EMPLOYMENT TRIBUNALS

Claimant: Ms R Tabuko

Respondent: CIS Security Limited

HELD AT: London South ET by Cloud Video Platform

ON: 17 and 18 June 2021
5 and 6 October 2021

BEFORE: Employment Judge Barker
Mr R Singh
Mrs A Williams

REPRESENTATION:

Claimant: Ms Wright, counsel
Respondent: Mr Harris, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

1. The claimant's claims of direct sex and race discrimination and harassment on the grounds of sex and race succeed.

2. The claimant was constructively unfairly dismissed by the respondent.

3. The claimant was wrongfully dismissed by the respondent.

REASONS

1. The claimant's claims against the respondent were partly heard at a hearing on 17 and 18 June 2021. The claimant had also brought proceedings for sex and race discrimination against a second respondent, Mr Metodi Metodiev. The parties agreed that the claimant's claims against the second respondent were

issued outside the primary time limit in s123 Equality Act 2010. At an earlier case management hearing, it was directed that the issue of any extension of time regarding the claimant's claims against the second respondent would be considered at the final hearing.

2. In a judgment dated 26 July 2021, the Tribunal found that the claimant's claims against Mr Metodiev were not presented within such time as the employment tribunal considered just and equitable in the circumstances of the case, as per s123(1)(b) Equality Act 2010. The claimant's claims against Mr Metodiev were therefore dismissed. The resumed hearing, which took place on 5 and 6 October 2021, heard closing submissions from the claimant and the respondent employer, CIS Security Limited, only.

3. The Tribunal heard evidence from the claimant and from Mr Khan who was the manager for the University of Westminster account, Mr Graves and Mr Woodley for the respondent. Mr Metodiev had prepared a witness statement which the Tribunal read, but he was not cross-examined on it.

4. It was clear from the claimant's responses to cross-examination that she remained profoundly affected by the incident on 24 December 2018 and what she saw as the respondent's inadequate support of her in relation to it.

5. The claimant was employed by the respondent as a security guard from January 2016 until 21 March 2019. She worked at sites in London, namely Regent's University and the University of Westminster. ACAS Conciliation involving the (first) respondent commenced on 18 January 2019 and ended on 18 February 2019. ACAS Conciliation involving Mr Metodiev took place from 12-13 March 2019. She engaged in further ACAS Conciliation with the (first) respondent on 4 April 2019 which lasted one day. The claimant presented her ET1 claim form against both respondents to the Tribunal on 18 April 2019.

6. The respondent provides security services on site at various sites, including a number of universities in London. At the University of Westminster, Marylebone, where the incident occurred, the respondent's team of 80 employees was ethnically and racially diverse, with the majority of staff being non-white and not British. The gender composition of the workforce of the respondent overall is 84% male, but with a high concentration of female staff in administration and HR, according to Mr Woodley. He was not able to provide the number or percentages of women who were security guards, either generally or at the University of Westminster, but it can be deduced from this information that it is considerably less than 16% of the workforce.

Issues for the Tribunal to decide

7. The issues for the tribunal to decide were set out in the case management order of Employment Judge K Bryant dated 24 January 2020. The claims raised in the ET1 were:
    a. direct sex discrimination relating to the incident on 24 December 2018 (hereafter "the Incident"). The claimant relies on a hypothetical comparator;
    b. harassment related to sex relating to the Incident;
    c. direct race discrimination relating to the Incident. The claimant relies on a hypothetical comparator;
    d. harassment related to race relating to the Incident;
    e. constructive unfair dismissal. The claimant relies on the Incident and the respondent's subsequent handling of her complaint as resulting in a breach of the duty to maintain trust and confidence entitling her to resign and claim constructive dismissal; and
    f. wrongful dismissal.

8. In the claimant's Grounds of Complaint at paragraph 6, she provides a list of four complaints of verbal comments made to her during the Incident by Mr Metodiev which she says amount to direct sex and race discrimination and sexual and racial harassment. Those comments are as follows:
    a. "*You sound really happy like someone who a man has f****d overnight";*
    b. "I'm erotic now";
    c. "*I wonder what your real hair looks like. I want to know why black women wear white women's hair*"; and
    d. "*you should keep it shaven like mine. Actually, I like women with short hair*".

9. The Grounds of Complaint also contain, at paragraph 7, a list of five complaints of physical actions carried out during the Incident by Mr Metodiev. The claimant says these amount to direct sex and race discrimination and sexual and racial harassment. Those actions are as follows:
    a. forcing his body onto the claimant, violating her personal space and creating an intimidating atmosphere;
    b. looking in her bag without permission;
    c. leaning close to her and "licking his lips";
    d. smiling in an intimidating and perverted manner; and
    e. removing her hat and wig and thereafter attempting to stamp on the wig in an aggressive manner. This action caused an injury to the claimant's scalp.

10. It was accepted by the respondent in closing submissions that

"R1 [the respondent] *does not deny that, if R2* [Mr Metodiev] *used the words set out in paragraph 6 of the Details of Complaint, they would have been direct sex and race discrimination and also sex and race harassment. Nor does it deny that, if R2*

had carried out the actions set out in paragraph 7 of the Details of Complaint, they too would have been direct sex and race discrimination and also sex and race harassment. The reason for the caveats "if R2 used the words" and "if R2 carried out the actions" is because R1 made no express findings in R2's dismissal letter or elsewhere about each of the Claimant's allegations all of which R2 denied with the exception of the removal of the Claimant's hat resulting in her wig falling off which he admitted.

However, R1 accepts that it considered that it was more likely than not that R2 did carry out some at least of the other matters the Claimant alleged and that was impliedly confirmed in the dismissal letter at the end of the second paragraph with the words "and you [sic] subsequent behaviour"

11. The respondent made the following submissions in their defence. Firstly, the actions detailed above were not actions for which they should be held vicariously liable because Mr Metodiev did not act "*in the course of employment*" as set out in s109(1) Equality Act 2010 which states "*anything done by a person (A) in the course of A's employment must be treated as also done by the employer*."

