her witness statement had only been sent to her the previous week, in circumstances where the proceedings had been ongoing for several years and the date for the respondent to produce its statements was significantly in the past. Mr Gilbert explained that he had fairly recently taken over representation of the respondent from someone else in his company and was not sure why Ms Kay's statement had not been produced and exchanged earlier. We considered the claimant's objection but concluded that she had had time to prepare to cross examine Ms Kay and it would be in the interests of justice to hear Ms Kay's evidence.

7. The claimant wished to introduce some new documents into the bundle. One item had been produced by Mr Taylor as part of a mediation and clearly was not material which we should consider. There were also some messages between the claimant and Mr Baylis and the claimant and other members of staff which did not seem to us to be relevant to any issue which we had to decide and we did not admit those documents.

Facts in the claims

8. The respondent is a company which specialises in selling corporate gifts; it was formed as a result of a merger in 2014 of two promotional companies Mr Stephen Taylor set up in 1993. Mr Taylor is the managing director. The respondent employs salespeople who cold and warm call prospects to make sales of the products. Employees have to work to profit targets and they earn commission as well as a basic salary.

9. At the relevant time, the respondent had eleven employees although its workforce has recently shrunk as a result of the pandemic.

10. At the relevant time, Mr Marsh was the financial controller and responsible for HR matters. Mr Taylor said that Mr Marsh was the claimant's line manager. It appeared to us that Mr Taylor was the claimant's line manager for all real

purposes including allocating work and assessing performance; however Mr Taylor persisted in a denial that he was the claimant's line manager. We discuss this issue further when we consider Mr Taylor's credibility

11. At the relevant times the respondent had a high turnover of sales staff. Mr Taylor said that sales work was not suitable for everyone and that he took on inexperienced young staff who often did not work out and who left or were dismissed. Mr Taylor said that he had had some 300 employees over the years. There were a few longer serving employees, in particular the claimant, Mrs Taylor and now Mr Baylis.

Religion

12. Mr Taylor is a practising Jew, that he is he has a Jewish religious belief. The claimant is ethnically Jewish but does not practice the Jewish religion. Mrs Joelle Taylor practices the Jewish religion.

Policies and procedures

13. No policies or procedures were provided to us as part of the bundle. No grievance policy was produced until the penultimate day of hearing when the respondent applied to introduce into evidence the respondent's employee handbook. We refused the application because we concluded that there would be prejudice to the claimant, who had not had an opportunity to cross examine Mr Taylor in particular on the document, which included not only a grievance procedure but also a harassment policy, a disciplinary procedure and conduct rules. The harassment policy was not mentioned by any witness in evidence and it seemed to us likely that no one was aware of it or ever referred to it.

14. Mr Taylor said the handbook was available to everyone on the server.

15. The claimant's evidence was that she was not aware of it and Ms van Leer and Ms Murphy were also unaware of the existence of the grievance procedure. Mr Baylis' evidence was that it was referred to in his contract of employment.

16. We accepted that none of the claimant, Ms van Leer and Ms Murphy had ever been provided with the grievance procedure or the handbook as a whole, or been referred to it.

17. On 10 October 2011, the claimant commenced employment with the respondent as an account manager. She was successful in her sales work and was promoted in due course to the role of senior account director.

18. The claimant gave some evidence that she had been told that Mr Taylor did not want to hire her in the first place and that in interview he had questioned her about her family set up and made a comment about what she was

wearing. Mr Taylor said that he did not comment on her clothing but asked about her employment background.

Cameras

19. There were two security type cameras installed on the sales floor of the respondent's premises and also elsewhere in the office. We saw a floor plan of the office. Mr Taylor had a separate office which was separated by two doors and a short vestibule space from the sales floor which was a large open plan office area. There was also a board room and some other rooms.

20. The claimant said that she and other women believed Mr Taylor was operating the cameras so they pointed at and/or zoomed in on female employees. She said that they could hear the cameras moving and zooming in.

21. We saw a photograph of a security camera with a cover which was located on the sales floor.

22. Mr Taylor said that a theft of an iPad and money occurred in about 2010 and caused the respondent to instal the cameras. They were fixed cameras and he could see the feed by opening an app on his computer but he rarely looked at the feed.

23. The claimant said that she was not aware of any theft and questioned why if the issue was theft it was relevant to have cameras on the sales floor, as opposed to the stock room.

Commission structure

24. The evidence which we had about commission structures was difficult to understand. There was no document setting out any commission structure produced to us.

25. The claimant said that she had to hit a target of £16,500 before she would earn commission throughout most of her time at the respondent. She would then earn 10% of the profit she brought in on sales over that figure.

26. Mr Taylor said that Mrs Taylor was on an entirely different commission structure which had been in place when she commenced employment. She was on a lower basic salary. The commission structure changed in 2010 for all staff and the claimant started on this commission structure. This structure was essentially as described by the claimant.

27. The claimant said that she asked on a number of occasions to be put on the same commission structure as Mrs Taylor. The claimant accepted in evidence that she had probably become aware of the commission structure Mrs Taylor was on in about 2013.

28. When Mrs Taylor went on maternity leave in April 2017, the claimant took over a number of her clients, including her highest spending accounts and her target was increased to £36,000.

29. The claimant told us that Mrs Taylor only had to earn about £12,000 in order to start earning commission and then was able to earn a higher percentage on the profits. Her percentage went up in tranches, from 10%, to 12.5% to 15%. The claimant said that Mrs Taylor could earn about twice as much commission as she could. She prepared some calculations which demonstrated that had she been on Mrs Taylor's commission structure there would have been a material increase in her earnings.

30. Mr Taylor said that Mrs Taylor's commission structure was contractual. No contract was shown to us nor any commission scheme document although Mr Taylor told us that these had been put in writing.

31. In terms of how targets were determined, Mr Taylor said there was no fixed algorithm. He would look at basic salary and experience; the figure needed to be motivational. He suggested that Mrs Taylor's scheme was extremely complicated and had some other element but was not able to tell us what that element was. He said that her scheme had a 'justification' rather than a target figure but was not able to explain to use what the difference was between the justification figure and a target figure.

32. We were able to derive from his evidence that there was a connection between basic salary and targets and those with higher basic salaries would also have higher targets.

