EMPLOYMENT TRIBUNALS

Claimant: Miss L Worthing

Respondent: BDW Trading Ltd

RESERVED JUDGMENT

Heard at: Remotely, by Cloud Video Platform ('CVP')

On: **17th – 21st May 2021**

Before: Employment Judge Sweeney

Members: Dennis Morgan and Steve Wykes

Representation:

For the Claimant: In person,
For the Respondent: Eleanor Wheeler, counsel

JUDGMENT having been given to the parties on 21ST May 2021 and a written record of the Judgment having been sent on 26 May 2021 and written reasons having been requested in accordance with Rule 62{3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

The Hearing

1. The parties had prepared a bundle of documents consisting of 403 pages. In these reasons, any reference to page numbers in the bundle are in bold and in square brackets as **[page x]**. The Tribunal discussed the complaints and issues with the parties at the beginning of the hearing. It then adjourned to read the witness statements and relevant documents before resuming the hearing at 2pm on the first day.

2. The Claimant gave evidence on her own behalf and called one additional witness, Sandra Ferguson, a colleague who attended a grievance meeting as the Claimant's companion. The Respondent called the following witnesses:

   2.1. Mark Davis, Technical Director

   2.2. Karen Velleman, PA to Mr Davis

   2.3. Val Lamb, PA and HR Coordinator

   2.4. Carl Sobolewski, Managing Director, North East Region

   2.5. Katie Campion, Regional HR Business Partner

The Claimant's complaints and the issues

3. The Claimant's complaints had been identified by Employment Judge Aspden at a preliminary hearing on 14 April 2020 and set out in paragraph 36 of her notes of that hearing [**pages 48-49**]. At the start of the hearing the Tribunal discussed the issues with the parties. The complaints were that:

   3.1. She had been treated less favourably than others of a different age or age group by being subjected to detriments [direct discrimination, section 13 Equality Act 2010] and/or

   3.2. The Respondent engaged in unwanted conduct related to age [harassment, section 26 Equality Act 2010]

4. The Claimant confirmed that although she had renumbered them in a further document [**pages 57-70**] the complaints which amounted to detriments and/or harassment and which she wished to pursue were as identified by EJ Aspden in paragraph 36 (a) to (m) as referred to above. We shall refer to those as the 'complaints'. We had a discussion as to whether each complaint was pursued as direct age discrimination **and** in the alternative harassment or whether some were pursued as direct discrimination and others harassment. We asked the Claimant, during the time that the tribunal would take to read the statements, to reflect on whether she was pursuing all of the matters as allegations of harassment related to age. When we resumed the hearing having read the statements and documents, Ms Worthing said that she was pursuing all complaints as harassment and direct discrimination. It was evident to us that Ms Worthing did not appreciate the distinction between direct discrimination because of age on the one hand and harassment related to age on the other. That is not meant as a criticism of her in any way at all. We mention it only to explain why the Tribunal proceeded on the basis that each complaint in paragraph 36 [a] – [m] was to be considered as one of direct discrimination/harassment in the alternative.

Findings of fact

5. The Claimant is employed by the Respondent as a Technical Coordinator. She commenced her employment on 18 December 2017, having been approached by Randstad CPE Ltd on behalf of the Respondent. At the time, the Claimant had been working for a competitor, Bellway Homes.

6. She was born on 26 March 1962. At the time she started her employment she was 55 years old. She was initially not interested in moving but was persuaded to join the Respondent by Mr Steve Jones, the then Technical Director, who was impressed by the Claimant.

7. Carl Sobolewski is the Respondent's managing director for the North East region. He has responsibility for something in the region of 300 employees, leaving aside contracted labour. The workforce has an age of ranges. Over a third of the workforce is aged over 50. Three of his fellow directors are in their 50s. the sales director is aged 63. There are 26 employees in their 60s.

8. Mark Davis was employed by the Respondent as Technical Director from 01 July 2018 to 31 December 2020. He replaced Steve Jones who left in about May 2018.

9. The Claimant initially reported to David Atkinson. He undertook the Claimant's PDR in August 2018. That PDR was not a positive one and the Claimant was unhappy with it. She regarded Mr Atkinson as being inexperienced and a somewhat limited manager. Mr Atkinson left the Respondent in December 2018 resulting in a change of line management.

10. It became clear to Mr Davis and to others in the business that there were problems regarding the Claimant's relationship with another employee, in the sales department, Christie Edge. The issues were a mix of work-related issues and issues relating to attitudes and behaviours [as is apparent from the Claimant's subsequent grievance].

11. The Claimant and Mr Davis had a number of discussions surrounding her relationship with Christie Edge. There was a meeting in September 2018 between the Claimant, Ms Edge, Mr Hewitt and Mr Davis. The upshot was that Mr Davis encouraged the Claimant to get on with her job which he felt she did well and that whilst they did not have to like each other or get on, that they should behave professionally towards each other. The same message was conveyed to Christie Edge.

12. That meeting must have achieved a degree of success because the Claimant did not raise any issues about Ms Edge until June 2019. This is evident from the Claimant's grievance which she subsequently submitted on 18 July 2019 [**page 188-190**]. In that grievance she refers to three occasions on 27 May, 31 May and

20 June 2019 where she complains about Ms Edge [as well as Carol Jukes and Chris Blair].

13. On 20 June 2019 the Claimant spoke to Mr Davis to say that she was unhappy with Christie Edge's behaviour. Mr Davis' initial reaction to what he believed to be a personality clash was that there were plenty of projects/developments and that he would move the Claimant to different projects. However, the Claimant objected to this. Upon reflection, Mr Davis agreed that this would be wrong, that she should not be moved to different projects. However, he again urged the Claimant just to get on with her work and – basically – ignore Christie Edge. He emphasised that she should not worry about Christie Edge or anyone else, that the Claimant was good at her job and should get on with it. That was the import of what he conveyed to her.

