EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms. Severine Obertelli	v	**Maxxton Limited**

Heard at: **Birmingham via CVP** **On:** **25 February 2022**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **In Person**

Respondents: **Mr. D. Ludlow, Solicitor**

JUDGMENT & SUMMARY OF OPEN PRELIMINARY HEARING

The Judgment of the Tribunal is that all of the claimant's claims (with reference to the schedule of acts) and additional claims have little reasonable prospect of success and are subject to a deposit order of £150 each :-

1. Allegations A, B, D, E, H (allegations of sexual harassment)
2. Allegations C, F, G, J, K, L (allegations of direct sex/race discrimination)
3. Allegation I (victimisation);
4. Constructive unfair dismissal;
5. Breach of contract;
6. Unlawful deductions.

REASONS

Introduction

1. The purpose of the listed preliminary hearing was to determine whether the claimant should be ordered to pay a deposit (not exceeding £1,000 per allegation) *"if it seems that any contentions put forward by the claimant have little reasonable prospect of success"* (see order of Employment Judge Britton dated 8 December 2021).

2. This was a remote hearing by CVP which was not objected to by the parties. At the commencement of the hearing the respondent's representative experienced some technical difficulties in joining the hearing. Therefore, the start of the hearing was slightly delayed. Due to the inadequate listing given to the hearing,

agreed by the parties, the Tribunal was unable to deliver its decision on the day and had to reserve its judgment.

Documents

3. The Tribunal was provided with a 175 page bundle of documents. Both parties who had provided skeleton arguments were given an opportunity to make oral submissions.

The claim

4. ACAS notification was on 9 March 2020 and the ACAS certificate is dated 9 April 2020. In summary by claim form presented on 28 April 2020 the claimant brought complaints against the respondent of unfair dismissal, sex discrimination, missed pension payments, failure to pay healthcare and other expenses. From approximately February 2013 until 30 January 2020 the claimant was employed by the respondent in the role of Head of Sales and Marketing EMEA.

5. The respondent is a company in the business of developing software for the hospitality industry. The claims are disputed by the respondent. It states that the claimant's claims are out of time and further are not well founded.

6. The case has been subject to a number of preliminary hearings (16 June 2021, 27 September 2021 and 8 December 2021 before Employment Judge Britton) to clarify the particular complaints.

7. The claimant clarified her claim in an amended schedule of acts of the alleged discrimination at pages 80 to 82 of the papers dated 19 January 2022.

The respondent's application

8. The respondent applied for a deposit order against every allegation made by the claimant. Mr. Ludlow referred to page 80 of the bundle which he described as a critical document in the case. The respondent submitted that the claimant's two breach of contract claims/constructive unfair dismissal claim rely upon an alleged breach of failing to pay the claimant a bonus and/or a breach of the implied term of trust and confidence. The respondent submitted that in accordance with the case of **Lewis v Motorworld** a last straw must be established. The claimant needs to prove that there was a failure to pay pension, bonus and expenses as a series of cumulative acts which breached the implied term of trust and confidence. The respondent submitted that this claim on its face was out of time because the ACAS notification was dated 9 March 2020 and the ET1 was presented on 28 April 2020.

9. Further in respect of the unfair dismissal claim the claimant has not amended her claim to clarify the last straw. At previous preliminary hearings the claimant had indicated that it was an email from the CEO a few days prior to her second sickness note. The only email disclosed is dated 4 December 2021 (page 127-131) which is entirely innocuous and could not on any grounds form a last straw (**Omilaju v Waltham Forest London Borough Council 2005 ICR 481)**; in fact the email is positive. The claimant's resignation letter itself is inconsistent with a suggestion of a last straw or breakdown of an employment relationship; in particular the third paragraph and the last straw of that letter (page 132 and

133). On the basis that the claimant said she wished to keep the contract alive even after the alleged breach and subsequent end of the contract of employment in the form alive even after the alleged breach of contract and end of the contractual employment relationship in the form of an ongoing contractor consultancy. It was submitted that there was no evidence that the respondent behaved in a manner that was calculated or likely to destroy the relationship of trust and confidence between the claimant and it. Even if the claimant can show this it was submitted that the respondent had reasonable and proper cause for doing so because of the claimant's attitude and behaviour towards it and not because of any protected act.

10. It was further submitted all discrimination complaints were brought outside the primary time limit. The claimant was not alleging from the critical document page 80 onwards that her dismissal was discriminatory.

