EMPLOYMENT TRIBUNALS

Claimant: **Mr D Finch**

Respondents: **(1) Clegg Gifford & Co Ltd**
(2) Shirley Bellamy

Heard at: **East London Hearing Centre (via CVP)**

On: **16,17,18,19 August 2022**

Before: **Employment Judge Britton**
Members: **Ms A Berry**
Ms J Henry

Representation

Claimant: **Ms J Linford (Counsel)**

Respondents: **Mr M Williams (Counsel)**

JUDGMENT

1. **The claim of harassment in part succeeds.**
2. **The claim of victimisation succeeds.**
3. **The claim for constructive discrimination based dismissal succeeds.**
4. **The claim for constructive unfair dismissal succeeds.**
5. **Orders as to the way forward are hereinafter set out.**

REASONS

Introduction

1. The claim (ET1) was presented to the tribunal on 19 October 2020. In due course following case management, the Claimant provided an amended particulars of claim

which is to be found in the bundle before the tribunal commencing at Bp[1]270 and dated 25 April 2022. As a consequence, the Respondents provided amended grounds of resistance dated 10 June 2022 which commences at Bp 308. There is a final agreed list of issues commencing at Bp 283 and which mirrors most of the issues that Employment Judge Russell had defined at the case management hearing heard on 8 March 2021 (Bp55-65). There was also a preliminary hearing thereafter (Bp 82-89) on 1 November 2021 before Employment Judge Buchanan who ruled on admissibility viz without prejudice and excluded conversations pursuant to common law on the Equality Act 2010 (the EqA) front and section 111A of the Employment Rights Act 1996 (the ERA) on inter alia the constructive unfair dismissal front. In that context, given that ruling, left as admissible was the letter before action of the Claimant's solicitors dated 20 August 2020 (Bp.169-173) and what we will refer to as the ultimatum e-mail to the Claimant written by the Respondents' managing director, Shirley Bellamy (SB), who is also the second Respondent, dated the 23 September 2020 (Bp176) and in response to which the Claimant resigned on 24 September 2020 (Bp 177) with immediate effect and which is thus the effective date of termination (EDT).

2. Summarised the core issues, are first as to whether the Claimant was discriminated against by the Respondents pursuant to the provisions of the EqA because of his disabilities. The Respondent conceded prior to this hearing that the Claimant is a disabled person and was so at the time of material events pursuant to s6 and Sch 1 of the EqA. Summarised he has a raft of long standing serious conditions including heart disease, angina, anaemia, kidney disease, hypertension and type 2 diabetes. He is dependent on a range of prescribed medication.

3. The second interlinking claim in relation to the EqA is whether he was also discriminated against by the Respondents because of his age. He was 66 at the EDT.

4. In conjunction thereto in terms of the material events and culminating with SB's ultimatum letter, is whether the first Respondent, as the employer, by way of a series of actions culminating in that last straw acted without reasonable and proper cause in a way which fundamentally undermined trust and confidence, thus entitling the Claimant to resign with immediate effect and treat himself as constructively unfairly dismissed: hence the claim pursuant to section 95 of the ERA. Constructive dismissal can also be claimed under the EqA[2] if the acts relied on are also discriminatory culminating again in the ultimatum letter. Also in that context further relied upon by the Claimant being that the solicitor's letter before action is a protected act pursuant to s27 of the EqA and thus the ultimatum letter of SB was an act of victimisation predicated on the basis that the Claimant had done the said protected act via his solicitors.

5. As to labelling viz the EqA the Claimant claims direct discrimination on both the disability and age fronts pursuant to s13; Unfavourable treatment as to the disability pursuant to s15, and also failure to make reasonable adjustments pursuant to s20-22; harassment as to both age and disability pursuant to s26; and as already referenced victimisation pursuant to s27.

[1] Bp=bundle page.

