Case Number: 2204618/2020

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr T Elimlahi		**Metro Bank Plc**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 8-13 July 2021**

BEFORE: Employment Judge A M Snelson **MEMBERS: Dr V Weerasinghe**
Mr P de Chaumont-Rambert

On hearing the Claimant in person and Ms D Masters, counsel, on behalf of the Respondents, the Tribunal determines that the Claimant's complaints of unfair dismissal, direct age discrimination and age-related harassment are not well-founded and the proceedings are accordingly dismissed.

REASONS

Introduction

1 The Respondents describe themselves as a small UK-only challenger bank. They employ about 4,000 people.

2 The Claimant, Mr Tarique Elimlahi, who was born on 6 August 1986 and is now 35 years of age, was continuously employed by the Respondents between 15 September 2010 and 31 May 2020, latterly in the role of Commercial Risk Analyst at an annual salary of just over £36,000. The circumstances in which his employment ended were unusual. Having been dismissed for gross misconduct, he appealed and was notified on 2 April 2020 that the dismissal had been overturned and replaced with a final written warning. The same day, he resigned giving two months' notice.

3 By a claim form presented on 27 July 2020, the Claimant brought complaints of unfair (constructive) dismissal, direct age discrimination and age-related harassment, all of which the Respondents disputed.

4 In a document dated 10 December 2020 Employment Judge Davidson identified the issues to which the claims gave rise. For present purposes, it is sufficient to say that they all rested on alleged deficiencies in the conduct and outcomes of the investigatory, disciplinary and appeal stages of the internal procedure and the alleged failure of the Respondents to address the Claimant's grievance raised in the course of that procedure.

5 The case came before us in the form of a final hearing held remotely by CVP on 8 July this year, with four days allowed. The Claimant appeared in person and the Respondents were represented by Ms D Masters, counsel. A large bundle of documents was produced. Having read into the case for most of day one, we heard evidence from the Respondents' witnesses, Mr Mark Williams, Head of People Partners, Distribution, Ms Chloe White, Retail Delivery Manager (who conducted the initial investigation), Ms Kim Connelly, Regional Operations Manager and Regional Retail Manager (who held the disciplinary hearing) and Mr Steve Broom, Area Director (who heard the appeal). We also read a statement produced by the Claimant in the name of Mr Ronan Heeran, Commercial Risk Manager and the Claimant's line manager at the time of the relevant events. Ms Masters did not wish for the opportunity to cross-examine that witness. We then heard evidence from the Claimant. Closing argument was presented on the afternoon of day three, whereupon we reserved judgment to spare the parties the cost and trouble of attending on day four.

The Legal Framework

Discrimination and harassment

6 The Equality Act 2010 protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics'. These include age.

7 Chapter 2 of the 2010 Act lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(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.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

8 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu-v-Akwiwu* [2014] EWCA Civ 279, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

9 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(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.**
> **…**
>
> **(3) In deciding whether conduct has the effect referred to in sub-section (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.**
>
> **(4) The relevant protected characteristics are –**
> **…**
> **race …**

10 In *R (Equal Opportunities Commission) v Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011), which does not claim to be an authoritative statement of the law (see para 1.13), deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

11 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the Claimant must show that the conduct was unwanted. Some claims will fail on the Tribunal's finding that he or she was a willing participant in the activity complained of. Moreover, it seems to us self-evident and necessarily implicit that any behaviour on which a claim rests must be (a) of a sort to which a reasonable objection can be raised and (b) voluntary, or at the very least such that the Respondent can properly and lawfully bring it to an end.

12 Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

13 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry v Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

14 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL.

15 Employees enjoy parallel protection against harassment by the 2010 Act, s40(1)(a).

16 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

17 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence. But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

18 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. "Conduct extending over a period" is to be treated as done at the end of the period (s123(3)(a)). Now, under the Early Conciliation provisions, the period is further extended by the time taken up by the conciliation process. The 'just and equitable' discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

Unfair dismissal

19 The first prerequisite for an unfair dismissal is a dismissal. The legal effect of a successful internal appeal against dismissal is that the dismissal disappears. Accordingly, the Claimant rightly bases his claim of the alleged constructive dismissal brought about by his resignation. By the Employment Rights Act 1996 ('the 1996 Act'), s95 it is provided that:

> **(1) For the purposes of this Part an employee is dismissed by his employer if …**
>
> **…**
>
> **(c) the employee terminates the contract … (with or without notice) in circumstances in which her is entitled to terminate it without notice by reason of the employer's conduct.**

The provision embodies the common law. A party to an employment contract is entitled to terminate it summarily in circumstances where the other party has breached an essential term.

