



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Stannard

**Respondent:** Overseas Courier Service (London) Limited  
Mr L Farr  
Mr T P Jones

**Heard at:** Reading **On: 21-24 September 2020, 2  
October 2020 and 25 February  
2021**

**Before:** Employment Judge Gumbiti-Zimuto  
Members: Mrs C Anderson and Mrs H T Edwards

**Appearances**  
**For the Claimant:** Mr N Toms, counsel  
**For the Respondent:** Mr M Smith, counsel

## JUDGMENT

1. The claimant was constructively dismissed. The respondent has not shown that there was any potentially fair reason for the dismissal. The claimant's claim of unfair dismissal succeeds.
2. The claimant's claims of direct sex discrimination and harassment succeed, in respect of the treatment of the claimant after her return to work in June 2017 in respect of the comments made to the claimant about her retirement, and further in respect of comments made to the claimant of a sexual nature, comments about her appearance made in the period from 1 November 2016 onwards.
3. The claimant's claim for harassment related to sex also succeeds.
4. The claim for victimisation is not well founded and is dismissed.

## REASONS

1. The claimant was initially employed by the first respondent from 1992 until leaving the employment in 2001. In that period she was promoted from Sales

Administrator to the field sales team progressing to Senior Sales Consultant and was Acting Branch Manager for the office in Manchester for three months.

2. On 17 September 2007 the claimant re-joined the respondent as a Senior Account Manager. In November 2008, Mr Timothy Jones and Mr Lance Farr became owner-Directors of the first respondent. From 1 October 2010 the claimant was promoted to National Sales Manager reporting to Mr Farr. The claimant was responsible for a team of up to four sales executives, a telesales person and a sales administrator.
3. During a meeting with Mr Jones and Mr Farr on 6 October 2010 to discuss her promotion to National Sales Manager, at one point during this meeting Mr Farr turned to Mr Jones and said "*What if she gets pregnant? That will mess things up*". The claimant did not complain or make any comment about this statement at the time, when the claimant raised this in her grievance in 2018 Mr Farr accepted that he made this comment explaining it as a joke.
4. In February 2013 the claimant informed Mr Jones she was pregnant. The claimant described how when she told Mr Jones of her pregnancy he remained silent and then said, "*can you please take that back so that I can make you redundant?*" The claimant did not complain about this comment at the time. When the matter was raised by the claimant in her 2018 grievance Mr Jones apologised to the claimant for any upset the comment may have caused her and explained that the comment was not meant seriously. In his grievance outcome Gary Billingham says of this "*you did not raise your complaints in relation to these two comments at the time... it would have made it clear to them that you found such comments hurtful and upsetting and that you did not consider them to be just part of office banter.*"
5. The first respondent was a male dominated organisation at senior level. The claimant says that a sexist culture existed at the first respondent reflected by the inappropriate comments that were often made to her and other women.
6. Throughout her employment with the respondent which began when the claimant was the age of 22 years male colleagues regularly made comments about her appearance. The comments were of a type that were not made to male colleagues; the type of comments made were on the length of her legs, how tall she was, and the size of her breasts during pregnancy. The claimant's evidence was that such things were said regularly in what was a very male orientated environment, "*it was just the norm 'double entendre' were a regular feature of conversations with sexualized comments being made again and again.*" The claimant explained that her approach to dealing with this situation was to say nothing and ignore the comments.
7. Referring to a period in 2013 when she was pregnant the claimant states:

*"As I gained weight during my first trimester, ... my breasts increased in size ... several comments were made. I recall comments from drivers and operations staff including: "Sexy*

*curves" "Are you putting on weight because everything is getting bigger" and "Oh my god you are bursting out of your shirt". ... I did not want to complain as, again, I felt I would be seen as a troublemaker. I decided I was better off keeping my head down ... just getting on with my work..."*

8. In about 2012/2013, PD joined the respondent as an Operations Manager. PD asked the claimant to go out on a date and she refused. Thereafter PD regularly made rude comments to her, among the things he said to the claimant when she was pregnant was the statement that she was *"too old to have a child"*. The claimant did not complain about this at the time.
9. From January 2015 to December 2016 the claimant worked alongside CC. CC commented to the claimant that he found her attractive. CC on one occasion said to the claimant he wanted to lose weight, the claimant made a comment about running keeping her fit and toned, CC said to her *"we could lose weight and tone up together in bed."* On another occasion, when the claimant was asked by a female colleague whether she planned to have another child, CC said to the claimant *"can I get you pregnant."* On another occasion after having had a tattoo CC and another colleague asked to see the tattoo; CC responded by saying *"I will show you later in bed"*, he also said to her *"if we were having sex it would be good."* The claimant's approach was to ignore these comments.
10. The claimant gives the following account of a meeting:

*"42. After a period of months when CC realised there was clearly no possibility of any relationship outside of our working one, he became incredibly difficult to deal with, belligerent and hard to manage. He subsequently took things to a very uncomfortable place when I was engaged in another sales meeting with MT, a sales consultant, and another member of staff, JL was talking about a recruitment plan and suggested that as we had 3 full time male sales consultants I might like to try and find a female to join our team... CC literally jumped an inch or two from his chair and shouted "Don't be ridiculous, women have to take a week off every month". At this point MT very strongly said "steady on mate" (Bundle p336) ... I suggested to CC that this comment was not appropriate and that he should take it back. CC said, "I don't think so". He then went on to ... wave his arms around shouting "Get HR in here and I'll repeat it" (Bundle p336). At this point I did ask CC to leave the room where I advised that his behaviour was unacceptable."*