33. Mr Taylor was unable to explain how the target of £36,000 was arrived at for the claimant once Mrs Taylor went on maternity leave and the claimant took over some of her clients.

34. There was no documentary evidence or evidence in chief as to what Mrs Taylor's basic salary was. Mr Taylor said he thought it was about £30,000. He was unable to tell the Tribunal how much commission she earned at relevant times.

Events

35. The claimant said that several employees were dismissed abruptly soon after she commenced working for the respondent. She said that in her first three months there was a meeting where Mr Taylor shouted at everyone saying he was angry that people had gone home at 5:30. The claimant said that she said at the meeting that a lot of the employees came in an hour early so they could leave on time if they had finished their work. She said that Mr Taylor told her to shut up.

36. Mr Taylor denied shouting at people for going home at 5:30. He said that people stayed late as they wanted to earn commission.

37. The claimant said that an employee named Carla said in the meeting that she thought everyone worked very hard. Carla was fired after the meeting. Mr Taylor said that he could not remember the discussion in detail but that he would not fire someone on the spot; an employee could choose to leave without notice.

38. The claimant said that Mr Taylor pulled her into a room and told her not to say goodbye to people or speak up in meetings. Mr Taylor said she was told not to speak over him and that he explained why he had said shut up in the meeting.

39. The claimant told us that over the next few years of her employment, Mr Taylor would be abusive to female staff in the office. This took the form of shouting and criticisms on the sales floor. She said that staff were often made to cry. She was older than other staff and would sometimes stand up for them to Mr Taylor.

40. The claimant said that at the staff Christmas party in 2013, Mr Taylor commented on some wet look legging she was wearing. In evidence she said that the comments were about looking like a dominatrix. She said that Mr Taylor told her to go on the pole and dance on the stage of the comedy club the event took place at on several occasions when she was passing the stage. These remarks made her feel uncomfortable. Mr Taylor denied the remarks and said that he had left the event early.

41. The claimant said in her statement that during 2013 – 2014, Mr Taylor continued to 'be creepy' and that she would tell him his remarks were inappropriate. In evidence she said that by this she meant remarks about how he liked her wet look leggings and that she would make a good dominatrix. When she got glasses, he said that she looked good in them, like a sexy secretary. He would ask if she had a boyfriend and when she said she did not he would ask if she was having sex with anyone. Mr Taylor denied ever making such remarks.

42. The claimant said that on 23 August 2013 she diagnosed with severe anxiety. Mr Taylor said this was never raised with the respondent. The claimant said in evidence that she did not tell Mr Taylor because she did not want him to hold it against her. No medical evidence was produced to the Tribunal.

43. The claimant said that said that in about January or February 2014 an employee named Catherine Smith was unhappy about costumes two employees were asked to wear at a trade show, which she thought were demeaning, and she gave notice.

44. Mr Taylor said that they were preparing for a trade show and he had wanted the employees to dress using a 1960s rock and roll theme. He said that the outfits were chosen and ordered by Ms Smith. No one wore the outfits because both employees fell ill with flu.

45. At the trade show, the claimant said that Mr Taylor sent Ms Smith a text at 5 am saying ‘are you cold?’. Mr Taylor accepted that he sent the text but said it was because Ms Smith had flu and had been shivering.

46. The claimant said that employees continued to be dismissed abruptly apparently for no reason. Mr Taylor said that members of staff were dismissed for lack of sales; they were offered notice and could choose to work it but that it was common to be paid in lieu in a sales environment,

47. The claimant said that she handed in her notice after the Christmas party in December 2015 and told Mr Taylor that she did not like the way he was treating employees. She said that Mr Taylor asked her to stay and promised that he would change. Mr Taylor’s evidence was that there was no resignation. The claimant asked for a pay review and her salary was increased and a bonus agreed and that the claimant then went travelling for four weeks in Australia.

48. Mr Baylis started work in January 2016. The claimant was responsible for training him and he was an enthusiastic and successful salesperson. He and the claimant had a friendly relationship. The claimant said that he was given some of her clients. She was unable to say which clients and there were no documents in the bundle to assist with identifying the clients. Mr Taylor said accounts were transferred from one salesperson to another if a member of the sales team was failing to get sales. Mr Baylis could not recall receiving any of the claimant’s accounts prior to her resignation.

49. Mr Baylis gave evidence that the claimant used inappropriate language on occasions including calling a client a ‘cunt’. It was apparent to us from the evidence that salespeople would sometimes engage in banter with clients which was part of rapport building and this incident appeared to relate to some kind of jocular sparring with a client.

50. On one occasion Mr Baylis went to a football match with Mr Taylor and on another occasion the two played table tennis.

2017 incidents

51. The claimant said she had a diary in which she recorded commission owed to her and also the remarks made by Mr Taylor. She said under cross examination that this was a 2017 diary; she could not remember what colour it was. She said that this was not returned to her when she left her employment and that she was told by Mr Marsh that Mr Taylor had taken the diary home and disposed of it. She did not have records in her phone or texts or WhatsApp messages recording things she said had happened or remarks made by Mr Taylor.

52. The claimant’s evidence about Mr Taylor’s behaviour in 2017 was that:

- On one occasion in his office he mimed hitting her with a ruler and said 'I wish I could'. At other times he would make the same remark whilst miming spanking with his hand – this happened on the sales floor;

- He would pressure her to make sales, saying 'do whatever it takes', with the implication that she should use sex to obtain business. Mr Taylor denied using those words although he said that he would of course encourage sales and said that most of the work was on the telephone, so it would not make sense to 'use sex'.

  The claimant referred to a client who would ring and be sexual on phone with female employees. She said that Mr Taylor knew and did nothing about it

  Mr Taylor said that he was not aware of this; the client was Mrs Taylor's and she made no complaint. Mr Baylis said that he did not recall a conversation with this client about prostitutes and was not aware the client could be inappropriate with female employees.

- When the claimant wore lowcut tops, Mr Taylor would look her up and down and would say that she looked nice / 'that's a nice top'. Mr Taylor denied this and said that he would speak to employees about the need to wear appropriate business attire.

Complaints

53. The claimant said in her witness statement that she submitted 'several grievances' to Mr Taylor saying his conduct was inappropriate but these were never dealt with formally.

