EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
Miss M Cobbing	**(1) V & P Global Ltd** **(2) Mr Frank Varela**

Heard at: London Central

On: 19 – 23 and 26 July 2021
In chambers: 27 – 28 July 2021

Before: Employment Judge Lewis
Ms J Cameron
Mr I McLaughlin

Representation

For the Claimant: Mr E Hammer, solicitor

For the Respondents: Mr M Greaves, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that:

1. The 1st and 2nd respondents subjected the claimant to harassment related to race contrary to s26 of the Equality Act 2010 by the 1st respondent stating to one employee about the skin colour of a non-white partner on a law firm's website, 'Do you think she just has a really good suntan?' and then asking a further employee for her opinion.

2. The tribunal will arrange a date to decide compensation for this matter.

3. The claimant is awarded two weeks' pay as compensation for the 1st respondent's failure to provide particulars of employment under s1 of the Employment Rights Act 1996.

4. The claim for race-related harassment in an alleged comment that in Singapore they put slaves in cupboards is not upheld.

5. The claims for sex-related harassment by alleged use of the phrase ‘sassy minx’ is not upheld.

6. The claim for disability-related harassment in the use of the phrase ‘on the spectrum’ is not upheld.

7. The claim that the 2nd respondent shouting in the claimant’s face on 11 July 2019 is sex-related harassment is not upheld.

8. The claimant was not constructively dismissed.

9. The claim for victimisation by sending emails on 12 and 15 August 2019 and writing to the claimant on 13 August 2019 is dismissed for want of jurisdiction.

SUMMARY

The claimant worked for a few months as general administrative support with a small HR element for a small company which recruits senior lawyers, partners and teams for international law firms. She brought claims for sex, race and disability-related harassment in respect of remarks made by the company’s CEO (the 2nd respondent) in her hearing in a small open office, but not addressed to her. She also claimed constructive dismissal as harassment under the Equality Act 2010, claiming she resigned because of this harassment and particularly because the 2nd respondent became aggressive and shouted at her after she challenged him over a sexist remark. The tribunal found one instance of race-related harassment. Apart from that, the tribunal either found that the alleged remarks were not made or that they did not constitute unlawful harassment. The tribunal also found the claimant was not constructively dismissed. To the extent that she resigned over behaviour by the 2nd respondent , it was not a fundamental breach of trust and confidence (even if not desirable), nor did it relate in any way to the alleged or upheld harassment.

REASONS

Claims and issues

1. The claims were for harassment under the Equality Act 2010 in relation to a number of remarks, and for constructive dismissal. There were also claims for notice pay, breach of section 1 of the Employment Rights Act 1996 and victimisation.

2. All the claims were made against the 1st respondent. The only claims against the 2nd respondent as an individual were harassment in relation to the remarks.

3. The issues were agreed as follows:

Jurisdiction (S123, EA 2010)

3.1 In respect of any acts which occurred prior to 6 June 2019 (and which would otherwise be out of time)?

a. Are they part of a course of conduct which concluded after 6 June 2019?

b. If not a course of conduct, would it be just and equitable to extend time in respect of them?

Harassment (S26, EA 2010) (1st and 2nd respondents)

3.2 Did the following conduct occur:

a. The 2nd respondent used the phrase "sassy minx" in May 2019 to refer to a woman whom the 1st respondent had placed in a Real Estate role?

b. The 2nd respondent used the phrase "sassy minxes", throughout the claimant's employment and a few times per week about particular female candidates?

c. On or around 4 July 2019, the 2nd respondent stated about the skin colour of a non-white partner (likely of Asian descent) on the website of a law firm, "you can't tell me that's just a good tan" or very similar words; and then asked another colleague whether that partner was of a different race or whether she "just had a good sun tan"?

d. On or around 4 July 2019, the 2nd respondent said that in Singapore they put "slaves in cupboards"?

e. On 10-15 occasions on unspecified dates throughout the claimant's employment, did the 2nd respondent say that candidates were "on the spectrum"?

f. On 11 July 2019, did the 2nd respondent shout in the claimant's face, shouting that she had "*put in the wrong dates*" (or words to that effect)?

3.3 If such conduct did occur, was it related to sex? If such conduct did occur, was it related to sex (allegations (a), (b) and (f)) / race (allegations (c) and (d)) / disability (allegation (e))?

3.4 If so, did the conduct have the purpose or effect did the conduct have the purpose or effect (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) of violating the claimant's dignity, or

creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Constructive Dismissal (s26 EA 2010)

3.5 Did the claimant resign because of an act or omission (or a series of acts and omissions) by the 1st respondent?

3.6 If so, did that conduct by the 1st respondent amount to a fundamental breach of contract?

3.7 Did the claimant affirm the breach?

3.8 Did the claimant resign, at least in part, in response to that breach?

If so, was the constructive dismissal an act of harassment?

3.9 If the claimant was constructively dismissed, was the act of constructive dismissal related to sex and/or race and/or disability?

Written statement of employment particulars (s1 ERA and s28, Employment Act 2002)

3.10 If the claimant is successful in any of her claims, did the 1st respondent breach its duty to provide written particulars of the claimant's employment under s1, ERA 1996?

Procedure

4. The tribunal heard from the claimant and Ms Stevens, who she called by witness order. For the respondents, the tribunal heard from Frank Varela, Sophie Partner, Tracy Burrows, Natalie Locherer, Caitlin McCreight, Anais Plisson, Emma Lopez and Nikki Evans

5. There were a number of electronic bundles, ie the main trial bundle (615 pages); a late documents bundle (45 pages); a bundle of without prejudice correspondence; an unredacted SH bundle; a bundle of documents concerning the claimant's application for additions to the trial bundle; a bundle containing the respondents' witness statements; and the claimant's witness statement. Some additional late documents were also added: an unredacted copy of page 15 of the Late bundle; an article regarding Glass Door; dictionary definitions of 'Dad Joke'; and a WhatsApp exchange between Ms Stevens and Ms Heschuck.

6. The tribunal was asked to decide several applications before the case could begin.

Redaction

7. The respondents applied to anonymise the name and firm of a particular female partner whom the claimant alleges had been called a 'sassy minx'. This application had already been made and rejected by EJ Khan. The respondents argued that the circumstances had changed because they had now seen the claimant's witness statement, which added additional allegations that the 2nd respondent had looked at a photograph of this partner in a lace blouse and was titillated by it. The claimant pointed out that the photograph, albeit in smaller form, had been before EJ Khan.

8. We rejected the application. We do not think this is a material change in circumstances. It is simply an additional detail.

9. The respondents said they would not apply for a restricted reporting order as no one from the press was in the room. When it was suggested that a member might come in during the week, the respondents extended their application. However, we rejected it for the same reason. It is essentially the same application and indeed more restrictive.

10. In any event, no representations were made to us as to why the individual's article 8 rights would be infringed or why the open justice principle should be departed from.

Whether to allow certain documents into the trial bundle

11. The claimant wished to add a Glass Door review written by an anonymous reviewer on 29 May 2020. The respondents objected that it was disclosed very late, after exchange of witness statements; that it was anonymous; and that it was prejudicial. Mr Hammer said he had found that document at a late stage on a speculative search. He had got the idea of doing such a search from a Glass Door review coming up in another case he was handling.

12. The other document, also disclosed late, was a print out of various definitions of the phrase 'sassy minx', which Mr Hammer had found on a google search. The phrase, as opposed to individual words, had not appeared in the OED. The respondents objected that no particular definition was required, much less one from an Urban Dictionary or from American dictionaries. They said the tribunal could take judicial notice of its own understanding of the phrase, but in any event, what counted was what the parties had meant and understood by it when communicating.

13. The tribunal decided to allow both documents into the trial bundle. They are unremarkable documents of the kind that are often put into trial bundles. It is also common to have late documents and we were not told of any particular prejudice caused by that. We will consider the documents' relevance when we have heard the evidence, and give them the appropriate weight.

Whether to allow a witness who had been ordered to attend to give evidence without submitting a witness statement

14. The claimant had called for Ms Stevens to attend by a witness order. However, she had been unable to get in touch with Ms Stevens recently or persuade her to provide a witness statement.