11. AB, acting Transport Manager, regularly and openly spoke to the claimant in an inappropriate way. He made comments to the claimant regarding winning new business such as *"You always wear short skirts to get the business"*, *"why not use your best skills, your legs"*, and when the claimant was visiting a male client that she should *"Take one for the team"* to win the business. During the last quarter of 2017 AB stated that he thought himself to be an *"alpha male"* and that

the claimant was an *"alpha female"* and then went on to say *"That's why all the guys want you, it's an attractive trait"*. In December 2017 AB made the comment *"I know, you're a quality woman and that's why I'd like to fuck you"*. AB and another, JL, commented during 2017 that they didn't like the claimant's outfit and that it didn't suit her. AB on many occasions commented *"You wear a skirt to see man and trousers when seeing a woman"*, the claimant heard similar comments from other staff in the customer service team. On 1 November 2016 AB sent the claimant a meme which shows the lower legs of two people apparently having sexual intercourse standing up, this was accompanied by text which read: *"you gotta marry someone you know you'd still be down to fuck in the laundry room real quick while the kids are downstairs watching Lion King & ten minutes left till the dinosaur nuggets are ready to come out of the oven."*

12. The claimant referred to further examples of inappropriate behaviour during her employment: after a staff Christmas party, the claimant was told by a colleague that he heard she was looking *"Sexy"* at the party and he couldn't wait to see the pictures; after having a visit to the office during a weekend to collect a parcel while wearing shorts, the claimant was told on the following Monday by staff that they heard about her turning up in shorts and that she looked great; a driver asked the claimant if she was wearing tights, as her legs *"looked flawless"*; a driver said to the claimant *"Oh I would"* when she walked past him in the warehouse; the claimant was given the nicknames *"legs"*, *"duchess"* or *"stretch"*; referring to the claimant's legs comments were such as *"they go on for miles"* and *"they go all the way up"*.
13. Comments were also made by the directors. In 2016, the claimant went to see Mr Jones in his office to discuss a sales issue. The claimant mentioned in passing that she had tried to talk to Mr Farr but he seemed in a bad mood. Mr Jones laughed and said, *"Perhaps one of his Sarahs isn't looking after him in the bedroom."* Mr Farr's wife and the claimant are both called Sarah.
14. In November 2017 during a return car journey from visiting a client for lunch Mr Jones was talking to the claimant about his friends and their lives. Referring to one of his friends, who he said was not very stable, a bit off the wall, and quite a drinker, he told the claimant that *"If your marriage to John does not work out, my friend is available for dates"*. Mr Jones denied making any such comment, but states that he enjoyed a relationship with the claimant which was relaxed and respectful in which they shared banter. The claimant in her evidence has been reliable in her recollection of events, we consider that the claimant's recollection in this regard is more likely than not a correct retelling of events.
15. The claimant was not the only female employee to endure this treatment. The claimant was informed by a colleague (AH) that she wanted to leave the first respondent because of the comments made to her by a male colleague (SR). AH raised a grievance which resulted in the male colleague being disciplined and given a final written warning for comments that *"could be construed as racial and sexual abuse"*. AH left the respondent's employment, in part, because of this experience. The claimant carried out AH's grievance investigation.

16. In dealing with a specific allegation of offensive behaviour by SR the second respondent considered that a final warning was appropriate because SR had said that he had not realised that he had offended other staff and that had it been mentioned he would have stopped immediately. This is a surprising explanation for the action taken as it is demonstrably untrue. There is in the tribunal bundle documentation showing that SR was warned about his behaviour (see bundle pages 304, 312, 313). The conduct of which SR was accused is plainly offensive, it is however simply dismissed as banter. We are satisfied that this employer tolerated sexist and offensive comments by men directed at women, seeing such conduct as banter. The attitude is encapsulated in the following comment made by Mr Farr, "*When she joined the business, she knew the culture. She knew the way the business operates the characters involved.*"
17. In May 2017 the claimant suffered a slipped disc and was off work for three weeks until June 2017.
18. The claimant required physiotherapy as part of her rehabilitation. On her return to the office the claimant, on occasions, left the office early to attend physiotherapy sessions for her back. This became an issue, and it was suggested to the claimant that she should get treatment completed during her lunch break rather than taking afternoons out of the office.
19. The claimant's workload came under scrutiny. The claimant was asked by Mr Farr what she was working on, she questioned why her work was being checked. She was told by Mr Jones, "*we can check your emails to see how busy you are*". The claimant's emails were monitored by Mr Farr who read the claimant's emails without her knowledge for a brief period. The claimant told Mr Farr that she was so busy she was over worked, Mr Farr explained that he needed to review her work and emails to see how he was able to help, but once he did so there was no evidence of the claimant being over worked or struggling to cope rather that the claimant was not covering all her hours.
20. On 28 July 2017, the claimant received an email from Mr Farr which started: "*You need to work 40 hours per week and make up the physio time.*" The email made clear that Mr Farr did not consider that the claimant was working a full working week. Following her return from maternity leave, in 2014, the claimant had been working from home on Fridays. The claimant was told that she could no longer work from home on Fridays.
21. Following a discussion with the claimant during which she said that she did a lot of work outside her working hours Mr Farr asked the claimant to copy him in on emails that she sent so that he could review how much work she was doing outside her working hours. After discussing the issue with the claimant Mr Farr agreed that the claimant could continue to work from home on Fridays.
22. In the grievance outcome it was stated that Mr Farr: "*had some concerns about your performance and, in particular your workload and he did try to speak to you about those concerns. Monitoring emails and CRM was a reasonable*

