



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Hortence Yagmur

**Respondent:** Ceiling Solutions Limited

**Heard at:** Watford (by CVP)

**On:** 17–21 January 2022  
25 March 2022 (in chambers)

**Before:** Employment Judge Reindorf  
Mr P English  
Mr L Hoey

**Representation:**

Claimant: In person

Respondent: Mr P Kerfoot (counsel)

## RESERVED JUDGMENT

- (1) The direct age discrimination claim fails and is dismissed.
- (2) The direct disability discrimination claim fails and is dismissed.

# REASONS

## INTRODUCTION

1. In an ET1 presented on 12 March 2020 the claimant presented complaints of unfair dismissal, breach of contract, age and disability discrimination. She did not have sufficient qualifying service to bring a complaint of unfair dismissal. At a Preliminary Hearing on 18 February 2021 it was agreed that there was no extant breach of contract claim. Accordingly the complaints which were before the Tribunal for determination were for age and disability discrimination.
2. The respondent denied the claims in its ET3 and argued that the claimant was not a disabled person and that she had presented some of her complaints out of time.
3. At a further Preliminary Hearing on 7 October 2021 it was determined that the claimant had been a disabled person for the purposes of s.6 of the Equality Act 2010 at the relevant times by reason of anxiety and depression.

## THE EVIDENCE AND HEARING

4. The hearing was conducted remotely by video (CVP).
5. The hearing took place over five full days.
6. The claimant gave evidence on her own behalf. The Tribunal heard evidence from the Mrs Bernadette Barrett (sales and Marketing Administrator), Ms Isabel Blanco (formerly Marketing Communications Manager) and Ms Nicola Gallagher (Head of HR) for the respondent. All witnesses produced written witness statements and were subjected to cross-examination. There was an agreed trial bundle consisting of 173 pages. Several documents were disclosed and added to the bundle during the course of the hearing.
7. The claimant also produced a letter dated 24 November 2021 from a friend called Baveeinthiran Ravichchandran. This related to the claimant's health and her mitigation of loss. The claimant said that this person could be called to give evidence if necessary, but agreed that the evidence contained in the letter was not relevant to liability. It was agreed that the Tribunal would not have regard to the letter during the liability stage of the hearing, but that the claimant could call the witness for the remedy stage if appropriate.

8. It was agreed that the Tribunal would deal with liability only, in part because the claimant had not provided sufficient disclosure relating to mitigation of loss for the Tribunal to deal with remedy. Ultimately the evidence and submissions on liability took the full five days of the trial window in any event. Judgment was therefore reserved.

## THE ISSUES

9. An agreed list of issues was produced at a Preliminary Hearing on 16 December 2021 as follows

- 1. Time limits**

- 1.1. *Whether the Claimant's claims were presented within the applicable statutory time limit.*

- 2. Disability**

- 2.1. *The Claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, as set out in the judgment of EJ Bartlett.*

- 3. Age**

- 3.1. *The Claimant was 21 years of age at the time of the matters she complains about. She compares herself with others aged 32 and above.*

- 4. Direct discrimination (Equality Act 2010 section 13)**

- 4.1. *Did the Respondent do the following things:*

- 4.1.1. *In June 2019, Isabel Blanco [the Claimant's manager] failed to take seriously the Claimant's complaint about the behaviour of Chris Toole [age];*

- 4.1.2. *On 3 or 4 July 2019, Isabel Blanco told the Claimant she was spending too much time away from her desk [age];*

- 4.1.3. *In about July 2019, the Claimant was told that she was argumentative and aggressive after she expressed an interest in having business cards [age];*

- 4.1.4. *In September 2019, on more than one occasion, Isabel Blanco challenged the Claimant over the number of times she went to the toilet, taking her mobile phone with her and the amount of time she spent away from her desk [age];*

- 4.1.5. *In October & November 2019 Bernadette Barrett [admin]:*

- 4.1.5.1. *On more than one occasion asked the Claimant about why she was away from her desk [age];*