12. Furthermore, the respondent alleges in the alternative that even if Mr Metodiev is found by the Tribunal to have acted "in the course of his employment", the respondent should not be vicariously liable for his actions because, as per s109(4) Equality Act 2010 they carried out "*all reasonable steps*" to prevent him carrying out acts of discrimination.

13. The issues for the Tribunal to decide were therefore:
    - Whether Mr Metodiev said or did any or all of the things alleged in paragraphs 6 and 7 of the claimant's grounds of complaint. If he did, each of these incidents are accepted by the respondent to be acts of discrimination as alleged by the claimant;
    - Whether these were said or done "*in the course of employment*" as per s109(1) EQA 2010
    - If so, whether the respondent carried out "*all reasonable steps*" to prevent him doing so as per s109(4) EQA 2010;
    - Whether there were one or more breaches of the duty of trust and confidence by the respondent in relation to the claimant's employment;
    - Whether the claimant resigned in response to the breach(es) without unreasonable delay;
    - Whether the claimant, if constructively dismissed, was also wrongfully dismissed.

Findings of Fact

14. The claimant attended the control desk at the reception area of her place of work at the University of Westminster to begin her shift at approximately 7am

on 24 December 2019, Christmas Eve. During the handover to the claimant from Mr Metodiev, who finished the night shift at 7am, the Incident occurred that is the catalyst for these proceedings. Mr Ashish Gurung was present at the control desk and was a witness to the incident, as was Mr Niazi who were both employed by the respondent.

15. As well as the claimant's witness statement and oral testimony of the events of that day, and the evidence of Mr Metodiev, the Tribunal was taken to 44 still images taken from CCTV footage, from 7.03am until 7.09am. We also examined the claimant's "Incident Report" document produced for the respondent, which the claimant told the Tribunal was produced on 30 December 2018. There was also an email dated 26 December 2018 at 17.33 from the respondent's Control Room, sent by the duty controller on that day, Khuram Nazir, which records the contents of the claimant's report to him of the incident on 24 December 2018. An email from Ray Khan dated 27 December 2018 at 06.23 am to the respondent's HR team (including Hayley Fichtmuller and Tony Graves) was also examined by the Tribunal and records the contents of Mr Khan's conversation with the claimant the previous evening. Mr Gurung was subsequently interviewed by Mr Khan and gave his account of the incident, as well as Mr Niazi and we have considered the accounts of these interviews as part of these proceedings.

16. From the CCTV footage and the accounts of the observers Mr Gurung and Mr Niazi, we make the following findings.

17. Mr Metodiev can be seen to stand very close to the claimant at several times during the Incident. Mr Metodiev is a tall and broad man, and the claimant is a small and slightly-built woman and the differences in size and stature are obvious in the footage. Indeed, when Mr Metodiev is between the claimant and the camera, the claimant is barely visible. The close contact can be seen to take place in a narrow corner of the reception desk.

18. The claimant can be seen wearing a hat with a pom pom on it in most images, and not wearing it in some others. She can be seen bending down low towards the floor on several occasions, as Mr Metodiev stands over her.

19. In other images, they are at opposite ends of the desk, as the claimant writes in what appears to be the booking-in log book, for example. Third parties (known to be Mr Gurung and Mr Niazi) appear in the images on occasion and are at times only a distance of several feet away from the claimant and Mr Metodiev.

20. It was accepted by the respondent that Mr Gurung and Mr Niazi were witnesses to the incident. They provided witness statements on 4 January 2019 to Mr Khan. Mr Gurung's statement provides the most detail. In it, he tells Mr Khan:

    - That Mr Metodiev pulled at the claimant's hat and her wig fell down;

- That the claimant told Mr Metodiev "*I have a wig on. My wig will fall down*";
- That Mr Metodiev said "something like "*a woman who has kept her husband satisfied*"; and
- That when the claimant referred to going to take a shower in the shower room Mr Metodiev replied "*this is getting too erotic, I'm leaving*".

21. Mr Niazi told Mr Khan in his statement of 4 January 2019:

- In response to the claimant saying she would shower at work using the facilities, that Mr Metodiev replied "*that the conversation was becoming too erotic for him*";
- While making this comment, Mr Metodiev's facial expression "*looked like it was possibly merry/happy/smiling/smirking*";
- Mr Metodiev "*said some stuff as he left in a cheerful manor [sic]"*

22. The account of the claimant's report on 26 December 2018 to the duty controller, Mr Nazir, is reported by him to have been:

- That "*Metodi came towards her with his tongue sticking out and said you look like someone I slept with*";
- That "*he pulled her wig off her head and said I wanted to know what was below the wig and what black people looked like without their wig*";
- That "*she was emotional over the phone and I comforted her as much as possible*"
- That he has informed the duty manager Mr Bridgeman and Mr Khan by telephone;
- That she has been advised to prepare a statement; and
- That Mr Khan would meet her on site the next day where she was working.

23. The claimant's description of the incident in the incident report of 30 December 2018 (dated 24 December 2018) was that:

- as soon as she said hello to Mr Metodiev, he replied with "*you sound really happy, like somebody who a man has f***ed overnight*";
- he then came towards her and brushed up against her;
- he started going through her bags, claiming that he could smell alcohol;
- she told him to move away from her and not to touch the things in her bag;
- he stood very close to her, only 6 or 8 inches away;
- he said "*I'm erotic now*";
- she was "*really frightened of his grin [sic] smile as his actions were intimidating. I tried to divert his attention and asked for the second officer. He said he was alone on site and that the second officer had left which left me even more frightened*";
- He said "*I wonder what your real hair looks like. I want to know why black women wear white women's hair, why can't they keep their own hair*"; • She

was shocked by his racial comments and didn't want to reply as there was no-one on reception except the two of them;

- then Mr Gurung came in to reception and she begged Mr Metodiev not to remove her hat and wig, which Mr Gurung overheard;
- Mr Metodiev nevertheless pulled her hat off her head, which removed both the hat and the wig from her head, which hurt her scalp, as he pulled out some of her own hair with it;
- He then tried to stamp on the wig;
- He said "*you should keep it shaven like mine, actually I like women with short hair"*.
- Mr Gurung witnessed the point from when she was begging him not to remove her hat and wig to when he pulled both off.