[2] Ms Lindford referred us to a case referenced Driscoll v Victor and Key Global Td heard by the EAT in 2020. The Judge could not find this on Bailli but the actual principle is long standing as to which see Greenhof v Barnsley Metropolitan Borough Council (2006) IRLR 98, EAT

6. As to the evidence before us, we first heard from the Claimant and thence for the Respondents from first the second Respondent, Mrs Shirley Ann Bellamy (SB), and finally from Paul Thomas Blakeway (PB), who is the finance director and chief finance officer of the first Respondent. In each case evidence in chief was by written witness statement. We have already referred to the agreed bundle. Finally, we heard comprehensive closing oral submissions from both Counsel.

Findings of fact

Background and the attendance issue

7. The Claimant had been in the insurance industry at the time of the material events for a great many years. He was working in the insurance division of a company known as Tradex, when that division was acquired by the Respondent in November 2017; and so he transferred (TUPE'd) along with the other employees to the Respondent. It is also in the insurance business and particularly that relating to motor insurance. At the time of the material events in this case, it employed, apart from the board management team, approximately 225 people in six offices, but the centres of operations being the headquarters in Romford and to a lesser extent Minories in the City of London.

8. The Claimant was based at Romford as a credit controller. His job was in effect chasing the bad debts. He had carved that job out for himself and was obviously very good at it. That is not in dispute. It entailed being provided by i.e. credit control with essentially long-term bad debts and analysing which ones were or were not worth pursuing. If they were, then other attempts to obtain payment having failed, he would assess whether to place the matter in the hands of solicitors for forward progression and if that happened, prepare the case file. Although he was very much in that sense day-to-day left to his own devices, in terms of line management he theoretically reported to Marichu Hart the finance manager[3] who in turn reported to PB. But in reality he reported to the latter. As to why is because they had a longstanding working relationship back to the days of Tradex. Indeed, we could surmise that PB, who is now in his early 40s, may have grown up to some extent in the business under the wing of the Claimant and then of course progressed. They clearly got on well. There is no doubt that the Claimant trusted PB and would confide in him. And likewise PB , because of course they had been together at Tradex, was protective of the Claimant as indeed he was of Lesley Tabner and Tina Thomas who had also TUPE'd and worked in the same credit control sub-department within the finance department. Lesley was 62 and Tina 61 at the time of material events.

9. The Claimant had these serious health conditions. In that context in the past adjustments had been made to his start and finished hours by his manager at Tradex. But as of July 2019, and as to which we have an email trail (Bp 118**)**, there had been flagged up concerns by it seems Clare Banks of HR, but who in turn reported to SB and who had overarching responsibility for HR as part of her role as Managing Director, as to whether or not the Claimant was fulfilling his contractual hours. Suffice it to say that in the email trail in which PB was not unsympathetic of the Claimant, he established that the Claimant had received an adjustment to his start and finishing times when at Tradex, although he could not provide documentary proof of it. Thus, as per that arrangement

[3] See chart of the finance department helpfully prepared by Mr Williams.

he continued to work 9.30am to 4.30pm PB decided to basically treat that as therefore established and not pursue the point. There was a second issue at that time as to whether or not the Claimant ought to be attending his appointments to see his medical consultants etc inside working hours and if he was, as to whether or not he should make up the time. This again, PB did not pursue.

10. We were taken to a file note, in particular by Ms Lindford, made by Clare Banks dated 13 February 2020 (Bp 123). First she flagged up as per the timekeeping issues from the previous July and that even if therefore the Claimant had an arrangement pre TUPE and which:

> *"we have said we would honour this*
> *…it has come to light he is getting in at after 9.30am and leaving around 16.10pm I have run his "Fob Reports for this year" and you will see he is constantly leaving early."*

11. Fob is the electronic attendance recording system whereby the employees log in and log out using a fob and the system will record times.