15. The respondents argued that EJ Khan's order of 5 August 2020 said that oral evidence in chief would be given by reference to witness statements and no additional witness evidence would be allowed at the final hearing without the tribunal's permission. They said that the witness order for Ms Stevens must be read subject to that. The witness order in fact simply states that she is ordered to 'attend to give evidence … on 21 July 2021 and any adjourned hearing'.

16. Mr Greaves said the respondents would be prejudiced if Ms Stevens was allowed to give evidence without a prior witness statement. They would be ambushed by her evidence. It might affect their cross-examination of the claimant who would already have given part or all of her evidence. It may affect what the respondents had to give evidence on. If witnesses had to be recalled or applications to treat her as a hostile evidence, it would affect the timetable.

17. The tribunal decided to allow Ms Stevens to give evidence, without a witness statement if necessary. The whole point of the witness order procedure is that it enables parties to call reluctant witnesses. Inevitably that sometimes means the witness will not cooperate and provide a witness statement in advance. If there was any prejudice involved to the respondents, we would work around it and give breaks to take instructions or allow witnesses to be recalled as necessary. Mr Greaves himself said, this was a case which would largely turn on oral evidence. The respondents had nine witnesses. It would not be just and equitable in all the circumstances to preclude a witness the claimant wished to call from giving relevant evidence.

<u>Whether to allow disclosure of evidence of an alleged protected act and alleged consequent detriment carried out in without prejudice correspondence</u>

18. The claimant wished to refer to elements of her letter dated 8 August 2019 and the respondents' letter dated 13 August 2019, both headed 'without prejudice save as to costs and subject to contract'. The claimant wished to refer to these in support of a victimisation claim under the Equality Act 2010. The alleged protected act was the allegations of harassment made in the 8 August 2019 letter, and the alleged detriments were (i) accusing the claimant of CV fraud in the 13 August 2019 letter and (ii) sending (open) emails to agencies who had employed the claimant.

19. In view of our decision not to admit the without prejudice evidence, we will not repeat the content of the 8 August and 13 August letters here. However, we did read them carefully, as invited to do, for the purpose of determining the application.

20. The claimant first argued that, as the 8 August 2019 was the first in the chain of without prejudice correspondence and written by her, she could

choose to waive privilege. We do not accept that. The claimant did not provide any legal authority in support of that principle. Waiver of without prejudice communications can only be by agreement. Moreover, that would usually have to be unequivocal. That is not the case here.

21. The claimant next argued that there were elements of each letter which did not refer to without prejudice matters and could be extracted out. Subject to our consideration of the 'unambiguous impropriety' argument, we do not accept that. The entirety of the letters read as if they were written in order to put positions for a negotiation. One cannot separate allegations and counter-allegations from other parts of the letter mentioning possible terms. They are completely interwoven.

22. The claimant also argued that EJ Hodgson decided in their favour that such elements could be extracted out, as indicated by paragraph 2.13 of his case management letter. We do not accept that. It appears to us that EJ Hodgson is saying the opposite, ie that he is not deciding admissibility and that it will need to be decided.

23. In so far as there is any argument that the respondents waived privilege by answering the victimisation allegations in their pleadings (and we are not sure that this line was pursued), we would reject it anyway. It is explicit that the respondents' primary argument was privilege, and they only answered the substantive arguments in the alternative should they fail on that ground.

24. Finally, there is the claimant's argument that privilege should be removed because the respondents showed 'unambiguous impropriety'. The claimant argued that the allegation of a fraudulent CV in the 13 August 2019 letter was so unfounded in fact, so aggressive, and so unrelated to any equality issue that, taken together with the timing of raising the issue, it was a clear response to the protected act, and this showed unambiguous impropriety. Thus it would follow that the 8 August letter 2019 containing the protected act should also lose privilege as it was part of that matrix.

25. In terms of context, the claimant also referred to Mr Varela's emails of 12 and 15 August 2019 to the claimant's current employers, giving the impression that the 1st respondent was seeking a reference for a prospective employee. These are of course open letters, but that is of no avail to the claimant if evidence of her alleged protected act is not allowed.

26. The claimant referred to the most recent case on this issue, Motorola Solutions Inc and another v Hytera Communications Corpn Ltd and others [2021] EWCA Civ 11, which summarises the case law.

27. It is not enough that there is a good arguable case of unambiguous impropriety. Cases where the unambiguous impropriety exception have been recognised have been truly exceptional.

28. An improper threat could potentially constitute unambiguous impropriety. In Ferster v Ferster [2016] an email during a mediation threatened that unless

the claimant accepted an offer to settle, the defendants would cause criminal proceedings to be brought against him, which would also impact upon his partner. At first instance, the judge held this was an attempt at blackmail which fell within the exception, and her decision was upheld on appeal. The critical question was whether the privileged occasion was itself abused.

29. In BNP Paribas v Mezzotero [2004] IRLR 508, the EAT emphasised the importance of hearing and properly determining allegations of unlawful discrimination. We very much bear this in mind. However, the EAT in Woodward v Santander UK PLC [2010] IRLR 834 rejected any suggestion that discrimination was itself a ground for the loss of without prejudice privilege, or that it was automatically an example of unambiguous impropriety. It gave these general guidelines:

> 'The policy underlying the rule is that parties should not be discouraged from settling their disputes by a fear that something said in the course of negotiations may be used to their prejudice in subsequent proceedings. There is an exception to that rule if the exclusion of what was communicated in without prejudice negotiations would act as a cloak for perjury, blackmail or other "unambiguous impropriety". The requirement for any impropriety to be "unambiguous" must be strictly applied lest the exception overtake the rule and render it of no value
>
> 'The policy underlying the without prejudice rule applies with as much force to cases where discrimination has been alleged as it applies to any other form of dispute. Indeed, the policy may be said to apply with particular force in those cases where the parties are seeking to settle a discrimination claim
>
> 'A claimant must be free to concede a point for the purposes of settlement without the fear that if negotiations are unsuccessful he or she will be accused for that reason of pursuing the point dishonestly. A respondent must be free to adhere to and explain a position, or to refuse a particular settlement proposal, without the fear that in subsequent litigation this will be taken as evidence of committing or repeating an act of discrimination or victimisation. It is idle to suppose that parties, when they participate in negotiation or mediation, will always be calm and dispassionate. They should be able to argue their case and speak their mind, within limits. Those limits are best stated in terms of the existing exception for impropriety, which applies only in the very clearest of cases. Words which are unambiguously discriminatory will of course fall within that exception.
>
> 'It may at first sight seem unattractive, given the fact-sensitive nature of discrimination cases, to exclude any evidence from which an inference of discrimination could be drawn. It would, however, have a substantial inhibiting effect on the ability of parties to speak freely in conducting negotiations if subsequently one or other could comb through the content of correspondence or discussions (which may have been lengthy or contentious) in order to point to equivocal words or actions in support of (or for that matter in order to defend) an inference of discrimination. Parties should be able to approach negotiations free from any concern that they will be used for evidence-gathering or scrutinised afterwards for that purpose.'

30. We have decided that the 8 and 13 August 2019 emails cannot be admitted. They were part of without prejudice communications. The claimant chose to make her allegations of harassment in a without prejudice letter and not openly at that stage. We do not consider that what the respondent said in the 13 August 2019 email about CV fraud amounts to unambiguous impropriety. The case law sets the bar high and we do not think it meets that high bar. It is true that there is an implicit threat, but it is not the order of threat in for example Ferster. It is bluster. It refers to 'investigating'. It is true that it does not directly relate to the holiday pay which was being discussed or to the harassment allegations. However some link is made in so far as the respondent suggests the harassment allegations were false and the purpose of raising them was to blackmail the company into not recouping overpaid holiday pay and wages. It is said that such conduct is dishonest, and moves on to suggest the CV was also dishonest. So it is not an entirely unconnected allegation. As we have said, it is a high bar and we do not believe that threshold has been reached.