24. Mr Khan's immediate view of the incident and the claimant's behaviour in connection with it is recorded in his email to Ms Fichtmuller, Mr Graves and Mr Bridgeman of 27 December 2018 in which he states:

"The incident occurred in the morning of 24th at changeover 7am but control and/or myself were not informed until yesterday afternoon which I found a little strange. Also Rose worked 24th, 25th and 26th without escalating the matter which again I find a little strange."

25. The claimant attended work on 2 January 201, but became very emotional and left the site and was subsequently attended to by paramedics. Mr Khan was asked in cross-examination if he was aware of her extreme distress. He accepted that he was concerned about her welfare after the incident on 2 January 2019. The claimant was signed off sick and did not return to work after 2 January 2019.

26. Mr Metodiev was interviewed as part of a disciplinary process on 14 January 2019, having been suspended on 28 December 2018 and interviewed as part of the investigation on 9 January 2019. He accepted that he pulled the claimant's hat off by the pom-pom and that he was in high spirits as it was Christmas, but denied making any comments of a sexual nature, denied going through her bag and denied making reference to her hair. He denied that she had pleaded with him not to touch her hat. He alleged that the witnesses had colluded and when told a witness had heard him saying he was "erotic" then said that this would have been a joke.

27. As part of the disciplinary meeting, the respondent's officer Mr Woodley reviewed the CCTV footage with Mr Metodiev. He pointed out to Mr Metodiev that he could be seen going through the claimant's bag, and could be seen to have pulled the claimant's hat off and was holding it behind his back. Ms Fichtmuller was present as a witness at the disciplinary hearing. The outcome was that Mr Metodiev was dismissed for gross misconduct on 15 January 2019.

28. Taking all of this evidence into consideration, we find that on the balance of probabilities, Mr Metodiev did make the remarks as alleged to the claimant during the incident. We have considered the fact that the claimant reported the incident relatively quickly after it occurred and that her accounts of it at the time (on 26 December and 30 December) were largely consistent and are consistent with the allegations made before this Tribunal. Mr Khan accepted in cross-examination that the account given by the claimant initially over the telephone matched the account she gave subsequently. Furthermore, Mr Khan himself accepted that Mr Metodiev was not telling the truth about the incident at the investigation and disciplinary meetings when he denied many of the allegations.

29. Although the claimant was cross-examined about why she did not report it straight away, we do not consider that the short delay is indicative that the claimant was not being credible or truthful about her distress. We find that the claimant was distressed and hesitant to report the incident, which we consider to be a common reaction to such a situation.

30. We find that Mr Metodiev said "*You sound really happy like someone who a man has f****d overnight"* to the claimant. The witness Mr Gurung reported a version of this as having been said, but without using sexually explicit language. The claimant reported this having been said in sexually explicit terms in the incident report of 30 December. The tone and sexual nature of the comments is consistent with other comments made and reported by the claimant and the witnesses.

31. We find that Mr Metodiev said *"I'm erotic now*" to the claimant. Both third party witnesses reported this as having been said, as did the claimant. When pressed on the issue, having initially denied it, Mr Metodiev said if he had said this it would have been a joke.

32. We find that Mr Metodiv did say "*I wonder what your real hair looks like. I want to know why black women wear white women's hair*" or words to the same meaning and effect, if not this exact phrase. The claimant is reported to have told the duty controller that this was said, albeit not the exact phrase. The comment is consistent with Mr Metodiev having pulled the claimant's hat off despite her having asked him not to touch her hat because she was wearing a wig.

33. We find on the balance of probabilities that Mr Metodiev also made the comment to the claimant "*you should keep it shaven like mine. Actually, I like women with short hair*". The claimant's reports of the incident were credible and consistent and Mr Metodiev's were not. This statement was also not disputed by the respondent.

34. In terms of the physical actions alleged to have been done by Mr Metodiev, we find on the balance of probabilities that the following did take place:

a. forcing his body onto the claimant, violating her personal space and creating an intimidating atmosphere;
b. looking in her bag without permission;
c. leaning close to her and licking his lips;
d. smiling in an intimidating and perverted manner; and
e. removing her hat and wig.

35. We have found no evidence that Mr Metodiev attempted to stamp on the claimant's wig. We have carefully studied the still images from the CCTV footage and considered the minutes of the disciplinary meeting at which Mr Woodley considered the CCTV footage with Mr Metodiev. We have also considered the claimant's accounts and those of the two witnesses, and find on the balance of probabilities that the other allegations did take place as described, but not this one.

36. As the respondent has accepted that, if the Tribunal finds that the allegations in paragraphs 6 and 7 of the claimant's Grounds of Complaint took place, that they would amount to direct sex and race discrimination and sexual and racial harassment, we make no further findings of fact on these issues as they are not disputed by the respondent.

The respondent's training programme for staff and the actions taken after the Incident

37. Mr Khan confirmed, when asked by the respondent's counsel, that he was the manager of the University of Westminster's account and was responsible for employee welfare. He was asked about the training he had received and told the Tribunal that he had received "general diversity training" at the start of his tenure at the University of Westminster, but that he did not recall the specific content. He confirmed that he had not received any specific training on sexual or racial harassment, or on how victims may respond as a consequence of experiencing harassment.