12. Therefore, she stated that this issue needed to be addressed with the Clamant. That:

> *"either he needed to keep to 9.30 and 4.30pm or reduce his hours and his salary to reflect the hours he will be working. He must also know that ALL time needs to be made up, and he needs to agree how this is done (reduced lunch etc) with Marichu and/or Paul.*
>
> *If he does not agree to any of the above, he will have to be notified that we will have no alternative than to proceed down the disciplinary route.*
>
> *We should also ask about his health and perhaps recommend he see occupational health".*

13. In that respect the tribunal observes that if his health was causing him to have the attendance issue, then a reasonable employer would of course investigate matters down the occupational health report with a view to considering what reasonable adjustments might be needed.

14. Ms Lindford submits that this note and its contents could be said to be the date upon which the Respondents started to seek a way to dismiss the Claimant or otherwise engineer his departure. For reasons we should come to, we as a tribunal do not find that to have been the case in terms of the circumstances thereafter up until we get the ultimatum letter and because of the evidence of PB who we found to be a most impressive and credible witness.

The "young man" issue

15. In his further and better particulars, the Claimant sets out as an act of continuing harassment how he had been called "young man" by SB repeatedly since the TUPE. What is to be noted is as follows. Clearly, he felt free to discuss issues with PB. Indeed,

in his final email (Bp118) over the working time issue back the previous July he referred to being " *just totally pissed off with the comments made by certain people*" and that he was therefore going to take retirement. He did not say who they were in that email. As it is, PB told us that the Claimant regularly used to moan about working colleagues. He had from time-to-time difficult relationships. In passing, the Claimant is a man who is clearly capable of forcefully expressing himself. He is a prickly and thin skinned. and he had never been the subject of disciplinary action. Furthermore, the appraisals before us show that his work was highly thought of by PB. The point being this. When PB endeavoured to discuss "*comments made by certain people"* with the Claimant, he learnt that it had "something to do" with Lesley Tabner. But this was nothing new. They had a long history of ups and downs in their working relationship. There were periods when they did not talk to one another. It seems that may have been the case with another of the employees alongside which the Claimant worked. But these fall outs would blow over, and so PB decided to let it pass and the Claimant did not come back with any further complaints in that respect.

16. The relevance to the "young man" issue is that the Claimant was undeterred in raising issues. As an example is his forceful and combative attitude on the attendance issue as per the July e-mails.

17. The point being that PB also said that SB, who at the material time was in her early 70s and had been working for the Respondent in one shape or form for about 40 years, would use the phrase "hello young man" or "young man" to the male employees and she used it to him; that is of course a man in his early 40s. Now of course Ms Linford says it does not matter the age of those who it is addressed to, what matters is the reaction it has on the Claimant and that the phrase "young man" is capable of having an ageist connotation. The point however is this. The Claimant never complained about it to PB or indeed anyone else at the material time. He says he did not know about the first Respondent's grievance procedure. We do not have that document in front of us, but we do have the document he signed having been TUPED across acknowledging the same and which purports to have attached to it the company handbook, i.e. grievance procedures etc. The point then being that although he may not have got it, and it seems the Claimant has never asked for it by way of discovery, we find it highly unlikely that an employee of the intelligence and wits of the Claimant would not have been able to explore a grievance procedure i.e. by asking PB or Clare in HR; and if he wanted to in any event pursue a complaint against SB. He is not backward in coming forward as is self-evident from the complaint he made on 24 March 2020 (Bp124) and to which we shall come . In therein making a forceful complaint against SB and Claire viz the meeting which took place on the 19th, he is self-evidently not fearful of expressing himself forcefully to senior management. So, we do not buy the fear factor. What we therefore find is that the Claimant did not raise the issue of "young man" and because he did not find it offensive, thus it is not an act of harassment, we need say no more.