31. As a result of our decision not to admit the without prejudice evidence, we put out of our mind the contents of the 8 and 13 August 2019 letters. The parties agreed that we could take account of the fact that there had been a without prejudice exchange on those dates.

32. We were frequently referred to Mr Varela's notes in a meeting on 8 August 2019 with Ms Vaughan and Ms Stevens, which Mr Varela called to discuss the allegations in the 8 August 2019 letter. We all considered and discussed these without reference to the actual content of the letter. Both parties wanted to refer to the 8 August 2019 notes. The respondents asserted and we accepted this was not a waiver of privilege. The clamant did not argue that the reference to the 8 August 2019 notes was in itself a waiver of privilege.

33. As the parties accepted, the logical consequence of not admitting the without prejudice evidence is that the victimisation claim cannot stand. There is no protected act and indeed one of the alleged detriments cannot be referred to. The victimisation claim is therefore dismissed for want of jurisdiction.

Fact findings

The claimant's recruitment and the office generally

34. The 1st respondent ('V&P') recruits senior lawyers, partners and teams for international law firms. The company's HQ is in London, where it employs 15 people. It has a small Singapore office and works with associates and consultants from around the world.

35. The 2nd respondent, Mr Varela, established the company in 2006. In 2020, ownership was passed on to the staff by way of an Employee Ownership Trust, managed by employees including Mr Varela as CEO.

36. The claimant started on 2 April 2019. At the time of the claimant's employment (April – July 2019), the staff comprised two men (Mr Varela and Mr Ogilvie (an Associate) and 12 women.

37. In London, the Directors were Ms Partner and Mr Varela. Ms Locherer had the title of Director, athough strictly speaking she was not a Director. Ms Plisson was Associate Director, (also covering Brussels and Paris). Associates were Ms Vaughan, Ms Stevens, Ms Heschuck, Ms Lopez, and Ms McCreight (also covering Brussels and Paris). Ms Burrows was managing director of an associated company in Singapore and worked closely with the London office.

38. In an email dated 1 April 2019, V&P offered the clamant the position of Executive PA/Operations Manager for an annual salary of £25,000. The email set out her key responsibilities in some detail. These included PA support to the Directors; preparing CVs, business plans and other documents for the team; supporting the Directors on basic HR functions; and office management. The email said that the claimant's employment was subject to a 3-month trial period. It also set out her holiday entitlement.

39. The respondents argue that this email constituted a statement of the terms of her employment. In fact, as the respondents later conceded, it omits certain of the mandatory terms under section 1, eg frequency of pay, any rules on sickness and sick pay, notice required by each party.

40. The claimant was asked to draft her own contract of employment by amending a template. When she showed it to Mr Varela, he was annoyed that she had left in the commission section, which was obviously only applicable to Associates. There is conflicting evidence as to whether the claimant was given the task of drafting her own contract on her first day, as the respondents contend, or whether she was only asked to do so in the second week after Mr Varela's failure to provide her with a draft which she had requested. We suspect the truth is somewhere between the two. In any event, the key point is that the respondents did not at any stage provide her with a completed contract of employment.

41. The London office is open plan and fairly small. Everyone present can usually hear any conversations going on, unless they are themselves on the telephone.

<u>General evidence regarding the atmosphere and Mr Varela's manner</u>

42. We have divergent evidence regarding the office atmosphere and Mr Varela's manner and conduct as chief executive. There appear to be some differences between the experiences of the claimant and many of the Associates compared with that of more senior staff. Also, some of the 1st respondent's witnesses did not work with Mr Varela in the office on a day-today basis, so we did not find their evidence particularly persuasive.

43. Our overall impression was that this was a small open plan office with a generally friendly and collaborative, but also competitive and 'driven' atmosphere. There would be periods of quiet intense work, and periods of chat, the latter usually when Mr Varela was not present.

44. Mr Varela himself was busy and work-focussed. While he took an avuncular approach in the sense of taking staff out regularly for meals, buying birthday presents and weekly gin and tonics, the rest of the time he wanted staff to be focussed and working. He could be demanding, critical, impatient and short-tempered. He was easily frustrated. He had high professional standards and would show his frustration if he felt they were not met. He did not like to be asked for information which he felt the member of staff should already know or have other access to. He did not like mistakes.

45. We cannot accept that, as some of the 1st respondent's witnesses suggested, Mr Varela was calm and collected at all times. That does not accord with certain evidence, eg the text exchange we reproduce below between Ms Stevens and Ms Heschuck. It also does not accord with accusing a solicitor (Mr Hammer) of 'concocting' matters together with the claimant, which is not an accusation we would expect from a senior professional used to working with senior members of the legal profession. It does not accord with emailing the claimant's agency after she had left, asking questions in a way to convey the impression that he was a potential employer as opposed to checking up on her after she had resigned. We also accept that Mr Varela would bang on the printer and swear at it when it broke down. Although several witnesses sought to say he kept completely calm even with a broken printer, we did not find that credible. Other witnesses were prepared to admit that Mr Varela did swear at the printer. We were more inclined to believe the claimant's evidence that he swore at and banged the printer and that Mr Ogilvie had warned her soon after she started that 'You haven't seen what he does to the printer yet'.

46. On the other hand, we do not accept that Mr Varela shouted and swore at people. All the 1st respondent's witnesses deny that he did so and spoke very positively in the opposite direction. We suspect it was more a question, as we have already said, of him displaying impatience and a critical tone, when he was not happy with how things were done. The capital letters in the text exchange below suggest that he probably did raise his voice for emphasis from time to time, but we would not call it 'shouting' for the reasons we have given.

47. We give no weight to the Glass Door Review ('An Objectively Hateful Experience'), because it is anonymous. The claimant said she did not write it herself, but it could have been someone who knew her and had heard only her account of events.

48. As for treatment of the claimant, Mr Varela did not talk to her much. Partly that was because he was busy and not inclined to chat. He did not have much to say to her specifically. But also, Ms Stevens said she had the impression the claimant and Mr Varela did not think much of each other.

49. On 15 May 2019, Ms Stevens and Ms Heschuck exchanged text messages on WhatsApp. The claimant found this message had been stored as a photo image on her WhatsApp hard drive. The reason it was a photo image was because a screen shot had been forwarded to her by one of those involved in the exchange. The claimant asked leave to produce the image in evidence on 22 July 2021. She said she had just moved temporarily and a lost hard drive had turned up which she had checked through. She says that there is no reason to believe she deliberately held back this document, because obviously it would have been in her interests to disclose it, had she found it earlier. We accept that. The respondents did not object to its admission in evidence and did not request that Ms Stevens be recalled. They accepted that it was an authentic exchange, but no more than that. The tribunal gave the claimant the choice whether to ask for Ms Stevens to be recalled. She decided not to. The exchange was as follows:

> '12:34 Is fran ok?
>
> I mean nothing big
> But frank laid into her a bit
> Tiny bit
>
> Oh shut
>
> Nothing to what everyone else gets all the time lol
>
> Lmao nice what about?
> Not getting shit done
>
> Nah
> She asked a question about what time they arrive at the forsters thing tonight
> And he was like
> I EMAILED YOU AT 17:32 yesterday explaining all of this'

50. Mr Varela told the tribunal that 'Forsters' was a reference to a drinks party with a client. The claimant had described a similar incident when Ms Vaughan asked the timing of an award ceremony they were attending together and Mr Varela had shouted at Ms Vaughan, making her go red with embarrassment. We suspect the claimant was describing the exchange over the Forsters event. We accept that Ms Vaughan was upset and went red.

51. The claimant, Ms Stevens and Ms Heschuck shared a WhatsApp group and used to chat about non-work matters and some work matters. The claimant said she had disclosed the only relevant text messages in her possession. We therefore conclude there were no other text messages evidencing the behaviour which she has complained of in these proceedings. This is a general factor we took into account when considering whether certain remarks had been made at all or as frequently as the claimant remembered in her evidence. We would have expected to see at least a few more text messages evidencing such matters, directly or indirectly, if they had all taken place.

52. By early July 2019, Mr Ogilvie, Ms Heschuck, and Ms Stevens were all thinking of leaving and looking for jobs. The claimant dreaded them leaving, because they were the people in the office who she got on with. She also started looking for jobs around this time.