*management response to get a better understanding of your workload ... this could have been approached slightly differently, but given the concerns it was not, in my view, unreasonable."*

23. The claimant refers to a recruitment freeze announced on 28 June 2017 at a time when the claimant needed to recruit sales staff. The respondents agree that there was a need to recruit more sales staff, they deny that there was a freeze on recruitment. The respondents say that there had been problems with recruitment so they wanted to have more input and involvement in the recruitment process. Whether it can properly be described as a freeze on recruitment or not it is agreed that there was no recruitment to the claimant's sales team at a time when she considered that recruitment was necessary.
24. On 4 August 2017, the claimant sent a marketing plan to both Mr Farr and Mr Jones, neither replied.
25. The claimant contended that in about October/November 2017 Mr Jones took over a lead that the claimant had been working on and this meant that the claimant would not be paid any commission on any deal that was concluded with the prospective client. The respondents agreed that *"it was not the done thing to take away a lead"*. Mr Jones said that a number of factors led him to consider that he should deal with the opportunity including that the client was one with whom he had a pre-existing relationship, previously having been involved with the client on another project and received training on the US postal service process: he did not accept that it was as simple as the claimant suggested in saying it was her lead.
26. In January 2018 the claimant requested to attend the Metapack conference. This request was refused by Mr Farr and Mr Jones, their position was that the return from the conference, which they had attended in the past, did not justify the cost and burden of attending.
27. While returning from a client lunch in December 2017 Mr Jones raised the claimant's childcare situation, saying: *"John gets away with murder.. .I have to collect and drop off the kids an equal amount to Carmen"* and *" We share everything to do with the kids". "How does John get away with it?" "You could work longer hours if John shared the childcare."* *"You could share the drop offs and then you could get to work earlier."* During the same conversation Mr Jones asked the claimant, *"When do you plan to retire?"* On a different occasion Mr Farr asked the claimant when she planned to retire saying, *"John earns well don't you plan to retire?"* And then adding that he would *"Love to be looked after by a woman ... to not have to work and just spend the day doing nothing"*.
28. Mr Jones did not recall making all the comments recounted by claimant. Explaining the context in which his comments might have been said Mr Jones said that the claimant often spoke with pride about her husband and that he engaged in such conversation when initiated by the claimant *"in a tongue-in-cheek manner"* as part of the *"chat and banter"* that he and the claimant engaged in and might have made the comparison of their marriages or asked the claimant

about retirement. Mr Farr said that his comments were just a joke and not meant seriously. To the extent that there is a conflict in the evidence of the claimant and the evidence given by the respondents we accept the evidence of the claimant on this issue. In coming to our conclusion we take into account that the claimant has been a reliable narrator of events and her recollection is clear. Mr Jones did not expressly challenge the evidence given by the claimant and Mr Farr broadly accepts the account that the claimant has given.

29. The claimant stated that the *"amount of times the Directors shouted at me during the last few months of my working for the business and reduced me to tears was extraordinary"*. The claimant gave examples including an occasion when she needed to check a complicated formula that she was to explain to the client about which she had some initial confusion over and Mr Jones shouted at her, *"What was so confusing?" "Why can't you understand?"* On another occasion she says Mr Jones shouted at her, *"You are supposedly Head of Sales and Marketing. You work it out."* Mr Jones denied that he had ever shouted at the claimant; *"I have never shouted at Sarah or anybody in the business."*
30. The claimant was paid commission in a number of different ways during her employment: commission was paid to the claimant for the first 3 months of any new business; the claimant was given a yearly target to increase the overall revenue for which she was responsible (this was the scheme through which the claimant expected to be paid for Boden); an agreement made in 2017 by which 0.5% running monthly payment was made to the claimant on a handful of significant accounts.
31. The claimant had gained the Boden account in 2012 it was one of the respondent's largest accounts. When the claimant went on Maternity leave in September 2013 Mr Jones took over the management of the account and continued after the claimant returned to work in 2014, it was agreed that the claimant would continue to be paid for the revenue of the account. The claimant had some involvement with the Boden account, but it was managed by Mr Jones.
32. In 2018 Mr Farr wrote to the claimant saying that the respondent was going to remove the Boden account commission from the claimant. The claimant says that the effect was going to be a reduction in the claimant's earnings of between £10,000 and £15,000 a year.
33. The respondents and the claimant profoundly disagree about the Boden account. Mr Jones says after obtaining the Boden contract the claimant's continued involvement was *"in a fairly light weight capacity"*. Mr Jones states that from the start the claimant deferred to him on the information and rates, that she was not involved in the tender process for new Boden contracts and was unaware of the commercial and operational details of new accounts.
34. There is a dispute between the parties as to whether moving the management of accounts was common. Mr Farr says that it is common for accounts to be moved from one territory to another. The claimant says this was unique and never before was there an account of the size of the Boden account moved. The parties agree that the Boden account was unique in its importance to the first respondent.