11. The respondent also submitted that there was no continuing acts of discrimination. He submitted the claimant's discriminatory complaints amount to a number of different disparate intermittent acts by different individuals. He referred to the sexual harassment complaint at page 80 dated Spring 2017 involving Mr. Mampay; this alleged act occurred 3 years prior to the presentation of the claim. The next alleged act of sexual harassment involving Mr. Mampay did not take place until a year or so later dated Spring/Summer 2018; the next act of sexual harassment is dated late 2018 concerning Mr. Mampay; and the next pleaded act concerns another individual Reuben in late 2018. He listed the acts of Spring 2019, July 2019, May 2019, August 2019; there was little prospect of establishing a continuing act with large gaps of time and involvement of different individuals. On the last page of the critical document there were two acts of direct sex discrimination in 2018 and in 2019 with no specific date; the time frame being one year and in 2018 the claimant has not identified who made comments against her seniority. The claimant would have to rely upon the just and equitable extension to permit her to bring these claims and it was not just and equitable to allow an extension. Referring to the claimant's medical evidence, it was submitted that the claimant had provided two sick notes which expired on 3 January 2020 (pages 125 and 126) one month prior to the notice period expiring. The respondent submitted the sick note was in stark contradiction to the lucid letter of resignation dated 5 December 2019 (page 132). The onus was upon the claimant to persuade the Tribunal it was just and equitable to extend time and this was the exception rather than the rule **Bexley Community Centre (trading as Leisure Link v Robertson (2003) EWCA Civ 576.**

12. The respondent further submitted that the factual assertions upon which the claimant's claims were based were flawed. Mr. Ludlow referred the Tribunal to the original grounds of resistance and submitted that the respondent has reasons for any treatment the claimant complains about; it is not discrimination. Any treatment was due to her conduct which had been noted by EJ Britton at previous preliminary hearings and warned that if she continued to interrupt him, her claim might be struck out. The claimant was not suitable for the role of CCO and therefore was not appointed. It was further admitted that the claimant had failed to identify an actual comparator in respect of her direct complaints of discrimination. It was asserted a comparator would have been treated the same

in particular allegation (c); the CEO is not bound to provide employees with feedback.

13. In respect of the victimisation complaint, the claimant has failed to identify the protected act relied upon.

14. Allegation J still does not identify perpetrators. A comment related to seniority is not a comment related to sex.
15. In respect of allegation L if the claimant was treated less favourably it was not because of her race or Italian/French ethnic or nationality or any protected characteristic because she is not a dutch speaker. Language per se is not a protected characteristic. However, the respondent did make available the English translation document to all employees.

16. In respect of the sexual harassment allegations, there is a discrepancy between the particulars in the schedule at page 80 and the particulars in the claim statement (page 18). The allegation in the claim statement is “I needed to sell myself internally” (page 18). It was submitted that such a comment in a sales environment between the sales and marketing professionals even if not qualified by the word “internally” is not objectively or subjectively viewed related to sex. It would not be reasonable to have the effect of violating the claimant’s dignity. In respect of allegation E the remarks were not related to sex but were supportive remarks.

17. In respect of the unauthorised deductions claim, the claimant complains the respondent failed to make a payment of bonuses to which she was entitled. It was submitted that the claimant in fact received more bonus that she was contractually entitled to. The respondent relied upon bonus payments in October 2017, November 2017 and February 2018 and new client signings in HSBC bank statements pages 159-163 for October and December 2017 and February 2018 and was awarded £59,590 in respect of a new client Novasol. Although at page 98 Novasol withdrew the contract, the claimant was not contractually entitled to any bonus she received and kept her full commission payment. In 2018 and 2019 no new clients were brought in by the claimant that being the sole criterion and condition of a bonus payment under the bonus system that was operating so that no further bonus payments were “properly payable” pursuant to section 13 Employment Rights Act 1996. In any event any complaint of a non-payment of bonus was out of time because the EC notification was received on 9 March 2020.

18. In respect of the breach of contract claims, the claimant alleges that the respondent failed to make the full amount of the agreed employer’s pension contributions into a pension scheme on her behalf. The respondent disputes that it agreed to contribute to the claimant’s private pension in the measure of 10% of her basic earnings; paid monthly contributions from April 2013 to January 2010 including additional contributions to a further occupational pension plan from August 2017 and relies upon documents which directly dispute the claimant’s contentions showing pension contributions of £23,916.12 from April 2013 to January 2020 plus from August 2017 additional agreed pension contributions of £10,257.22. In relation to a failure to pay private medical insurance the respondent argues there was a discrete temporary

agreement to pay for the provision of healthcare costs in 2017 and 2018 only. The respondent relies upon the contract of employment at page 92.

19. It submitted the claimant's allegations have little reasonable prospect of success and should be subject to a deposit order.