54. In evidence, the claimant said that she made oral complaints to Mr Marsh, mostly about the treatment of other staff. She said she also complained to Mr Taylor about his behaviour at the time when particular incidents took place. She said she would tell him his behaviour was creepy or not appropriate. She said in cross examination that she thought that if she put a complaint in writing she would be dismissed.

Treatment of Mrs Taylor

55. The claimant said that an example of preferential treatment which Mrs Taylor received was that when a large client of hers was not spending (Sony), the account was not taken away from her, instead the claimant was brought in to share it with her. Mr Taylor said that it was a large and complex account and the claimant was brought in to assist. There was a lot of work to do and it was time consuming and required the creation of new products; it was outside the respondent's usual line of business. She was invited to help and happily accepted. The claimant said that people usually had non spending accounts

removed and given to someone else. Mr Taylor said that the movement of accounts happened by agreement amongst salespeople.

56. It was clear from evidence that Mrs Taylor was a longstanding employee who was successful in retaining clients and maintaining client relationships and Mr Taylor held her in high regard.

57. Mrs Taylor went on maternity leave in about April 2017. Her accounts were distributed amongst other staff. One high-spending client, HSBC, did not wish to work with the claimant and went to Mr Baylis.

58. The claimant said she asked again to go onto Mrs Taylor's commission structure when Mrs Taylor went on maternity leave in April 2017.

59. In June 2017, the claimant requested a meeting to talk about her pay. There appear to have been several meetings, which meetings included Mr Marsh. The claimant was told there was no commercial justification for a pay rise, a point Mr Marsh repeated in an email dated 11 July 2017.

60. Mr Taylor said that in a meeting the claimant was told there had been a dip in her performance and that she had stormed out of the second meeting. She denied that she had stormed out. She said she had asked for a pay rise because she was trying to get a mortgage at the time. He said that he had offered her a back end loaded performance bonus if she got back on track and over-performed.

61. Mr Taylor says that the claimant never got back to him and Mr Marsh about the performance bonus and went quiet.

62. There was a series of emails on 11 July 2017. Mr Marsh wrote to say:

'Further to our earlier meeting held on the 30/06/2017 and for clarity I write to confirm that unfortunately there is no commercial justification for a pay rise at present we are therefore not in a position to offer you a pay rise. We are however happy to review the position at the end of this year.'

63. In response to that email, the claimant asked, also in an email, 'What about the commission scheme Joelle is on?'

64. The claimant said in evidence that she felt the difference in commission structure at this time was unfair because she had taken on many of Mrs Taylor's clients and been given a much higher target, so it was unfair that she was on an inferior scheme.

65. Mr Marsh replied that this also had been mentioned in the meeting and that she had been told she could not go on that scheme: 'again this will be reviewed at the end of the year.'

66. The claimant replied: 'Why if Joelle is currently on it? Shouldn't we both be on the same if we are doing the same work? Has her commission structure changed to the standard one then? As we have Sony orders due to be paid

this month and it seems unfair I would get less for them, when we worked together on them and they were all my ideas.'

67. Mr Marsh's response was: 'I cannot discuss anyone's personal details with-you the important thing was to make you aware of what was said during that meeting as there appeared to be a bit of confusion on your part yesterday. I hope that clarifies your questions.'

68. On 17 July 2017 the claimant wrote to Mr Marsh and Mr Taylor:

'As you know I still think it's unfair for me not to have the same commission structure as Joelle, particularly as my target is higher than hers.

With you saying that's not possible, I feel a pay rise would be slightly fairer than nothing at all.

What you think I'm worth is up to you!'

69. On 17 July 2017, the claimant incorporated a limited company - 'Pearl Promotions Limited'. She said that she wanted to 'bagsy' the name as she was naming the company after her mother and that she did not know if she could handle working for the respondent much longer. She said that she wanted to have the company ready in case she had to leave the respondent at short notice. She said she was holding on until she got her mortgage offer.

70. On 18 July 2017, the claimant sent a chaser email to both Mr Marsh and Mr Taylor: 'Have you read the below?'

71. Mr Taylor that day said he wanted to delay all discussions until the end of the month 'as I am hoping it will improve.'

72. The claimant replied:

'But waiting will mean I lose out yet again, I don't see how its fair that I am targeted on more than other people such as Joelle, but don't get rewarded for it, my target has always been aligned with a pay rise, so now I'm targeted on more, I don't get a pay rise and I am on a commission structure different to someone who only had to get around 12k to earn any commission, whereas I have to get £36k. Basically I have to bring in two peoples targets for one person's pay.

I don't want to argue, but need to get my point firmly across.'

73. She sent a further email on 18 July to Mr Taylor

'Richard has spoken with me about Joelle's client's, if you feel that is fair I will hand over Joelle's clients back to you and reduce my target to its previous level?

Any orders that come in from the quotes I have already sent I will of course expect to have them on my figures as I have already done all the work for them.

Please confirm this is agreed.'

74. The respondent's case was that these emails demonstrated that the claimant was not afraid to argue with Mr Taylor.

75. The claimant received her mortgage offer on 18 July 2017.

76. There were no further relevant emails but Mr Taylor says he went for a coffee with the claimant to discuss the issues. An email from Mr Taylor to Mr Marsh on 18 July 2017 set out the issues he considered had arisen:

'Issues ellie

Gave all top spending accounts to earn more money which is what she always wanted.

Bizarrely demanded more money even though there was no commercial reason. 3 meetings took place to demonstrate the facts.

Demanded a change in commission structure for no good reason. Timing is unfortunate. feels like she holds us to ransom.

Given a dedicated sales support to help achieve figures.

Had a coffee trying to remotivate her and then demands more money again quickly when there is no performance to justify it now.

Performance drooped off totally.

Calls low activity low when we would have expected to see the opposite

Unable to open up lapsed accounts

Willing to give you joelle accounts = loss of motivation

Holding company to ransome' [quoted as written]

10 August 2017

77. There were two emails in the bundle from the claimant to Mr Taylor on 10 August 2017. One, at 9:29 am, said: 'Please take this email as confirmation of my resignation and my 30 days' notice'.