14. Over the coming weeks the Claimant became dissatisfied with this 'get on with it' approach. In her subsequent grievance meeting with Mr Brazell [**page 205**] she explained that for 5 weeks, she had tried to deal with things informally but nothing happened. The reference to '5 weeks' was the reference to the period of time between raising issues with Mr Davis and presenting her grievance. She refers to two further incidents on 26 June [involving an email exchange] and 18 July 2019 [when she said Ms Edge had ignored her [**205 and 206**]]. We find that the Claimant wanted some action to be taken over what she considered to be Christie Edge's hostile attitude to her and she was not prepared any longer just to go along with Mr Davis' advice to keep her head down and get on with her work. Therefore, she presented a grievance on 18 July 2019.

15. Looking back, the Claimant has come to regard Mr Davis' handling of her concerns as poor and over a longer period of time – certainly during these proceedings – she has come to see it as part of some wider conspiracy to remove her from the business. However, we find that Mr Davis' objective throughout was to ensure that the Claimant and Ms Edge could work and behave professionally towards each other even if, as was apparent to him, they did not like each other. We considered Mr Davis to be someone who did not particularly like confrontation. That is why he urged the Claimant to effectively ignore Christie Edge and get on with her work; it is why he raised his wife's situation [as an example of how confrontation could end badly]; it is why he suggested initially that he should simply move the Claimant to different projects where she would not have to be in contact with Christie Edge. This is also why he thought and said that a formal grievance would 'get messy', because his personal experience of workplace confrontation – through his wife's experience – was just that. However, there was not a grain of evidence to support the allegations that he was intent on removing the Claimant from the company. On the contrary, the evidence points directly against this: namely, his advice to keep her head down and do her job which she is good at. He was positive in her PDR in September 2019 – had he been intent on forcing her out he could have given her a poor review. There was simply nothing that was in any way consistent with the Claimant's allegation. We should also say that there was no evidence either to

support any allegation that Mr Sobolewski was intent on removing her from the business or that he was in some way pulling Mr Davis' strings. We find that neither wished to remove her or see her leave the business.

16. The Claimant does not accept that she was in any way at fault or had any personal responsibility as regards her relationship difficulties with Ms Edge and she may well be right about that. During these proceedings, she took exception to the matter being referred to by counsel and witnesses as problems 'between' them. From her perspective it was all one way. It may be that Ms Edge's attitude and treatment of the Claimant was hostile and dismissive. Given our conclusion that the issues that existed between Ms Edge and the Claimant had nothing to do with age [on which see below], the issue of who was to blame for the poor relationship is not a matter for us to determine and it would be quite improper for us to do so, especially given that Ms Edge has not been present to advance her side of the story and it is not part of our remit to determine grievances generally. We reminded the Claimant during the proceedings that our function was not to hear a 'grievance' but to consider whether there had been any unlawful discrimination or harassment.

17. Whatever the rights and the wrongs, we are entirely satisfied that the issues that existed between the Claimant and Ms Edge had nothing whatsoever to do with age. That was something she confirmed twice during her evidence, once in answering questions by Ms Wheeler and again when asked by the Tribunal Judge. More importantly, Mr Davis – and subsequently Mr Sobolewski at the grievance appeal – genuinely believed that at the heart of the difficulties was a personality clash between the two. That is how they genuinely saw things. Mr Davis frankly acknowledged in his evidence that he may be wrong about that but that was his genuinely held view based on what he had seen and heard at the time from both the Claimant and Ms Edge. We accept that he did see the problem as being one of personalities and that the Claimant and Ms Edge did not like each other and did not get on.

18. As we have said, things settled down after the meeting in September 2018. The Claimant had a further PDR in February 2019, undertaken by David Ross and Scott Robinson.

19. It was fed back to Mr Davis that the Claimant's February PDR had been good. As far as Mr Davis saw things, she had improved since August 2018; the feedback was good; she had reacted positively to the PDR and there were no significant relationship issues any longer. Part of the reason for improvement he put down to the fact that Mr Atkinson had moved on. More importantly, Mr Davis, who had now been in the business for over 7 months, had no issues or concerns regarding the Claimant's performance at work and neither did his direct reports. From what he could see, the Claimant performed well. That remained his view throughout and he was supportive of the Claimant.

20. Having satisfied ourselves that the issues between the Claimant and Ms Edge were nothing to do with age, we turn now to the events which form the subject of the complaints as identified by Judge Aspden in her orders of 14 April 2020 in paragraph 36[a] to [m] of her notes.

21. The first date of any potential relevance is that of 26 March 2019. According to the Claimant this was the first occasion on which Mr Davis referred to her future retirement. Mr Davis has no recollection of saying anything about the Claimant's retirement at any point, whether on that date or thereafter.

22. We were not given much information around the nature of the discussion on 26 March 2019 (if indeed that was the correct date) other than that it was in connection with a development at Pegswood. This was a routine development. However, Mr Davis considered the development to be, what he called, a 'flagship' in the sense that he wanted to develop a particular approach for the future handling of all developments. He referred to the development as being a flagship not only to the Claimant but to others. What he meant by 'flagship' was, as he confirmed in evidence, more like a 'benchmark'. This is consistent with how it was described to the Claimant. In her grievance meeting [at **page 205**] she says it was given to her as a 'how we should proceed' site.