- 4.1.5.2. *On one occasion recorded the Claimant's hours incorrectly [age];*
- 4.1.6. *On 13 November 2019, the Claimant raised a query about the repayment of expenses and Isabel Blanco's response to this, made orally and / or in writing, was to describe it as "unprofessional", "argumentative" showing a "bad attitude" and amounting to "unacceptable" behaviour [age];*
- 4.1.7. *On 26 November 2019:*
  - 4.1.7.1. *the Claimant's ability to work flexibly was removed [age];*
  - 4.1.7.2. *the Claimant was no longer allowed to eat lunch at her desk [age];*
  - 4.1.7.3. *on asking whether she could use alternative taxi provider, was told she was "being problematic" [age];*
- 4.1.8. *On 6 December 2019, having told the Respondent about her mental health and need for a break, the Claimant was summarily dismissed by email [disability].*
- 4.2. *Did the Respondent's treatment amount to a detriment?*
- 4.3. *Was that less favourable treatment?*
- 4.4. *Was the treatment because of her protected characteristics of age or disability [the Claimant's case in this regard is indicated in the square brackets above].*

**5. Remedy for discrimination or victimisation**

- 5.1. *Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?*
- 5.2. *What financial losses has the discrimination caused the Claimant?*
- 5.3. *Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*
- 5.4. *If not, for what period of loss should the Claimant be compensated?*
- 5.5. *What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?*
- 5.6. *Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?*
- 5.7. *Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a*

*result?*

- 5.8. *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*
- 5.9. *Did the Respondent or the Claimant unreasonably fail to comply with it?*
- 5.10. *If so is it just and equitable to increase or decrease any award payable to the Claimant?*
- 5.11. *By what proportion, up to 25%?*
- 5.12. *Should interest be awarded? How much?*

## **FINDINGS OF FACT**

10. The claimant was employed by the respondent from 29 April 2019 until 6 December 2019 as a Marketing Coordinator. Her line manager was Isabel Blanco, Marketing Communications Manager. She received training on the respondent's policies and procedures as part of her induction.
11. Initially the claimant was based at the respondent's Uxbridge office with around 14 other members of staff. Her desk was located next to Ms Blanco's desk. On 7 October 2019 she and Ms Blanco moved to the respondent's new office at Denham, where they were located on the same bank of desks. The remainder of the Uxbridge office staff also moved to Denham at around the same time.
12. The claimant joined the respondent very shortly before her 22<sup>nd</sup> birthday. At that time two of the Uxbridge staff were 29 years old and the rest were a range of ages between 30 and 62.
13. The claimant's contractual hours of work (as set out in her terms and condition of employment) were 8:30am to 5:00pm Monday to Friday inclusive with a one hour unpaid lunch break. However from the beginning of her employment she was permitted to take part in the respondent's discretionary flexitime scheme. The written flexitime policy was produced to us on the third day of the hearing, as were the claimant's training records including a Powerpoint presentation containing the main points of the written policy. The scheme required employees to work core hours of 9:30am to 12:00pm and 2:00pm to 4:00pm and to complete their contracted hours at any time between 7:00am and 7:00pm. It stated that an intentional abuse of the scheme could result in a three month suspension from entitlement to work flexibly.
14. At the Uxbridge office the flexitime calculations were done by an automated system. This was not initially in place in the Denham office,

so the calculations were done by Bernadette Barrett. Staff were required to log their hours manually for this purpose.

15. The claimant's colleague Lindsay Scott was not on the flexitime scheme because he was Grade 12 employee. On occasion he went outside to smoke. When he did so he was required to log in and out of the building in order to comply with health and safety requirements.
16. Both the claimant's job and Ms Blanco's job entailed an element of travel within the UK and abroad. The claimant's travel arrangements were ordinarily made in advance by Mrs Barrett and paid directly. The respondent used a regular taxi service with which it had an account.
17. During the course of the hearing we were shown documents relating to the expenses policy. These included an email dated 15 August 2019 which was copied to the claimant, which showed that expenses claims submitted and approved by close of business on a Tuesday would be included in the payment run on the following day, and that the employee would receive the funds by the same Friday.
18. The claimant was on occasion granted a cash advance to cover travel expenses. This was not normal practice. We were told that one other employee, who had financial difficulties, was given cash advances to cover expenses.
19. In the Uxbridge office the respondent's offices were located on one floor of the building. Other companies were located on other floors. Each floor had toilet facilities which were accessible to all occupants of the building. In the Denham office the respondent's employees only had access to one set of toilet facilities.
20. The claimant attended training in Newcastle from 10 to 12 June 2019. Ms Barrett booked her taxi to leave her home at 5am on 10 June to go to Heathrow to catch the 7am flight to Newcastle. On arrival at the Newcastle office she met a colleague, Chris Toole, for a marketing update. After this meeting she attended training with other colleagues who had travelled separately.
21. Following the Newcastle training Ms Blanco received feedback from the trainer. On the claimant, he said that she "got on OK when she was actually there" and suggested that she spent a lot of time leaving the class. Two of the other attendees also fed back to Ms Blanco that the claimant had not had a "great" attitude and that she had "practically refused to attend the second plant tour". Ms Blanco recorded this feedback in a contemporaneous note. We find Ms Blanco's contemporaneous notes to be credible and reliable.
22. On 19 June Ms Blanco conducted a training feedback meeting with the claimant, which she also recorded in her note. The claimant was