35. The respondents say that although the claimant won the account after that she had little or no input into the account and its daily running which was all done by Mr Jones so it was reasonable to move the account to his territory.
36. On 31 January 2018 the claimant was sent an email at 8.57am calling her to a meeting with Mr Farr where she was told Mr Phil Rees was joining the first respondent as Head of E-Commerce. The claimant was told that she was to work with Mr Rees but he would not affect her role. Later that day the appointment of Mr Rees was announced to the business as a whole, it was explained that Mr Rees was joining the respondent to be involved in service development, customer acquisition and on boarding.
37. Mr Rees was not a sales person, but the second and third respondents thought that he *“had contacts in customer business that [the first respondent] could potentially lever and ... he could be effective in explaining [the first respondent’s] e-commerce products”*. Mr Rees had experience of designing and implementing an IT system for his former employer, and could replicate that for the first respondent. The claimant thought Mr Rees’ appointment encroached on her role in customer acquisition and on boarding of new business E-commerce accounts was part of the claimant’s role’s remit.
38. On 4 February 2018, the claimant met with Mr Rees. In this meeting, the claimant describes Mr Rees questioning her about her role in the business: *“like a new manager ... asking what and how I did things.”* The claimant came to the conclusion that she was being replaced by Mr Rees and presented a grievance.
39. The claimant first raised a grievance relating to behaviour of CC. In December 2015 CC resigned from the first respondent citing the claimant’s management which was described as bullying and complaining that he was misled by the claimant about potential earning capacity. The claimant raised a counter grievance. Mr Farr says in answer to questions, *“the claimant was put under pressure by CC with the grievance he raised against the claimant, she brought up CC’s alleged sexist behaviour, as a defence mechanism, having never mentioned it before which was out of character for the claimant.”*
40. The claimant lodged her second grievance on the 23 February 2018 alleging sex discrimination and harassment. The grievance was investigated by Mr Gary Billingham. The first meeting on the grievance took place on the 15 May 2018. The claimant received her grievance outcome in a letter dated 4 July 2018. The claimant was not happy with the outcome of the grievance and appealed the grievance outcome. The appeal was considered by Mr Nalliah Rathakrishnan. The appeal outcome letter sent to the claimant is dated 3 August 2018. The claimant considered that the respondent was discriminating against her in the way that the grievance and grievance appeal was handled.



41. On 17 August 2018 the claimant sent her letter of resignation to the respondent. The claimant says, *“I felt the entire grievance and appeal process failed me and had been discriminatory against me.”*

*Law*

42. Section 123 Equality Act 2010 provides that any complaint of discrimination must be made to an employment tribunal within the period of three months starting with the date of the act to which the complaint relates. An employment tribunal may consider a complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so. The time limits are exercised strictly in employment cases, there is no presumption that we should consider a claim that is out of time, we cannot hear a complaint unless the claimant shows that it is just and equitable to extend time, the exercise of discretion is the exception rather than the rule.
43. Section 13 Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others. Sex is a protected characteristic. An employer must not discriminate against an employee of his/hers in dismissing the employee, or subjecting her to any other detriment. Section 136 Equality Act 2010 provides that, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened a relevant provision, the court must hold that the contravention occurred, unless A can show that A did not contravene the provision.
44. We were referred to the guidance of the Court of Appeal Madarassy v Nomura International Plc [2007] ICR 867, approved by the Supreme Court approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054. The claimant must prove 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. A prima facie case must be proved, and it is for the claimant to discharge that burden.
45. Section 26 Equality Act 2010 provides a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. A also harasses B if A engages in unwanted conduct of a sexual nature, and the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for 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.
46. Section 27 Equality Act 2010 provides that A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A

believes that B has done, or may do, a protected act. Protected acts are (a) bringing proceedings under the Equality Act 2010; (b) giving evidence or information in connection with proceedings under the Equality Act 2010; (c) doing any other thing for the purposes of or in connection with the Equality Act 2010; (d) making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010.

47. Section 95 (1) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employers conduct.

48. To establish a constructive unfair dismissal it must be shown that the employer has committed a repudiatory breach of contract; the employee has left because of the breach; and the employee has not waived the breach.

49. In Waltham Forest v Omilaju the following propositions of law were set out

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.
2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".
3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per *Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).
4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).
5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in *Harvey on Industrial Relations and Employment Law*:

"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship..."