78. A second email at 10:08 am said 'Can I have a chat with you in the board room please.'

79. The respondent's case was that the claimant sent the first email before any meeting with Mr Taylor, i.e. that she resigned before the meeting. Mr Taylor said she tendered her resignation and said that she hated working for him and that he was a bad boss. He said that she was aggressive to him and he felt 'abused'.

80. The claimant told us that there were two meetings. She had not resigned prior to the first meeting. She said that she was uncomfortable to be alone with Mr Taylor and alerted the security guard to come and look for her if she did not come out for a prolonged period. She said that she did not want to be alone with Mr Taylor because he could be abusive and threatening. She said that at the meeting she explained that she thought the difference between her and Mrs Taylor's commission structures was unfair as their roles were not different. She said that it was unfair that Mrs Taylor was being remunerated more than she was when she did the same job. She said that she had worked to build up her accounts and Mrs Taylor had inherited a lot of hers. She said that Mr Taylor said there was nothing he could do and did not explain the reason for the difference in pay.

81. The claimant said that she felt this was the last straw. She said that she decided that she could not continue to work for someone who frightened her and sexually harassed her and was treating her unfairly. She told Mr Taylor she wanted to resign. She said she then wrote the email resigning. She said that there was then a further meeting at which there was a discussion about whether she would work her notice or not.

82. The claimant offered to work her notice but the respondent required her to leave immediately.

83. The claimant said that she offered to work her notice because she was concerned the respondent would not pay her commission she was owed if she did not work her notice. She said that she did not want to give the respondent an excuse to not pay her commission, which was paid three months in arrears.

84. The claimant said she did not raise bullying or sexual harassment with Mr Taylor because she would not have had the confidence to do that in a room alone with Mr Taylor. She said that she did not leave earlier because she needed to get her 'ducks in a row' i.e. the safety net of her mortgage offer and the company set up.

85. The claimant's email of 11 August 2017 to the respondent referred to there having been two meetings. Given that this was the only contemporaneous record, we accepted that there had in fact been two meetings and that the claimant resigned at the first meeting and then sent the email confirming her resignation.

Relationships in the office

Mr Taylor's management style.

86. The evidence of the claimant and her witnesses was that Mr Taylor would shout at employees and berate them about performance failures on the salesfloor.

87. It was common ground that, over at least a period of time, it would not be uncommon for employees to cry at work. Mr Taylor said that he was a strong character and that sometime his management style was perceived as tough; he was passionate about his business and could perhaps come across as 'overly strong.'

88. The claimant nicknamed the board room 'the crying room' because it was a regular occurrence for her to go into that room with an employee who was upset after being spoken to by Mr Taylor.

89. There were fairly frequent dismissals during this period, which appeared sudden and unexplained to staff and created an anxiety about being dismissed.

90. The claimant said that she was a mother figure to some of the younger women employees and that they would come to her to her when upset by Mr Taylor.

Claimant

91. Mr Taylor said that the claimant was a trusted and valued member of staff but that the claimant could be highly challenging to manage given her 'unpredictable outbursts' and 'her refusal to accept my management decisions'. He said that she had a big personality, used crude language and could be overbearing and disruptive in the office. He gave no examples in evidence of her being overbearing and disruptive.

92. He said she was vocal and if she had issues could have raised them with Mr Marsh

Evidence of other employees about Mr Taylor

93. The claimant submitted a number of emails from employees who did not attend to give evidence. We did not attach any particular weight to those as the evidence was untested.

94. We heard from three ex employees did attend to give evidence for the claimant. All were very young women.

95. All three were credible witnesses who were careful to be accurate with the Tribunal about what they did or did not remember.

96. Sophie Cox was employed for a month only in January to February 2016.

97. Her evidence was that Mr Taylor was disrespectful and bullying to staff. This related to sales performance but the comments were made in front of others on the salesfloor; people would be ‘showcased’ on the sales floor. People were called into Mr Taylor’s office in a manner she described as aggressive. Mr Taylor told her she ‘was nobody if she couldn’t make sales’. The conversations were not held privately and she felt the tone was unprofessional. An employee named Cat had been made to cry several times by Mr Taylor.

98. Mr Taylor raised with Ms Cox how she dressed; Ms Cox accepted that this related to whether what she was wearing was sufficiently formal but she was unhappy with the manner in which it was raised.

99. Mr Taylor said Ms Cox had been dismissed because she was repeatedly late and was a poor performer. He said in evidence that he had looked at his records, which were ‘notes’ and ’on the server’ but was unable to say what records these were when asked by the Tribunal and no records were disclosed. He was then unsure who had looked at these records and what they were. Although the respondent sought to introduce documents on the penultimate day of the hearing, no such records were produced.

100. Ms Cox said she handed her notice in.

101. We preferred Ms Cox’s evidence because we found her entirely straight forward and precise about what she could and could not recall. Mr Taylor could not produce what we felt were probably fictional ‘records’ and we had the concerns about Mr Taylor’s overall credibility we describe below.

102. Lily van Leer worked as a sales executive for the respondent between April 2014 and January 2015. She said that Mr Taylor called her ‘sweetheart’ and ‘darling’, which made her uncomfortable. She said that initially he was flirty with her and described an occasion when there was a work do at a ping-pong bar. She said Mr Taylor told her that he and his twenty-something year old girlfriend had broken up. She expressed surprise about the girlfriend’s age. Mr Taylor asked how old she thought he was. She said that at the time he was standing too close to her as he did in the office. She was trying to keep it ‘breezy’, although she was uncomfortable. Mr Taylor told her he was in his early thirties, although Ms van Leer said that he clearly was not.

103. On another occasion, Ms van Leer said that she wore jeans and a blouse and high heels to the office. She said Mr Taylor looked at her bottom and said she looked good but should not wear jeans to the office.

104. She said that on an occasion in August 2014, Mr Taylor called her into his office and asked her about her boyfriend. He asked whether she was ever unfaithful to her boyfriend and when she said no, said that was what she was not doing well. He said that the claimant cheated on her boyfriends and was ‘a bitch’ and that in sales you had to be a bitch to succeed.

105. On another occasion, she said that Mr Taylor asked her in his office about whether she was Jewish. She said no, not practicing, but that her family were. He asked which side and Ms van Leer said both sides. She said Mr Taylor said that she was really Jewish and would do well in the company then.