"Are you going to sleep later today"

18. The Claimant alleges as a further allegation of harassment as per 17.10 in the list of issues (Bp 288), that on four or five occasions over two years approximate before the material events starting in March 2020, SB had said to him in the open plan office where the Claimant worked "are you planning on a nap this afternoon" or words to this effect. Put simply, that is because the Claimant did fall asleep on occasion in the office when

he says it became hot and stuffy. The Respondents counter that he was the one who always wanted the window shut whereas the others might want them open and which could cause friction. But in terms of the issue, it matters not. The important point is that the employer via in particular SB , given it knew of his health conditions via at least PB and also the reference by Claire in the February 2020 file note, ought to have established why it was he was falling asleep and particularly given that circa February 2020, SB was informed by the first aider responsible for health and safety in the pod i.e. hub in which the Claimant worked in the office alongside others, that he was concerned because the Claimant was falling asleep. Cross reference to the impact statement before us made by the Claimant and one of the problems the Claimant has to face is that some of the medication he takes for the type 2 diabetes, coupled with the blood deficiency because of the anaemia, makes him get very drowsy and he can in those circumstances fall asleep.

19. The fact that SB queries before us as to whether or not that is because of the office climate because she saw him asleep on a bench in the shopping precinct in which the offices are based when he was on a break, is neither here nor there. It of course could go again to whether that he is falling asleep is because of i.e. the disabilities. SB admits albeit, she says it was only on two or three occasions in early 2020, that she did remark only to the Claimant, but which could have been overheard by others in this pod area, "are you planning a nap this afternoon" or "are you going to fall asleep". We conclude that to do so was crass. No reasonable manager of the seniority of SB, and her also being the head of the HR department and given the substantial size of the business and which also uses an outsourced HR consultant, would have made such a remark particularly in the presence of others. If there was a concern, it should have been addressed in a closed meeting commencing with an enquiry as to why it was that the Claimant was falling asleep and in a context where by 13 February 2020 Clare had flagged up the possibility of getting an OH report given his health.

20. On the Claimant's evidence, given disability has been conceded, we find on the balance of probabilities that the falling asleep was attributable to his disability and in particular the diabetes and anaemia. There is no evidence to the contrary before us.

21. This brings in the definition of harassment as per s26:

> *(1) A person (A) harasses another (B) if –*
>
> > *(a) A engages in unwanted conduct related to a relevant protected characteristic , and*
> >
> > *(b) the conduct has the purpose or effect of –*
> >
> > > *(i) violating B's dignity , or*
> > >
> > > *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B*
>
> *…*
>
> *(4) In deciding whether conduct has the effect referred to in sub-section (1)(b) each of the following must be taken into account –*

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect"

22. Thus, we conclude that these remarks related to a relevant protected characteristic, namely his disability. On his evidence, we find that as to the effect the Claimant clearly did find the repeated remark to be humiliating and degrading. And in the context of where and how it was said that objectively it did therefore create a humiliating and degrading environment for him and that it was reasonable for the conduct to have that effect. The fact that SB may not have intended it to be humiliating or degrading is quite irrelevant, motive does not matter.

23. The valid point made however by Mr Williams, is given that the Claimant was not adverse to complaining, why did he not raise it at the material time or in his complaint of the 24 March 2020? We conclude that this is because as an issue it was overtaken by the events starting with his need to self- isolate because of Covid and the issues which flag up on the 19 March 2020 and the context thereafter in what is a "continuing act" scenario[4] given the short span of events between February and September 2020. Thus, it is harassment that he had not waived as is clear from the solicitor's letter before action to which we shall come.

The impact of Covid 19

Event starting with the 19 March 2020 and " you may not be around in September or October". The claim of harassment as per 17.1; 17.2; and 17.3 in the list of issues

24. Of course, we are all aware that by early March 2020 the country was in the throws of having to address the most serious crisis, namely the corona pandemic. Little else needs to be said, save that of course we are well aware of the impact that it was having on all aspects of life, including the running of businesses who were entering into a period of ever-increasing crisis management in the context of uncertainty as to the future.