Comments made to the claimant in respect of her pregnancy by the second and third respondent

50. The claimant complains that comments were made to her about pregnancy by Mr Farr and Mr Jones. The comments made by Mr Jones (6 October 2010) were not recalled by him. Mr Farr's comments (January 2013) were intended to be jokes or banter. In the grievance the comments made by Mr Farr were admitted and an apology was extended to the claimant in respect of the comments. The comments were not intended to be hurtful to the claimant.
51. We find that the claimant did not complain about either of the comments at the time, the claimant had a long standing and good relationship with both Mr Farr and Mr Jones. We note Mr Farr's evidence that: "*I believe the claimant was a confident individual and that she would have been confident that she could have said what she felt about any issue and was not slow at making her feelings heard when needed. In fact, she was one of the more vocal members of staff and would always voice her opinion which was always welcome.*" Mr Farr said that the claimant "*made her feelings known when not happy*".
52. The claimant did not complain about the comments at the time or give any indication that the comments caused her offence or were upsetting to her. Had the claimant done so we are satisfied that this would have been recognised by Mr Jones and Mr Farr who, not wanting or intending to offend the claimant, in our view are likely to have adjusted their behaviour and not indulged in banter that caused offence to the claimant. It was not until the claimant raised her grievance in 2018 that these matters were raised as complaints for the first time, this was many years after the comments had been made.
53. The claimant's complaints about these comments are made out of time. These comments of Mr Jones and Mr Farr do not form part of a continuing act. The Tribunal do not consider that it is just and equitable to extend the time for presenting the complaints of harassment and direct discrimination arising from these comments. The claimant did not express any objection to Mr Jones and Mr Farr about the comments at the time, the comments were intended as a joke and in our view the claimant would have known that they were intended as a joke. The Tribunal notes that the claimant's approach was to ignore comments made to her. The claimant makes the complaints about these matters many years later in the context of her grievance which was about a wide variety of matters arising

throughout her employment. Mr Jones was unable to recall the event that the claimant refers to and so was deprived of the opportunity of putting the comments in context and thus illustrating the true nature and impact of the comments.

Treatment of the claimant by the second and third respondents on her return to work after her back injury in June 2017

54. The claimant complains about a number of matters which occurred in the period after June 2017, when the claimant returned to work after a period off work as a result of a back injury. In respect of these complaints we consider that it is just and equitable to consider the complaints notwithstanding that the complaints have been presented outside the time limit for the presentation of complaints. There was not a single event that resulted in the claimant coming to the conclusion that the matters she complains about were unlawful or otherwise matters about which she would want to complain. The claimant came, over a period of time, to the crystallisation of the view that she was no longer wanted by the respondent which led her to raise her grievance. On coming to this view the claimant raised complaints about matters which had arisen over a period of time and which she had tolerated or said nothing about previously, including matters which occurred before June 2017. We considered the fact that the matters arising before the claimant was off work with a back injury in 2017 are matters which the claimant allowed to pass without complaint at the time, we consider that in respect of those earlier matters it is not just and equitable to extend time: the comments were made a long time ago, the claimant did not wish to complain at the time, in many instances the claimant does not specifically name any persons, the respondent would find it difficult or impossible to investigate many of these issues now. The position is different in respect of the matters which arise after June 2017, the respondent has been able to address or could have addressed the complaints in the grievance investigation and in our view there is little or no prejudice to the respondent in having to address these issues out of time.
55. The claimant's further and better particulars of claim set out the matters on which she relies in support of her complaint of direct discrimination. The complaints come in a number of categories; not offering the claimant assistance on her return to work, being asked to account for her time, being told that her emails can be checked to see how busy she is, being asked to copy emails to the second respondent to monitor her working time, reading the claimant's emails, informing the claimant she was required to make up time taken for physiotherapy, aggressive emails from the second and third respondent, ignoring the claimant's emails setting out a proposed business plan, and informing the claimant that she could no longer work one day from home. In respect of this list of matters the conclusion of the Tribunal is that some of these matters have not been established by the evidence and where they have been established by the evidence the claimant has failed to show that there was any less favourable treatment.
56. The Tribunal is satisfied that the third respondent said to the claimant "*when do you plan to retire?*" and the second respondent said to the claimant "*John earns well don't you plan to retire?*", and he would "*Love to be looked after by a*

woman" and "to not have to work and just spend the day doing nothing". The claimant is a long way from conventional retirement age. We are satisfied that the comments would not have been made to a man by either Mr Farr or Mr Jones as the comments were intricately connected to her status as a wife and mother, for example Mr Jones accepted that his comments were linked to the claimant's husband's job promotion or success. The comments appear to have been predicated on the basis that the claimant is a woman and therefore can afford to retire and be looked after by her husband. The comments were described by Mr Farr as a joke or banter. The comments in our view were a detriment to the claimant. The claimant was treated less favourably by the second and third respondents making these comments. The comments were related to her sex.

57. The claimant has been able to show that a decision was made that the Boden account was to be removed from her and it is accepted that Mr Rees was appointed as Head of E-Commerce. The conclusion of the Tribunal in respect of both of these matters is that they are not related to the claimant's sex. The decision to remove the Boden account was not related to the claimant's sex and was clearly explained by the respondent, we accept that explanation. The appointment of Mr Rees was in order for the respondent to acquire his services because of his skill set and experience. This was not in any sense related to the claimant's sex. We accept the explanation that the respondent has given for the appointment of Mr Rees.