38. Although Mr Graves, the respondent's Operations Director, told the Tribunal that Mr Metodiev had completed (as all staff did) the respondent's Welcome Host induction programme which lasted a day, and had an SIA licence which involved training in standards of behaviour expected in the security industry, we note that both of these training programmes (the contents of which were in the bundle) make reference to equality and diversity but by way of high-level statements which lack practical examples. For example, the respondent's "Equal Opportunity and
Inclusion Policy" states under the heading "Your responsibilities"

"Every employee is required to assist the organisation to meet its commitment to provide equal opportunities in employment and avoid unlawful discrimination…acts

of discrimination, harassment, bullying or victimisation against employees or customers are disciplinary offences…"

39. We find that this written information did not translate into an understanding or awareness of appropriate behaviour in the workplace on the part of Mr Metodiev. It is notable that although the incident on 24 December was witnessed by two colleagues, both of whom confirmed that they overheard Mr Metodiev make comments of a sexual nature to the claimant, there is no evidence before us to suggest that either witness considered reporting this behaviour to a manager, or made any comment about it at the time until asked to do so by Mr Khan. This is, we find, indicative of a lack of awareness by the respondent's other staff of the seriousness of such incidents and a lack of understanding of the role of members of staff in ensuring that the workplace is safe for all employees. This is also concerning given the nature of the respondent's business, which by its nature is a business which undertakes (amongst other aims) to keep members of the public safe on premises on which the respondent is engaged.

40. Mr Khan was asked by Mr Metodiev's counsel in cross-examination about the location of the incident on 24 December 2018 and Mr Khan acknowledged that the reception desk was not a secluded or hidden place, that it was covered by CCTV cameras, and that the security guards, including Mr Metodiev, would have known about this. The fact that Mr Metodiev considered himself at liberty to behave in such a manner with a colleague in the workplace in full view of CCTV cameras and continued to do so when two colleagues arrived, leads the Tribunal to the conclusion (along with our other findings of fact above) that the respondent's training and management practices on respect for diversity and inclusion in the workplace were inadequate. Mr Metodiev appeared to have no idea that what he was doing was inappropriate in the workplace and could lead to a disciplinary sanction and, worse still, appeared to have no idea of the consequences of his actions on the claimant.

41. It was put to Mr Khan that the comments he made in his email of 27 December about it being "*strange*" that the claimant had not reported the incident straight away and that she had attended work on 24, 25 and 26 December, indicated that he was not believing the claimant or taking the complaint seriously, allegations he denied. However he did note subsequently that he believed that the incident was of a nature that it should have been reported immediately.

42. It was further put to him that his use of the word "*strange*" potentially threatened to undermine the seriousness of the incident to those who would investigate, and that as the person responsible for employee welfare, he should have known better. Mr Khan said that, to a certain extent he agreed with the latter statement.

43. The Tribunal finds that the use of the word "*strange*" by Mr Khan does suggest that he was not aware of the variety of ways in which victims of harassment can react, including by not being able to report an assault straight away.

44. Furthermore, we find that the respondent believed that dismissing Mr Metodiev was sufficient to resolve the issue of the claimant's harassment and discrimination in the workplace. It is clear from Mr Metodiev's disciplinary process that the respondent did not even make clear findings as to whether he committed acts of discrimination and harassment and on what grounds. His dismissal letter refers to "gross misconduct" and does not mention discrimination at all.

45. The respondent's closing submissions state *"R1 made no express findings in R2's dismissal letter or elsewhere about each of the Claimant's allegations*". This, we find, is because the respondent did not even consider whether any of its policies, training methods, management actions or workplace culture was such that discrimination and harassment was an issue for its employees and something that needed to be addressed in any specific way other than removing Mr Metodiev.

46. This is perhaps most succinctly expressed in the email of Ms Fichtmuller (the respondent's regional human resources manager) of 22 January 2019, in which she states:

> *"She is complaining of sexual discrimination and racial discrimination in that when she raised the allegations in December (this was the officer that took her hat off) she feels she was not taken seriously (we dismissed the other officer)…."*

47. The tone of this email contrasts with the tone of Ms Fichtmuller's email to the claimant of 7 January 2019, in which she says "*We are taking this situation very seriously and as such if you want to provide a written version of events I would be happy to accept this. We also understand that this has affected you and would like to support you, please do let me know what I can do to help*." The claimant's evidence, which we accept, was that in fact no-one from the respondent called her after the incident, including Mr Khan, despite her calling them repeatedly – hence the acknowledgement of the claimant's apology at the start of Ms Fichtmuller's email ("*Please do not be sorry to contact me – I am happy for you to do so*").

48. Given the nature of the respondent's business, the respondent's employees are frequently working alone save for one other colleague, as was the case with Mr Metodiev. They are often alone in otherwise empty premises at antisocial hours. Given the safety risk inherent in such a pattern of work it is, we find, concerning that the respondent considered the matter dealt with by the dismissal of Mr Metodiev.

The Claimant's Grievance

49. The claimant raised a grievance on 23 January 2019. In it, she says that the subject of the grievance was "*discrimination which began in February 2017*" She refers to four issues, which were:
    a. The removal of her personal items from a locker at Regent's University without her consent, the respondent's failure to respond to her grievance at the time or provide feedback from the grievance hearing on 16 August 2017, or return the items to her;
    b. That she was "*barred*" from Regent's University for reporting an officer for bullying, yet the male officer came to the University of Westminster on 3 August 2018;
    c. Mr Khan "*demanded*" she change her hospital appointment on 15 October 2018, which caused her distress;
    d. The incident on 24 December 2018, in relation to which the claimant noted that she "*reported it to Control and Ray Khan and yet he was still allowed to come and work on the night of 26/12/2018*"

50. It was accepted that the claimant worked three shifts on 24, 25 and 26 December and six shifts from 28 December to 2 January and that Mr Metodiev worked on the night of 26 December 2018. Mr Khan's evidence was that he was first made aware of the incident by the Control room on 26 December 2018 at 17.30 by email and that he spoke to the claimant after that. He told her to leave an hour early on 26 December and to arrive late on 27 December to avoid any contact with Mr Metodiev, who was covering the night shift on 26 December.