The claimant's reply

20. The claimant submitted allegation J concerned an allegation dated August 2019 about weekly meetings. Further that she was subject to a threatening email; see allegation K dated August 2019. In respect of her letter dated 5 December 2021 she highlighted the detriment/emotional financial detriment "impeded my ability to defend myself". The claimant states she has provided comparators in her skeleton argument for this application. Although specific events started in 2017; the harassment really more evident in May 2019 when colleagues left. She stated the respondent owes her pension payments. The CEO told the accountant that 10% was an agreed contribution to a private pension.

21. The claimant submitted act A occurred in 2017 and she was asked to "sell herself internally". This was not a comment made in a sales environment; the CEO and other men were present at the time; it felt sexual and there was no reason to make such a comment. The claimant further stated that she was employed by the respondent and the comment was not made in an interview and was not related to her job.

22. In respect of the failure to pay her bonus from April 2013 to 2018 the claimant took £60,000 of bonus she took this in three parts £23,000 on 1 October; £19,000 on 31 December and £19,000 28 February 2018; she was a success there was no need for such a comment it felt very threatening and out of place and she felt uncomfortable. This comment would not have been made to a man. Allegation B too was not banter; it was threatening; and there was no reason for the comment.

23. In respect of allegation C this concerned a commercial plan in Spring 2018, the claimant had sought further support but her plan was dismissed in an unconstructive way without addressing any of her points and dismissed unreasonably. The respondent admits that regularly Dutch was spoken this might have been discriminatory as the claimant could not understand so could not access relevant information. The claimant stated she was never made aware she was working for Maxxton as a company. There was no reason why the respondent did not accept her plan.

24. In respect of allegation D again this allegation had a sexual, threatening connotation and had nothing to do with the closure of the contract. The claimant was left to feel powerless; the comment was made out of context and she was made to feel like a prostitute.

25. In respect of allegation E and working around the kids. The comment was directed at the claimant as she was working from home and was not made to any male colleague.

26. In respect of allegation F the claimant accepted that everybody was involved in sales administration, but after a colleague left the business the claimant was meant to receive assistance from both Ramone and Reuben, male colleagues but did not. Instead she was required to do work for Reuben which made her feel inferior. There was no reason to ask her as Ramone could do this work; he was meant to replace an executive working for the claimant.

27. In respect of allegation G in the Spring 2019 she attempted to put forward some issues. She needed to work and collaborate with the respondent but no one was interested. Her colleague left and she became responsible for Dutch colleagues. The claimant needed further support on the international side and she was the only woman in the meeting. Men were covering the leadership roles. The comment was made to her as a woman The claimant felt ridiculed from a professional perspective.

28. In respect of meetings conducted in Dutch the claimant felt she was not listened to; she had no presence; her role was diminished. Her mental well-being led her to resign her employment.

29. In respect of the allegation in May 2019 the claimant felt that he was not put at the same level. She was head of sales and marketing. As everyone spoke English this should have been spoken to allow access.

30. In respect of allegation I, no measure was taken to diminish the discrimination. She was the only person left in the team following her colleague leaving the business. She was not made aware of the reason; it was sex or not being Dutch. She felt this was threatening and she needed support. The claimant felt isolated and unwell. Her colleagues were not co-operative.

31. Following her resignation, the claimant stated that the respondent's behaviour towards her got worse. On 16 June 2020 the respondent piled up an enormous emotional pressure and stress and she was subject to increased threats. On 1 February 2020 the respondent sent a debt collector to collect the car. She was not available to travel for two weeks. The claimant accepted these emails were not included in the bundle.

32. The claimant submitted that her resignation indicates the incoherent state she was in at the time. Her job was important and she needed her job due to financial pressure. Her letter of resignation shows burn out.

33. In respect of her letter dated 5 December 2021 she could not recall all the events before her resignation. She was not feeling well. She received an email from the CEO. Standard disclosure is incomplete and the claimant was unsure that the document was included. The way she was treated was beyond harassment. She was unwell and not coherent in the letter.

34. In respect of the claimant's complaints of breach of contract and unlawful deductions the claimant submitted her resignation was not inconsistent. Her job had diminished and she was not supported. In respect of her bonus in 2017 it is agreed from 2013 to 2017 she had been paid a large amount of £60,000 and the last part was paid in 2018. From 2017 no bonus was actually set up. The claimant was performing well. There was a typo in the claimant's pleading it should have said it was suggested there should be a CCO (although a COO would have been a good idea). The claimant nominated putting someone together so to create a sales team and someone responsible. There was an agreement to pay dental health insurance and that should have been paid; it was not. The claimant stated that there was a verbal agreement for 10% of private pension should have increased. This was an independent contract. Payments were removed from the claimant's pay slip without her consent.
35. The claimant submitted that the respondent is not a small company. It has a large development and marketing department. She was owed payments and she was harassed.