- emotional during the meeting. She told Ms Blanco that the reason why she had left the class frequently was that she was having her time of the month, and that she had not realised that the second plant tour was compulsory. Ms Blanco recorded in her contemporaneous note that she decided to accept the claimant's explanation and give her the benefit of the doubt.
23. The claimant also told Ms Blanco that Mr Toole's conduct towards her had been overfamiliar and disrespectful, adding that another colleague had commented on how rude he was. We find that the claimant did not tell Ms Blanco that Mr Toole had used sexual innuendo. Ms Blanco said that they should all treat each other with respect and that she would pass the claimant's feedback on to Graham Taylor, who was Mr Toole's line manager. She asked the claimant whether she wished to take the matter to HR, which the claimant declined. Ms Blanco said that the claimant was within her rights to challenge any such behaviour in future and that if there were further problems they could speak to HR. Subsequently Ms Blanco brought the matter to Mr Taylor's attention.
  24. We find that there was no meeting between the claimant and Ms Blanco in early July at which the claimant told Ms Blanco that she had irritable bowel syndrome or any medical condition. If there had been such a meeting the Ms Blanco would not have asked the claimant at a later meeting in September whether she had a medical condition that necessitated extra time in the toilet (as to which we have made findings below).
  25. The claimant said that she had nothing that had been diagnosed and it was just her usual habits
  26. In September 2019, after her return from her summer break, Ms Blanco received feedback from staff in the Uxbridge office that the claimant had been observed to spend a lot of time on her mobile phone and to leave the office for long periods during core hours. Ms Blanco recorded in her notes on 24 September she witnessed this herself for the first time, when the claimant was absent from her desk for 30 minutes between 9:00am and 10:00am and was then absent again from 11:15am until 11:55am. At that time she met Ms Blanco in reception to go with her to an external meeting. They had been due to meet at 11:45am. Ms Blanco had looked for her in the toilet but she had not been there. During the external meeting, which was three hours long, the claimant left the room three times, taking her mobile phone with her. One of these occasions lasted for around 15 to 20 mins.
  27. At a one to one meeting the following day Ms Blanco raised these issues with the claimant. Ms Blanco recorded in the notes that the claimant was "outraged" and became emotional. The notes record that the claimant's explanation was that "without going into details she had always had the need to go to the toilet frequently". She said that she used the toilets on