25. On 19 March, the Claimant went into the office which SB and Claire Banks shared to explain that his GP had just phoned him, cross that he was in work and reminding him that he was vulnerable because of his age and disabilities and that he should return home and shield forthwith. It may be that in the confusion as to what was meant by shielding SB and CB thought it that had to be treated as a sickness absence. The lay members of this Tribunal have particularly had in mind with their extensive experience of what was going on, that a lot of employers did not know at that time how to handle such absences in that respect, and so SB and CB may have genuinely referred to the absence as being sickness related. In the context the Claimant accepted there may have been a misunderstanding in his reply to SB on 25 March 2020 (Bp 128). Thus, it was not harassment as per s26.

[4] See Hendricks v Commissioner of Police for the Metropolis (2003) IRLR 96 CA..

26. But what is engaged is as follows, the Claimant was planning to take a holiday in Cyprus in September or October 2020. It was suggested he bring it forward and take it now. There is only one contemporaneous record of what was said, namely the Claimant's complaint to CB and SB, copied to PB, by the e-mail of 24 March 2020 (Bp 126-127). The reply of SB cc'd to CB and PB does not address the core issue to which we now come. Thus, CB and SB obviously knew that the Claimant had two weeks leave planned for later in the year. In the context of whether the shielding would be treated as a sickness absence it was suggested he take it now. Obviously, this would be paid annual leave. The Claimant declined the offer pointing out that the holiday was long planned for late September/October 2020 with a view to looking at a potential home to purchase in Cyprus. He then records as per the e-mail that:

> *"…The response to this has caused me lots of stress and ongoing anxiety, as what was said to me was along the lines of "you should take the vacation now, otherwise you may not be around in September or October." This is an extremely hurtful thing to say - and could be taken to mean that I might actually be dead by September or October anyway. To have such a hurtful comment said to be by a member of HR team has only added to the stress and anxiety and uncertainty about the current situation".*

27. In his witness statement at paragraph 15 the Claimant was clear that this was said by SB and in the context of his having raised Cyprus and her countering with this sentence "very bluntly and abruptly". Before us it was "they". In the amended particulars of claim at paragraph 3 (Bp 270) it is "both SB and CB advised…".

28. Originally in this case it appeared to be that the Respondents denied that it was ever said. But in cross-examination SB conceded that it could have been said but there were three in the room, apart from the Claimant, namely her, Marichu and Clare (CB). And she suggested it must have been one or the other. We have not heard from either. On the balance of probabilities, because it fits with the remarks we have now found that SB would make and thus our conclusion that sometimes she does not think before she speaks, we conclude that it was likely her and particularly given her seniority and commanding sense of authority. It may be due to the longevity of her career, but it became apparent from the cross examination of her, that she has a complete lack of such as equality or diversity training.

29. Mr Williams makes the valid point that the words "*you should take the vacation now, otherwise you may not be around in September or October*" need to be seen in context. In other words, none of us i.e. "we" might be around by then either from succumbing to Covid or because the business might have folded. But as per the complaint of the 24 March and the concession of SB as to what might have been said under cross-examination, the word "we" has never been proffered. Thus, we find on the balance of probabilities that it was specifically addressed in the singular to the Claimant. The Claimant clearly perceived that to be deeply hurtful and humiliating given how life threatening his disabilities were and particularly bearing in mind he had suffered two heart attacks and survived of course on a raft of medication. That he was offended and found what was said "extremely hurtful" is incontrovertible given the contemporaneous complaint on 24 March (p.126-127). Thus, given the context and in particular the additional health worries stemming from Covid 19 and his urgent need to shield, we find that what was said was related to the disability and did have the effect of inter alia

creating a humiliating and degrading environment for the Claimant and that in the context it was objectively reasonable for it to have that effect. Thus, we find that this was an act of harassment by the first respondent via its employee, namely SB, and also an act of harassment by her as an individual.