36. In respect of her financial situation at present she is working. She commenced work about 1.5 months ago with a net salary of £4753.63 but this was in the context of not working for 12 months and she has accumulated some debt on loans and credit cards of £35,000. She has no savings and has about £2,800 to £3,00 outgoings.

The Law - making deposit orders

37. Rule 39 of the Employment Tribunal Rules 2013 provides
"(1)where at a preliminary hearing – the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party "the paying party" to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
(3)The tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
(4)If the paying part fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out.."

38. Rule 34 (2) states that enquiries should be made into a party's means before the order is made. Rule 34 (5) addresses the position where the sum is paid in compliance with a deposit order and the allegation or argument does not succeed at the merits hearing for substantially the reasons given in the deposit order. The paying party is treated as having acted unreasonably for the purposes of costs consequences unless the contrary is shown and the deposit is paid to the other party/parties. If this scenario does not eventuate then the deposit is refunded to the paying party.

39. In the case of the **Garcia v the Leadership Factor Limited (2022) EAT 19** it was stated that deposit orders (paragraph 36) have a valuable role to play in discouraging claims or defences that have little reasonable prospects of success without adopting the far more draconian sanction of dismissing the claim or response altogether. The deposit order affords a paying party the

opportunity for reflection. In the case of ***Hemdan v Ishmail & Al-Megraby (UKEAT/0021/16)*** it was stated that the purpose of a deposit order is to identify at an early stage, claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. Further it was stated that claims or defences with little prospect, cause costs to be incurred and time to be spend by the opposite party which is unlikely to be necessary. They are likely to cause both wasted time and resource and unnecessary anxiety. They also occupy the limited time and resources of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit. Mrs. Justice Simler stated *"The purpose is emphatically not in our view ..to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose..Likewise the cap of £1000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice.."*

40. Evaluating the likelihood of success for these purposes entails a summary assessment intended to avoid cost and delay and a mini trial of the facts to be avoided (see paragraph 13 of **Hemdan**). If the tribunal considers that an allegation has little reasonable prospects of success the making of a deposit order does not follow automatically but involves discretion which is to be exercised in accordance with the overriding objective having regard to all the circumstances of the particular case.

41. The extent to which the tribunal may have regard to the likelihood of disputed facts being established at the full merits hearing has been considered by the EAT in **Jansen Van Rensburg v Royal Borough of Kingston Upon Thames UKEAT/0096/07;** the assessment by the Tribunal is a broad one and there was no justification to limit matters to be determined to purely legal ones. In **North Galmorgan NHS Trust v Ezsias (2007) IRLR 603**it was held that *"a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."*

<u>The Law -the claims pursued</u>

42. The claimant brings complaints of constructive unfair dismissal, breach of contract, direct sex discrimination, harassment related to sex or race, and victimisation.

43. Section 13 (1) of the Equality Act 2010 states that *"A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others."* Pursuant to section 23 (1) of the Equality Act 2010 *"there must be no material difference between the circumstances relating to each case."*

44. The Tribunal should concentrate primarily why the Claimant was treated as he was. Was it because of the protected characteristic (of age or sex) ? That will call for an examination of all the facts of the case. Or was it for some other

reason? If it was the latter, the claim fails; see paragraph 11 of **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) UKHL 1.** The inquiry for the Tribunal is into the subjective motivations of the decision maker (**CLFIS (UK) Limited v Reynolds 2015 EWCA Civ 439**).

45. Less favourable treatment is because of the protected characteristic if either it is inherently discriminatory or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind; **Nagarajan v London Regional Transport (1999) IRLR 572.**

46. In a direct claim of discrimination, the Tribunal must compare the treatment with an actual or hypothetical comparator. In accordance with section 23 (1) of the Equality Act 2010 there must be no material difference between the circumstances relating to each case. In **Shamoon** it was stated "*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he or she is not a member of the protected class."*

Burden of proof

47. Section 136 (2) and (3) of the Equality Act 2010 states
"(2)..If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the Court must hold that the contravention occurred; (3)But subsection (2) does not apply if A shows that A did not contravene the provision."

48. Section 136 (2) of the Equality Act 2010 envisages a two-stage approach to the burden of proof in discrimination claims. The Claimant has the initial burden of proving a prima facie case of discrimination and if this hurdle has cleared the burden shifts to the Respondent to provide a non-discriminatory explanation **(Ayodele v Citylink Ltd and anor 2018 ICR 748).**

49. If the Claimant can prove a 'prima facie' case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efobi (2019) EWCA Civ 18.**

50. To establish a prima facie case, the Claimant has to show that he was treated less favourably than others were or would have been treated, and in addition to this also needs to show 'something more' which indicates that discrimination may have occurred:

'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

(***Madarassy v Nomura International plc*** **[2007] ICR 867** at [56] *per* Mummery LJ).