20 Terms of employment contracts may be express or implied. Essential implied terms include those which require the employer to provide the employee with access to a means of redress in respect of any grievance (see *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516 EAT and *Hamilton v Tandberg Television* UKEAT/2002/65) and to conduct disciplinary processes fairly and without undue delay (*Lim v Royal Wolverhampton Hospitals NHS Trust 2011* EWHC 2178 QBD, at para 93).

21 A course of conduct or series of events may cumulatively amount to a repudiation of an employee's contract of employment entitling him to resign and treat himself as constructively dismissed. In such a case, the 'last straw' need not itself amount to a breach of contract (*Lewis v Motorworld Garages Ltd* [1986] ICR 157 CA). On the other hand, it cannot be an entirely innocuous act or omission: it must add something to the overall breach (*Omilaju v London Borough of Waltham Forest* [2005] ICR 481 CA).

22 If there is a dispute as to whether a claimant was dismissed, the burden is upon him or her to prove dismissal. Subject to that, the outcome depends on the proper application of the 1996 Act, s98. It is convenient to set out the following subsections:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it – …**
>
> **(b) relates to the employee's conduct …**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

23 The first effect of s98 is that, if there was a constructive dismissal, it is incumbent upon the employer to prove a potentially fair reason for it. The 'reason' for a constructive dismissal is the reason for the employer's act or omission which precipitates the resignation. If a potentially fair reason is not shown, the dismissal is necessarily unfair.

24 Subject to a permissible reason being shown, s98 requires the Tribunal to weigh the reasonableness of the employer's action. No burden applies either way. That said, given that a complaint of constructive dismissal does not get off the ground unless it is shown that the employer has committed a repudiatory breach of the employee's contract of employment, it will be a rare case in which such a dismissal is not also found to have been unreasonable and unfair.

25 The ACAS Code of Practice on Disciplinary and Grievances Procedures (2015), to which Employment Tribunals are required to have regard, includes (at para 46) the following guidance on cases where grievances and disciplinary proceedings overlap:

> **Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.**

The Primary Facts

26 The evidence was extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history. The facts essential to our decision, which were very largely undisputed, we find as follows.

27 On 16 January 2020 the Claimant interviewed a young woman then just 18 years of age, to whom we will refer as MK, for a job in a call centre operated by the Respondents. He recommended her for appointment and she was notified soon thereafter that her application had succeeded. At the time he was 33 years of age.

28 On the evening of 23 January 2020 the Claimant contacted MK online and an extended exchange followed over the next 17 hours or so (the last six being working hours for the Claimant), initially on LinkedIn and then on WhatsApp. When the exchange began, the Claimant already knew that she had accepted the job offer and was due to start work for the Respondents a few weeks later.

29 The conversation was led by the Claimant. It rapidly became informal and then intimate. In early course, he called her "babe". He pressed her to tell him about herself. Picking up on her comment several hours earlier about being in the last few weeks of waking up late he asked her if she had gone back to bed. She said that she had. Following the move (at his behest) to WhatsApp, he teased her about spelling his name right and remarked, seemingly in jest, that if she got it wrong he might have to "have a word with HR" (*ie* report that he had made a mistake in recommending her for appointment). A minute later he steered the conversation on to the subject of her pyjamas, wanting to know what kind she was wearing at that moment. Very soon afterwards he attached a photo of himself. Minutes later he was probing her about where she lived. Next he proposed a "deal": "Anything that gets said or happens between us stays between us". She agreed ("Deal"). There was then a nine minute pause, after which the Claimant wrote to say that he had changed his mind about the "deal". She responded with a concerned face emoji. He asked if she was easily upset or offended; she replied, "Nope. I get scared." Then he wanted to know if she was still in bed and the