Comments that the claimant experienced over a long period that were levelled at her and relayed to Gary Billingham in her grievance

58. The claimant states that she sustained and tolerated improper sexual and other abusive comments over a long period, but has always sought to act resiliently in respect of these, taking no action at the time in each case. However, after July 2017 the claimant contends that there was a 'step change' in the treatment she received. The claimant raised a grievance which complained about many of these comments. The grievance was raised in February 2018 and investigated in May-July 2018.

59. The claimant set out a number of matters which occurred in the period from 2010 to 2016. The comments that come into this category include; comments about the claimant's pregnancy (2010), comments about the claimant's breasts during her pregnancy (2012), comments made to the claimant by PD after she rebuffed his request for a date (2012-2015), comments made by CC to the claimant (2015-2016), a meme photo sent by AB (11 November 2016), comments by AB (2012-2016). The Tribunal is satisfied that on a balance of probabilities these comments were made as alleged by the claimant. However, they come within the type of conduct that the claimant chose to ignore for many years. Some of the comments are contentious in that the respondent does not accept that they were made towards the claimant or if made that they should be given the interpretation that the claimant puts upon them.

60. In respect of these comments which were made over a period extending over many years on diverse occasions by diverse people are all presented out of time. They do not form part of an extended act. They do however, set a clear picture of

the claimant's working environment. The second and third respondents are not said to have been aware of the specific incidents alleged before the grievance was raised. Some of the perpetrators of the alleged incidents are no longer employed by the respondent and may not have been contactable for the purpose of the grievance investigation by the time the complaints about their conduct was made. Until the grievance was raised there was no opportunity to investigate these matters. Many of the matters were not considered in the grievance investigation and some overlooked in the grievance appeal despite the claimant making it clear that she wished to have the matters investigated. The Tribunal have come to the conclusion that, save for the complaints relating to the alleged conduct of AB, it is not just and equitable to extend time for the presentation of the complaints in respect of these matters which occurred prior to June 2017.

61. In respect of the complaints relating to AB a distinction is made because the conduct is egregious, AB continues to be employed in a senior position by the respondents, he remains in the respondents' employment at the time of the grievance and the employment tribunal proceedings, at one time he was identified as the person to conduct the claimant's grievance investigation and the claimant made specific complaints about his conduct which the respondent could have investigated but failed to do so despite the claimant making it clear that she wished the matters to be considered as part of her grievance.
62. In respect of complaints in this category arising after June 2017 the Tribunal is of the view that the complaints have been presented out of time and do not form part of an act extending over a period. The Tribunal is of the view that it is just and equitable to extend the time for presenting complaints of discrimination in respect of complaints after June 2017, the respondent has been able to address or could have addressed the complaints in the grievance investigation and in our view there is little or no prejudice to the respondent in having to address these issues out of time.
63. The matters the claimant complains of occurring after June 2017 in this category are the following; comments by the third respondent "*if your marriage does not work out...*" (November 2017), comments by the third respondent the claimant's husband "*gets away with murder*" (December 2017), comments by the second and third respondent asking when the claimant was going to retire (November and December 2017), meme photograph sent to the claimant 1 November 2016, various comments to the claimant by AB such as comments by AB (December 2017), comments by the customer service about the claimant's outfit (2017/2018), sexual innuendo and comments about the claimant's appearance made by drivers (2017).
64. The Tribunal is satisfied that these types of comments were made to the claimant, they were directed at her because she was a woman. They relate in some instances to explicit sexual references that would not be made to a man. The comments are at times insulting, other times lascivious, other times attempts at humour but always demeaning and unwanted by the claimant. The Tribunal is satisfied that this was unfavourable treatment of the claimant on the grounds of her sex.

65. Further the Tribunal is satisfied that this was unwanted conduct related to the claimant's sex, and that the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Some of the conduct was unwanted conduct of a sexual nature, and had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The Tribunal has taken into account the claimant's perception, the other circumstances of the case, and considered whether it is reasonable for the conduct to have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and we are satisfied that it does.

The difference in treatment the claimant experienced in respect of being allowed to develop e-commerce

66. The claimant's case is that she was responsible for the development of e-commerce in 2016-2017 including the establishment of the e-commerce website. Mr Rees was appointed as head of e-commerce on 31 January 2018. Despite assurances that there would be no cross over with her role, this was in fact not the case and Mr Rees took on work that had been part of her role including visiting her customers.

67. The respondents say that Mr Rees was appointed to be involved in service development, customer acquisition and on boarding. Mr Rees was considered by the second and third respondents to have "*contacts in customer business that [the first respondent] could potentially lever and that he could be effective in explaining the first respondent's e-commerce products*". Mr Rees's experience of designing and implementing IT systems was a significant incentive in employing him.

68. The claimant and Mr Rees did not work together for very long but the little time that they did work together left the claimant with the view that his appointment encroached on her role in areas of customer acquisition and on boarding of new business e-commerce accounts. The claimant thought the respondents' other employees thought this also. This was not the intention of the second and third respondents, who saw the role Mr Rees was to perform as complimentary to the claimant's role. Whether their ambitions were realistic is moot.