51. A discrimination claim may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. Where conduct extends over a period, the act is to be treated as done at the end of the period (see section 123 of the EqA). There is a distinction to be made between an act of discrimination which has continuing consequences and an ongoing situation or a continuing state of affairs which extends over time (**Hendricks v Commissioner of Police for the Metropolis)**.

52. The discretion to extend time is broad. In **Miller v MOJ (UKEAT/0003/15)** it was stated that time limits are to be observed strictly; the EAT can only interfere if the decision is Wednesbury unreasonable/perverse; the prejudice to the respondent is customarily relevant and section 33 of the Limitation Act 1980 contains a useful checklist. Lord Justice Underhill in the case of **Adedeji v University Hospital Birmingham NHS Foundation Trust (2021) EWCA Civ 23** that it was a useful exercise to consider the factors in section 33 of the Limitation Act 1980 but that there is no requirement to go through the list. The most relevant factors are likely to be (a)the length of and reasons for the delay and (b)whether the delay has prejudiced the respondent. In the case of **Wells Cathedral v Souter** the EAT held that a balancing exercise is required for the just and equitable test and that if the use of the grievance procedure exhausted the limitation period then this is a relevant factor for the Tribunal to consider in the balancing exercise.

53. <u>Constructive unfair dismissal</u>

54. Section 95 (1) (c) of the Employment Rights Act 1996 ("ERA") relevantly provides *"For the purposes of this Part an employee is dismissed by his employer if (and only if)-the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

55. An employee seeking to establish that he has been constructively dismissed must prove :- (1)that the employer fundamentally breached the contract of employment; and (2)that he resigned in response to the breach (see **Western Excavating (ECC) Limited v Sharp (1978) IRLR 27**).

56. It is an implied term of the contract of employment that the employer will not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee; **Malik v BCCI plc (1997) IRLR 462; Baldwin v Brighton & Hove CC (2007) IRLR 232.** The two part test was emphasised in the case of **Mr. M Sharfudeen v T J Morris Limited t/a Home Bargains (UKEAT/0272/16).**

57. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT in **Pearce v Receptek (2013) All ER (D) 364** at paragraphs 12/13

"It has always to be borne in mind that such a breach (of the implied term) is necessarily repudiatory and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious". The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal not in an employment context, in the case of **Eminence Property Developments Limited v Heaney (2010) EWCA Civ 1168** *"..the legal test is simply stated..it is whether looking at all the circumstances objectively that is from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract'.* That case has been followed since in **Cooper v Oates (2010) EWCA Civ 1346** but is not just a test of commercial application. In the case of **Tullet Prebon Plc v BGC Brokers LP (2011) EWCA Civ 131** Aikens LJ took the same approach and adopted the expression *'Abandon and altogether refuse to perform the contract. In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that since it is repudiatory it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract'.*

58. The case of **Morrow v Safeway Stores plc (2002) IRLR 9** held a finding that there has been conduct which amounts to a 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 and entitling the employee to resign and claim constructive dismissal. Whether any conduct amounts to a repudiatory breach is a matter for the tribunal to determine having heard the evidence and considered all the circumstances.

59. Where a fundamental breach of contract has played a part in the decision to resign the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning; **Wright v North Ayrshire Council (2014) IRLR 4 (paragraph 16).**

60. Where a Claimant relies upon a final straw to resign the final act may not be blameworthy or unreasonable but it must contribute something to the breach even if relatively insignificant **Omilaju v Waltham Forest London Borough Council (2005) EWCA Civ 1493.** Further, there cannot be a series of last straws; once the contract is affirmed earlier repudiatory breaches cannot be revived by a subsequent "last straw" and following affirmation it takes a subsequent repudiatory breach to entitle the employee to resign.

61. If dismissal is found, the Tribunal considers whether the respondent has established an admissible reason for the dismissal pursuant to section 98 of the Employment Rights Act 1996. Some other substantial reason is a potentially fair reason pursuant to section 98 (2) of the Act.

62. There is a neutral burden in respect of the fairness of the dismissal pursuant to section 98 (4) of the Employment Rights Act 1996 but the Tribunal should consider all the circumstances of the case including the size and administrative resources of the employer's undertaking, whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing

the employee and this issue is to be determined in accordance with equity and the substantial merits of the case.