23. Mr Davis could not recall saying anything about this development being a 'legacy' or referring to the Claimant's future retirement. We find on balance that he did not say anything in March 2019 about the Claimant's retirement or about the project being the Claimant's legacy.

24. The only reference to any comment about 'retirement' and 'legacy' is found on page **240** of the bundle in the Claimant's document prepared by her and sent to Mr Sobolewski, on 30 September 2019. That is almost 6 months after the meeting of 03 April 2019. Nevertheless, it is the only written reference to it provided by the Claimant and it is the nearest in time (albeit six months after the event). The document consists of the Claimant's responses to comments made by those interviewed as part of her grievance. In that document at [**page 240**] she does not refer to Mr Davis having previously mentioned her retirement before 03 April. She says only that he referred to retirement on one occasion, which was on 03 April 2019, in a meeting in the presence of Karen Velleman. In her document, she says he added the words "in three years' time".

25. The Claimant telephoned Ms Velleman later in the evening of 03 April 2019. Ms Velleman could not now recall what it was that the Claimant said to her at the time that gave her cause for any concern at the meeting with Mr Davis earlier that day. However, at the time, she did not detect anything inappropriate in Mr Davis's comments or behaviour and she explained this to the Claimant when they spoke. The Claimant asked her during the call whether she thought that Mr Davis was getting at her about her age. Ms Velleman tried to reassure the Claimant that whatever it was that Mr Davis might have said, there would have been no malice

in it. The Claimant did not display to Ms Velleman any signs of being upset about the remark during that call.

26. Although we find that Mr Davis did not say anything about retirement or legacy in March 2019, we do find, however, that he said something about the project being the Claimant's legacy before she retired at a meeting on 03 April 2019. We are satisfied that it was the reference to 'retirement' that caused the Claimant to call Linda Velleman that evening. We considered whether he and Ms Velleman were withholding the truth from us out of a concern that Mr Davis had indeed said something with the intent to upset the Claimant or in recognition that he had overstepped the mark and that what he said had the effect of humiliating or offending her. However, we conclude that this was not the case. We are satisfied that his inability to recall is not sinister but was genuine – the remark, even on the Claimant's description, was nothing other than a passing remark at the end of the meeting. It was not a particularly memorable thing for Mr Davis or for that matter for Ms Velleman. He and the Claimant had many discussions between July 2018 and April 2019. There was no follow up question by the Claimant to him about what he may have meant by what he said. He did not say it in a tone that would be considered dismissive or aggressive or undermining. Mr Davis, on the Claimant's account, was never aggressive or dismissive in his treatment of her. It is much more likely, and we so conclude, that the comment was meant as an 'accolade', that the Claimant should take pride in handling a project that would be held up as a 'how we should proceed'. That was in keeping with the general message he had been trying to convey to her.

27. In her complaint to the Tribunal, the Claimant says that Mr Davis referred to her retirement being 'in three years'. However, we do not accept that Mr Davis said that or anything like 'in three years' time'. We find that he said something like 'this will be your legacy before you retire'; in the sense that that will be a good thing. We are not satisfied that he said 'in three years'. In her grievance document the Claimant said: 'I felt he was <u>insinuating</u> I would retire in 3 years' time. We conclude that, if he had explicitly referred to her retirement 'in 3 years', there would be no need for the Claimant to have said that she <u>felt</u> that he <u>insinuated</u> that. We find that, by the time she came to record the words on **page 240** (approximately 6 months after the event), the Claimant had looked back to this period and realised that the remark had been made shortly after her 57th birthday and reasoned [wrongly] that he must therefore have assumed she was to retire at age 60 and has convinced herself that he referred to the period of three years, when he in fact did not.

28. The Claimant suggested that Mr Davis had 'possibly' been told the Claimant's age when he signed her birthday card. We considered that possibility. However, we accept his evidence that he was not told and that he did not in fact know what how old the Claimant was. In the absence of being told a person's age it is not always easy to know, and guesses can often be wide of the mark. The Claimant herself struggled to place the ages of some people mentioned in these proceedings. The

Claimant had never told Mr Davis her age and he had not been made aware of her specific age by anyone else. We find that the Claimant has come to look back and attribute this comment by Mr Davis simply because it was made only a week or so after her 57th birthday – and assumed that he must have thought she was going to retire at 60. Her memory, we conclude, has simply played tricks on her and she has come to associate the proximity of the remark to her 57th birthday and convinced herself that he said 'in three years' time. It fits with her narrative and is something which she has come to believe he said.

29. In any event, we find that the claimant was not offended at the time. In her witness statement she said no more than she was 'puzzled' by his reference to retirement. In the only document where it is referred to [page **240**] it is simply a passing reference in response to a paragraph in Chris Blair's statement. The Claimant does not say she was offended by it, or felt it was in any way degrading or humiliating. She never mentioned it - or any other conduct by Mr Davis for that matter – in her original grievance meeting with Chris Brazell or in the two hour appeal meeting with Mr Sobolewski and Ms Campion. She did not actually perceive it as having any of the effects listed in section 26 EqA. She was not in any way intimidated by the remark. She did not feel any hostility from Mr Davis or by the remark itself. She was not degraded or humiliated in any meaningful sense of those words. She felt that it was no more than an odd thing to say.

30. We are satisfied also that Mr Davis meant no ill will towards the Claimant in saying this. That was not his purpose or intention. If anything, his passing comment highlighted the Claimant's positive contribution.