106. Ms van Leer said that as time went on Mr Taylor's attitude changed towards her and he would berate her for not closing deals in the way that he would.

107. She related an incident when she said he screamed about her calling a client back and grabbed her headset to make the call himself. He said that the headset was too large for him, what was wrong with her, why was her head so big. After speaking to the client, Mr Taylor said, 'What a bitch. I don't know what her problem was.'

108. In terms of treatment of other employees, Ms van Leer's evidence was that most employees would be shouted at on the sales floor apart from Mrs Joelle Taylor and the claimant. They were the most senior employees. He did however make derogatory comments about both of them publicly. He would say that Mrs Taylor was a princess who was given her accounts. In relation to the claimant, Ms van Leer says he would stand at her desk and speak loudly, making sexual innuendos to try to make the rest of the sales team laugh. Ms van Leer could not remember much detail but said that there were lots of references to the claimant's chest.

109. Ms van Leer said that Mr Taylor frequently threatened to fire people.

110. Ms van Leer was unaware there was a grievance procedure. Her parents had encouraged her to pursue a grievance but she said that it would have been too scary; she was twenty three and in her first sales job. Ms van Leer said that she was very good friends with the claimant but denied that she was giving evidence to 'assassinate' Mr Taylor's character to support her friend or because she was a disgruntled employee who had been fired.

111. Mr Taylor's evidence was that Ms van Leer was dismissed. Ms van Leer told the Tribunal that she resigned. She had not quite hit her target for two months and because of the environment did not want to risk being publicly dismissed. She started looking for another job and resigned when she found one. She wrote a resignation letter on a company computer which she had not retained a copy of.

112. Mr Taylor denied the ping-pong allegation, making remarks about the claimant's chest and the conversation in his office about whether Ms van Leer was monogamous.

113. Ellie Murphy worked for the respondent as an account executive from July 2016 to August 2017. She was twenty years old when she commenced employment. She described Mr Taylor as the worst boss she had ever worked for. She said he screamed in her face on a few occasions; this would relate to meetings targets of various sorts and getting sales. This was his behaviour to everyone on the sales floor. Many people were made to cry. On one occasion

he told Ms Murphy in particular that 'sex sells' and if she was going to a meeting with a man she should wear a lowcut top because that was the kind of thing that got sales. She said that he referred to some female suppliers as 'bitches', made comments that suggested men were better than women, and gave the general impression that he felt he was better than everyone else and men were better than women.

114. She did not make a formal complaint or bring a grievance. She was not aware of any grievance procedure. She did not believe bringing a grievance would have been a good idea in that work environment.

115. Mr Taylor denied Ms Murphy's account.

116. Again, we found Ms Murphy straight forward and credible; we preferred her account and did not accept Mr Taylor's denials.

Respondent's witnesses

Charlie Baylis

117. Mr Baylis is a young man who still works for the respondent in sales and has a good relationship with Mr Taylor. He said that he loved working for the respondent and that Mr Taylor was a fair boss. He said that there used to be crying in the office although he would not say it was frequent and it had not happened much in recent years. Mr Taylor might raise his voice on occasion because he was passionate about his business. He had not seen or heard any sexual harassment or inappropriate remarks from Mr Taylor.

118. He said that the claimant had instigated conversations with him of a sexual nature, joking that she could 'ruin him' in the bedroom. He was a willing participant in these conversations, but he pointed out that he was 18 at the time and she was 36.

Laura Kay

119. Ms Kay worked for the respondent between 2014 and 2020 in an administrative role. She said that she had a good working relationship with the claimant, who was a strong character. She said that the claimant and Mr Taylor would bicker because they were both strong personalities but would also laugh and joke together. She said that she di d not witness any sexual harassment to any member of staff by Mr Taylor. She had occasionally been called 'sweetheart' by Mr Taylor but was not offended by that.

Joelle Taylor

120. We had a witness statement from Mrs Taylor which was supportive of Mr Taylor. She did not attend to give evidence for the reasons outlined above. Mrs Taylor's evidence was not tested by the claimant or the Tribunal so we only gave weight to it where it was unchallenged. For example, Mrs Taylor,

like most of the other witnesses, said that employees sometimes ended up in tears after conversations with Mr Taylor.

Law

Direct discrimination

121. Direct discrimination under section 13 Equality Act 2010 occurs when a person treats another:

- Less favourably than that person treats a person who does not share that protected characteristic;
- Because of that protected characteristic.

122. For an individual to be an actual comparator for the purposes of a direct discrimination claim, there must be no material difference in their circumstances: s 23 Equality Act 2010. Whether the situations of a claimant and her comparator are materially different is a question of fact and degree: Hewage v Grampian Health Board [2012] ICR 1054, SC.

123. If the treatment of which a claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

124. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision."

125. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which

the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense

whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

126. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

127. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

128. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

129. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

130. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

Harassment

131. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, or unwanted conduct of a sexual nature, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

132. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.

133. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so……..Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

134. An 'environment' may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

Time limits

135. Under s 123 Equality Act 2010, discrimination complaints should be presented to the Tribunal within three months of the act complained of (subject to the extension of time for Early Conciliation contained in s 140B) or such other

period as the Tribunal considers just and equitable. The onus is on a claimant to convince the tribunal that it is just and equitable to extend the time limit: Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA.

136. Under s 123(3), conduct extending over a period is to be treated as done at the end of the period.

Constructive dismissal

137. 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".

138. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) 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.

139. 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 was, whether the breach played a part in the dismissal (Nottingham County Council v Miekle and Abbey Cars Ltd v Ford EAT 0472/07). In United First Partners Research v Carreras 2008 EWCA Civ 1493 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

140. In this case the claimant claims breach of the implied term 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.

141. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it (Woods v W M Car Services (Peterborough) Limited) [1981] ICR 666. It is the impact of the employer's behaviour (assessed objectively) on the employee that is significant - not the intention of the employer (Malik v BCCI [1997] IRLR 462). It is not however enough to show that the employer has behaved unreasonably although "reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach": Buckland v Bournemouth University Higher Education Corporation [2010] IRLR

445.