Harassment

63. Section 26 (1)(a) of the Equality Act 2010 states *"A person A harasses another B if (a)A engages in unwanted conduct related to a relevant protected characteristic and (b)the conduct has the purpose or effect of (i)violating B's dignity or (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

64. Pursuant to section 26 (2) of the Equality Act 2010 it states *"A also harasses B if-(a)A engages in unwanted conduct of a sexual nature and (b)the conduct has the purpose or effect referred to in subsection (1)(b).*

65. Whether the conduct is related to a relevant protected characteristic is a question of fact. In deciding whether conduct had the proscribed effect, tribunals should consider the context; (**Bakkall v Greater Manchester Buses (South) Limited (t/as Stage Coach Manchester 2018 ICR 1481**) including whether or not the perpetrator intended to cause offence.

66. 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.

67. 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 related to other protected characteristics) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase; **Richmond Pharmacology Limited v Dhaliwali (2009) IRLR 336.**

Victimisation

68. Section 27 (1) of the Equality Act 2010 states
"A person (A) victimises another person (B) if A subjects B to a detriment because (a)B does a protected act or (b)A believes that B has done or may do a protected act. Subsection 2 (a) categorises protected acts as including (d)making an allegation (whether or not express) that A or another person has contravened this Act. The EHRC Code states that a protected act need not be the only reason for the detrimental treatment; it is enough if it is one of the reasons.

Breach of contract

69. In a breach of contract claim, the claimant has the burden of establishing that the respondent breached the terms and conditions of her employment contract.

Conclusions

70. For the purposes of the application, the Tribunal takes into account (a)the tribunal must take the claimant's case at its highest (b)the test is "little

reasonable prospect of success"; (c)a summary assessment is applied (d)the assessment is a broad one and (e)even if the test of little reasonable prospect is satisfied there is still a discretion to be exercised in accordance with the overriding objective as to whether to make a deposit order having regard to all the circumstances of the particular case.

Harassment related to sex

71. Allegations A, B, D, E and H are allegations of sexual harassment.

72. In respect of A, B and D there is a factual dispute between the parties as to whether there was a comment made by the CEO about the claimant selling herself or selling herself internally or at all. If made the respondent contends that in a selling context, it was an innocuous remark. The claimant disputes the context and says this was not in a sales context at all and was humiliating when the comment was made in front of male colleagues. Context of such a comment is highly relevant and can only be determined having heard all of the evidence; if the claimant is correct that it was not in a sales context but simply a gratuitous remark, it cannot be said that her allegations have little reasonable prospect of success.

73. Allegation E concerns a comment the claimant believes directed at her namely *"working around the kids"* as she was the only person working from home in an online meeting with others present. The respondent's case is that these were supportive remarks. Again, context is highly relevant. The Tribunal needs to hear evidence about the context of this meeting. If it is correct that the comment was directed at the claimant, she was the only person working from home and it critical and it therefore would not appear relevant or necessary to make such a remark; it cannot be said that her allegation has little reasonable prospect of success.

74. Allegation H concerns an alleged dismissive attitude to the claimant's proposal for the need of a COO to handle sales at group level where her faults and unsuitability were highlighted. The respondent says the claimant was not suitable for the role of CCO and therefore was not appointed. This allegation is also run under the head of harassment related to race and/or direct sex or race. On the present information provided by the claimant, the Tribunal struggles to see that this allegation has anything to do with the claimant's sex or race. If a person is unsuitable for a post it does not mean that it is related to sex or race. The respondent says it was not a COO post anyway; it was a CCO. The respondent has stated that there was no actual comparator identified by the claimant in respect of her direct complaints of discrimination either. On the limited information available and even using perhaps a hypothetical comparator the Tribunal considers if faults and unsuitability were identified the claimant will struggle to establish a prima facie case that this unwanted conduct was related to a protected characteristic or that her treatment was related to sex or race. In the circumstances the Tribunal concludes that this allegation has little prospect of success.

Other Direct sex discrimination allegations

75. Other direct sex discrimination allegations are those set out at C, F,G,J,K and L. In respect of allegation C the claimant's case is that CEO was dismissive of her commercial plan and she received no help. The respondent argues there any number of non-discriminatory reasons why a senior manager may not approve an employee's work and a CEO is not obliged to provide full feedback on the work. The Tribunal agrees and concludes that this allegation has little reasonable prospect of success.
76. Allegation F-The claimant alleges that she was asked to do administrative tasks in the Spring of 2019. She felt this was demeaning and was treated as if she was the PA of Ruben. There is a dispute of fact since the respondent contends others do administrative tasks too. If the claimant is correct that she was asked to do these tasks and no one else was, she may well establish a prima facie case of direct sex discrimination. On that basis it cannot be said that the allegation had little reasonable prospect of success. The respondent would then have to provide an explanation that such an instruction had nothing whatsoever to so with the claimant's sex. That is a matter for evidence.
77. Allegation G (which the respondent disputes) concerns an allegation that she was shut down for talking too much in a meeting; her intervention did not get noted and she felt isolated. This could potentially be because the claimant was a woman. It cannot be said that the allegation had little reasonable prospect of success.
78. In respect of allegations J and K the claimant has been unable to give any specific date save years 2018 and 2019. The complaints are very general namely comments against my seniority/openly cornered or no real help when asked for support. These allegations are too non-specific, vague and embarrassing to be categorised as allegations of direct sex discrimination and the Tribunal concludes that they have little reasonable prospect of success.