31. Although the Claimant has said that the notes of the appeal meeting were deliberately fabricated in certain respects (which we reject), she has at no stage said that the notes omitted to set out her references to 'ageism' in that appeal. We come to the appeal later.

32. On 18 July 2019 the Claimant submitted a grievance by email [**188-190**]. The complaint was about how she had endured the hostility, humiliation and dismissive behaviour from Christie Edge and surrounding colleagues, namely Carol Jukes and Christie Edge's "friends in sales" and Chris Blair. The grievance is largely about Christie Edge and some others and their alleged behaviour towards the Claimant.

33. Mr Davis undertook the Claimant's PDR on 16 September 2019. It was a positive PDR. He set out the Claimants' strengths and noted some minor negatives but nothing of any significance as far as he was concerned. The Claimant refused to sign off that PDR for reasons which Mr Davis did not understand and which she never explained.

34. The Claimant mentioned to Mr Davis that Steve Dobbing had said that, being a former local authority worker, she must have a huge pension pot. In essence, she did not like being wound up by him in this way. Mr Davis said that she should pay

no attention to this and that she should respond to him, winding him up by saying 'yes, I have got a big pension and I am going to go out and spend it'. Whether or not his approach was the correct approach, he was in terms saying go back and give as good as you get. We are not satisfied that he did say 'I don't know how you have managed to come to work' and in any event the Claimant accepted in cross examination that this particular remark had nothing to do with her age and that it related to her upset with Christie Edge.

35. The Claimant's grievance was not upheld and she appealed. She attended an appeal meeting on 01 October 2019 with Carl Sobolewski and Katie Campion. She was accompanied by Sandra Ferguson. Katie Campion took notes of that meeting. At the outset it was explained that the notes would not be verbatim notes. The Claimant and Ms Ferguson were told that they could not record the meeting on a recording device. Ms Ferguson understood also that she could not take any notes. Mr Sobolewski and Ms Campion said that they were not told this, only that they could not digitally record the meeting. It may be that this got lost in translation. However, we would expect an employer of this size to make it clear that a person's companion can take notes and can contribute to the meeting – they are not there simply to sit and observe, unless that is what the companion wishes to do. We hope the Respondent takes this on board.

36. In advance of that meeting, in the afternoon of 30 September 2019 the Claimant sent through the document which is at pages **238-234**.

37. The meeting lasted about 2 hours, which included a break of about 10-15 minutes. Mr Sobolewski was direct in his manner and repeated his questions a number of times and we can see how the Claimant would have perceived this as aggressive, bearing in mind her frame of mind at the time, which was that she felt that her complaint about Christie Edge was not being taken seriously. In her letter of 27 September 2019 [**page 237**] she says that '*my mind has been consumed by this on-going issue for several months now'*.

38. During the appeal meeting, the Claimant felt that she was being distracted and not listened to. Again, we accept she genuinely perceived it in that way. Mr Sobolewski, for his part, felt that the Claimant was not giving him straight answers to questions and he kept coming back to the same points. Mr Sobolewski was particularly keen to understand why the Claimant had taken legal advice. He said in evidence to the Tribunal that this was because the Claimant said all she wanted was an apology and that this did not seem to sit right with her having sought legal advice. He wanted to know whether an apology was sufficient and if so, why then was there a need to seek legal advice.

39. As a tribunal, we were not impressed by Mr Sobolewski's repeated questioning of the Claimant about why she sought legal advice. We can understand why he would want to ask why, if all that she was seeking was an apology, she had sought legal advice. However, even if he did not get a clear answer to that question, there was

no benefit in repeatingly asking it, whether or not he understood the answer given. Every employee is free to seek legal advice on matters that concern them at work. Although we do not accept that Mr Sobolewski was, in fact, aggressive at this hearing – as confirmed by Ms Ferguson - we can readily understand why Ms Worthing would regard the repeated questioning on that subject as being intimidating or aggressive.

40. However, we are satisfied that by repeating the question, Mr Sobolewski genuinely wanted to know what the Claimant was 'looking for'. It had nothing whatsoever to do with her age and was in no way related to it. The Claimant brings it back to age in order to air her grievances before this tribunal.

41. At the end of the appeal meeting the Claimant was asked whether there was anything that she wanted them to investigate. She mentioned that she would like Scott Robinson's comments and comments made around Natalie to be investigated. She did not raise anything in connection with Mark Davis or any remark that he had made to her back in April 2019 or at any other time.

42. Following the meeting, Ms Campion sent the notes of the meeting to the Claimant. Those notes are brief. Although they were never intended to be verbatim, they are surprisingly brief bearing in mind the meeting lasted about 2 hours. Be that as it may, we are satisfied that the notes do not contain anything that is false or untrue. Ms Worthing identified those parts which she said were untrue on pages **262 and 263**. The reference to 'outcome of the appeal' on **page 262** is a slip. It should say 'outcome of the grievance'. The Claimant made much of the reference to Denise Major on **page 262**. However, there is nothing in this. She herself had referred to Denise Major, if not by name, then by position. It was perfectly obvious who the Claimant had been referring to. In any event, the only point that was being made was that the Claimant had spoken positively of Denise Major, in contrast to others mentioned by her.

43. There are often differences of view as to the accuracy of notes. However, to make the leap from disagreement to 'deliberate falsification' is another matter. The Claimant was sent the notes on 08 October 2019 [**page 260**] and was asked to make any proposed changes as tracked changes and send them back to Ms Campion for her review. The Claimant never did that. We are entirely satisfied not only that there is nothing false in the notes but that Ms Campion acted properly in sending the notes and asking for the Claimant's proposed changes.