69. The Tribunal is satisfied that the intentions expressed by the second and third respondents in recruiting Mr Rees are genuine. The Tribunal also accept their evidence that denies an intention to push the claimant out of the business. The claimant had been a very successful employee for many years and we are not satisfied that the evidence shows that the claimant was no longer wanted as an employee. In this respect the Tribunal have not been able to conclude that there was any less favourable treatment of the claimant.

The overall manner in which the respondent managed the claimant's grievance and grievance appeal including the decision not to appoint an external investigator

70. The Claimant requested that her grievance is dealt with by an independent

person from outside the company. This request was rejected. The claimant states that Mr Billingham did not have the experience or seniority to deal with the grievance. The second respondent accepted that with hindsight it might have been better to have an independent person carry out the grievance. We agree with the claimant that there was no reason in principle why an independent person was not appointed to carry out the grievance investigation. This would clearly have been desirable as both Mr Billingham and Mr Rathakrishnan accepted in cross-examination that being appointed to hear the grievance was a 'hot potato' and put them in a difficult position.

71. The third respondent commenting on the failure to appoint an independent person from outside the company said that he was "*confident that our internal procedures [are] robust enough*" and that Mr Billingham had external support, he also stated that managers are advised when a grievance starts to "*say it as they see it.*" The second respondent agreed with these comments emphasising that Mr Billingham and Mr Rathakrishnan were independent. Mr Billingham, who did not have any training on equal opportunity issues or grievance/disciplinary hearings, and had not previously dealt with a grievance of this nature said that a grievance against your employer is "*not something to be done lightly*". Mr Billingham said that the directors will have the final say in respect of the grievance. Mr Billingham explained that he had "*guidance regarding the handbook... There was a solicitor as well*". It was also accepted by the respondents that other employees were reluctant to come to the hearing with the claimant but her sister was not permitted to accompany her because it was not permitted by the handbook. Mr Rathakrishnan stated that he was independent and made his own decisions on the grievance accepting that the claimant was asking for an independent person from outside the respondent to carry out the investigation.
72. We have come to the conclusion that the decision to refuse to appoint an outside investigator was probably an error of judgment on the part of the respondents but it was not a matter that was ill intentioned. The respondents thought they were acting appropriately by keeping the matter inhouse and dealing with it in accordance with their internal procedures. The Tribunal do not consider that this decision was less favourable treatment on the grounds of the claimant's sex and it was not a decision taken with the intent to neuter the claimant's grievance by keeping matters in house. However, a failure to appoint an independent investigator leaves the respondents open to the criticism that any internal investigator was not only considering complaints against the 'bosses' but was also potentially tainted by the sexist culture of the respondent's organisation.
73. The delay in dealing with the grievance was regrettable but in our view there was nothing in this that arose from consideration of the claimant's sex or the nature of her grievance. The Tribunal do not consider that the evidence before us established that Katherine Doree was discouraged from giving evidence in the grievance.
74. Mr Billingham was told to 'say it as he sees it' and in our view he appears to have done so, his investigation of the grievance, in so far as it went, appears to have been a conscientious effort to address the claimant's complaints. We do not



consider that there were considerations of the claimant's sex that led him to reject those parts of the grievance which were not upheld and we do not consider that he was affected by the nature of the grievance in rejecting any complaints. We accept that he did his best to arrive at conclusions on the matters before him.

75. There was one area where we had some concern this arose from the failure of Mr Billingham to address all the matters that were put before him by the claimant. Mr Billingham accepted that the claimant gave him details of additional matters which she wanted to be investigated, he was aware that the claimant wanted these matters investigated but in his evidence was unable to say what he did to move forward an investigation of those matters other than in his grievance outcome letter inviting the claimant to say whether she wanted further matters investigated. However, we accept that he was acting in good faith. On balance we have come to the conclusion that Mr Billingham's actions though wrong, in that he should have considered all the matters raised by the claimant as part of the grievance, were not tainted by considerations of the claimant's sex or the nature of the allegations that resulted in him not dealing with them.
76. The respondent did not appoint an external investigator at the appeal stage for the same reasons they did not appoint one at an earlier stage. This was more than an error of judgment it was in our view part of the general failure of the respondent to deal adequately with the claimant's grievance at the appeal stage. The grievance process includes an appeal stage a failure in the appeal stage is a failure in the process of the grievance.
77. Having heard the evidence of Mr Rathakrishnan as to how he considered the claimant's grievance appeal we have come to the conclusion that he failed to address adequately or at all the claimant's appeal. Further we conclude that the decision to dismiss the claimant's appeal was made without having carried out any adequate investigation.
78. Mr Rathakrishnan had no training in grievance appeals and had never previously dealt with a grievance appeal. The only documents he had when carrying out the appeal were the original grievance letter, Mr Billingham's outcome letter and the claimant's letter of appeal. He did not consider the evidence from Mr Billingham's investigation and carried out no investigation of his own. Mr Rathakrishnan's approach to the appeal was "*reviewing the grievance and giving my opinion ... I was giving the claimant the opportunity to answer. If the company is right, I have to back it.*" The claimant criticises this approach stating that what Mr Rathakrishnan did was to go through the points in the claimant's grievance appeal letter and to provide his comment or conclusion without having seen any of the evidence or giving the claimant the opportunity first to explain her case to him. We agree with that submission and consider that Mr Rathakrishnan's handling of the appeal was inadequate, the following passage from the transcript of the appeal hearing illustrates this.