conversation, steered by him, moved on to what she wore to sleep in. He then prompted her to send him a photo. A minute or two later she commented, "I'm [Metro] now". His immediate reply was, "Lol not yet. You belong nowhere right now." Next, he proposed a game of dare, the questioner being free to ask whatever he or she liked. She agreed but said that since he was the "interviewer" he must go first. He asked her what she did not like about herself, physically and in terms of personality. She complained about her nose and said that she had insecurities. He volunteered that he was divorced, then switched to the subject of age, stating that he was 33 and wanting to know how old she was. She told him. There was then some discussion about "young girls" and "older guys". He said, "Sometimes it's hot if a girl calls you daddy. It's not hot when you do it" (she never had). She wondered why. He replied, "Actually hold up… It'll settle this… Excuse the personal question but … what's … your underwear size?" Having got the requested information, he commented, "It can be hot" and went on to volunteer his tastes in underwear brands. Soon afterwards he returned to the subject of the breakdown of his marriage, stating that his divorce would be final soon. She commiserated and asked if he wanted a cuddle. She then started to describe a relationship in which she had been involved. He ignored that subject and replied it once, "Tell you what, instead of a cuddle … Get me a divorce present." She replied, "Okay, anything for Tarique." Minutes later, he asked her to tell him "something private… That you wouldn't normally tell anyone". She asked what contexts he had in mind, to which he replied, "We can talk about anything we like. We're both adults here right?" He then volunteered a story of a sexual encounter he claimed to have had in a toilet at the Respondents' premises. She reciprocated with some details of sexual acts involving her. He then turned the conversation to the subject of nude photographs stating that he would not request such but adding, "if you're gonna show me something, show me cos you want to not because I'm asking" and, "It's hotter that way". Moments later, without warning, he returned to the subject of MK's interview, made certain unparticularised criticisms of her performance and went on, "So I'll [be] honest. I gave you the benefit of the doubt …" , adding, "I think I made the right call. Don't let me regret it …" After one or two further inconsequential exchanges MK asked the Claimant whether he lived alone to which he replied that he was living at his mother's house, his matrimonial home having been sold in the divorce. She ended the conversation shortly thereafter, saying that she had enjoyed chatting with him but had to go as she was busy.

30 On 24 January 2020 MK telephoned the Respondents and spoke with a member of staff. She referred to the exchanges on LinkedIn and WhatsApp between the Claimant and her and said that they had left her feeling very uncomfortable and that she was minded to withdraw her job application. She thought that she might find herself trapped and that the Claimant might be in a position to manipulate her.

31 Ms White (already mentioned) was asked by Ms Helen Maslin, Director of Retail, Business & Commercial Risk, to conduct an investigation, which the Respondents call a 'fact find'.

32 Ms White interviewed the Claimant on 30 January 2020. Also present was Mr Danny Holland, People Manager, who took a note. She did not give him

advance notice of the subject-matter of the interview. A fair and accurate record of the interview was included in the bundle before me.

33 Ms White explored with the Claimant those messages which MK had supplied in support of her complaint. She pressed him to explain his actions and questioned his motivation. She referred to the age difference between the two and drew attention to the obvious power imbalance between them. She asked him on a number of occasions if he thought that his conduct had been appropriate. She asked for his thoughts on possible implications for the reputation of the Respondents. Following a break, Ms White became more direct and trenchant in her observations. She told the Claimant in terms that his behaviour had been inappropriate and amounted to an abuse of his power. She stated that the formal procedure would be taken forward to a disciplinary hearing. She denied his accusation that she had pre-judged the case. Throughout, the Claimant maintained that he had done nothing wrong and that he had simply engaged in a personal exchange which, he accepted, had been "stupid and silly" between two adults. He also stressed the point (not in dispute before me) that the record of the conversation which MK had shared with the Respondents was incomplete, and contended that the messages which she had omitted painted the conversation in a very different light.

34 In her conduct of the interview, Ms White did not strictly adhere to the Respondents' guidance document on the fact-finding meetings. In fact she did not read that document at all before holding the interview. She did, however, begin by introducing Mr Holland, stating that the question for discussion was sensitive, urging the Claimant to be honest, assuring him that he could take his time in answering questions and advising him that the notes would be shared with him afterwards. Asked if he was content with these arrangements, he said that he was. In the course of the interview, he was given a full opportunity to respond to all questions put to him.

35 On 31 January 2020, by agreement, the Claimant forwarded to Ms White copies of the messages which MK had omitted or deleted. These included some salacious messages of hers touched on in the summary above.

36 The Claimant was aggrieved by Ms White's conduct of the investigation and sent an email to Ms Maslin complaining of age discrimination in the fact-finding exercise.

37 In the meantime, the Claimant raised numerous challenges to Mr Holland's note of the investigatory meeting. This was not a helpful exercise given that (a) the key evidence consisted of the original messages, the content of which was not, and could not be, in dispute and (b) the proposed amendments did not identify or suggest any fundamental error or flaw in Mr Holland's note and were largely aimed at bolstering the Claimant's defence rather than correcting the record of what had been said on 30 January 2020. In any event, we are satisfied that Mr Holland's note, which did not claim to be a verbatim record, was a fair summary of was said.