Expectations of the claimant

53. From May 2015 – September 2018, the claimant had worked for herself as a vegan blogger. Although she built up almost 10,000 followers, she was unable to monetise this and decided to return to paid employment. After 4 months as a barista, she temped for a brief period as a Customer Service Assistant for Ritz Recruitment at Euromoney PLC.

54. The respondents recruited the claimant into a newly designed job. Mr Varela was impressed with her at interview, and we believe that he gave her a job which was more senior than she may have realised she was applying for. Mr Varela, Ms Partner and Ms Plisson felt the claimant would grow with the job. They appear to have applied the model which they used with Associate headhunters. But they had unrealistic expectations, both as to what the claimant would be able to do, and the hours she would be committed to work.

55. The claimant was given a large range of duties and was required to be the sole administrative support for many people. The respondents' approach is illustrated by the fact that, as soon as she started, she was given the task of updating a huge office processes and procedures manual when she had just arrived and had not yet learnt or been inducted into the procedures for herself.

56. We do not accept all the respondents' criticisms of the claimant's performance. Several did not bear closer examination, and Mr Varela entirely withdrew one criticism regarding overbooking staff on holiday at the same time. This was primarily someone else's fault. We feel the criticisms regarding not completing the large manual were also unfair for the reason we have given. However, we are not saying there were no concerns about the claimant's performance. The essential problem was that the respondents had unrealistic expectations, and the claimant would have felt the pressure of this.

Sassy Minx

57. The claimant alleges that Mr Varela used the phrase 'sassy minx' throughout her employment about particular female candidates, and that he used it specifically in May 2019 to refer to a female candidate whom the respondent had recently placed at Druce's. Mr Varela denies using the phrase on any occasion except once, when he asked what it meant.

58. Ms Stevens introduced the phrase 'sassy minx' to the office when she started in September 2018. She and Ms Vaughan regularly used the phrase to refer to themselves and to compliment each other when they did something

well. They understood it to mean a strong, independent and confident woman, and they used it as a term of endearment to each other. They explained to the tribunal that this is an example of where people 'reclaim' a negative word used against them and turn it into a positive meaning. However, they felt this was appropriate because they both consented and were talking to each other. They would not use the word about a candidate.

59. The candidate's placement was announced with a photograph on Druce's website on 1 May 2019, and there was an article in the Gazette on 13 May 2019. The website photograph shows the candidate wearing a black blouse with some filigree netting on the shoulder. It is cut off just below the collar. The photograph is perfectly respectable.

60. Around those dates, Ms Vaughan called Mr Varela over to her computer to show him the announcement, since she was proud of having achieved the placement. Mr Varela congratulated her. Mr Varela made some reference to 'sassy minx'. He did not understand what the phrase meant, but he had heard Ms Stevens and Ms Vaughan use it in a congratulatory way to each other, eg when making placements. We do not accept that Mr Varela said 'She is a sassy minx', ie describing the candidate. We think it far more likely he was referring to the achievement of placing the candidate ,and meant it as a 'well done' to Ms Vaughan. We reach this conclusion because that is the way he was hearing his staff using the phrase, and because it is unlikely that someone of his generation would use or adopt such a phrase.

61. We do not accept the claimant's contention that Mr Varela was titillated by the photograph and was referring to the candidate. It is a professional photograph. We do not know how the claimant would know he was titillated, even if he was – as she contends – referring to the candidate. We also do not feel that was Mr Varela's style. There was no evidence that he made any other 'casual sexist remarks' as the claim form appears to suggest. The vast majority of his Directors and Associates are female, a number of whom are in senior positions, and with whom he is now sharing ownership of the business, albeit that he is still the Chief Executive. In particular, we had a strong impression that Mr Varela is very focused on his work and would be far more interested in the fact that his firm had made a high profile placement, than the appearance of the candidate.

62. The claimant had no issue with Ms Stevens and Ms Vaughan using the phrase between themselves, but she felt it should not be used in the professional side of the business. Given her role included basic HR, she felt she should make the point. When Mr Varela said 'Sassy minx, she said, 'Can we not use that phrase?'

63. Mr Varela asked what the phrase meant, which the claimant found surprising as he had used it, and this led to a general discussion. Apart from whether the claimant 'challenged' Mr Varela, there is a general consensus that there was at some point a general discussion sparked by Mr Varela asking what the phrase meant. We believe this was the occasion because

estimates of dates tally and the Druce's placement is the most logical trigger factor.

64. There is also a general consensus that during this discussion, Ms Vaughan googled the phrase and read outs its different meanings. She explained she and Ms Stevens meant it as a bold, spirited and lively young woman, rather like Beyonce or Kim Kardashian. Everyone agreed the term 'saucy minx' was different and should never be used. The claimant told them she did not like sassy minx either. She said, 'Can we please not use that word again?'

65. Mr Varela says the claimant never 'challenged' him about having used the phrase. We would not necessarily say she 'challenged' him personally. But she did say 'we', ie the office, should not use the phrase, and she participated in the general discussion.

66. We were shown definitions of the phrase. The urban dictionary defined 'sassy minx' as 'As attractive as they come. Ridiculously hot' etc. Another dictionary defined 'minx' (on its own) as 'an impudent, cunning or boldly flirtatious girl or young woman'.

67. The definition of 'minx' accords with our own understanding of the word on its own. We haven't come across the phrase 'sassy minx' as such, though 'sassy' used on its own we would say meant 'bold'. We accept this may be a matter of usage by different generations, and some young women may have co-opted the phrase and used it differently of themselves.

68. The claimant says that as a result of her challenging him about his use of 'sassy minx', Mr Varela deliberately dropped the phrase into conversation with Ms Stevens, Ms Vaughan and others, so that she would hear it, and in order to get a reaction. She says he did this about 18 times altogether, until the end of her employment. She also says he stopped saying Good Moring or Good Evening to her and only spoke to her aggressively.

69. We do not accept that Mr Varela continued using the phrase 'sassy minx' after this discussion. First of all, we do not think that what happened amounted to a 'challenge' of a kind which would upset him. She raised the issue, used the word 'we' which generalised her criticism, and it led to a general discussion and exploration of the meaning of the phrase. Second, we do not see anything in what the claimant said which would have upset him. Third, Mr Varela does not strike us as the type of person who would spend energy trying to upset a junior member of staff. His prime focus during work time was on getting the job done. Fourth, the claimant did not describe any specific occasion or discussion when Mr Varela used the phrase (apart from the single one we have just described). We would have expected her, if she felt he was using the phrase deliberately to get at her in such an intense way over such an intense period, to have kept some kind of note. Fifth, there are no text messages complaining that he is deliberately and incessantly using the phrase to wind her up. Finally, even though the phrase had been explained to him, it was still one which did not come naturally to Mr Varela

and while he may previously have used it once or twice, copying his staff, it is unlikely he would have wholesale adopted it.

70. Nor do we find that Mr Varela's manner towards the claimant became worse after her 'challenge'. As we discuss above, Mr Varela's manner was always demanding and abrupt. Further, the text exchanged about 'laying into' Ms Vaughan records the texter's view that Mr Varela generally 'laid into' everyone. The claimant herself said that Mr Varela was aggressive from the start, shouting at her and making her red with embarrassment in her first or second week over her drafting of the contract of employment. She also said the first thing Mr Ogilvie said to her was that she should see how Mr Varela treats the printer. All this was before she questions the use of 'sassy minx'. We were given no description of any change in Mr Varela's manner towards the claimant after the 'sassy minx' discussion apart from vague evidence about Mr Varela no longer saying Good Morning and Good Evening to her. There was nothing that persuaded us of any escalation from the description of Mr Varela's behaviour in the very first two weeks.

Suntan comment

71. On 4 July 2019, Mr Ogilvie was discussing an African candidate and whether he could be placed in a particular firm. Mr Ogilvie was concerned that it might not be a good 'cultural fit' as that firm was not culturally diverse. Mr Varela said, 'Lets have a look' and crossed the room to look at Mr Ogilvie's computer, asking him to bring up the firm's website. Mr Varela pointed at someone on the website and said, 'Do you think she just has a really good suntan?'. The claimant inferred from this that he was pointing to a partner who did not look white. Mr Varela then asked Ms Stevens her opinion, but she would not engage.