44. The grievance appeal was not upheld and the Claimant was informed of this on 16 October 2019 [**page 276**]. In the meantime, the Claimant had gone on sick-leave and at the date of this hearing she remains on sick-leave. The first of her fit-notes dated 03 October 2019 gave as the reason for absence 'acute stress reaction' **[page 255]**.

45. On 28 October 2019, Mr Davis spoke with the Claimant by telephone for about 25-30 minutes. The Claimant says that Mr Davis referred to his wife's experience with a grievance she had at her workplace. Mr Davis accepts this. We are satisfied that Mr Davis mentioned his wife's position with no malevolent purpose or intention. On the contrary, it was well intended, whether advisable or not to bring it up. He was trying to be empathetic towards the Claimant. He had regarded her as being ill advised for going down the formal grievance route because he had seen his wife's health deteriorate as a result of her pursuing a grievance in the past in a totally different organisation to the point where she left her employment. He was concerned about the Claimant and this was his attempt at demonstrating this. We find that she has come to look back and regard what he was doing in a different light, wondering if he was hinting that she, the Claimant, should leave the organisation. It may be that he had briefly mentioned his wife prior to this discussion on 28 October 2019 in the same context. However, on this occasion there was a more heartfelt discussion about it. But the conversation was not related to the Claimant's age in any way. We do not accept that Mr Davis was hinting at the Claimant leaving the organisation or that he wanted her to do so. Any reference to what things would be like when she returned to work after sick leave was in connection with her own well-being.

46. On 01 November 2019, the Claimant asked to work from home for a week. We can see this from both points of view. She wanted to get back into the routine of work but not in the office. Mr Davis was of the view that the Claimant was telling him she was very poorly physically and mentally. His view was that she should not work in those circumstances whether from home or at the office and should concentrate on her health. As a tribunal we think he should have explained his rationale to her. We don't think he handled this part of the situation well. He could have handled it better. However, we are satisfied that he was in no way motivated consciously or unconsciously by age. It may well be that another employee, Kyle Dobson, was permitted to work from home when he had shingles but we do not know anything of the circumstances of this. Mr Davis did not give that permission and it is his motivation that we are concerned with.

47. On 08 November 2019 the Claimant emailed Mr S Boyes, Chief Operating Officer [**298-301**]. She headed her email 'formal grievance - Carl Sobolewski and Kate Campion'. It was in essence an appeal against the appeal, in which the Claimant went over some old ground but also expressed her unhappiness with the manner in which the appeal meeting had been conducted. She asked for Mr Boyes to review the situation. This was passed to Tania Donnelly, former Head of HR Operations.

48. On 19 November 2019 the Claimant spoke to Tanya Donnelly. We accept that Ms Donnelly was abrupt towards the Claimant and said to her that the conversation was 'inappropriate'. We accept the evidence that Ms Donnelly generally had an abrupt manner. However, there is nothing to suggest that this had anything to do with the Claimant's age. We can readily see that she might not want to take a call

from the Claimant given she was reviewing on paper what had taken place and we can recognise that she may have felt it was inappropriate to talk to her. That, and her manner is a much more plausible explanation for her abruptness (of which we know nothing more than she is said to have put the phone down) than that it was age related conduct or that it was treatment because of her age. There is absolutely nothing to suggest that this (as with the other complaints) was remotely connected to age.

49. The Claimant's absence from work was recorded on an internal HR and payroll system as 'anxiety/stress/depression/other mental illness'. The fit note of 18th November 2019 had given as the reason for absence '*stress reaction due to work related issues now anxiety and low mood symptoms*' [**page 312**] and the previous fit-notes were in similar terms. When a person is absent on sick-leave, the reason for absence is recorded on the Respondent's HR system. That system consists of, among other things, a 'drop-down' box which lists a number of pre-populated reasons. One of those is 'anxiety/stress/depression/other mental illness.' When the Claimant became aware that this is how her absence was recorded on the system, she took exception to it and contacted Val Lamb. She had taken exception to the reference to 'depression'. Ms Lamb explained how the workings of the system to her and that she was unable to remove the word 'depression' [**page 320**]. She also explained that it was only an indication as to the reason a person is off and that they understand that a person may be off with only one of the reasons identified in the description. Ms Lamb then agreed to arrange for the absence reason to be removed from the system (effectively, leaving the reason for absence section blank) and emailed the Claimant to this effect on 26 November 2019 [**page 319**]. However, following the submission by the Claimant of her further fit-note dated 05 December 2019 for '*stress at work*', the Claimant's absence was again recorded as anxiety/stress/depression/other mental illness'. We accept Ms Lamb's evidence that this was almost certainly done by someone in payroll who assumed that the reason for absence had been left blank by accident and, in accordance with the fit-note, selected the appropriate entry from the drop-down box. The Claimant queried this with Ms Lamb on 17 December 2019 [**page 341**] who responded on 18 December 2019 fully and clearly explaining the position and apologising to the Claimant **[page 340]**.

50. Accepting as she did in her oral evidence that she understood that there was a 'drop down' box recording system and that this was explained to her by Ms Lamb, it is surprising that the Claimant asserts that this was done deliberately by Ms Lamb [an HR Coordinator] because of her age or that it was in some way associated with a wider conspiracy to remove her from the organisation. It was an entirely innocent act and the explanation is obvious and Ms Lamb was not challenged on it by the Claimant in any event. We accept Ms Lamb's evidence entirely and we cannot see a basis for any reasonable complaint arising out of this matter.