The Laptop and homeworking Issue

30. The issue is whether the Claimant in being denied a laptop and in the context thus prevented from homeworking was discriminated against. In the list of issues, it is claimed as disability discrimination[5]. For the direct discrimination claim the comparator is Lesley Tabner (LT). As to what occurred engages the context of the crisis management that was going on, bearing in mind in terms of the timeline[6] of coronavirus events that by 23 March 2020 the Government had now ordered that there would be a first lockdown and people would be ordered to stay at home. Those lockdown measures came into force on 26 March. The Respondent of course would not be within the criteria of those businesses allowed to continue working from their own premises i.e. say the NHS or supermarkets. But its core business could whilst the crisis lasted by and large be done by those employees working from home with modern IT technology. In that sense selling motor insurance to such as motor traders, taxi fleets, individual customers, underwriting the same, and liaising with i.e. Close Brothers viz instalment insurance payments.

31. So, we bring back in Paul Blakeway (PB). From the evidence which in particular he gave, he was much more hands-on in dealing with the crisis than SB. He explained that although SB was still managing director, the reigns of the business were now in the hands of the group chief executive, Toby Elliott, and with a core of specialist directors reporting into him, each responsible for a given department or group thereof. One of these was of course PB as the Finance Director. So, each director was having to triage how to go forward and prioritise. But as to homeworking, there was a chronic shortage of laptops and they were not the only ones facing this. Other business were in the same position. At the start of the process the first Respondent had only 10. It was then able to source only another 60.

32. There was a list drawn up by the relevant directors of therefore who was and who was not going to be given a laptop on a prioritisation basis. We gather from PB that SB was not involved. The primary focus would be on customer facing roles and those which generated immediate income streams plus of course a nucleus of such as IT support. Cross reference to the finance team, and PB therefore concluded that the bad debt role performed by the Claimant and the Traditional Customer Credit Roles performed by Lesley Tabner (LT) and Tina Thomas (TT) would not be allocated laptops. Thus, they would not homework. This therefore effected the Claimant, LT and TT. The justification as made plain by PB was that the Claimant's role by its very nature was unlikely to generate assured and vital short-term income. And as to LT and TT much of it involved trying to recover premiums which customers were contracted to pay by instalments via consumer credit agreements in turn via Close Brothers with whom the Respondent had an arrangement to that effect. Many were at the vulnerable end of the consumer credit market and the FCA was urging that such as the first Respondent lay off enforcement for the time being. PB relied upon an FCA document before us which in fact did not exclude enforcement for this type of default. He was wrong about that. But it did not

[5] Direct viz s13 and unfavourable treatment viz s15. LT is the comparator viz s13 as not being disabled.
[6] See the print out of the timeline of UK government coronavirus lockdowns and measures , March 2020 December 2020 helpfully obtained by Mr Williams

detract from his principle point which was given the unfolding crisis attempting to recover instalments was unlikely to generate short term income and second that given the increasing importance given to the protection of the individual credit consumer, the business was moving away in any event from offering to the individual consumer insurance repayable on an instalment basis.

33. In any event it meant of course that the casualties, so to speak, in that respect in the finance department were the Claimant, LT and TT. All are in the same age range. However as per list of issues 3.1 this direct discrimination claim is confined to less favourable treatment because of the disability the comparator being LT.

34. This is because LT managed to get one of the laptops. We accept the evidence of PB, and there is nothing of substance to contradict him, that this should never have happened. She managed, somehow, to circumvent the restrictions. PB found out about that and it was retrieved. As to how long she had it, on the evidence she would not have got the laptop before circa 24 March and she was furloughed on 7 April and then, if not before, it was retrieved, so a period of maximum two weeks.