Direct race discrimination

79. There is a dispute of evidence here. Both parties agree that there an announcement in Dutch to the whole team and that the claimant does not understand Dutch. The difference is that the claimant says that there was no available briefing in English; the respondent says that one was available. An announcement in a different language does not appear to be an act of direct race discrimination and the Tribunal concludes on a summary assessment that this allegation has little reasonable prospects of success.

Victimisation

80. At allegation I, the claimant alleges that in August 2019 the CEO agreed to have weekly meetings to address her role and UK strategy as she was unable to work with two male colleagues in the Netherlands. The respondent disputes the allegation and makes the point that no protected act has been identified. The claimant also runs this as a direct sex/race allegation. The claimant relies upon "protected act paragraph 11 of claim statement". However, paragraph 11 of her claim statement states *"In September/October 2019 I had a few online discussions with the CEO via Skype I explained clearly that I could not so the job anymore because of lack of support and the dismissive behaviour. The CEO told me that he would speak with me daily to work out a better strategy. After that last conversation he never got back to me."* A protected act pursuant to section 27 (2)(d) of the Equality Act 2010 includes making an allegation whether express or not that A or another person has contravened this Act; the

particulars provided by the claimant fail to get anywhere close to identifying a protected act within the definition. The identification of a protected act is essential to get a claim of victimisation off the ground. On this basis the Tribunal finds that the claim has little reasonable prospect of success. In respect of whether this amounts to direct sex/race discrimination, the failure to attend a meeting to address the claimant's role and strategy because she did not get on with other colleagues, does not even potentially mean that there was less favourable treatment because of a protected characteristic. There is no information to suggest that this allegation has any relationship with any protected characteristic. The Tribunal finds on a summary assessment that the direct claim has little reasonable prospect of success.

Time/continuing act

81. The claimant has difficulty in her claim in respect of time limits. The claimant relies upon a number of different acts of discrimination, the first dating back to Spring 2017. The next is about 12 to 15 months later in Spring/Summer 2018 and further acts in late 2018. There is then a gap until Spring 2019 and then July 2019. Allegations J and K are undated save for the years "In 2018" or "In 2019".The acts from Spring 2017 to late 2018 involve the CEO. The acts from late 2018 to Spring 2019 involve Ruben. The CEO is then alleged to have committed other acts from July 2019. There are significant gaps of time between the allegations of discriminatory treatment and different perpetrators of the alleged discrimination over the period of time. There is a strong argument that the incidents complained of are discrete acts (if established) as opposed to a continuing act or continuing state of affairs. Even if it was considered that the earlier acts of the CEO amounted to continuing acts between Spring 2017 to late 2018 (and there difficulties with that case bearing in mind the large gaps in time) there is a significant break whereby Ruben is said to be a perpetrator of discriminatory treatment in Spring 2019 and he commits no further alleged acts. The next act allegedly committed by the CEO is in July 2019.The last specific act is dated August 2019. The claimant does not allege her dismissal (dated 30 January 2020) was discriminatory and she entered ACAS conciliation on 9 March 2020 and obtained a certificate on 9 April 2020. The claimant lodged her complaint on 28 April 2020.

82. A summary assessment leads the Tribunal to conclude that her complaints are therefore prima facie out of time; the last act of discrimination occurring in August 2019 and her claim was not brought until 28 April 2020. The claimant would have to seek a just and equitable extension. The claimant has stated that her health was not good and the Tribunal has a wide discretion to extend time in all of the circumstances of the case. Poor health could be a valid reason. However, the burden rests upon the claimant to establish it is just and equitable to extend time and there is little material before the Tribunal to persuade it that this argument would be successful. Based on a summary assessment there is little reasonable prospect of establishing it would be just and equitable to extend time. A summary assessment leads the Tribunal to conclude that there is little prospect of establishing that the claims are brought within the primary limitation period or that it would be just and equitable to extend time.