51. On 29 November 2019, Tania Donnelly emailed the Claimant [**page 331**] to say that they would be writing to her shortly in order to invite her to a 'formal absence review meeting'.

52. On 02 December 2019 the Claimant received the letter to attend the review meeting, which she had been expecting. The letter was headed 'absence review meeting'. Although she had been told that it was to be a 'formal' review meeting the Claimant queried the description of the meeting with Mr Davis in a telephone call on the morning of 03 December 2019. He agreed to check with Val Lamb whether it was to be formal or informal and whether she could take a companion. He did check with her but did not get back to her until about 8.30pm by text [**page 336A**]. He apologised for the delay. He said that she could bring a colleague from work. His text was sympathetic. He did not, however, say whether the meeting was to be 'formal' or 'informal'. We accept that this innocently slipped his mind and he subsequently confirmed that it was (see below).

53. On 04 December 2019 the Claimant emailed Mr Davis. At the end of the email she said she would not be attending any meeting that week. On 09 December 2019 he emailed to say the meeting would now be on 11 December but it was not until the 11th that he confirmed in response to a further email that it was to be 'formal' [**pages 351-350**].

54. Mr Davis was unaware that the Claimant had already been told by Ms Donnelly that the meeting was to be 'formal'. He apologised during the proceedings for not having personally confirmed this to the Claimant before he did. It may not seem a big thing to him or to the Respondent but we can see that this was a matter of concern to the Claimant that she should know precisely what the nature of the meeting should be. It is right that she had been told by the Head of HR that it was to be 'formal' and she ought perhaps to have proceeded on that basis. However, she was suffering from considerable stress and anxiety at the time and this explains why she was in the frame of mind in which she was. It may also explain why she believes there was some kind of conspiracy against her. However, there was, we find, no conspiracy.

55. Whether Mr Davis should have been clearer earlier or not, his failure to insert the word 'formal' in the letter had nothing whatsoever to do with the Claimant's age. There was, we have found, no conspiracy. That Mr Davis did not respond quickly to a telephone call is not evidence of any desire to remove the Claimant and is not evidence of any age-related conduct.

56. The sickness absence review meeting never took place. The Claimant remains employed by the Respondent and has been on nil pay for about a year now.

Relevant Law

57. Section 39(2) Equality Act 2010 provides that an employer ['A'] **must not discriminate** against an employee of A's ['B']

57.1.1. as to B's terms of employment,
57.1.2. in the way A affords B access, or by not affording access to, opportunities for promotion, transfer or training or for receiving any other benefit, facility or service,
57.1.3. by dismissing B,
57.1.4. by subjecting B to any other detriment.

58. Section 40(1)(a) EqA 2010 provides that an employer 'A' **must not, in relation to employment by 'A' harass a person**, 'B' who is an employee of A's.

59. The meaning of 'discrimination' is then set out in other provisions, one of them being section 13 (direct discrimination). The meaning of 'harassment' is found in section 26.

Section 13 Equality Act 2010: direct discrimination

60. Section 13 provides:

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

61. To be treated less favourably implies some element of comparison. The employee must have been treated differently to a comparator or comparators, be they actual or hypothetical, who do not share the relevant protected characteristic. The cases of the employee and comparator must be such that there must be no material difference between the circumstances relating to each case: section 23 Equality Act 2010.

62. It is for a claimant to show that the hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal must, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances.

63. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of 'diminishing any eloquence the cumulative effects of the primary facts' might have on the issue of the prohibited ground: ***Anya v University of Oxford*** [2001] IRLR 377.

64. Unreasonable conduct by the employer is not of itself sufficient to constitute less favourable treatment. However, unreasonable conduct which adversely affects the employee may be evidence of hostility which in turn may justify an inference of discriminatory prejudice.

65. A complaint of direct discrimination can only succeed where the tribunal finds that the protected characteristic (in this case, age) was the reason for the less favourable treatment (if less favourable treatment is established). If there has been less favourable treatment and the reason for it is not immediately apparent – i.e. not inherently discriminatory – it is necessary to explore the mental processes, conscious or unconscious of the various actors or alleged discriminators to discover what operated on their minds. Tribunals must focus on the 'reason why', in factual terms, the employer acted as it did. In doing so, the protected characteristic need not be the only reason for the treatment. Provided the protected characteristic has a significant influence on the outcome, that is enough.

Detriment

66. When considering whether an employee has been subjected to a 'detriment' Tribunals should take their steer from the judgement of the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337, where it was held that a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'. It was further held in that case that 'an unjustified sense of grievance cannot amount to 'detriment'.

Section 26 Equality Act 2010: harassment related to age

67. Section 26 provides that:

> (1) A person [A] harasses another [B] if--
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of--
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

68. Unwanted conduct is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant (see ECHR Code of Practice on Employment, paragraph 7.8). However, it is not enough that the alleged perpetrator has acted or failed to act in the way complained of. There must be something in the conduct of the perpetrator that is related to the protected characteristic, here, age. The unwanted conduct must be related to the protected characteristic. This is wider than the phrase 'because of' used elsewhere in the legislation and requires a broader inquiry. There must be a relationship between the conduct complained of and the protected characteristic.

69. The necessary relationship is not established simply by the fact that the Claimant is of a particular age or age group and that the conduct has the proscribed effect. The intention of those engaged in the unwanted conduct is not a determinative factor although it may be part of the overall objective assessment which a tribunal must undertake.