38 On 10 February 2020 the Claimant was invited by Ms Connolly (already mentioned) to attend a disciplinary meeting on 13 February to discuss allegations that he had inappropriately contacted a candidate, made comments of a sexual nature, provided feedback relating to the interview and scoring process and told the candidate not to let him regret passing her at interview. These acts, it was explained, had caused the candidate to feel very uncomfortable and vulnerable, could be deemed an abuse of his position and authority and could bring the Respondents into disrepute. The Claimant was advised that he was entitled to be accompanied by a colleague or trade union official. It was pointed out that owing to the serious nature of the allegations, the hearing could result in summary dismissal. Attached to the letter were notes from the meeting of 30 January 2020, screenshots of the messages disclosed by MK and a summary of MK's complaint prepared on behalf of the Respondents on the basis of the telephone conversation of 24 January 2020. The letter also referred to the further messages disclosed by the Claimant on 31 January, stating that they would be reviewed at the hearing.

39 On 11 February 2020 MK withdrew her application for the call centre job.

40 At the Claimant's request, the disciplinary hearing was postponed to 18 February 2020.

41 Ms Connolly chaired the hearing and was supported by Mr Williams (already mentioned), who took a note. The Claimant was present, supported by Mr Heeran (already mentioned). The hearing lasted over three hours (including breaks). Ms Connolly took the Claimant carefully through the screenshots of his conversation with MK and gave him every opportunity to explain his behaviour and defend himself. His line was similar to that taken at the investigation stage. He maintained that he had done nothing wrong and had simply engaged in a private conversation by private means with another adult. But he went further, painting himself as the victim of a malicious complaint by MK. He argued that she had been the principal instigator of flirtatious and overtly sexual exchanges. He relied particularly on the deleted messages as vindicating his case that her complaint was raised in bad faith. Ms Connolly asked probing questions in the course of the hearing. She tested the Claimant's assertion that his age and that of MK were immaterial and gave him the opportunity to respond to a number of suggestions as to why that view might be mistaken. She was at times visibly frustrated, and perhaps irritated, by his complete refusal to accept any culpability or acknowledge that any third person might reasonably form an adverse view about his behaviour.

42 Ms Connolly reserved her decision.

43 Following the disciplinary meeting there was again a disagreement about the notes. Again, we are satisfied that the note taken on behalf of the Respondents was substantially fair and accurate. Again, the Claimant sought to use the process of seeking to agree a note as an opportunity to improve upon and expand his arguments rather than to correct errors in the record. Again, nothing turns in any event on precisely what was said at the hearing.

44 On 25 February 2020 the Claimant made a lengthy written complaint alleging age discrimination in the fact-finding and disciplinary stages and raising numerous procedural complaints, particularly concerning the fact-find process.

45 On 27 February 2020 Mr Williams advised the Claimant that the matters which he had raised were not apt for separate consideration under the Respondents' grievance procedure and would be dealt with by Ms Connolly in her reserved decision.

46 On 3 March 2020 the Claimant received Ms Connolly's reserved decision (of even date). Her letter is comprehensive and should be read in full, but I will identify here what seem to me to be its key findings and conclusions. (1) The Claimant's approach to MK had been motivated by physical attraction and his denial of that motivation was untrue. (2) His references to "having a word with HR" were inappropriate and could be construed as suggesting that he had "power over [her] future employment." (3) The flirtatious and/or sexual conversation with MK was "initiated and predominantly led" by the Claimant and was a "grossly inappropriate" conversation to be having with an individual whom he had met only once, in a job interview setting. (4) Age was a relevant factor since it bore upon MK's maturity (or lack of it) and potential vulnerability. The Claimant himself had been alive to the significance of age, referring to repeatedly in the conversation with MK. (5) Although age was significant, the Claimant's conduct had been such that, regardless of his age, dismissal was merited. (6) Although it was noted that the Claimant's explanation that his (apparently unambiguous) reference in one of the WhatsApp messages to his involvement in a sexual act in a toilet at the Respondents' premises had been misconstrued and that the event had taken place elsewhere (as to which Ms Connolly made no finding), the story reflected poorly on the Respondents and was liable to be damaging to their reputation. (7) Offering feedback to MK on her performance at interview was doubly inappropriate: first because feedback was the responsibility of those who conducted the recruitment, and secondly because the Claimant's remarks could reasonably result in MK feeling indebted to him. (8) The consequence of the Claimant's behaviour was that MK had made a complaint and withdrawn her application. These circumstances had exposed the Respondents to the risk of a legal claim and reputational damage. (9) The Claimant's "lack of understanding" of why his behaviour was judged inappropriate and lack of any remorse led to the conclusion the trust between him and the Respondents had broken down and that retaining him in their employment would expose them and their business to risk in the future. In the circumstances, despite his long and unblemished service, dismissal was the only "viable option". (10) There was no substance to the Claimant's subsidiary points (on such matters as the conduct of the fact-find, the classification of MK as a candidate rather than a colleague, and the significance of MK's use of emojis in the conversation). (11) Attention was drawn to the Claimant's right to appeal.