- the other floors of the building because they were cleaner. She also agreed that it looked suspicious that she took her mobile phone with her and that she would not do so in future.
28. Ms Blanco asked the claimant whether she had a medical condition which required extra time in the toilet. The claimant said that she had nothing that had been diagnosed and it was just her usual habits. Ms Blanco explained that she would continue to keep an eye on the situation and would speak to the claimant again if it continued to be a problem.
  29. On 24 October 2019 the claimant emailed Ms Barrett and Ms Blanco requesting some business cards in her name. She had a number of work trips coming up at which she would be meeting external people and customers. Ms Barrett responded the same day explaining that it did not make sense to print business cards at that time because staff would be changing their email addresses at the end of November.
  30. The claimant responded eleven minutes later saying that she did not understand how the change of email addresses at the end of November would affect the meetings she had coming up in the forthcoming month. She said she had received the same explanation a couple of months previously. She reiterated her request, saying that she only needed “a handful” of cards. She said that her colleague Emily had had some business cards provided recently.
  31. Ms Blanco responded to the claimant five minutes later. She explained that an exception had been made for staff who were in customer facing roles. She suggested that when the claimant met new people she should simply explain the situation and take the other person’s card, and then follow up with an email.
  32. Twelve minutes later the claimant responded again, explaining that she found it “unnecessarily awkward” not to have business cards and that her name was difficult to pronounce. Ms Blanco’s response ten minutes later reiterated the reasoning for the decision and offering to discuss it again at the claimant’s one to one meeting.
  33. On 29 October 2019 the claimant ate her lunch and then left her desk at 1:30pm. At 2:00pm Ms Barrett went looking for her, and saw her outside the building using her mobile phone. She did not return to her desk until 2:40pm. She had been on the phone to her bank. The claimant’s evidence about the purpose of this telephone call was unsatisfactory. We do not accept that the purpose of the call was to arrange a loan to buy a car or that this was the only time that the bank could call her to discuss a car loan. A telephone call of that nature would not take such a long time. The claimant had not even taken her driving theory test, so there was no need for her to take time out of her working day to have a discussion with the bank about a speculative purchase of this sort. We consider it likely that the telephone call was connected to the new business – Yagmur



- Investments Ltd – which the claimant incorporated the following day. The claimant later incorporated a second business, a marketing agency called Exi Creative.
34. On the evening of 29 October 2019 the claimant left the office at 4:30pm but returned at 5:15pm. She spent 15 minutes sending an email and then left the office again at 5:30pm. This was observed by Ms Blanco and Mr Scott, who were working at an adjacent desk. The claimant did not record the time she had left the office on her flexitime sheet.
  35. The following day Ms Barrett spoke to the claimant about her flexitime recording. Ms Barrett updated the claimant's flexitime sheet to remove the time that she had been away from her desk the previous afternoon. The claimant was visibly angry with Ms Barrett.
  36. Ms Barrett spoke to the claimant again on 11 November 2019. On this occasion the issue she raised was that the claimant had incorrectly claimed for extra hours for travel which took place within normal flexitime hours. We find that the claimant shouted at Ms Barrett causing Ms Barrett to fear that the claimant was going to lash out at her, and that the claimant stormed out. This was witnessed by Mr Taylor, who came out of his office to see what was happening after hearing a commotion.
  37. On another occasion Ms Barrett made an inadvertent error calculating the claimant's flexitime hours. The claimant behaved aggressively to Ms Barrett about this.
  38. In November 2019 the claimant was travelling back to the UK from a work trip to Germany. Her flight was cancelled due to a national strike. She decided to book an alternative flight from a different city, as well other transport and a hotel for the night. Her expenditure was almost £900. She made an expenses claim for repayment of the sum, which she submitted on Monday 11 November. The respondent's procedure was that if an expenses claim was processed by Wednesday the expenses would be paid by Friday of the same week.
  39. On Wednesday 13 November 2013 the claimant sent an email to the accounts team, copied in to others, in relation to this expenses claim. In this email she said "I do not earn my salary to finance the company". There had previously been some telephone communication about an error in the claim, and she had been told that the claim would not be approved that day. We find that nobody in the accounts team put the phone down on the claimant.
  40. Later the same day Ms Blanco discussed this matter with the claimant. Ms Blanco used words to the effect that it seemed to always be difficult to sort out the claimant's expenses and that the claimant's behaviour towards the accounts team had been unprofessional and argumentative. The claimant refused to accept this. Ms Blanco then sent an email to

Catherine Brannigan of Accounts approving the expenses claim and apologising for the claimant's tone in her email, which she described as "completely unacceptable". She said that she imagined that the claimant's emotions had got the better of her, but that she had told the claimant that she needed to take responsibility for the mistake she had made on her expenses claim.