*"[claimant]: I think you don't have a grasp on it in detail. There's several points you have been confused about so I don't know what my position is whether I can appeal again I don't know anyway so the outcome in your eyes is that you agree entirely with Gary ?*

*[Mr Rathakrishnan]: yes he has done a fair assessment of all the points you have raised .....*

Mr Rathakrishnan was asked if in investigating the grievance he would do anything differently today his shocking response was *"If I did it today I might go more thoroughly into the documents"*. Although not intended as such this was an express admission that he could have gone *"more thoroughly into the documents"*. This is a particular problem here because of the limited material that Mr Rathakrishnan considered. Mr Rathakrishnan's approach was to carry out a review of what had gone before, however, in doing this he failed to thoroughly consider the documents and information available. Mr Rathakrishnan said in evidence that Mr Billingham had done a thorough investigation, he was asked how he knew this, his response was *"I believed him"*.

79. Before the appeal meeting concluded Mr Rathakrishnan decided that the claimant's grievance appeal was not upheld. He took no time to consider any points she made or investigate any aspect of her grievance. He did nothing to address the fact that Mr Billingham had not addressed all the matters the claimant had put before him.
80. The Tribunal is satisfied that the approach to the grievance appeal was so inadequate that the claimant was deprived of a proper appeal. This was a serious failing on the part of the respondent. The grievance appeal was not dealt with in a way that a reasonable employer would have dealt with it.

#### Constructive dismissal

81. The claimant relies on the cumulative conduct of the respondents up to the grievance appeal conducted by Mr Rathakrishnan as amounting to a breach of the implied term to treat her with trust and confidence. The claimant submits that the first respondent had a company culture where sexualised comments are made to female employees and there is no attempt to provide training in equal opportunities even where complaints are brought to the attention of the directors is not treating a female employee with trust and confidence; placing a long standing, hardworking employee under a cloud of suspicion and effectively accusing her of not being truthful about her actual working hours without evidence when you know she has been unwell is not treating her with trust and confidence; the comments being made about the claimant retiring even though she was just 45 were not treating her respectfully and with trust and confidence; the sexist references to her child care arrangements to the effect – if only she didn't have her son so she could work more as she did before were not treating her with trust and confidence; the removal of the Boden account, the respondent had no good reason to do this; the appointment of Mr Rees without any consultation, warning or discussion to a role which clearly impinged on her role – as was understood by everyone in the company at the time, was not treating her with trust and confidence; the claimant's grievance was not dealt with seriously and/or appropriately. The claimant resigned shortly after the grievance appeal outcome.
82. The respondent contends that there was no breach of the implied term, the claimant reacted badly to being managed by the respondent from June 2017

onwards, and subjectively viewed matters from then on as all designed to force her out of the business, when such a conclusion is incorrect. The claimant made up her mind that there was a conspiracy to undermine her, and refused to engage with the reality of the situation in respect of the respondents' desire for her to work her contracted hours and spend more time in the office, the changes to her commission scheme and the appointment of Mr Rees.

83. The Tribunal concludes that the respondent has committed a repudiatory breach of contract. We consider that the first respondent did have a company culture where sexualised comments are made to female employees and there is no attempt to provide training in equal opportunities. The comments made about the claimant retiring and the sexist references to her child care arrangements were not treating her respectfully and with trust and confidence. The unreasonable way in which the claimant's grievance was dealt with, in particular the inadequate appeal was breach of a fundamental implied term.
84. The claimant left the respondent's employment because of the breach or breaches outlined. The claimant did not waive the breach, the claimant resigned as a result of the cumulative effect of the breaches as found and the other matters which the claimant objected to but we have not found to amount to less favourable treatment with the final trigger being the way that the grievance appeal was handled by Mr Rathakrishnan. This final matter, relating to the grievance and grievance appeal on its own was a repudiatory breach of contract.

#### Victimisation

85. The Tribunal is satisfied that the claimant has done a protected act by her conduct of AH's grievance in about July 2017 and in her own grievance; however, the Tribunal has not been able to conclude that the claimant has suffered a detriment as a result of the making of the protected acts. The claimant's allegations of harassment and direct discrimination either pre-date the protected acts or are unrelated to the claimant's actions in respect of AH's grievance.

#### Outcome

86. The claimant was constructively dismissed. The respondent has not shown that there was any potentially fair reason for the dismissal. The claimant's claim of unfair dismissal therefore succeeds.
87. The claimant's claims of direct sex discrimination and harassment succeed, in respect of the treatment of the claimant after her return to work in June 2017 in respect of the comments made to the claimant about her retirement, and further in respect of comments made to the claimant of a sexual nature, comments about her appearance made after in the period from 1 November 2016 onwards. The claimant's claim for harassment related to sex also succeeds.
88. The claim for victimisation is not well founded and is dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 25 March 2021.

Sent to the parties on: ...31 March  
2021...  
THY

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For the Tribunals Office

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