51. He told the Tribunal that the claimant was satisfied with this, but that she told the respondent that she would be absent on 27 December as she was so upset over the incident on 24 December. Mr Khan spoke to the claimant on 27 December and told the Tribunal that the claimant said she would be "*happy to return to work*" if Mr Metodiev was not there, and she did do so on 28 December.

52. The claimant told the Tribunal that she was surprised to learn that despite her report to the Control on 26 December, Mr Metodiev was allowed to work his full shift overnight on 26 December, which was from 7pm, as she expected the respondent to suspend him immediately. The Tribunal notes that the Controller's email to Mr Khan and others that day notes that the claimant called at 17.15 and told him that "*she was sexually and physically harassed*" by Mr Metodiev on 24 December, in front of Mr Gurung. He also reports that the claimant had already reported this to her line manager Mr Gilboa who told her to leave 30 minutes early as Mr Metodiev was due to work that night.

53. It is the claimant's case that the respondent's actions in this regard indicate that they did not take her complaint seriously and that this is a breach of the duty of trust and confidence. The Tribunal accepts the claimant's evidence in this

regard, taking account of the claimant's fears for her safety and the distressing nature of the incident. It is, we find, concerning that the respondent did not suspend Mr Metodiev straight away, given the nature of the allegations against him.

54. The claimant attended a grievance hearing on 12 February 2019 with Mr Woodley. Her grievance outcome was provided to her on 20 February 2019, with her grievance partly upheld but not in relation to any of the issues that are the subject of her complaint of constructive dismissal. She appealed against the grievance outcome on the same day, and attended an appeal hearing on 6 March 2019 and was provided with the outcome on 21 March 2019. Her grievance appeal was not upheld and she resigned the same day, citing "*constructive discharge tactics*" which the claimant explained was a reference to cumulative previous incidents of discrimination, starting with the incident involving her locker in 2017.

55. In the meeting with Mr Woodley, the claimant raised several issues that, in the view of the Tribunal, suggested discrimination, but Mr Woodley acknowledged during cross-examination that these did not raise any concerns with him, nor that he asked the claimant to expand on any of these concerns. She said in relation to her removal from Regents University *"Kwako is favoured over me because he is male and I am an older lady*". In relation to Mr Woodley's question as to what the respondent could have done further in relation to Mr Metodiev, the claimant responds that "*he should be taught to treat black women with respect"*, but Mr Woodley does not ask the claimant to expand on this comment. This is further evidence, we find, that the respondent did not train its staff properly to recognise and manage discrimination issues in the workplace, did not take the issues of discrimination seriously and was not sufficiently committed to ensuring that such an incident as happened on 24 December 2018 did not happen again.

56. Mr Woodley's minutes of the meeting, which are summarised in an email dated 18 February 2019, state that

"Rose stated that she feared for her safety. I have advised Rose during the meeting that she should never put herself in a position where she feels unsafe and should call from home to inform us that she will not be attending for those reasons. Instead, Rose worked 2 shifts after the incident before escalating the incident……

……..

The offending officer was suspended from site within 14 hours of the complaint being raised and was subsequently dismissed from the company."

57. We find that the respondent placed too much onus on the claimant to take steps to ensure her own safety (and impliedly criticised her for not doing so) rather than taking proactive steps themselves to ensure the safety of those in their workplaces (and, by extension, their clients and customers) by suspending Mr Metodiev immediately.

58. The Tribunal is asked to consider the earlier allegations of breach of contract made by the claimant, relating to the three earlier incidents contained in her grievance. We find that, taking the evidence into account and Mr Khan's evidence as to the circumstances of each of these, that although they would have upset the claimant at the time, they did not amount to fundamental breaches of contract. This is because the respondent's evidence, which we accept, was that they did not know at the time of the incidents in August 2017 and October 2018 that the claimant had any underlying medical condition which may have caused her to be sensitive as to the contents of her locker, or her attendance at hospital.

59. Furthermore, although it is not best practice to move the individual who alleges bullying from their workplace, Mr Khan's explanation as to why this was done, which was that the claimant was on a temporary assignment at that place of work, is accepted as a reasonable action to take.

60. The respondent submits that none of the reasons given for the claimant's resignation in her resignation letter are valid and that the Tribunal should find that the actual reason for the claimant's resignation from the respondent was her failure to secure a settlement or an "exit package". The claimant admits that she asked for an exit package during her grievance procedure. The respondent also submits that further evidence of this can be found in the claimant contacting ACAS on 18 January 2019.

61. The respondent has reviewed the claimant's resignation letter, witness statement, the notes of the meetings that were part of the grievance process and her grounds of complaint and points to the fact that complaints in some of these documents are not repeated in her grounds of complaint or her witness evidence. Where phrasing is not repeated, the respondent invites the Tribunal to conclude that the claimant's allegations are invalid.

62. It can be said that the claimant has not expressed herself particularly clearly in her resignation letter, but taking the letter as a whole we find that it is clear that the reasons for her resignation are the lack of support from the respondent in relation to the matters raised in her grievance, and her distress as a result of the incident on 24 December 2018. She notes that she fears for her safety. We note that this was raised in the grievance appeal hearing with Mr Graves and was repeated before the Tribunal. This is not inconsistent, and is also found in her complaint that Mr Metodiev was not suspended immediately.