41. Mrs Barrett offered to lend the claimant £900, which she declined. The claimant was paid the expenses on the Friday of the same week.
42. On 14 November 2019 Ms Blanco met with the claimant to discuss the expenses claim as well as other issues relating to her attitude and tone and continued problems relating to her time away from her desk. Ms Blanco's notes record that the claimant was argumentative and unwilling to accept responsibility. We accept this account.
43. Ms Blanco raised the email exchange about business cards and the claimant's attitude to Ms Barrett on the occasion when she had been spoken to about her flexitime claims. She explained to the claimant that having received more feedback from colleagues about the amount of time she spent away from her desk she had monitored the situation more closely. Her note sets out some examples of this, which show numerous absences of 20 to 50 minutes on several days, which we accept were accurate. Ms Blanco told the claimant that this had become a problem and she would have to speak to HR about it.
44. After the meeting the claimant sent an email to Accounts apologising for her tone in her email of 13 November 2019. Ms Blanco spoke to Ms Gallagher of HR, who advised that the claimant's use of the flexitime scheme should be suspended for three months. She informed the claimant of this on her return from leave on 24 November and followed up with a letter dated 25 November.
45. We find that the claimant was not told by Ms Blanco or anybody else that she could no longer eat lunch at her desk. She was told to ensure that she cleared away dirty crockery and to abide by the respondent's clean desk policy.
46. We do not accept that the claimant spent a lot of time crying in the toilets at around this time. If she did, her managers were not aware of it.
47. By email on 26 November the claimant asked Ms Blanco for a cash advance of around £500 for various items of forthcoming expenditure. Amongst these was a taxi to and from Heathrow for an overnight work trip to Dublin. She asked for £40 each way, on the basis that she would have 20kg of luggage because the event involved a black tie dinner.
48. Ms Blanco forwarded the email to Ms Barrett, asking her to book the taxis through the respondent's usual provider. The following day Ms Barrett

- responded to Ms Blanco that she had booked the outward taxi journey through the respondent's usual provider but that the claimant would arrange her own journey back.
49. The claimant discussed the matter with Ms Blanco on the same day in Ms Barrett's presence. She said that she was planning on staying on in Dublin for the weekend with her boyfriend so she did not need the return taxi. She also said that she was not comfortable using the respondent's usual taxi company because previously a driver had been 35 minutes later to pick her up. Ms Barrett said words to the effect that she did not understand why the claimant was the only person who had a problem with the taxi company. She did not say that the claimant was "being problematic". Later in the discussion the claimant said that a driver who had picked her up on the morning of 12 November had been intoxicated. At this point Ms Barrett promptly telephoned the taxi company and relayed to them this allegation.
  50. The following day, 28 November 2019, the claimant asked to speak to Ms Blanco. They had a conversation lasting around 1.5 hours, which Ms Blanco recorded in a note. The claimant did not refer to this meeting in her witness statement. The note records that the claimant told Ms Blanco that she was feeling stressed at work because of the incident with accounts, the cessation of her entitlement to flexitime and the decision taken the previous day about her request to use a different taxi service. She said that her mental health was being affected to the extent that she felt that needed to resign. Ms Blanco said that the claimant should take some time over Christmas to think about things rather than resigning immediately, and that if she wanted to do that Ms Blanco would hold off on informing HR that she was thinking of resigning. In response the claimant said that she had been speaking to a therapist and had decided that she needed to prioritise her mental health. She said that she had no choice but to resign.
  51. The claimant then asked Ms Blanco what support the respondent could offer her. The claimant's case was that she asked Ms Blanco for a month's paid leave. Ms Blanco's evidence (reflected in her note) was that in fact the claimant asked for financial support because her mental health had been so badly affected that she probably would not be able to find another job straight away. Ms Blanco said that she did not think that financial support of this sort was very likely, and that the claimant became annoyed by this. Ms Blanco said that she made it clear that she would not assist the claimant in negotiating a financial settlement with HR.
  52. In evidence the claimant accepted that she said in this part of the conversation that two months previously a senior colleague had told her that he was having an on-off affair with Ms Blanco. She said this had made her "uncomfortable and confused" and affected her mental health.
  53. Ms Blanco's evidence was that she had been very offended by this

allegation, which was untrue, and had told the claimant that she would have to ask the senior colleague in question whether he had spoken to the claimant in the terms alleged. The claimant responded “yes I guess so, it is just his word against mine”. Shortly thereafter, the claimant said that it would be better for Ms Blanco to approach HR about her decision to resign, because if she spoke to HR she would have to tell them everything including the allegation about the affair. Ms Blanco said that the claimant was very calm during this exchange, which we accept. Ms Blanco’s notes of the meeting conclude by saying that she had “made exceptions for [the claimant] as she is still so young and inexperienced and gave her the benefit of the doubt on many occasions. I now feel like she has totally abused my trust and thrown all my effort and help with her back in my face”.