47 The Claimant exercised his right of appeal.

48 The appeal was heard on 18 March 2020 by Mr Steve Broom (already mentioned).

49 On 1 April 2020 the Claimant was informed orally that his appeal had succeeded to the extent that Ms Connolly's decision to dismiss had been overturned and replaced by a final written warning to remain in force for 12 months.

50 The same day, the Claimant resigned on two months' notice.

51 By a letter dated 2 April 2020 Mr Broom notified the Claimant of the reasons for his decision. In essence, he found that there were certain mitigating factors in the Claimant's conduct, that MK had herself behaved in a manner worthy of criticism and that a final written warning met the justice of the case having regard to all the circumstances including the Claimant's long and unblemished service with the Respondents. Despite this outcome, Mr Broom was clear that the Claimant had behaved inappropriately and explicitly rejected his contention that age was not a material consideration in the case.

52 By an email of 14 April 2020 the Claimant wrote to the Respondents to explain his reason for resigning. His message included the following:

> **Although I disagree with the outcome of a final written warning (which can't be appealed), this is not the reason for my resignation and I hope it has not been assumed that I have resigned as a result of this.**
>
> **…**
>
> **I feel that I have been discriminated against … It is as a result of Metro Bank's conduct and lack of accountability that I have been forced to resign against my will as I felt I had no other choice but to resign on the same day that I was reinstated after being unfairly dismissed.**

53 The Claimant's contract of employment refers to the Respondents' disciplinary and grievance procedures and expressly states that both are non-contractual.

54 The Claimant placed great emphasis on what he saw as flaws or errors in the procedural handling of the disciplinary case against him, particularly at the fact-finding stage. He drew attention o a document on the Respondents' intranet headed "Lead and complete a fact find". This is a non-contractual document intended as guidance to managers charged with conducting investigations. Under "Top tips" it warns against the fact-finder at the investigatory meeting issuing a "disciplinary outcome" or stating what further action he or she envisages recommending. Under "The meeting" it advocates the use of open questions. Another document on the intranet is entitled "Fact Find meeting checklist". This too is designed as guidance for fact-finders and is non-contractual. It includes these suggestions:

> **Opening up the meeting**
>
> - **Explain to the colleague that this is a Fact Finding meeting and make sure they know the allegation**

- **Let the colleague know that you understand that these types of meetings can be very difficult so they should take their time, make sure they tell us everything they feel is relevant and ask any questions**
- **Let them know this is not a disciplinary meeting but we may proceed to a formal disciplinary process/meeting once you have completed your Fact Find**
- **Be clear that both you and they can ask for a short break at any point**
- **Tell them that you will be documenting the meeting and they will be sent a copy of the note afterwards (introduce the note taker)**
- **Explain to the colleague that you may need to talk to other colleagues, or gather other information as part of the Fact Find**
- **Don't forget to ask the colleague if they have any questions before you start**

During the meeting

- **Listen hard to what's being said by the colleague so you don't miss any important information, remain open-minded and don't lead the colleague with assumptive questions**
- **Check whether the colleague knew the implications behind their actions …**
- **Check that the colleague has had all of the right training or support in relation to the allegations**

Top Tip: Use closed questions to clarify important points …

- **Summarise what the colleague has told you …**

55 We were referred to the Respondents' disciplinary procedure. It is an unremarkable document. In the usual way, it includes a non-exhaustive list of categories of behaviour which may be classed as gross misconduct. Among these are:

- **Behaviour that could in any way negatively impact Metro Bank's reputation and/or adversely affect our business (such as on social media), or conduct that could otherwise be damaging to Metro Bank, our customers or our colleagues**
- **… using rude or abusive language; using intimidating, bullying or discriminatory behaviour …**

56 The Respondents' grievance procedure explains the right of employees to raise grievances and the manner in which they will be investigated and determined. Under "Occasions when we may refuse to hear a grievance" the first listed example is:

- **Where you want to complain about a disciplinary sanction (including an actual or threatened dismissal). Any complaint about this should be raised as part of the disciplinary procedure**

57 We were also referred to the Respondents' (non-contractual) Diversity and Inclusion Policy. This too is an unremarkable document. It prohibits its staff from committing acts of discrimination or harassment and seeks to promote diversity and inclusion.