72. Mr Varela denied there was any such conversation. Mr Ogilvie, who has since left the company, was not called as a witness. Ms Stevens said she could not remember. No one else in the room said they had heard it. However, the claimant exchanged text messages with Ms Stevens immediately afterwards. The exchange was as follows:

> C [11:29] - Well that was extremely uncomfortable
>
> CS - What happened. Did I miss something.
>
> C - Just Frank and his complete lack of understanding of what is okay and isn't in the office
>
> CS - Oh.
> Yes I know
> Exactly what you're talking about now.
> That's why when he asked my opinion I was just like no I can't even engage now
>
> C –
> Its like he just doesn't think

> Like youre standing around a computer guessing someones race as a game
> Ahhhhhh
> Get me out of here
>
> CS – He's so oblivious to whats OK
> 'Do you think she just has a rly good sun tan'
> NOT OK
>
> C – Yeah
> Im gonna ask him for a chat later
>
> CS – What you gonna say
>
> C – Too mad at the moment
> That it is inappropriate
> Are me and emma 'just tanned'

73. We have no further exchange beyond that.

74. We find this exchange is supportive of the claimant's account of the incident. We cannot think of any other sensible explanation for its content. We agree that, on the balance of probabilities, Mr Varela was referring to a non-white lawyer and probably partner on the website of the relevant firm. That is the logical inference given the nature of the discussion and Mr Ogilvie's opening comments.

75. On the balance of probabilities, we do not find that Mr Varela was overtly smirking and laughing when he said this. There is no reference to that in the text exchange or in the original or amended ET1. The amended ET1 provided more detail on this - and other incidents - and we would have thought the fact that Mr Varela was laughing was a sufficiently important detail to have been included there if it occurred.

76. Ms Stevens accepted the text exchange was authentic. She also had the exchange on her own phone. The respondents say it is taken out of context, but we cannot see that. The start of the exchange is clear because there is the last line of a different much earlier exchange. The content is absolutely clear. Ms Stevens even put what Mr Varela said in quotes.

77. The exchange took place immediately after the event in question. Although Ms Stevens said she could not remember the exchange, it is in writing.

78. It was very clear to us that Ms Stevens did not want to get involved on either side in these proceedings, and her general approach (with minor exceptions) was to retreat into vagueness or say she could not remember, She even told Mr Varela in the meeting he called on 8 August 2019, only 5 weeks afterwards, that she did not remember the exchange, which we find surprising given the nature of what is said. In the 8 August 2019 meeting, she also told him generally that she would not write a statement for him and did not want to get involved. Ms Stevens had to be summoned to the tribunal by

the claimant on a witness order. She had told the claimant she did not was not to come without an order and she still refused to write a witness statement for the tribunal after she received the order.

79. The respondents say they would find it extraordinary for a firm these days to say they did not want a candidate on racial grounds. That may be so, but in our experience, one cannot say with confidence that all forms of race discrimination have disappeared, even if some might now be less overt. In any event, it may simply have been Mr Ogilvie's own observation about cultural fit.

80. We do not accept the respondents' suggestion that the reference to 'suntan' had something to do with a joke which Mr Ogilvie made to Ms Stevens after her recent return from Glastonbury to the effect of 'Did she have a suntan or had she not washed?' Ms Stevens quite firmly stated she did not remember any such joke and in any event, it does not fit the discussion on the texts.

81. It is clear from the text exchange that the claimant was angry. She also related the comment to her own skin colour. She typed: 'Are me and Emma just tanned?' The claimant felt particularly upset because she is of mixed heritage - her father is of Asian ethnicity and her mother is white.

82. The claimant did not in the event speak to Mr Varela about this afterwards. Her husband advised her not to, because she was too upset about it.

83. Finally we would add here that, other than the allegation of a joke about slaves in the cupboard (see below) which we have rejected, there was no other allegation – much less evidence of racist remarks or behaviour in the office.

<u>Slaves in cupboard comment</u>

84. On 7 May 2019, when Ms Burrows was visiting the London office from Singapore, she had a discussion with Ms Partner about the terrible conditions that some migrant domestic workers are subjected to in Singapore, Hong Kong and Dubai, where their dedicated bedroom area can be the size of a cupboard. This was a serious conversation with no humour.

85. The claimant alleged in her ET1 that on an occasion around 4 July 2019, Mr Varela mentioned that in Singapore they 'put slaves in cupboards', which he thought was hilarious, but which she thought was disgusting and made her feel very uncomfortable.

86. The claimant accepted in cross-examination that there had been a conversation on 7 May 2019 on the same topic which had not been objectionable and was merely factual. She said that her claim was talking about a different and later conversation.

87. Mr Varela said that he did not recall hearing the conversation on 7 May 2019 and never made any comment at any time about slaves in cupboards.

88. The claimant did not mention in her ET1 or witness statement that there had been an earlier, acceptable, conversation. We believe she would have mentioned it if she had recalled it, as it would have provided context for what was allegedly said on 4 July. We therefore believe that there was only one conversation and the claimant was mistaken about its date.

89. Moreover, given that the 7 May 2019 'factual' and unobjectionable conversation took place, we think it unlikely that Mr Varela – even if he had heard it – would have made a joking reference back as long as two months' later.

90. As we find there was only the one conversation, on 7 May 2019, we find it implausible that Mr Varela – even if he had been present – would have made any joke about the subject, especially as Ms Burrows and Ms Partner were expressing horror about the conditions.

91. Given the claimant's failure to mention the earlier conversation and the implausibility we have mentioned above, we prefer Mr Varela's evidence to the claimant's on this matter. He did not refer to 'slaves in cupboards' at all and he did not find it hilarious.

<u>'On the spectrum' comments</u>

92. The claimant alleges that Mr Varela and Ms Partner used the phrase 'on the spectrum' around 10 – 15 times during the four months of her employment. She said this was a reference to anyone who was very intelligent, as opposed to anyone who was genuinely on the autistic spectrum. She said this made her feel very uncomfortable but she did not feel capable of calling either of them out on the particular phrase after Mr Varela had shouted at her after she challenged him regarding 'sassy minx'.

93. The claimant said that in May 2019, Ms Stevens went with Mr Varela to meet a potential candidate in Intellectual Property at the Hilton and that Ms Stevens told her afterwards that, after the meeting, Mr Varela had referred to the lawyer as 'on the spectrum'. She said Ms Stevens told her that she had found it offensive because her mother worked with disabled people and that she had told Mr Varela it was not OK to use the phrase that way.

94. Mr Varela said there was one occasion around late May 2019 when he repeated in the office feedback he and Ms Stevens had received from a client meeting, which included feedback that the client thought the candidate was 'almost on the spectrum'. Mr Varela said his niece has Asperger's and he would never use the phrase 'on the spectrum' except when factually referring to someone who genuinely had that neurodiverse condition.

95. Ms Stevens said she did not specifically remember the Hilton meeting. But she felt she remembered that Mr Varela had used the phrase once or twice

when referring to an intelligent lawyer though she could not remember details. She did not recall telling the claimant she found it offensive because her mother worked with disabled people, but it rang true that she had said something along those lines because her father worked at a deaf school and her mother worked with vulnerable adults facing homelessness (albeit not with disabled children).

96. Mr Varela's notes of the 8 August 2019 meeting state, 'On the spectrum – Chloe said we discussed it in the office and I use expression. I don't think its bad or offensive. She agreed.'

97. We find that Mr Varela did use the phrase on a few occasions in the claimant's hearing, beyond the specific client feedback occasion, to refer to a very intelligent candidate as 'on the spectrum'. This did not mean that they were literally on the autistic spectrum. We make this finding because of what Ms Stevens said on 8 August 2019, and because something she considered unacceptable had made her tell the claimant about her parents' work.