54. The claimant’s evidence was that the information she claimed to have received about Ms Blanco having an affair “made me question whether her personal relationship with [the senior colleague] was something to do with her being in a managerial position”. When asked for clarification of this statement she said “If they had a personal relationship could this have influenced the position?”. She denied that what she meant by this was that she thought Ms Blanco had got her job by sleeping with a senior colleague.
55. We find that in this exchange the claimant was seeking to put pressure on Ms Blanco to negotiate a pay out on her behalf by threatening to make untruthful and damaging allegations against her if she refused to do so. This was calculated and premeditated.
56. Ms Blanco told Ms Gallagher about her conversation with the claimant and provided her with the notes.
57. On the morning of 6 December 2019 the claimant had a conversation with Ms Gallagher. The claimant told Ms Gallagher that she was resigning and that she was looking for compensation.
58. Ms Gallagher sent the claimant a letter by email later the same day saying that she accepted her resignation. The letter said that the claimant would not have to work her notice but would be paid for a month in lieu of notice in order to assist her with her search for alternative employment, and that she would be paid all other sums to which she was contractually entitled.
59. The claimant emailed Ms Gallagher back on the same day, saying that she had not said to her that she intended to resign, but only that she was thinking of resigning. She said that she had made it clear to Ms Blanco that if she were to resign it would be on “good terms”. She went on “Regarding the financial support I am seeking that seems to have been completely overseen [sic] by you”. and that the company had put her in a position where she “had no choice for my own mental health and sanity

but to resign". She asked for "at least 12 months' salary" or financial support for the remaining nine months of her tenancy agreement. She did not ask in terms for her resignation to be rescinded.

60. By return Ms Gallagher said to the claimant that she had clearly said that she wished to resign and that she had said the same thing to Ms Blanco. She reiterated that no financial package would be offered.

## THE LAW

### Direct discrimination

61. By s.13(1) of the Equality Act 2010 ("EqA") an employer directly discriminates against an employee if it treats him less favourably because of a protected characteristic than it treats or would treat others.
62. By s.4 EqA the protected characteristics include age and disability.
63. The protected characteristic of age refers to a person of a particular age group, and reference to an age group is reference to a group of persons defined by reference to age, whether to a particular age or to a range of ages (s.5 EqA).
64. By s.13(2) EqA treatment which would otherwise amount to direct age discrimination is not unlawful if it is shown to be a proportionate means of achieving a legitimate aim.
65. In a discrimination case, the claimant must prove on the balance of probabilities facts from which the Tribunal "could conclude", in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination ("the first stage"). This means that the claimant must show facts from which the Tribunal could conclude that:
  - 65.1. the claimant has been subjected to a detriment; and
  - 65.2. in being subjected to the detriment the claimant has been treated less favourably than a real or hypothetical comparator was or would have been treated. There must be no material difference between the circumstances of the claimant and the comparator (other than the protected characteristic) (s.23 EqA); and
  - 65.3. that an effective cause of the difference in treatment was the protected characteristic (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor* [1997] ICR 33 EAT).
66. At the first stage the Tribunal should consider all the primary facts, not

just those advanced by the claimant. The Tribunal should assume that there is no adequate explanation (*Hewage v Grampian Health Board* [2012] ICR 1054 §31, Guideline 6 in *Igen*). “Could conclude” means “a reasonable tribunal could properly conclude” from all the evidence before it (*Madarassy v Nomura International plc* [2007] ICR 867 CA).