142. The breach of this 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. In Omilaju v Waltham Forest LBC [2005] ICR 481 the Court of Appeal said:

"Although the final straw may be relatively insignificant, it must not be utterly trivial: …

… what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? …The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term… Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence …If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is **objective.**"

143. A breach of the implied term of trust and confidence is necessarily a repudiatory breach of contract (Morrow v Safeway Stores [2002] IRLR 9).

144. In Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978 the Court of Appeal listed 5 questions that it should be sufficient ask in order to determine whether an employee has been constructively dismissed;

a. 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?

b. Has he or she affirmed the contract since that act?

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

d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed together, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of the previous possible affirmation).

e. Did the employee resign in response (or partly in response) to that breach?

145. In relation to affirmation the EAT gave an overview of the general principles in

WE Cox Turner (International) Ltd –v Crook [1981] ICR 823: "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: Alan v Robles 1969 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to affirm the contract since his conduct is only consistent with the continued existence of the contractual obligation."

146. Having found that there was a dismissal within the terms of section 95(1)(c) the tribunal has consider whether that dismissal was fair or unfair within the terms of section 98 of the ERA. In these circumstances it is for the employer to show what was the reason for the dismissal and whether that reason was a potentially fair reason for dismissal falling within section 98(1).

147. It is of course somewhat artificial to require an employer who denies having dismissed an employee to show a reason for the dismissal. 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).

148. However, even where there is a potentially fair reason for dismissal, the question is whether in the circumstances the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee. In practice, what this means in a constructive dismissal case is that we should ask ourselves whether the employer's reason for committing the fundamental breach of contract was, in the circumstances, sufficient to justify that breach.

Submissions

149. We heard oral submissions and received written submissions from both parties. We considered the submissions in detail but refer to them below only insofar as is necessary to explain our conclusions.

Conclusions

Credibility

150. It was a problem for all of the witnesses that the hearing took place so long after the relevant events as a result of a number of posponements. The quality of recollection was significantly impaired.

151. It was a significant problem for the Tribunal that documents we would have expected to see had not been provided. We were not satisfied that the

respondent had complied with its disclosure obligations. In particular Mr Taylor asserted in evidence that various obviously relevant documents existed which had not been produced. It was difficult for us to determine whether the documents existed at all and there was a breach of disclosure obligations or the documents were fictional.

Credibility of Mr Taylor

152. We found Mr Taylor obstructive whilst giving evidence, misleading and lacking in candour. He would give a misleading account of events and then persist in maintaining that account. For example, he persisted in claiming he was not the claimant's line manager and that Mr Marsh was. This was simply not credible even on the basis of his own evidence – he allocated work, addressed performance issues and ran the sales side of the business. Some other concerning aspects of his evidence were:

- He corrected his statement for typos at the outset of his evidence but not to update to correct his denial that the respondent had ever been taken to an employment tribunal. When his attention was drawn in supplementary questions to a judgment dismissing a claim on withdrawal which the claimant had included in the bundle, he said that he had not been to a tribunal because that claim had been withdrawn, so his statement was correct. He still failed to mention a further claim which had recently gone to a contested hearing and which the claimant raised with him in cross examination.
- His opaque evidence about how the commission schemes worked. We felt that he was wilfully trying to confuse the Tribunal.
- His evidence, which we rejected, about how Ms van Leer and Ms Cox had been dismissed and that he had looked at 'records'. We found that the records were almost certainly fictional and his evidence was misleading.
- Mr Taylor said that he did not know if Mrs Taylor was of Jewish religion / observant and that he would not have known that about any employee. He accepted in cross examination that he attended her religious wedding ceremony and Mrs Taylor referred to being Jewish in her witness statement, which we had to presume Mr Taylor had read.

Credibility of claimant

153. We considered matters the respondent submitted rendered the claimant's evidence not credible:

- Lack of detail about the alleged harassment: we accepted that this was accounted for by the lapse of time, the fact that the matters occurred over a number of years and the lack of contemporaneous documentation;

- Diary: we did not make anything of the fact that the claimant could not remember the colour of her diary; we did not feel, reading her statement as a whole, that she was intending to suggest that the diary covered the whole period of which she complained. We did not conclude, as the respondent suggested, that she had intended to mislead.
- Lack of text messages and WhatsApp messages: we did not think it was inevitable that someone would text friends outside of the workplace about these matters and it was clear from evidence that the claimant and other employees discussed Mr Taylor's behaviour so there was no obvious need to send texts to colleagues in the workplace. We were unable to conclude that the lack of messages suggested that the claimant was fabricating her evidence.
- Not bringing grievances / formal complaints: We accepted that it was not really possible in this workplace for an employee who wished to retain her job, even had the claimant been aware of the grievance procedure.

154. We found the claimant broadly credible although there was a lack of precision and detail about her evidence, which we did not ultimately conclude was born out of an intent to mislead. What significantly reinforced her credibility for us was the corroboration provided by her witnesses, who were in the main more precise and detailed about the more limited incidents they were able to speak about.

Harassment – Sex (s26 EqA)

Issue: Did the following acts occur and if they did, do these acts amount to unwanted conduct and if so, is such conduct of a sexual nature?

a. *Mr Taylor allegedly miming sexual acts, including mimicking sexual intercourse to the claimant, stating 'I wish I could'. It is alleged that whilst making these comments Mr Taylor would pretend to spank the applicant.*

155. This ultimately related to allegations about miming hitting with a ruler and a hand. We accepted that these things occurred because we found the claimant overall significantly more credible than Mr Taylor and the behaviour was consistent with that described by the claimant's witnesses.

156. The acts were clearly of a sexual nature.

157. Were they unwanted? It was not the respondent's case that these things happened as part of some kind of sexualised banter between the claimant and Mr Taylor. Mr Taylor simply denied that they occurred. The claimant told

us that the behaviour was unwanted and that she had told Mr Taylor it was inappropriate.

158. We carefully considered the evidence that the claimant instigated sexual badinage with Charlie Baylis and whether that suggested that the claimant would not in fact have objected to Mr Taylor's behaviour. We considered however that sexual banter between colleagues is very different from one-sided sexualised acts or remarks from a manager with a management style which involves shouting and making employees cry.