98. However, we do not find that Mr Varela used the phrase 10 – 15 times during the claimant's short employment. We do not consider it likely that there would have been sufficient occasions during the claimant's employment for such a description of such a candidate to arise. Also we would have expected to see some reference in text exchanges if it happened with such regularity..

<u>GP visit</u>

99. On 9 July 2019, the claimant's grandfather, to whom she is very close, was taken into hospital. He was extremely unwell and the claimant was very upset. Ms Plisson allowed her to leave work and she went to the hospital and stayed with her grandfather until 1 am the next morning.

100. The claimant visited her GP on 10 July 2019. The appointment had been booked at short notice because the claimant's acupuncturist had noticed a mole on her foot and thought she should get it urgently checked out. The claimant's grandmother, concerned about how bad she had looked in the hospital, which the claimant told her was due to stress about work, suggested she also discuss this with the GP.

101. The GP's notes for 10 July 2019 indicate a referral made to a specialist regarding the mole. The notes also record the claimant discussed her anxiety state. They say she had a long history of this and had had CBT in the past. She had a worsening of anxiety recently, very vivid dreams, not sleeping properly, 'unsure of trigger'. The GP prescribed sleeping medication on a one-off basis. The claimant declined the offer of time off work.

102. The claimant told the tribunal that her nightmares started about 3 weeks after she had started the job. She said she had been embarrassed to mention them because she felt adults should not have nightmares. We do not know when her nightmares started since that is not recorded in the GP notes, which only refer to 'recently'.

103. The claimant told us that she declined the time off because it would have caused her more anxiety as she would have had to ask Mr Varela for it. She knew she had annual leave coming up (from Monday 15 – Friday 19 July), and she had arranged a rota to stay with her grandparents. We will comment on this in our conclusions.

104. The next GP entry is a telephone consultation on 17 July 2019 regarding 'anxiety state'. The notes record, 'all resolved since took time off work and managed to sleep without sleeping meds. Rev as needed. Has derm appt already'.

11 July 2020

105. The last day the claimant worked in the office was 11 July 2020. Mr Varela had just returned from a working trip to Spain. He asked the claimant whether she had set up the computer for a new employee (Mr Perry). The claimant told Mr Varela that she had set up the computer and informed Mr Perry. At 4 pm, she emailed Mr Varela, providing all the details.

106. According to the claimant, Mr Varela emerged from the conference room (where he had been working) and walked straight up to her, raising his voice. She says he shouted 'why have you sent this to me? You have put in the wrong dates, it is a week early.' She says she did not respond and the whole episode lasted 3 – 5 minutes. She says everyone was watching and she was fiddling with a tear-shaped bottle of hand moisturiser to try to take her mind off what was happening.

107. Mr Varela says he did not speak in person to the claimant at all that day. He says they just exchanged some emails.

108. On the balance of probabilities, Mr Varela did raise his voice and have a go at the claimant about this matter. We do not think this was anything beyond his usual manner, but we accept it was stressful for the claimant to be on the receiving end.

109. The claimant now says that she believes Mr Varela treated her this way because she had called him out in relation to his 'sassy minx' comments. We do not think this is consistent with her evidence about his treatment of her from the outset, nor the evidence about his behaviour towards others. We shall discuss this further in our conclusions.

110. The claimant emailed Ms Evans at 4.22, asking to cancel some holiday bookings in August and use it instead for 22-24 July, thus extending her leave to 12 – 26 July. The purpose of this was to participate in a rota to look after her grandparents. The dates were agreed.

111. The claimant wanted to leave, but she was worried about having no job to go to if she did. The immediate problem was solved by her annual leave starting the next day.

Resignation

112. On Monday 29 July 2019, the claimant wrote and hand delivered the following resignation letter:

> 'Dear Frank,
>
> Please accept this letter of resignation from my position as Executive Assistant / Operations Manager with immediate effect due to personal reasons.
>
> Please find enclosed with this letter my key and fob.
>
> Sincerely,'

113. In her witness statement, the claimant said she resigned because of the 'abusive conduct' of Mr Varela towards her throughout her employment, but also because of the last straw on 11 July 2019, which she says was because she had called out his sexist harassment. She said she did not want to spell out 'personal reasons' because she did not want to have to deal with any responses from Mr Varela.

114. When asked in the tribunal, the claimant essentially said that although she did not like the harassment remarks she had heard Mr Varela make, the reason she resigned was the way he spoke to her, the shouting, the failure to greet her and generally getting worn down by his manner towards her. The claimant was asked several times in cross-examination and by the Employment Judge to be sure about her evidence. When it was put squarely to the claimant at the end of the cross-examination sequence that the comments she overheard played no part in her resignation, she said that they did. However, that answer did not match with her more extensive explanation of why she had resigned in answer to earlier questions.

After the claimant's resignation (and 8 August 2019 meeting)

115. The claimant resigned on 29 July 2019. She notified ACAS under the early conciliation procedure on 5 September 2019. ACAS issued a certificate by email on 5 October 2019. The claim form was issued on 4 November 2019.

116. After receiving the claimant's resignation letter, Mr Varela emailed back to acknowledge it. He said he was sorry to hear she had personal issues and hoped they were resolved soon. He said that by resigning with immediate effect, they had overpaid her 3 days and she had also exceeded her holiday allowance. He said he would ask Ms Evans (from the firm which managed payroll) to calculate the amount.

117. On 30 July, Ms Evans emailed the claimant to ask for reimbursement of £704.19, which she said had been overpaid in her July salary. This appears to be mainly or wholly based on having exceeded her pro rata holiday entitlement as at the resignation date. The claimant replied to say she was

seeking legal advice and would get back to her. Mr Varela emailed back to ask that the claimant let them know within the next 5 working days whether she was intending to repay the sum.

118. On 8 August 2019, after receiving a letter where the claimant set out her allegations of harassment, Mr Varela called Ms Stevens and Ms Vaughan into a meeting to seek their comments, which he then wrote up. It is headed 'transcript' but is in fact a set of bullets. We have referred to this meeting a few times above.

119. It is hard to tell from the 'transcript' who said what and its purpose. We regarded it with some caution for this reason and also because we could not study the claimant's communication which had prompted it. However, it was useful in certain respects, as we have mentioned above.

Law

Harassment

120. Under s26 of the Equality Act 2010, a person harasses the claimant if he engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

121. The unwanted conduct does not need to relate to the claimant's own protected characteristic.

122. It was established by the appeal in the present case that a constructive dismissal can be harassment under the Equality Act 2010.

123. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, Mr Justice Underhill (as he then was) gave this guidance:

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

> other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

124. In Grant v HM Land Registry [2011] EWCA Civ 769, Elias LJ pointed out that the words 'violating dignity', 'intimidating, hostile, degrading, humiliating, offensive' are significant words. '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.'

125. In Betsi Cadwaladr University Health Board v Hughes and others UKEAT/0179/13, Mr Justice Langstaff said:

> 'The word 'violating' is a strong word. Offending against dignity, hurting it, is insufficient. 'Violating' may be a word the strength of which is sometimes overlooked. The same might be said of the words 'intimidating' etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'

126. Context is important in assessing the effect of the conduct. Relevant factors (though none of them are determinative) might be whether the conduct was directed at the claimant; whether and when the claimant complained; the frequency with which the words were used; what the speaker's intentions appeared to be; and whether the claimant possessed the relevant protected characteristic.

127. In Weeks v Newham College of Further Education UKEAT/0630/11, Mr Justice Langstaff considered the meaning of the word 'environment'. He said it means a state of affairs. It can be created by a single incident, but the effects must be of longer duration. Spoken words must be seen in context, which includes other words spoken and the general run of affairs within the office or staffroom concerned.

128. A single one-off event can constitute harassment of sufficiently serious. A flippant or light-hearted remark can constitute harassment, just as much as one which is made aggressively. What is relevant is whether such a remark, whether flippant or not, meets the legal definition.(See eg Driskel v Peninsula Business Svices Ltd and ors [2000] IRLR 151, EAT.)