Secondary Findings and Conclusions

Direct age discrimination

58 The principal target of the Claimant's complaints of direct age discrimination was Ms White. We attempted, apparently in vain, to convey to him that Ms White had had a limited function, namely to determine the facts and reach a view as to whether they warranted formal disciplinary action. In other words, her task was to decide whether there was a case to answer. The key facts were not, and could not be, in dispute. The LinkedIn and WhatsApp messages spoke for themselves. And given their content, it was plain and obvious that there was a case to answer. Any decision to the contrary would have been manifestly perverse. In the circumstances, our main interest, as in any case involving a dismissal on conduct grounds, was on the decision-making at the disciplinary and appeal stages. We regret the disproportionate attention given to Ms White's evidence.

59 The first question posed by the claims relating to Ms White's conduct of the fact-finding meeting on 30 January 2020 is whether an arguable detriment is shown. Most of the Claimant's points here have no substance. It was manifestly not a detriment to raise the question of age. On any sensible view the obvious power imbalance between the Claimant and MK was a relevant area for enquiry and the age difference between the two was, equally obviously, one notable aspect of that imbalance. If the Claimant is truly aggrieved about Ms White raising the question of age his sense of grievance is unjustified.

60 The peculiar complaint about Ms White rejecting the Claimant's allegation that she had pre-judged the case again, and again obviously, discloses no detriment.

61 The same goes for the complaint about Ms White's response to the Claimant's point about MK having deleted messages from the evidence disclosed to the Respondents. She simply said that the deleted material should be forwarded and would be considered but that the evidence before her by itself justified proceeding to formal action. There was no detriment in that reply: on the contrary, she was plainly right.

62 The complaints about Ms White failing to follow the Respondents' guidance on the conduct of fact-finds are for the most part equally groundless. The guidance was not contractual. Moreover, an actionable detriment is not established merely by pointing to technical non-compliance with a non-binding guidance document. The question for me is whether the Claimant has shown treatment which can reasonably be seen to have put him at a disadvantage. It is true that he was not confronted at the start of the meeting on 30 January 2020 with a list of "allegations" against him. That would not have been possible since no allegations had yet been formed. He was, however, made aware at the outset that the meeting was about his communications on social media with MK. He was not asked at the outset if he had any questions but (as already noted) Ms White did explain that her purpose was to explore a sensitive matter with him and that a note of the meeting would be taken and shared with him. He expressed no disagreement with the arrangements

proposed. The guidance document did not discourage the use of leading questions. In places the use of open questions was encouraged but the document also envisaged that the investigator might need to test or probe responses. There is no evidence of Ms White "missing important information". In our judgment the Claimant fails to establish any detrimental treatment in any of these complaints.

63 On a strict reading of the list of issues, the above analysis would entirely dispose of the complaints of direct discrimination aimed at Ms White. It seems to us, however, that the evidence exposed one matter about which legitimate complaint could be made and that, given the reference in the list of issues to her alleged failure to be "open-minded", there is room for a finding of detrimental treatment in exceeding her brief and purporting to constitute herself a decision-maker on the Claimant's guilt or innocence. We are satisfied that in this respect she overstepped the mark. It is no part of an investigator's function to decide whether misconduct has occurred: that is the province of the disciplinary and appeal officers. When an investigator wanders outside her jurisdiction, there is a risk of at least a perception of unfairness on the part of the person under investigation. We are prepared to accept that the Claimant formed that perception in this case and we cannot say that it was unjustified. Accordingly, we proceed on the footing that, in this one respect, an arguable detriment is made out.

64 The next question is whether the arguably detrimental treatment was 'because of' age (the Claimant's, MK's or both). We are entirely satisfied that it was not. There is no evidence to suggest that Ms White would or might have avoided the error which she made if she had been dealing with a case involving protagonists of different ages from those of the Claimant and MK. She made that error because she overlooked the limits of her role as investigator and there is simply nothing to suggest to us that considerations of age caused or contributed materially to it.