67. There does not have to be positive evidence that the difference in treatment is the prohibited ground in order to establish a prima facie case (*Network Rail Infrastructure Ltd v Griffiths-Henry* UKEAT/0642/05/CK at §18).
68. The decision that the Tribunal “could conclude” that there was discrimination may rely on the drawing of inferences from primary facts: guideline 5 in *Igen v Wong* [2005] IRLR 258 CA.
69. If the burden of proof shifts, the respondent must show that it did not commit those acts and that the treatment was not on the prohibited ground: guidelines 9 and 10 in *Igen* (“the second stage”).
70. At the second stage the Tribunal must assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the prohibited ground was not a ground for the treatment in question: guideline 12 in *Igen*.
71. Tribunals should be careful not to approach the *Igen* guidelines in too mechanistic a fashion (*Hewage* §32, *London Borough of Ealing v Rihal* [2004] EWCA Civ 623 §26). The question is a fundamentally simple one of asking why the employer acted as he did (*Laing v Manchester City Council* [2006] ICR 1519 at §63).
72. In every case the Tribunal should consider the totality of the primary facts and examine indicators from the surrounding circumstances and the previous history (*King v Great Britain China Centre* [1992] ICR 516 CA).

### **Resignation and dismissal**

73. In deciding whether ambiguous words used by an employer amount to a dismissal the Tribunal should not take the speaker’s intention into account (*Sothorn v Franks Charlesly & Co* [1981] IRLR 278 CA, *B.G. Gale Ltd v Gilbert* [1978] ICR 1149 EAT). The same approach should be taken to deciding whether ambiguous words used by an employee amount to a resignation.
74. Instead the Tribunal should “construe the words in all the circumstances of the case” (*J & J Stern v Simpson* [1983] IRLR 52 EAT). This involves an objective test.

75. If the words used were unambiguous then the other party is usually entitled to rely upon them. Exceptions may include words spoken in the heat of the moment or those spoken under emotional stress in circumstances where the other party knew or ought to have known were not meant to be taken seriously (*Sothorn v Franks Charlesly & Co* [1981] IRLR 278 CA, *Barclay v City of Glasgow District Council* [1983] IRLR 313 EAT (Scotland)).

### **Time limits**

76. Generally, complaints of unlawful discrimination must be presented to the Tribunal within three months of the act complained of (taking account of any automatic extension to allow for mandatory ACAS Early Conciliation), unless the Tribunal concludes that it is just and equitable to extend the time for bringing the complaint (s.123 EqA).
77. If a number of different acts are complained of the Tribunal may conclude that they form a single “act extending over a period”. In such cases, the time limit begins to run from the end of the period (s.123(3)(a) EqA).

## **CONCLUSIONS**

### **Time limits**

78. The question of whether the claimant’s complaints of unlawful discrimination amounted to an act extending over a period was not pursued with vigour by the respondent. The Tribunal was prepared to accept that the acts complained of did amount to an act extending over a period on the basis that, insofar as we have found that they happened, they were done by the same personnel over a relatively short period of time and were related to the same issues (largely the claimant’s attitude and habit of absenting herself from the workplace).
79. We therefore find that the claims were presented within the statutory time limit.

### **Direct age discrimination**

#### **Did the respondent’s treatment of the claimant amount to a detriment?**

80. The claimant has not shown that:
- 80.1. In June 2019, Ms Blanco failed to take seriously her complaint about the behaviour of Mr Toole (allegation 4.1.1). On the

contrary, we find that Ms Blanco acted entirely appropriately in response to the claimant's concerns, which did not include any allegation that Mr Toole engaged in sexual innuendo.

- 80.2. On 3 or 4 July 2019, Isabel Blanco told her she was spending too much time away from her desk (allegation 4.1.2). We find that no such meeting took place.
- 80.3. On 26 November 2019 she was told that she was no longer allowed to eat lunch at her desk (allegation 4.7.1.2).
- 80.4. On 26 November 2019 on asking whether she could use alternative taxi provider, she was told that she was "being problematic" (allegation 4.7.1.3).
81. Therefore the claimant's complaints that these alleged incidents amounted to unlawful age discrimination fail.
82. We find that the following events took place (in whole or in part) and reached the threshold of amounting to a detriment, but that the claimant has not shown facts from which we could conclude that any of these detriments amounted to less favourable treatment than that to which a suitable comparator of a different age would have been subjected:
  - 82.1. Allegation 4.1.3, which was that in about July 2019 the claimant was told that she was argumentative and aggressive in connection with her request for business cards. Our finding is that this did not occur in July 2019; the claimant raised the issue by email on 24 October and it was discussed at the 14 November meeting with Ms Blanco. Furthermore the claimant was not told that she had been aggressive. She was told words to the effect that she was argumentative. This just about amounts to a detriment. The claimant had been argumentative and Ms Blanco would have treated any other employee in the same manner in similar circumstances.
  - 82.2. Allegation 4.1.4, which was that Ms Blanco challenged the claimant on more than one occasion in September 2019 over the number of times she went to the toilet, taking her mobile phone with her and the amount of time she spent away from her desk. On numerous occasions the claimant had been away from her desk for protracted periods without reasonable explanation or excuse. Ms Blanco's attempts to discuss this with her were appropriate management interventions. She would have similarly challenged any other employee in the same circumstances. Mr Scott was not a suitable comparator for this complaint as he was not on the flexitime scheme and was of a different grade to the claimant. In any event there was no evidence that he had been