63. It is not, we find, necessary to insist that a precise mirroring of the claimant's grounds for her resignation be found in her grounds of complaint or her witness statement, particularly in distressing circumstances, as this would put too high a burden on a claimant. It is sufficient that her complaints can be understood in broad terms and we find that in broad terms her resignation letter reflects her evidence before this Tribunal, in that she felt unsupported both at the time of the incident and in the respondent's handling of her complaint thereafter.

64. In terms of whether the claimant affirmed the breach by waiting until the outcome of the grievance appeal was known, we note that the claimant was not at work during this period but remained off sick.

The Law

65. The law on constructive dismissal is set out in the case of *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA.* To claim constructive dismissal, an employee must demonstrate that there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment, that the employer's breach caused the employee to resign, and the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

66. *Chindove v William Morrison Supermarkets plc EAT 0201/13*, stated that Tribunals should not look at the mere passage of time in isolation when determining whether an employee has lost the right to resign and claim constructive dismissal.

What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. An important factor is whether the employee was actually at work in the interim, so that he or she could be seen as complying with the contract in a way that was inconsistent with a decision to terminate it.

67. Sex discrimination can be a repudiatory breach of contract, where it indicates a failure to carry out the duty to maintain trust and confidence between the parties (*Shaw v CCL Ltd [2008] IRLR 284*).

68. Where there is a repudiatory breach of contract that causes an employee to resign in response within a reasonable time, this is a "dismissal" for the purposes of the unfair dismissal regime in the Employment Rights Act 1996, Part X. A constructive dismissal will therefore be an unfair dismissal unless the employer can show there was a potentially fair reason for the dismissal, the dismissal was within the "range of reasonable responses" (as per *Iceland Frozen Foods v Jones*), and that a fair procedure was followed (s98(4) Employment Rights Act 1996).

69. An employee is entitled to notice on termination of employment in accordance with s86 Employment Rights Act 1996, or the contract of employment, whichever is the longer period of notice.

70. Section 109 of the Equality Act 2010 provides that employers and principals can be held liable for acts of unlawful discrimination committed by their employees (s 109(1)). *Jones v Tower Boot Co Ltd [1997] 2 All ER 406,* although decided under the preceding legislation, the Race Relations Act 1976 s32, remains the authority for the test to be applied under the Equality Act 2010 s109(1) to determine vicarious liability for discrimination under the Equality Act 2010 and whether an act was carried out in the course of employment. Further guidance on the scope of "in the course of employment" is found in *Forbes v LHR Airport Ltd [2019] IRLR 890*.

71. *W M Morrisons Supermarkets plc v Various Claimants [2020] IRLR 472 SC* considers the issue of vicarious liability of employers for tortious acts committed by employees "in the course of employment", in this case for breaches of data protection legislation.

72. Employers are vicariously liable for the acts of their employees done 'in the course of employment'. It does not matter whether the employer knew or approved of its employee's conduct (Equality Act 2010 s 109(3)), but liability can be avoided if the employer takes all reasonably practicable steps to prevent the discrimination (s 109(4)).

73. In *Canniffe v East Riding of Yorkshire Council 2000 IRLR 555*, *EAT*, it was held that the proper test of whether the employer has established the defence in s109(4) is to identify whether there were any preventative steps taken by the employer and then whether there were any further preventative steps that the employer could have taken that were reasonably practicable.

74. The Equality and Human Rights Commission Employment Code (2011) notes that "*an employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take*". The Code suggests the following are steps employers ought to have taken to be able to rely on the defence in s109(4):

- implementing an equality policy
- ensuring workers are aware of the policy
- providing equal opportunities training
- reviewing the policy as appropriate, and
- dealing effectively with employee complaints (see para 10.52).

75. Direct discrimination: Did the respondent carry out acts which treated the claimant less favourably that it treated or would treat a comparator, being a person not of the claimant's race or sex in not materially different

circumstances? Was that less favourable treatment because of the claimant's race or sex? (s13 Equality Act 2010).

76. Harassment: Was any of the respondent's conduct of which the claimant complains unwanted and if so, did it relate to the claimant's race and/or sex? Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? When assessing whether the conduct had that effect, the Tribunal is to consider the claimant's perception and the other circumstances of the case and whether it is reasonable for the conduct to have that effect. (s26 Equality Act 2010).

Application of the Law to the Facts Found

- **Constructive dismissal, unfair dismissal and wrongful dismissal**

77. The Tribunal finds that the Incident amounted to a breach of the duty of trust and confidence between the claimant and the respondent, as per (*Shaw v CCL Ltd [2008] IRLR 284*), as it was a significant breach going to the root of the contract of employment which was caused by a failure on the part of the respondent to take adequate steps to ensure that its staff understood that this was unacceptable conduct in the workplace and therefore breached the duty of trust and confidence.

78. We conclude that the respondent also committed breaches of the implied duty of trust and confidence in its response to the incident, to the claimant's grievance and her grievance appeal. This is because we find that the respondent considered that its actions in suspending Mr Metodiev 14 hours after the incident was reported to management, and then dismissing him, amounted to an adequate response to the claimant's complaints and to the incident on 24 December. No further action was deemed necessary by the respondent's management. The claimant, reasonably in our view, considered this an inadequate response and considered herself not properly supported by the respondent. By the time of her resignation, she reported that she still feared for her safety and had not returned to work since 2 January 2019.