159. We concluded that the conduct was unwanted, although it was endured because the claimant wished to retain her employment

b. Mr Taylor making crude sexual remarks such as 'I bet you are into bondage. I can imagine you being a dominatrix'

160. We concluded that the remarks occurred and were unwanted essentially for the same reasons as set out in respect of allegation a. The remarks were clearly sexual.

c. Mr Taylor allegedly pressurising the claimant into making sales saying: 'do whatever it take to get business' with innuendo that the claimant should use sex to obtain business

161. We accepted that Mr Taylor made these remarks and that they were unwanted by the claimant. However, we felt that there was insufficient evidence, on the claimant's own account, to persuade us that meaning of Mr Taylor's exhortation was a sexual one so we were not able to conclude that that the comments were of a sexual nature.

d. Mr Taylor allegedly commenting on the Claimant's appearance when she wore certain outfits with a sexual innuendo

162. This related to the remarks about the claimant's leggings and Mr Taylor looking the claimant up and down and making approving comments when she wore low cut tops. We accepted that these remarks occurred.

163. The remark about the claimant's tops could be innocuous in some contexts. In the context of the other matters we have found proven, including Ms van Leer's evidence about Mr Taylor's references to the claimant's chest and Ms Murphy's evidence about Mr Taylor suggesting low cut tops should be worn to sell to male clients, we found that the remarks were sexual in nature.

e. Mr Taylor allegedly positioning the security camera in the office to point at women in the office

164. We found no good evidence that this had occurred although we accepted that the claimant and other employees worried that it might be happening. That anxiety flowed from other aspects of Mr Taylor's behaviour which we have described. Apart from the claimant, other witnesses did not report hearing the cameras moving or focussing and there was no tangible evidence that Mr Taylor used the cameras in the way feared.

165. This allegation is not made out.

f. Mr Taylor allegedly flirting with employees even though such conduct was plainly unwelcomed

166. The evidence we had about this was the Ms van Leer's evidence about the ping pong incident, the monogamy conversation and the use of endearments. There was also the oddly timed text message to Ms Smith.

167. We concluded that this behaviour was a kind of flirting or overture and was sexual in character. It was unwanted by the claimant because inappropriate overtures made to subordinate female employees formed part of an overall environment in which Mr Taylor misused his power in relation to female employees. That environment was clearly unwanted by the claimant and other female employees.

g. Mr Taylor allegedly insisting that the claimant do a pole dance on a stage at a Christmas party approximately three years ago from the date of the claimant's second ET1 claim form - 1 September 2017

168. We accepted the claimant's account of what had occurred for the same reasons we accepted her other evidence about Mr Taylor's behaviour.

169. References to pole dances we find to be sexual unless the context clearly indicates otherwise; in popular culture pole dancing is understood to be something usually done in clubs by women for the sexual titillation of men.

170. The claimant's evidence was that Mr Taylor's behaviour made her feel very uncomfortable; it was clearly unwanted behaviour.

If so, did the conduct have the purpose or effect of: violating the claimant's dignity; creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

171. We considered the matters we found in the round, taking into account that the claimant was a strong woman in many ways, that she could be outspoken and that she was willing to discuss sexual matters with a younger colleague and use crude language with clients. We concluded that the effects of Mr Taylor's treatment on some of the younger female witnesses had been more profound, hence their clearer recollections of the conduct.

172. We took the view nonetheless that the effect of the acts we have found proven was at the very least to create a humiliating and offensive environment for the claimant. The picture we found was of a workplace where Mr Taylor had and exerted power and acted in ways which regularly upset employees and brought them to tears. Junior employees feared being dismissed at short notice. In the context of the power imbalance and power openly and inappropriately demonstrated by a manager, the sexualised remarks and behaviour from Mr Taylor to the claimant and other employees would reasonably have been regarded as humiliating and offensive; we accepted the claimant's evidence that the behaviour had that effect on her.

Direct Discrimination – Sex & Religion (s13 EqA)

Did the respondent treat the claimant less favourably than it would treat a person in materially the same position as the claimant, save that the person does not share the same protected characteristic as the claimant?

173. The first alleged act of unfavourable treatment in the list was the claimant's alleged constructive dismissal. For obvious reasons, we consider that claim last.

> *b. Mr Taylor distributing to Mr Charlie Baylis, shortly after commenced employment with the respondent in 2015, some of the claimant's clients. (**Sex only**)*

174. We did not have sufficient evidence to conclude that as a matter of fact Mr Baylis had been allocated some of the claimant's clients in 2016, so there were no or no sufficient facts from which we could conclude that there was any difference in treatment.

175. This claim was therefore not made out.

*c. Mr Taylor's refusing the claimant's request to be placed on the same commission structure as Ms Joelle Taylor. The claimant's request being made by email in April 2017 and confirmation of the refusal by the Respondent on 11 July 2017. (**Religion only**)*

176. There was a difference in treatment and a difference in religion: Joelle Taylor was on a more favourable commission structure and a lower target. She was Jewish by religion and the claimant was not.

177. There were two aspects to the claimant's complaint: the fact that she was on a higher target and the fact that her commission structure did not provide for a higher percentage than 10%.

178. Are there facts from which we could reasonably conclude in the absence of an explanation that either or both of those aspects of less favourable treatment were because of religion?

179. We looked at the following facts in particular:

- Facts which suggested that Mr Taylor favoured people of Jewish religious belief. We found no such facts. Ms van Leer's story, if it told us anything, suggested that Mr Taylor might favour those who were ethnically Jewish. That included the claimant.
- Reasons given for the difference in commission structure. The difference in the percentages was historically, we accepted, as did the claimant, based on the fact that the scheme changed for all new employees. No substantial reasons were given in evidence for why the respondent refused to put the claimant on Mrs Taylor's commission structure when she requested it in 2017.
- Mr Taylor's evidence about how the commission structure worked was opaque and obfuscatory. The details of how the commission structures worked were either undocumented, or we were not provided with the documents.
- Mr Taylor was able to provide no coherent reason as to why the claimant's target was so high. Her target went up by £20,000, which was more than Mrs Taylor's entire target, when she only took on some of the clients in respect of whom Mrs Taylor was targeted. We had insufficient evidence about how much commission Mrs Taylor earned and what her salary was to be persuaded that the explanation lay with the difference in salary.