65 Next, the Claimant complains of the Respondents' refusal to hear his grievance presented on 25 February 2020. There is nothing in this. No detriment is shown. The grievance was directed to a matter at the very heart of the disciplinary case and it made eminent sense for its subject-matter to be considered at the disciplinary hearing. That course is envisaged in the ACAS Code of Practice and in the Respondents' (non-contractual) grievance procedure. To have done otherwise in this case would have bordered on the perverse.

66 Nor, in any event, is there any remotely arguable basis for supposing that age was a factor in the Respondents' decision to proceed as they did.

67 The separate complaint that the Claimant was not notified that Ms Connolly would address his complaints of age discrimination as part of the disciplinary hearing fails on the facts. He was so informed.

68 Next, the Claimant complains of age discrimination in the conduct and outcome of the disciplinary hearing. In our judgment, there is no substance in this. Ms Connolly heard the case at considerable length and gave the Claimant every opportunity to put forward his defence and to respond to the points which she

raised. For reasons already given, it was entirely permissible and proper to raise questions of age, relative maturity and related considerations at the hearing. It was understandable that she should experience, and not entirely disguise, feelings of frustration and perhaps irritation at the Claimant's inability, or apparent inability, to appreciate the implications of his own behaviour and to accept any degree of culpability on his part. She did not treat him in an angry or aggressive way. There was no detriment in her conduct of the hearing.

69 As to the outcome, Ms Connolly analysed the evidence with scrupulous care and delivered an impressive, fully reasoned decision. The result was conveyed in terms about which no sensible complaint could be raised. If the Claimant was aggrieved by what she had to say, his sense of grievance was entirely unjustified.

70 As to the substance of the decision to dismiss, it was, in our judgment, eminently open to Ms Connolly to conclude that the Claimant had committed an act of gross misconduct and that, given his wholesale repudiation of the charges against him and the absence of any acknowledgement of wrongdoing or expression of remorse, the only proper penalty was dismissal, despite his long service and unblemished work record. She was obviously right, and on any view entitled, to reject his defence, which (a) ignored the power imbalance between him and MK and (b) relying particularly on the material which MK had not disclosed, cast her as the primary manipulator and the author of a malicious complaint. Her finding, despite the undisclosed material, that he had controlled and led the conversation was unimpeachable. Although we are mindful that Mr Broom on appeal saw the matter otherwise, we have to say with all respect to him that we find it very difficult to see how Ms Connolly could reasonably have decided the case differently.

71 In the ordinary case, the next stage of analysis would be to ask whether the dismissal was nonetheless an act of direct age discrimination in that age materially contributed to it. The difficulty here is that, by the time of the presentation of the claim form, the 'dismissal' effected by Ms Connolly had disappeared owing to the decision of Mr Broom on appeal to reinstate the Claimant. In the circumstances, the only possible dismissal on which to base a claim for discrimination under the 2010 Act, s39(2)(c) would be the alleged constructive dismissal brought about by the Claimant's resignation communicated on 2 April 2020. But, as we explain below, I have found that there was no constructive dismissal.

72 The necessary conclusion, in our judgment, is that the complaint based on Ms Connolly's decision-making can only stand as a complaint of detrimental treatment.[1] But this does not avail the Claimant because we are entirely satisfied that, although he appears to be sincerely aggrieved by Ms Connolly's disposal of the case, he has no justifiable ground for that sentiment.

73 It follows that the claim based on the original dismissal by Ms Connolly fails without more. But in case any part of our reasoning so far is mistaken, we move to

[1] Dismissal may constitute a 'detriment': that is implicit in the 2010 Act, s39(2)(c) and (d), which refer to "dismissal" and "any *other* detriment." Compare, in the 'whistle-blowing' context, *Timis and Sage v Osipov* [2018] EWCA Cic 2321 CA.

the next question: Was Ms Connolly's decision to dismiss the Claimant 'because of' age, in the sense that age played a material part in it? In our judgment, the answer to that question must be yes. The relative ages of the Claimant and MK, and the age differential between them, were factors in Ms Connolly's finding of wrongdoing on the Claimant's part and her assessment of how serious that wrongdoing was. It follows that, if we are wrong in finding no actionable detriment in the original dismissal, direct discrimination is made out unless the Respondents can show that their treatment of him was a proportionate means of achieving a legitimate aim.

74 Here we are satisfied to a very high standard that, if and in so far as any question of justification arises, the Respondents have discharged the burden upon them. We accept that their legitimate aim was the prevention of sexual harassment and that, for all the reasons already given, Ms Connolly's decision was a proportionate means of achieving that aim. Indeed, the stance taken by the Claimant in the disciplinary proceedings left no other reasonable means open to her.