79. The claimant resigned on 21 March 2019, the same day that she received the outcome of her grievance appeal. The respondent contends that the claimant did not resign in response to the alleged breaches by the employer, but because she sought an "exit package". We do not accept that this is the case. The fact that the claimant, through her trade union, considered the possibility of an "exit package" before resigning does not defeat her claim of constructive dismissal (*Gibbs v Leeds United Football Club [2016] IRLR 493).*

80. The claimant resigned in response to the repudiatory breaches by the respondent of failing to adequately handle her grievance, combined with the

incident of 24 December 2018 itself. She communicated this to the respondent in her resignation letter, albeit in broad terms and not in legally precise language. She did not delay too long before resigning and affirm the breaches, as the final breach did not, we find, occur until she received the outcome of the appeal stage of the grievance process. Furthermore, she had been off sick since 2 January 2019 and as per *Chindove v Morrisons Supermarkets*, had not complied with the contract of employment in a way that was inconsistent with a decision to terminate it. There is no evidence of the respondent having a potentially fair reason for the claimant's dismissal as per s98(2) Employment Rights Act 1996. The claimant has been constructively unfairly dismissed.

81. The claimant claims notice monies from this Tribunal. The respondent's case in its ET3 response form was that she resigned "with immediate effect" and is therefore not entitled to any notice monies, however counsel for the respondent acknowledged in his closing submissions that if the claimant's claim for constructive unfair dismissal succeeds then her claim for wrongful dismissal must also succeed. We agree with the respondent's submissions in this regard and find that the claimant's wrongful dismissal claim succeeds.

- **Discrimination**

82. The respondent acknowledges that if the Tribunal finds that Mr Metodiev said and did the things the claimant alleges, that would amount to unlawful discrimination on the grounds of sex and race. Our findings of fact above are that, save for the allegation that he stamped on her wig, Mr Metodiev did act as alleged by the claimant and therefore subjected her to unlawful direct discrimination and harassment on the grounds of sex and race.

83. The respondent's principal defences to the claimant's claims of discrimination are twofold; firstly that as per s109(1) Equality Act 2010 the acts of Mr Metodiev were not committed in the course of his employment and therefore that the respondent is therefore not vicariously liable for them. The respondent secondly states that the respondent took all reasonable steps (s109(4) Equality Act 2010) to prevent the discrimination occurring and so should not be found liable.

84. The respondent's counsel has provided the Tribunal with extensive closing submissions as to why the respondent is not vicariously liable for Mr Metodiev's actions, which we have considered, as follows.

85. Firstly, the respondent submits that as the incident began at 7.03am but Mr Metodiev's duty ended at 7am on 24 December, that this is not within the hours of employment and therefore outside the scope of the employment as per *Lister v Hesley Hall Ltd [2001] IRLR 472* and *Forbes v LHR Airport Ltd [2019] IRLR 890*.

86. The Tribunal do not accept that the fact that the incident started three minutes after the end of Mr Metodiev's shift means that this was not done in the course of his employment. The facts found were that Mr Metodiev was still at his place of work, in uniform, when the incident occurred and also that the incident began because Mr Metodiev was doing a handover to the claimant.

87. Secondly, the respondent submits that the recent Supreme Court case *of W M Morrisons Supermarkets plc v Various Claimants [2020] IRLR 472* is, (as per the respondent's closing submissions) "*…of crucial importance and is binding authority whenever a court or tribunal is required to consider whether an employer is vicariously liable for wrongdoing by an employee whatever statute or cause of action is involved. That is because, regardless of under what statute or cause of action the alleged wrongdoing fell, the key issue for the court or tribunal in every such case is to determine whether the acts of the wrongdoing employee were done*

"in the course of employment"."

88. The respondent's submissions continue that at no point in the *WM Morrison* judgment did the Court limit the judgment to cases under the Data Protection Act only (the Act in relation to which the breaches had been committed in that case).

The respondent's submissions continue that the *WM Morrison* case had been considered in personal injury cases, and cases under the Sexual Offences (Amendment) Act 1992.

89. The respondent argues that, as per *WM Morrison*, the test for whether actions were "*in the course of employment*" is whether the wrongdoing has a sufficiently close connection to what the wrongdoer is required to do that it is appropriate to hold the employer liable. The respondent also examines the concept of "risk" in *Lister v. Hesley Hall Ltd [2001] IRLR 472* and concludes that there was no such risk in the instant case.

90. We must respectfully disagree with the respondent's submissions concerning the applicability of the *WM Morrison* case to the instant case, for the following reasons.

91. Firstly, the landmark case in employment law relating to vicarious liability under the Equality Act 2010 (decided under the preceding legislation, the Race Relations Act 1976 s32) remains *Jones v Tower Boot Co Ltd [1997] 2 All ER 406*.

92. In *Jones*, the issue of the vicarious liability of employers for the acts of their employees under the common law and discrimination law was expressly considered and the differences in approach between common law and discrimination statutes explored. Waite LJ in *Jones* notes that the statutory scheme in the 1976 Act (as replicated in the Equality Act 2010) contains several

key differences from tortious principles of vicarious liability, such as the RRA/EQA not being restricted to relationships of master and servant, there being no reasonable steps defence in the common law and the inclusion of additional remedies such as compensation for injury to feelings, and the ability of Tribunals to make declarations and recommendations. Indeed, the respondent seeks to rely on one of those differences

(the "reasonable steps" defence) in these proceedings. The tortious and statutory regimes are therefore not the same and different tests may therefore be applied in each.

93. Furthermore, as per Waite LJ, a statute "*is to be construed according to its legislative purpose*" and to be given a wide interpretation. He continues "*It would be inconsistent with that requirement to allow the notion of "the course of employment" to be construed in any sense more limited than the natural meaning of these everyday words would allow*".

94. A consequence of a limited construction of "in the course of employment" in the context of a complaint under the RRA/[EQA], as described by Waite LJ, would be "…*that the more heinous the act of discrimination, the less likely it will be that the employer would be liable*" and this cannot have been what Parliament intended.

95. The Court of Appeal decided that a purposive construction of the legislation was correct, even though this went against the common law interpretation of vicarious liability. The application of the phrase as understood in everyday speech is a question of fact for the Tribunal to resolve and affords Employment Tribunals discretion to reach conclusions which uphold a purposive interpretation of the legislation.