129. Where the conduct was not done with the purpose of violating dignity etc, the question is whether it had that effect. The EHRC Employment Code says at paragraph 7.18:

> 'In deciding whether the conduct had that effect, each of the following must be taken into account:
>
> (a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.
>
> (b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for

example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

(c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.'

130. Context is important in assessing the effect of the conduct. Other relevant factors (though none of them are determinative) might be whether the conduct was directed at the claimant; the frequency with which the words were used; what the speaker's intentions appeared to be; and whether the claimant possessed the relevant protected characteristic. (See eg Weeks v Newham College of Further Education UKEAT/0630/11.) Whether and when the claimant complained might also be relevant, although it is not always easy for an employee to make an objection, so tribunals should be cautious about this factor.

Constructive dismissal

131. The claimant contends that her employer was in breach of the implied term of trust and confidence. Breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract (Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT).

132. In Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462. the House of Lords held the implied term of trust and confidence to be as follows:

> 'The employer shall not without reasonable and proper cause conduct itself in a manner calculated *and* likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

The italicised word 'and' is thought to be a transcription error and should read 'or'. (Baldwin v Brighton & Hove City Council [2007] IRLR 232).

133. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

134. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough

Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, ie from the perspective of a reasonable person in the claimant's position. (Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)

135. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)

136. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract.(United Bank Ltd v Akhtar [1989] IRLR 507, EAT).

137. A claimant may resign because of a 'final straw'. The key case of London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 establishes these principles in regard to the final straw:

> (1) the final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.
> (2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.
> (3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.
> (4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence."

138. A constructive dismissal can be discriminatory even if the last straw is not. Applying Omilaju, the last straw need not be something of major significance and need not even amount to a breach of contract. It is simply an act which tips things over the edge. 'If some of the deepest cuts were acts of discrimination, it should not matter that the final glancing blow, though painful, was not itself discriminatory'. (Lauren de Lacey v Wechseln Limited t/a The Andrew Hill Salon UKEAT/0038/20.)

139. The claimant must not 'affirm' the breach. A claimant may affirm a continuation of the contract in various ways. She may demonstrate by what she says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation. This must be seen in context. For some employees, giving up a job has more serious immediate financial or other consequences than others. That might affect how long it takes the employee to decide to resign. (Chindove v William Morrisons Supermarket PLC UKEAT/0043/14.)

Failure to give employment particulars

140. Under s38 of The Employment Act 2002, if the claimant succeeds (inter alia) in any harassment claim and the respondent was in breach of its duty to provide s1 particulars, the tribunal must award 2 weeks pay and, if it is just and equitable in all the circumstances, award 4 weeks pay. No award needs to be made if there are exceptional circumstances which would make such an award unjust or inequitable.

Conclusions

141. We now apply the law to the facts to decide the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

Issue 3.1: Jurisdiction (S123, EA 2010)

142. We considered the issue of time-limits after we had made our findings on the claims. It would be too hypothetical to consider time-limits for the various alleged actions before we had found what had happened and when.

143. The only claim which we have upheld is that the 'suntan remark' was harassment related to race. That took place on 4 July 2019. ACAS was notified on 3 October 2019. This claim was therefore in time.

Issue 3.2 a, b; 3-3; 3.4 – Sassy minx

144. Mr Varela did not in May 2019 use the phrase 'sassy minx' to refer to the candidate whom the 1st respondent had placed in a Real Estate role (ie at Druce's). Mr Varela directed a comment of 'sassy minx' towards Ms Vaughan as a statement of approval when she called him over to look at the announcement of the placement. This usage was copying the way that he had heard Ms Vaughan and Ms Stevens use the expression towards each other and about themselves when they had achieved a placement.

145. Mr Varela did not use the phrase 'sassy minx' at any stage during the claimant's employment, except on the particular occasion in May 2019 in the

context of the announcement of the candidate's placement at Druces. He never used it about particular female candidates.

146. There was therefore no harassment in this respect.

Issue 3.2 c; 3-3; 3.4 – the 'suntan comment'

147. This comment was made by Mr Varela on 4 July 2019, after Mr Ogilvie had commented that an African candidate may not be a good 'cultural fit' at a particular firm. Mr Varela crossed the room to Mr Ogilvie's desk, asked him to bring up the firm on its website, and apparently pointing to a non-white partner pictured on the site, said 'Do you think she just has a really good suntan?' He then asked Ms Stevens her opinion, but she would not engage.

148. We accept the claimant's evidence that this was unwanted conduct. This is apparent from the text message she immediately sent to Ms Stevens.

149. The conduct was related to race. It was clearly referring to the skin colour of someone whose photograph was on the website.

150. We accept the claimant's evidence that she was deeply upset by this and she felt it violated her dignity. She felt it was a flippant racist remark. Her text referred to 'guessing someone's race as a game'. Although the comment was not directed at her, and Mr Varela may not have known at that stage that her father was of Asian ethnicity, the claimant did feel the comment personally. She texted 'Are me and Emma 'just tanned'? She intended to take Mr Varela up on it later. She did not do this because her husband advised her against it because she was too upset.

151. We do not find that Mr Varela had the purpose of violating the claimant's dignity when he made the remark. There is no reason to think he was thinking about her at all during this conversation. Nevertheless, we find that the making the remark and compounding it by asking Ms Steven's opinion too, had that effect taking into account the claimant's perception, the other circumstances of the case, and whether it is reasonable for it to have that effect.

152. The comment was made carelessly in an open office, where everyone could hear. It was made by the organisation's chief executive. He made the observation to one staff member (Mr Ogilvie) and then tried to draw in another (Ms Stevens). It was a flippant and offensive remark. We do not think it is acceptable in the 21st century for an employer to be talking about people who are not white and using the term 'suntan' when doing so. We have taken into account that it was a one-off remark, although it was more than that, because of the follow-up enquiry of Ms Stevens. We have also taken into account that 'violating' dignity is a strong word. It is more than offending or hurting dignity. We appreciate the comment was not directed at the claimant and that she did not think that it was. But the claimant is of mixed heritage and she instantly related the comment back to her own skin colour. We consider it reasonable for the conduct to have made her feel her dignity was violated.

153. We therefore uphold the claim that the suntan remark was harassment related to race in that it was unwanted conduct related to race which had the effect of violating the claimant's dignity.

154. We do not need to consider the other limb of the definition of harassment, ie whether it created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. That would have been more difficult. We do not think that the remark created an ongoing intimidating, hostile, degrading, humiliating or offensive state of affairs. It was a one-off. The only other allegation of comments or conduct related to race was the 'slaves in the cupboard' allegation, which we have found was not made. Nor do we think the remark contributed to any non-race-related factors in creating an intimidating, hostile, degrading, humiliating or offensive environment.

Issue 3.2 d; 3-3; 3.4 – 'slaves in cupboards'

155. The claimant did not state on 4 July 2019 or at any other time during the claimant's employment that in Singapore they put slaves in cupboards. Nor did he make a joke out of it or find it hilarious.

156. There was therefore no harassment in this respect.

Issue 3.2 e; 3-3; 3.4 – 'on the spectrum'

157. Mr Varela used the phrase 'on the spectrum' on a few occasions to refer to a very intelligent candidate. This did not mean that they were literally on the autistic spectrum.

158. This was unwanted conduct. The claimant did not like or approve of this usage of the phrase.

159. The conduct was related to disability.

160. There is no reason to believe that Mr Varela intended to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her when he used this phrase in her hearing. There is no suggestion he was even thinking about her when he did so. The question is therefore whether it had that effect.

161. We do not find that Mr Varela's use of the phrase had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. As we have already stated, the words in the definition are very strong words. In terms of the claimant's perception, she disapproved. We do not believe it was any more than that. She did not raise it with Mr Varela. She did not send any texts to Ms Stevens or other colleagues saying she felt strongly about it. She did talk about it with Ms Stevens after the Hilton incident, but Ms Stevens raised the subject and it seems that it was her who took the initiative in expressing disapproval, referring to her parents' jobs.

162. As for whether it would be reasonable for hearing the phrase used a few times to have the unlawful effect, we add that the claimant was not on the autistic spectrum herself or otherwise disabled. The words were not directed at her or used to describe her.