75 Finally, despite what he wrote in the days following Mr Broom's decision to reinstate him, the Claimant complains of direct age discrimination in that decision. This complaint is utterly hopeless. On any view, Mr Broom arrived at a remarkably merciful, not to say indulgent, decision in the Claimant's favour. Plainly and obviously, imposing a final written warning involved no detriment because any sense of grievance here is wholly unwarranted.

Age-related harassment

76 The age-related harassment complaints are entirely groundless. They are based on comments and questions from Ms White and Ms Connolly at the fact-find and disciplinary hearings directed to the subject of the relative ages of the Claimant and MK and the age differential between them. In our judgment, those questions and comments were entirely reasonable and no sensible complaint can be made about them. They were not motivated by a purpose capable of meeting the demanding language of the 2010 Act, s26 and we agree with Ms Masters that the language used did not come within a country mile of establishing an effect capable of satisfying the section. The fact that an employee finds discomfort in being asked awkward and unwelcome questions about his behaviour is not a ground for complaining of harassment.

Unfair dismissal

77 The first question under this heading is: Was the Claimant dismissed? As already pointed out, the dismissal effected by Ms Connolly's decision was reversed and he was reinstated in his role. In those circumstances, the subsequent complaint to the Tribunal was, necessarily, based on his resignation. The Claimant complains that the Respondents repudiated his contract by the (as he sees it) succession of flaws and errors in the procedural conduct of the case. We have found nothing of any substance in his points save for Ms White's error in

overreaching herself and purporting to pronounce on the ultimate question of whether and if so how the Claimant had mis-conducted himself.

78 The Claimant's case on constructive dismissal appears to be based on the alleged breach by the Respondents of the implied duty to preserve mutual trust and confidence and/or the implied obligations to ensure that employees are afforded a reasonable means of access to redress for grievances and reasonable treatment if subjected to disciplinary action.

79 Does the Claimant establish a repudiation of his contract of employment? In our judgment he comes nowhere near to doing so. There was an imperfection at the fact-finding stage, to which we have referred. But that blemish did not come close to blighting the entire disciplinary process. As we have already explained, in our judgment Ms White reached the only sensible conclusion open to her, namely that formal disciplinary action was required given the Claimant's (undisputed) behaviour. Thereafter, there was a full, careful and fairly-conducted disciplinary hearing and an appeal which resulted in a remarkably generous outcome for the Claimant. In the disciplinary proceedings the concerns which he had raised in his grievance were addressed and fully considered. He was not denied a fair disciplinary process. He was not denied access to a means of redress for his grievance. There is not the first beginnings of a breach of his contract of employment, let alone a breach so substantial as to amount to a repudiation of it. Accordingly, the complaint of constructive dismissal falls at the first hurdle.

80 Even if we had somehow been persuaded that there was any room for a finding of a material breach of the Claimant's contract of employment, we would have held that there was no dismissal. The case was (necessarily) put on the basis of a 'last straw' dismissal. As the *Omilaju case* (cited above) makes clear, the 'last straw', although it need not entail in itself a breach of contract, must amount to something about which a legitimate complaint can be raised. In this case that essential requirement is notably missing. For the reasons already given, we are satisfied that it is simply impossible for the Claimant sensibly to complain about the outcome served up by Mr Broom.

81 For these reasons, no dismissal is established and the complaint of unfair dismissal inevitably fails.

82 For completeness we should add that, had we found that the Claimant was dismissed and that his dismissal was procedurally unfair, we would have gone on to find that the reason for it was his conduct and that, for the reasons given by Ms Connolly, it was in its substance the fair consequence of very serious misconduct by him. Accordingly, any compensation would have been reduced to nil or to a nugatory award.

Jurisdiction - time

83 In so far as the Claimant's claims rest on the actions of Ms White and Ms Connolly they were presented out of time. They cannot be seen with Mr Broom's decision on appeal as part of 'conduct extending over a period'. There were three

different actors performing three different functions at three different stages. Moreover, they delivered markedly different outcomes. We decline to consider extending the time limit so as to bring the out-of-time matters within the Tribunal's jurisdiction. Given that we have found no merit in those matters, it would be an idle exercise to do so.

Outcome and Postscript

84 For the reasons given, we are satisfied that the Respondents did not infringe the Claimant's legal rights in any respect. Accordingly, his claims fail and the proceedings are dismissed.

Employment Judge Snelson

28/09/2021

Judgment entered in the Register and copies sent to the parties on : 28/09/2021

For Office of the Tribunals