absent from his desk for inappropriately long periods, without reasonable excuse or with without accounting for his time.

- 82.3. Allegation 4.1.5.1, which was that in October and November 2019 Ms Barrett asked the claimant about why she was away from her desk. These were reasonable questions for Ms Barrett to ask the claimant, given her responsibility for administering the flexitime scheme and the claimant's tendency to be absent from her desk without good explanation. Ms Barrett would have treated any other employee similarly. Mr Scott was not an appropriate comparator for the reasons given in the previous subparagraph.
- 82.4. Allegation 4.1.5.2, which was that in October or November 2019 Ms Barrett recorded the claimant's hours incorrectly. This was an innocuous error and was rectified immediately. There was no evidence whatsoever that Ms Barrett had or would have treated other employees any differently.
- 82.5. Allegation 4.1.6, which was that on 13 November 2019 Ms Blanco described the claimant's attitude to the accounts team as "unprofessional", "argumentative" showing a "bad attitude" and amounting to "unacceptable" behaviour. We find that Ms Blanco used words to this effect, and that she would have done so in relation to any other employee in the same circumstances. The claimant's attitude to the accounts team had been argumentative and unprofessional.
- 82.6. Allegation 4.1.7.1, which was that on 26 November 2019 the claimant's ability to work flexibly was removed. This again was a reasonable management intervention and entirely in line with the written policy. The claimant had abused the flexitime policy. Any other employee would have been treated the same in comparable circumstances.
83. Therefore the claimant's complaints that these alleged incidents amounted to unlawful age discrimination fail.
84. Even if we are wrong, the claimant has proved no facts at all from which we could conclude that any of these acts were done because of her age. The fact that she was the youngest employee is not sufficient to show that this was the reason for any less favourable treatment of her. Ms Barrett's written comment of 28 November 2019 to the effect that she had previously given the claimant the benefit of the doubt because she was young and inexperienced did not support any inference that she had treated the claimant less favourably because of her age. On the contrary, it showed that she had demonstrated considerable leniency to the claimant in light of her young age.
85. Therefore the claimant has not shifted the burden of proof in respect of

any of her complaints of age discrimination. The respondent is not required to show that the treatment either did not happen or was not because of the claimant's age. For the avoidance of doubt, had we found that the burden was shifted we would have concluded that the respondent had amply satisfied it.

86. The age discrimination complaints fail and are dismissed.

**Direct disability discrimination**

87. The Tribunal finds that the claimant resigned from her employment in her meeting with Ms Blanco on 28 November 2019. The words she used to that effect in the meeting were unambiguous. She was not dismissed, whether constructively or actively.

88. Even if the claimant was dismissed, she has shown no facts from which we could conclude that the dismissal was an act of disability discrimination. What happened at the end of the claimant's employment was that she tried to coerce Ms Blanco into negotiating an exit package for her by threatening to make scurrilous allegations of sexual impropriety against her. If the respondent did anything that could amount to a dismissal, it was motivated by that fact along with the claimant's poor attitude and failure to observe her contracted working hours. There was no evidence of a prior plan or intention to dismiss the claimant. Indeed, the Tribunal finds that the respondent had shown considerable and unusual forbearance throughout the claimant's employment. There was no evidence that the respondent would have treated a suitable comparator in a different way, or that anything it did was because of the claimant's disability.

89. The disability discrimination complaint fails and is dismissed.

- 90.

Employment Judge Reindorf  
Date 14 April 2022

JUDGMENT SENT TO THE PARTIES ON  
FOR THE TRIBUNAL OFFICE

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