96. The *Jones* case, a decision of the Court of Appeal, remains good law despite the Supreme Court's decision in *WM Morrison* precisely because the law on vicarious liability in tort has developed separately from the statutory regime in equality legislation in the Employment Tribunal, although of course some principles in the various jurisdictions do have some commonality. *WM Morrison* was not limited by the Supreme Court to cases under the Data Protection Act because it is, in our view, clear and did not need to be expressly stated that the line of authorities for vicarious liability for tortious acts is separate from the line of authorities decided under equalities legislation. Indeed, none of the cases which have been decided since *WM Morrison* was decided by the Supreme Court and which uphold the principles established in *WM Morrison* in relation to vicarious liability, have been cases involving the employment provisions of the Equality Act 2010.

97. We find that cases decided under the Equality Act 2010 are to be decided according to the ordinary meaning of "in the course of employment" (as discussed in *Jones*), as it would be understood by a lay person. We conclude

that in the claimant's case the question to be addressed is broadly whether the Incident happened "at work".

98. Was Mr Metodiev "at work" when the Incident occurred? As noted above, Mr Metodiev was still at his place of work, behind the reception desk in full view of the respondent's CCTV cameras, in uniform, when the Incident occurred. It began within 3 minutes of the end of his shift, as part of a handover to the claimant. The actions and conversation that we find amounted to unlawful harassment and discrimination took place in the context of a conversation with a colleague (the claimant).

99. There is nothing to suggest, on the ordinary meaning of the phrase "in the course of employment" that Mr Metodiev was not "at work" when the incident happened. It is irrelevant that he was not instructed to harass the claimant by the respondent, or that harassment was not part of his job description, or that his shift ended three minutes earlier. He was at his place of work, in uniform, carrying out a handover at the end of his shift to his colleague. For the same reasons, the claimant was also clearly "at work" at the time. We are of the view that it would be difficult to imagine a clearer example of harassment and discrimination "in the course of employment" than this one.

100. The respondent relies in the alternative on the defence that they have taken "all reasonable steps" to prevent the discrimination occurring (s109(4) EQA). The respondent submits that, although the burden of proof is on the respondent to show it took all reasonable steps, the claimant has not indicated what she thinks the respondent should have done and that the incident was "so exceptional" that it could not have been anticipated.

101. We conclude as follows. Some preventative steps were taken by the respondent in relation to unlawful harassment and discrimination. Some were not voluntary steps; the respondent relies in part upon the training received by its staff as part of the SIA licensing scheme, but this is an industry-wide accreditation scheme and not one instigated by the respondent. Nevertheless, we accept that the respondents' employees completed a paper-based learning module on equal opportunities as part of their SIA licenses.

102. Mr Khan, the manager at the University of Westminster, told the Tribunal that he had received "general diversity training" and the Tribunal understands further that employees receive a day of a "Welcome Host" induction programme which covers expected behaviours in the workplace, but that neither managers nor other employees receive specific discrete training on discrimination and harassment at the respondent.

103. The respondent has an "*Equal Opportunity and Inclusion Policy*" but it was our findings of fact that the respondent's employees had not been made sufficiently aware of the practical implications of this policy. Mr Metodiev, we found, did not

understand and was not aware of how this policy and his training should translate into behaviour in the workplace. His colleagues who witnessed the discriminatory behaviour did not consider that they had any obligation to intervene in the incident, attend to the claimant afterwards or report what they had seen to the respondent's management. Mr Khan considered it "strange" that the claimant did not report the incident for some time afterwards and attended work. This shows a lack of understanding of the effect of harassment on individuals. Mr Metodiev was not suspended immediately the allegations were received but was allowed to complete his next shift. This shows a lack of consideration for individuals who may have come into contact with him before the investigation was carried out, when the respondent knew of the allegations but had made no assessment of the seriousness of the risk to others that he posed.

104. The respondent could reasonably be expected to have provided more in-depth and practical equal opportunities training to staff such that these omissions would not have happened. This is particularly the case given the very nature of the services that they provide to clients and the general public who use their clients' facilities.

105. It is precisely because discriminatory behaviour can take so many different forms that an educational and preventative approach is to be taken by employers to unlawful discrimination. It is irrelevant that the employer may not have predicted, for example, that an employee may pull off another's hat and wig and thereby harass them. The issue for the Tribunal in determining whether the defence under s109(4) is successful is whether an employer has taken all steps they could reasonably have been expected to take before the incident, to prevent it occurring. We find that they had not, and therefore the statutory defence fails. The respondent remains vicariously liable for Mr Metodiev's actions.

Remedy Hearing

106. There will be a remedy hearing with a time estimate of one day, to be conducted by CVP, on a date to be notified to the parties in due course. The parties are to cooperate with each other in preparing documents and evidence for the remedy hearing, including but not limited to an updated Schedule of Loss to be prepared by the claimant and supplied to the respondent 21 days before the remedy hearing.

107. The issues to be determined are:

In relation to discrimination:

a. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

b. What financial losses has the discrimination caused the claimant?
c. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
d. If not, for what period of loss should the claimant be compensated?
e. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
f. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
g. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
h. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
i. Did the respondent or the claimant unreasonably fail to comply with it?
j. If so is it just and equitable to increase or decrease any award payable to the claimant?
k. By what proportion, up to 25%?
l. Should interest be awarded? How much?

108. **In relation to unfair and wrongful dismissal:**

a. What basic award is payable to the claimant, if any?
b. If there is a compensatory award, how much should it be? The Tribunal will decide:

i. What financial losses has the dismissal caused the claimant?
ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
iii. If not, for what period of loss should the claimant be compensated?
iv. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
v. Did the respondent or the claimant unreasonably fail to comply with it?
vi. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

_____
Employment Judge Barker

Date 24 November 2021

JUDGMENT SENT TO THE PARTIES ON

13 January 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employmenttribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.