163. In our view, usage of the expression to describe someone who is intelligent but has poor social skills, and who is not in fact on the autistic spectrum, is offensive and we would not condone it. It trivialises the real experience and plays into stereotypes. It is not respectful. However, we do not think in the circumstances that it would be reasonable for Mr Varela's use of the phrase on a few occasions to have gone as far as violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her (bearing in mind again the strength of those words). We would think it reasonable for her to feel uncomfortable, to disapprove and be annoyed, but that is not enough.

164. We therefore do not uphold the claim of disability-related harassment. We do not consider that Mr Varela's occasional usage of the phrase had the unlawful effect under s26.

Issue 3.2 f; 3-3; 3.4 – shouting on 11 July 2019

165. While we would not say Mr Varela shouted in the claimant's face on 11 July 2019, he did raise his voice and have a go at her, telling her she had put in the wrong dates.

166. This conduct by Mr Varela was not in any way related to any of the alleged acts of harassment related to sex, race or disability. The claimant's main argument was that the shouting was related to sex in that it was because she had challenged him over usage of 'sassy minx'. However, we do not find that Mr Varela's conduct on 11 July 2019 was in any way connected with her picking him up over using 'sassy minx' back in May 2019.

167. On the claimant's own evidence, Mr Varela demonstrated this kind of behaviour from the outset. Indeed the description of what happened on 11 July 2019 is remarkably similar to the description of Mr Varela's reaction to the claimant including a clause about commission when drafting her contract in her first or second week, long before the 'challenge'.

168. It is also similar to the claimant's description of how he treated others, most notably Ms Vaughan. This is supported by the text exchange between Ms Stevens and Ms Heschuck: 'Is fran OK? … Frank laid into her a bit Tiny bit … nothing to what everyone else gets all the time'. The description of how Mr Varela spoke to Ms Vaughan: 'And he was like I EMAILED YOU AT 17.52 yesterday explaining all of this' is again very similar to the type of criticism of the claimant on 11 July 2019.

169. Apart from the claimant's assertion that Mr Varela stopped greeting her after she 'challenged' him, and his increased usage of 'sassy minx' which we

have not found to be the case, there are no concrete examples of any escalation in his negative behaviour towards the claimant. Nor is there anything to show that he was even upset by her questioning the use of 'sassy minx' in May 2019. He was himself curious about what the phrase meant and it had led to a jovial conversation.

170. Mr Varela's conduct towards the claimant on 11 July 2019 was consistent with his general manner. As we have said, he could be demanding, critical and short-tempered. His conduct was not in any way related to sex, race, disability or being picked up on usage of 'sassy minx'. The claim that this conduct was harassment therefore is not upheld.

Issues 3.5 – 3.9 – constructive dismissal

171. The claimant resigned because she was feeling stressed and unhappy in her job. Mr Varela had expectations, sometimes unrealistic, which she could not meet. He would often be impatient and short with her. We do not believe he shouted, but we can understand that it might have felt like he was shouting when he used a raised voice and critical tone. We believe that the 11 July 2019 incident was just one more incident of the same kind, but at that point her friends at work were looking for jobs, she was herself looking for a job, and her stress was greatly increased by anxiety over her grandparents. Her grandfather had gone into hospital on two days previously, and she had designed and was participating in a rota to look after him and her grandmother. After the incident on 11 July 2019, she asked to bring forward her booked leave in August so as to be able to take off 12 – 26 July 2019, but then she would have had to go back on Monday 29 July 2019.

172. The only reason given in the resignation letter is that she is resigning for 'personal reasons'. We believe it was exactly that. The personal reasons were her stressful family circumstances compounding her unhappiness at work.

173. We do not think her unhappiness at work was anything to do with the matters which she has claimed as harassment, ie the suntan comment, the 'on the spectrum' comments, the usage of 'sassy minx', any conversation about 'slaves in cupboards'. There are a number of reasons for this conclusion.

173.1. Her resignation letter refers only to 'personal reasons'. This is not a phrase which we would expect if the reason was in any way because of offensive remarks related to race, sex or disability. It is more consistent with her grandfather's illness and perhaps a general feeling that she was not valued in the job and could not cope with Mr Varela's manner towards her.

173.2. We take account of the claimant's contention that she was too afraid to put the real reason in her letter because she did not want Mr Varela arguing back at her. That is not impossible, although we find her suggestion that Mr Varela was 'terrifying' to be implausible. However, she was leaving. She did not have to go back in and talk to him. In our

experience, employees do usually spell out such matters in a resignation letter as they tend to feel this is their chance. The claimant did also stress at several points during the hearing that it was her character to speak out when she felt something was wrong. Without the fear of having to confront Mr Varela face-to-face, we would have expected her to mention the harassment if it was one of the factors driving her out.

173.3. The GP's notes on 10 July 2021 record that the claimant had a 'worsening of anxiety recently', but 'unsure of trigger'. We would have expected the claimant to have said – and the GP to have noted – if something as specific as all or any of the remarks related to race, sex or disability had played a part, or if it was something along the lines of 'my boss has been shouting at me ever since I challenged him over a sexist remark'.

174. In summary, we believe the claimant resigned because she was unhappy at work and could not cope with that any longer when her grandfather became ill. She was unhappy because Mr Varela had expectations which she could not fulfil and was impatient and short-tempered. She did not particularly get on with him. He did not particularly value her. And her friends at work were all looking for new jobs. None of the remarks in her hearing related to race, sex or disability played any part in her resignation. She disapproved. But that was not bothered her. Even the 'suntan remark', which violated her dignity when it occurred, did not remain an ongoing issue for her. She did not mention it again. What bothered her was the way Mr Varela spoke to her specifically, which she experienced as shouting.

175. The next question is whether that conduct amounted to a fundamental breach of contract. We find that it did not. Mr Varela's manner towards the claimant was not always pleasant. He had an unfortunate management style. However, it is not enough that he was a demanding impatient boss. It is not enough that he may have behaved unreasonably from time to time. The question is whether he behaved in a way likely to destroy or seriously damage the relationship of trust and confidence. It is not enough that the claimant subjectively felt that he did. It must be considered from the perspective of a reasonable person in the claimant's position. We do not feel such a person would consider trust and confidence had been breached.

176. The claim for constructive dismissal therefore fails. It is not necessary for us to address issues 3.7 – 3.8.

177. Issue 3.9 also does not arise. However, even if we had found constructive dismissal, we would not have found that it was harassment. The conduct over which the claimant resigned was not in any way related to race, sex or disability as we have already explained.

<u>Issue 3.10: Written statement of employment particulars and section 38</u>

178. The respondents accept that the claimant was not provided with a complete written statement of particulars as required by section 1.

179. Her offer letter set out her key responsibilities in some detail; the name of her employer; her annual salary; that her employment was subject to a 3-month trial period; her start date; and her holiday entitlement.

180. The letter did not include frequency of pay, any rules on sickness and sick pay, notice required by each party.

181. The respondents did not have any HR department. Part of the claimant's newly designed role incorporated HR.

182. There is a dispute regarding whether the claimant asked Mr Varela for a contract of employment on her first day or whether the respondents suggested to her that she draw up a draft from a template. Either way, even on the respondents' account, this does not amount to providing her with a section 1 statement, and we do not think it is an excuse for not doing so. The respondents were used to working with senior lawyers and indeed they had their own lawyers, to whom they had suggested she send her draft anyway. A new employee, even in an HR department – and the claimant's HR role was fairly basic – should not have to draw up their own section 1 statement or contract of employment. She was not an HR specialist. This was the employer's responsibility.

183. Having said that, the offer letter did contain most of the required details. Though it did not set out pay intervals, it did state annual salary. Only a few details were missing.

184. Balancing these factors, we make an award of two weeks' pay for failure to provide written particulars.

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Employment Judge Lewis
06/10/2021

This is a correction of the decision sent to the parties on 6 August 2021. The decision is corrected under r69 purely to add point 9 of the judgment and paragraph 33 of the reasons, which matters had been decided and stated orally.

Sent to the parties on: 06/10/2021

For the Tribunals Office