70. If unwanted conduct is related to the relevant protected characteristic, section 26[4] then requires the Tribunal to take into account a number of things when deciding whether that conduct has the effect referred to in section 26[1][b]. Those things are: the perception of the complainant, the other circumstances and whether it is reasonable for the conduct to be judged to have had that effect. When considering whether it is reasonable for A's conduct to have the proscribed effect, tribunals should heed the observation of Elias LJ in **Grant v HM Land Registry** [2011] IRLR 848, CA [para 47] that the words 'intimidating, hostile, degrading, humiliating or offensive environment' should not be cheapened as they are an important control to prevent trivial acts causing upset being caught by the concept of harassment.

71. Finally, it can be helpful to consider cases involving harassment allegations by looking at the separate components of section 26, referring to the complainant as 'B' and the alleged harasser as 'A'; and ask:

    a. If the Tribunal finds that A conducted himself as alleged, was the conduct unwanted conduct?

    b. Did the conduct have the proscribed purpose or effect?

    c. Did the conduct relate to age?

72. It may be helpful to consider points a and b together because the question whether conduct had the proscribed effect may be best looked at when considering whether it was unwanted and vice versa.

Burden of proof

73. Section 136 Equality Act 2010, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that

process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Gampian Health Board** [2012] I.C.R. 1054.

74. In cases where the tribunal is not in a position to make positive findings, s136[2] means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had discriminated against or harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA

Conclusions

75. The complaints can be broken down into two broad categories:

    a. First category: comments allegedly made by Mark Davis which are said to be 'ageist'. They are the complaints identified in paragraph 36 [a], [b] by Judge Aspden. The first was allegedly made on 03 April 2019; the second on 16 September 2019. On each occasion the Claimant maintains she was treated less favourably because of age by being subjected to a detriment [the detriment being the comments themselves] or alternatively that the comments amounted to unwanted conduct related to age the purpose and/or effect of which was to create the proscribed environment in section 26 Equality Act 2010 [i.e. that they were acts of harassment related to age]

    b. Second category: conduct by Carl Sobolewski, Katie Campion, Tania Donnelly, Val Lamb and Mark Davis which amounted to less favourable treatment because of age/unwanted conduct related to age

76. Although not part of her pleaded case nor does it feature anywhere in her witness statement, the Claimant asserted in oral evidence that the things that she complains of were deliberately done in order to engineer her out of the organisation because of her age. The person who engineered this was, she said, Mark Davis. That was the first time this was mentioned. In her witness statement she said that Mr Davis himself was being harassed and 'his comments and actions' were 'primarily instigated by Carl Sobolewski'. In oral evidence she veered between Mr Davis and Mr Sobolewski as being the person who was engineering her departure.

At one point the Claimant said that everything 'stems from' Mr Davis' comments about her retiring. On each occasion when the Claimant was asked whether she had any evidence to support the allegation that her departure was being engineered, she said no more than that she believes that to be the case. She maintained in the course of the hearing that there was a conspiracy against her involving Mr Davis, Mr Sobolewski, Ms Campion and Ms Donnelly. We say right away that we have found no evidence at all to support this assertion and we reject it.

First category: ageist comments by Mr Davis

77. These are the comments referred to in paragraphs 36[a] and [b] of the complaints. We have found that only one comment was made on 03 April 2019 [that is 36[a]] and even then, not as alleged by the Claimant. There was a passing comment by Mr Davis to a particular development being a 'legacy' before the Claimant retired. There was no reference to her retirement being "in three years' time". The remark was not made with any ill-will and was, if anything, delivered as a positive comment. We would add that this phrase was described by the claimant as 'ageist'. That is not a word that appears in the statute and it is best to avoid it because it is loaded and may have different meanings to different people.

78. Having found that he said this, we have asked whether this is a fact [either by itself or considered alongside any other of our findings] from which we could decide, in the absence of an explanation, that it amounted to a contravention of section 39 [direct discrimination as defined by section 13] or section 40 [harassment] as defined by section 26 Equality Act. If so, we must hold that he [and the Respondent] contravened one or other of those provisions.

79. However, there is nothing from which we could conclude that Mr Davis had contravened section 39 of the Equality Act. The Claimant was not subjected to any detriment by the passing, positive reference to a particular project being her legacy before retirement. Mr Davis was not suggesting that she was or might be leaving at any time soon. We considered all the evidence to see if he had treated the Claimant badly or made any other 'ageist' remark to her but we have found none. Indeed, the Claimant had not alleged that he had. Therefore, the reference to retirement was not said in the context or alongside other poor treatment or derogatory remarks. We have rejected the Claimant's evidence that Mr Davis said "in three years' time". We conclude that the mere reference to retirement was not a detriment to the Claimant. Applying the law as we understand it from the House of Lords decision in **Shamoon**, we conclude that no reasonable employee would see it as such and we have found that the Claimant herself did not, in fact, see it as such at the time. She thought it nothing other than an odd or puzzling remark. We are satisfied that the Claimant's sense of grievance in this respect was unjustified. As she was not subjected to any detriment, her complaint of direct discrimination in relation to this comment must fail.