180. We considered carefully whether we could reasonably conclude from the respondent's unsatisfactory evidence that the appropriate inference to draw was the Mrs Taylor was being favoured because of her religious belief, but found that we were not able so to conclude. When we looked closely at the facts we have found about the discussions relating to commission structure, what was apparent to us was that at the point of refusal Mr Taylor simply did not want to increase the claimant's remuneration because he felt that there was no financial justification for doing so.

181. We considered that his notes to Mr Marsh on 18 July 2017 revealed what Mr Taylor was really thinking at the time – he thought the claimant was asking for more money at a time when he considered it was not justified and 'holding the respondent to ransom' .The paucity of evidence and documentation was not materially different in this respect than it was for other aspects of the respondent's case so that inadequacy did not override what we considered to be clear evidence that the reason for the refusal was not related to religion. To put it another way, we might have inferred that these were matters from which we could reasonably draw an inference that religion played a role in the treatment of the claimant's commission structure had other matters been well documented.

Jurisdictional Issues – Equality Act Claims Time Limit: Equality Act 2010 ("EqA 2010"), s123(1), (3) and (4)

Issue: When is the act or omission treated as having happened?

182. There was no clear evidence of when the last act we found to constitute harassment occurred, save that it was in the course of 2017.

Issue: Is there a continuing act or omission over a period?

183. We considered that the various acts of harassment created a continuing environment which was offensive and humiliating and constituted a continuing act.

Issue: Are any of the claims out of time?

184. The claimant has not been able to put a date on the final act of harassment so she has not proven that her complaint about the continuing course of conduct was presented in time.

Issue: If so, is it just and equitable to extend time in the circumstances?

185. We considered that it would have been very difficult for the claimant to have presented a claim whilst still employed by the respondent; we accepted that her working life would have become intolerable. We also accepted that she wanted to leave at point when she had her 'ducks in a row' – a mortgage offer obtained and her company incorporated. Leaving to bring a claim without any economic safety net would have been difficult.

186. We also accepted the claimant's evidence that she did not know anything much about employment rights and the possibility of bringing a harassment claim until she left the respondent's employment.

187. The claims were brought promptly after the claimant left her employment. We considered that there was little if any prejudice to the respondent in a delay of a matter of months from the last act of harassment at some point in 2017 until the presentation of the claim; there was no evidence of a material loss of cogency of evidence, since Mr Taylor's account was simply that none of the things alleged happened. The evidence of the respondent's witnesses was that they had not seen these things happen.

188. For those reasons we concluded that it was just and equitable to extend time.

Unfair (Constructive) Dismissal – S94, 98 & 99 Employment Rights Act 1996 ("ERA")

Issue: Which allegations are established on the evidence?

189. We have made findings that a number of the allegations of harassment but neither of the allegations of direct discrimination were upheld.

190. We considered the additional allegations:

Shouting at the claimant and other employees and making them cry

191. We found that as a matter of fact Mr Taylor did shout at the claimant and other employees and frequently made employees cry. The trigger for these incidents might be performance concerns but the manner in which these were raised was unreasonable.

On 10 August 2017 the claimant met with Mr Taylor to discuss her concerns in respect of her employment … At this meeting the claimant explained that the difference in the commission structure between the claimant and Ms Joelle Taylor was unfair as their roles with the company were not materially different. The claimant highlighted that Ms Joelle Taylor was being remunerated almost twice as much as her and this was unfair as the claimant did the same job as her and had in fact worked hard to build up her account portfolio whereas Ms Joelle Taylor had inherited a lot of her accounts. In response to the claimant's concerns, Mr Taylor said that there was nothing he could do.

192. We accepted the claimant's account of the meeting on 10 August 2017. It was consistent with her account that there were two meetings, which we

accepted because it was backed up by documentary evidence. It was consistent with the previous course of events and it was consistent with Mr Taylor's somewhat autocratic management style not to give a reasoned explanation for his decision not to change the claimant's commission structure. We bore in mind that he was unable to give us a reasoned account of his decision and what we found was his obstructive approach to giving evidence when the Tribunal asked him about this matter.

Do any of the proven matters, individually or cumulatively, amount to a breach of the implied term of mutual trust and confidence?

193. We considered that the course of sexual harassment and the working environment created by harassment and the aggressive and unreasonable treatment of employees we have found was likely to destroy the relationship of trust and confidence and there was no reasonable or proper cause for it.

194. We considered that the last straw was itself more than trivial and was not innocuous. The claimant was given no cogent answer to her enquiry about the perceived unfairness of the commission structure she was on in circumstances where matters to do with pay did not appear to be documented and there was a lack of transparency. This unreasonable and unexplained treatment was, we concluded, sufficient to amount to a last straw.

If so, did the claimant affirm the contract following the breach?

195. Even if it was arguable that the claimant affirmed the breach in relation to the earlier course of conduct by tolerating Mr Taylor's behaviour (and we were not persuaded that she had), she resigned promptly in response to what we found was a last straw. There was no affirmation of the contract.

196. The claimant's offer to work her notice was not itself an affirmation of the contract; she had made it clear she found the working environment intolerable but she was being pragmatic about working for a limited further period because she was concerned that she would not be paid her commission.

If not, did the claimant resign in response to the breach?

197. We were persuaded that the working environment created by Mr Taylor's behaviour and the claimant's feelings of unfairness about pay, which were not properly dealt with by the respondent, were at the very least a significant reason for the claimant's resignation, even if they were not the only reason. We accepted the claimant's evidence thar the setting up of her own company

was a response to Mr Taylor's treatment and not a freestanding alternative reason for her resignation.

If so, was the constructive dismissal unfair?

198. No potentially fair reason has been put forward by the respondent and, on the facts we have found, we cannot see any potentially fair reason could have been advanced. The dismissal is accordingly unfair.

Was the constructive dismissal an act of sex discrimination?

199. In circumstances where we have found that sexual harassment played a material role in the claimant's resignation, it follows that the constructive dismissal itself was materially caused by unlawful sex discrimination and the claimant's claim under this head is also upheld.

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Employment Judge Joffe
London Central Region
04/01/21

Sent to the parties on:
.12/01/21

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For the Tribunals Office