Constructive Unfair Dismissal

83. Fundamentally, the respondent relies on what it contends is a positive lucid letter to the CEO as indicating that there was no last straw and no repudiatory breach; it is simply inconsistent for the claimant to allege in this context that the claimant resigned because of her treatment or cumulative conduct on the part of the respondent. The claimant's explanation is that she was unwell when she wrote to the respondent. The Tribunal having considered the letter notes a well -structured letter which on balance is a positive one. It does not give the impression that the claimant felt that the respondent had torn up the contract of employment and committed a serious breach of the employment contract. On a summary assessment, the content of the letter does contradict the position that there was a repudiatory breach relied upon the claimant. The Tribunal concludes that the claim of constructive unfair dismissal has a little reasonable prospect of success.

Unlawful deductions complaint

84. The claimant contends that there as a shortfall in the payment of bonus. The claimant has not produced evidence to support this contention. The respondent's case it that it did make bonus payments in October 2017, November 2017 and February 2018 and this is said to be based on new client signings in HSBC bank statements pages 159-163 for October and December 2017 and February 2018. The claimant was awarded a significant sum of £59,590 in respect of a new client Novasol and although (at page 98) Novasol withdrew the contract, the claimant was not contractually entitled to any bonus she received and kept her full commission payment. However, it is contended that in 2018 and 2019 no new clients were brought in by the claimant that being the sole criterion and condition of a bonus payment under the bonus system. On a summary assessment and in the absence of material for the claimant to establish that a bonus was owing the Tribunal concludes that there is little reasonable prospect of establishing bonus payments were "properly payable" pursuant to section 13 Employment Rights Act 1996. Further any complaint of a non-payment of bonus was prima facie out of time and no evidence that it was not reasonably practicable to have lodged this claim because the EC notification was received on 9 March 2020.

Breach of contract

85. The claimant alleges that the respondent failed to make the full amount of the agreed employer's pension contributions into a pension scheme on her behalf. The respondent disputes that it agreed to contribute to the claimant's private pension in the measure of 10% of her basic earnings; paid monthly contributions from April 2013 to January 2010 including additional contributions to a further occupational pension plan from August 2017 and relies upon documents which directly dispute the claimant's contentions showing pension contributions of £23,916.12 from April 2013 to January 2020 plus from August 2017 additional agreed pension contributions of £10,257.22. In relation to a failure to pay private medical insurance the respondent argues there was a discrete temporary agreement to pay for the provision of healthcare costs in 2017 and 2018 only. The respondent relies upon the contract of employment at page 92. On a summary assessment it appears that the respondent has paid the claimant in accordance with the documentary material and the Tribunal concludes that this claim too has little reasonable prospect of success.

Discretion - deposit

86. The case law indicates even if the Tribunal concludes that the threshold of "little reasonable prospect of success" is met the Tribunal has a discretion to award a deposit against each allegation in accordance with the overriding objective and all the circumstances of the case.

87. An important aspect of this case is that the claimant is a litigant in person who lacks knowledge of the law and tribunal procedure (see paragraph 15 of Chapter 1 of the ETBB). The respondent has the benefit of professional legal advice. However, it is important to take account of the purpose of a deposit order, namely that it identifies at an early stage claims with little reasonable prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. In these circumstances the Tribunal concludes that it would be in the interests of justice and in accordance with the overriding objective to make deposit orders per allegation as set out in the schedule of acts and for the breach of contract, unlawful deductions and constructive unfair dismissal claims but the Tribunal refrains from making orders for an allegation if pleaded in the alternative (sex or race). The Tribunal takes this stance because it considers it is in the interests of justice to make a deposit order to send the claimant the clear message that the allegation is not strong but does not seek to prevent the claimant from accessing justice. The Tribunal takes account of the purpose of the deposit order; as set out by Mrs. Justice Simler in the case of **Hemdan** it is not to make it difficult to access justice or to effect a strike out through the back door. The evidence of the claimant is that she does have some financial means; she has commenced a new job with a net salary of £4,753.63 per month. Taking account of her debt in the region of £35,000 and about £3,000 of outgoings per month, the Tribunal considers it would be both appropriate and proportionate for the claimant to pay £150 for each of the acts in her schedule and for the claims of breach of contract, unlawful deduction of wages and constructive unfair dismissal. As indicated the Tribunal is not ordering the claimant to pay four deposits for allegation H in her schedule but requires her to pay one deposit of £150 deposit to pursue the allegation (on any basis, harassment or direct discrimination; race or sex). The tribunal considers that this should present a clear enough message to the claimant her allegation is difficult on any basis without making it difficult for her to access justice or there being a strike out through the back door. If the claimant wishes to pursue all her claims she must pay a deposit order of £2,250 in total.

Employment Judge Wedderspoon

29 March 2022

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