80. As regards harassment, the reference to 'retirement' 'relates to age' in the very broad sense that retirement is associated with older employees. The reference to the project being a legacy was not unwanted but any reference to the word 'retirement' was unwanted. The real question then was whether it had the proscribed purpose or effect. As Mr Davis could not recall referring to retirement, we were unable to make a positive finding on his 'purpose' for mentioning it when referring to the project being the Claimant's 'legacy'. Therefore, we had to consider our findings of fact for the purposes of applying section 136 Equality Act. The facts as we found them (see paragraphs 22-30 above) were that he had simply referred to retirement once in the context of speaking positively about the Claimant. He was also supportive of the Claimant and felt she was doing a good job. From our findings of fact we asked ourselves could we decide, in the absence of any other explanation, that Mr Davis, on this single occasion when he referred to retirement in the context of speaking positively of the Claimant had the purpose of violating her dignity or creating an environment as described in section 26[1][b] [thus contravening section 40[1] Equality Act 2010]. We were satisfied that there were no facts from which we could decide that and therefore the burden did not switch to the Respondent to satisfy us that, in relation to this single comment, his purpose was not to violate the Claimant's dignity or to create such an environment as identified in section 26[1][b]. The mere reference to retirement is not something – when considered against all our other findings – from which we could conclude Mr Davis had contravened a provision of the Equality Act. We were satisfied overall that Mr Davis was not motivated against the Claimant in any way, by reference to age or any other factor.

81. Having rejected any suggestion that retirement was mentioned for the purpose of violating the Claimant's dignity or creating the proscribed environment we then considered whether, nevertheless, it had that effect on the Claimant. The Claimant did not actually perceive the remark to violate her dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for her. At its highest, she thought no more than that it was an odd remark. She never raised it as a complaint when she later pursued her grievance and referred to it only in the context of responding to something said by Mr Blair. Even if she did genuinely perceive it as such, reminding ourselves of the words of Elias LJ in **Grant v HM Land Registry**, we conclude that it was not reasonable to so regard it. It was nothing other than a one-off reference made by Mr Davis in the context of speaking positively of the Claimant. In that context, it is not reasonable to regard the simple reference to a future event such as retirement to violate a person's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Second category: other complaints

82. We now turn to paragraphs 36[c] to [m] of the complaints.

83. As set out above, although not part of her pleaded case, we have found that there was no conspiracy or desire to remove the Claimant from the business, whether

on grounds of age or on any other ground. This conspiracy only arose during the hearing. In the course of the proceedings – and in her final address to the tribunal, the Claimant herself advanced many different explanations for the treatment she perceives she has received: that she had been making waves (so to speak) by being tough on compliance, something she said Christie Edge did not like because it impacted on her sales; that Ms Edge then manipulated matters through her relationship with Carl Sobolewski; that Mr Sobolewski was protecting Christie Edge; that Mr Sobolewski then put pressure on Mr Davis, which, in turn, explained his so-called 'ageist' comments. These explanations only emerged during the course of the hearing. There was no evidential basis for any of them and we conclude they are more imagined than real.

84. The allegations under complaints [c] and [d] were not made out factually at all by the Claimant. No false allegations were made. The Claimant did not establish that the 'process' was not followed or that Mr Sobolewski and Ms Campion did not listen to her or that Mr Sobolewski behaved aggressively (as opposed to whether she perceived him to have so behaved). We did not find the Claimant to have been treated less favourably than Denise Major or any other actual or hypothetical comparator.

85. As for the remaining allegations, whilst factually they were not largely in dispute (leaving aside the nuanced way in which they are put), we have considered them under the provisions of sections 13 and 26 of the Act. There was nothing that was untrue in the notes made by Ms Campion (d) even though there may have been disagreement as to the accuracy of some parts. Mr Davis's reference to his wife was made in the context of supporting the Claimant (e). The Claimant did not establish that Mr Davis had refused her an opportunity to work from home (f). The reference to depression/mental illness appearing on the HR systems (h) was entirely innocent and entirely unrelated to the Claimant's age. The matters which make up complaints (i) to (m) were all explained by Mr Davis and Ms Lamb, whose evidence we accepted.

86. None of the things complained of was, on our findings, in any way whatsoever, motivated by the Claimant's age or by age in any shape or form – that is the case for Mr Davis, Mr Sobolewski, Ms Campion and Ms Lamb. We were entirely satisfied that they were not consciously or unconsciously motivated by age in their dealings with the Claimant. There is no evidence at all that Tania Donnelly's abrupt manner with the Claimant was motivated by age (g). In any event, being spoken to abruptly (with no evidence given to us other than that), in the circumstances and context surrounding the call and having regard to our findings did not constitute a detriment to the Claimant. The Claimant has not established a prima facie case in respect of any of these matters. In any event, as we have said above, we are entirely satisfied, having listened carefully over the course of the week, and having considered the documentation and our notes, that none of our findings in respect of these complaints amounts to age-related unwanted conduct (even applying the widest possible construction to the phrase 'related to'). We were also satisfied that the

Claimant was not subjected to any detriment on grounds of age. None of the things said or done to the Claimant as set out in our findings were done for the purpose of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. To the extent that the Claimant may have perceived that they did – and we are not satisfied that she did in fact perceive this in respect of anything other than the conduct of the appeal meeting – it was not reasonable for the conduct to have the proscribed effect.

87. Therefore, the Claimant's complaints of direct discrimination because of age and of harassment related to age are dismissed.

88. Finally, we remarked at the end of the hearing that it gives this tribunal no pleasure in seeing the distress that Miss Worthing currently feels and that she is in a situation where she has been away from work for some time without pay. That must be a difficult situation for her and, we also recognise, for the Respondent. We appreciate that she will be disappointed with the outcome, but we sincerely hope that she can move on now and regain the strength that she once had in the knowledge that we have given these matters careful scrutiny. She may not see it in herself right now but it is clear that she is someone with a wealth of experience and ability and who was regarded as an asset by her employer. That much was clear to us.

Employment Judge Sweeney

16 July 2021