35. As to the s13 claim it of course is predicated on the basis that the Claimant was treated less favourably than LT because of his being disabled and it has to logically follow that in contrast she was not. But the Claimant in his own statement said that she suffered from “minor” throat cancer. If so, then she cannot be a comparator because cancer is automatically a disabling condition as per Schedule 1 to the EQA. The first Respondent says via SB in her evidence that it understand she had a serious thyroid condition amongst other health issues, and underwent a thyroidectomy. But it did not plead this as a disability thus meaning s13 could not be deployed viz LT as a comparator. What do we make of it? The Claimant has to prove his case. He stated clearly in his statement that LT had “ minor” throat cancer. Thus, prima facie he cannot deploy s13. And he did not deploy TT as a comparator. That is of course because he cannot as she was treated the same as him. And as to unfavourable treatment because of something arising in consequence of his disability, there is no evidence from our now findings of fact that objectively PB denied the Claimant a laptop because of his disabilities. Also, he suffered no loss of income.

36. It follows that these heads of claim are dismissed.

Furlough

37. By 6 April the Government had announced the furlough scheme of which we are of course well aware. On that day faced with a worsening financial crisis, the first Respondent announced to its workforce, and focussing on those it had determined were not needed as already rehearsed, that it proposed furloughing those employees and thus offering them retention of employment whereby they would receive 80% of their salary subject to the Government cap and which would be paid by the Government. The Claimant was one of those offered this by letter of 6 April (Bp 131-133)) penned by PB. It would mean that from 7 April he would thus be employed on furlough terms whereby he would not work but be paid with his monthly salary gross reduced to 80% namely £2,216.66, of course to be paid by the Government. The alternative would be redundancy. If the Claimant agreed to the proposal, he would be required to signify his consent to the variation for the time being of the contract of employment. It would mean

that from 7 April he would be employed on furlough terms.

38. The Claimant had already raised that he be so furloughed in his e-mail dated 24 March 2020 (Bp 124-125) to which we have already referred. He reiterated his wish to be furloughed the following day (Bp128). He also wanted confirmation pay for April would be unaffected. Inter alia in replying on the same day SB stated "…*April salary will be paid as normal* ***if there has been no changes to be made***[7]*…*

39. The Claimant replied on the 7 April to Marichu Hart who had requested a prompt reply to PBs detailed e-mail *:"No problem with Furlough leave but Shirley has already confirmed that April will be paid in full…" (Bp142).* But as is obvious that is not what SB had said hence her reply (Bp143) of 8 April:

> *"Following our e-mail of 25 March wherein you were advised that April's salary would be paid as normal subject to no changes to be made the company took the decision thereafter to utilise the Govt Coronavirus Job Retention Scheme due to the downturn in business which is pretty general today with UK businesses as a result of the lockdown. All non income staff have been placed on the Scheme whilst the income earning staff are to continue to bring the business in to make up for the lost business.*
>
> *Your salary will be paid on 20 April but we need to have confirmation from you that you accept the change to your contract ie salary to be reduced to 80% whilst you are furloughed or should you decide that you do not wish to go down that route an alternative to this is your employment will be brought to an end by reason of redundancy".*

40. On 10 April the Claimant replied (Bp 136) to SB:

> "*I confirm that I am willing to accept my salary in accordance with job retention scheme." (Bp 136).*

First issue this topic: non-payment of full pay for the week of April 2002

41. An issue raised in the claim and the list of issues at 17.6 is: "***The Claimant was put on furlough leave with effect from 7 April 2020. Despite this he was paid a* reduced rate of pay for the whole of April rather from 7 April 2020 to 30 April 2020",** This is claimed as an act of harassment pursuant to s26 of the EqA.

42. It is not brought as a claim for non-payment of wages pursuant to s23 of the ERA. As to why it is alleged to constitute harassment is set out at para 33 of the particulars of claim and as to not being paid in full for the first week of April:

> *"By doing so SB engaged in unwanted conduct related to the Claimant's disability which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile degrading, humiliating or offensive environment for the Claimant contrary to the EA."*

[7] Our emphasis

43. The Claimant's witness statement only refers to the issue at paragraph 21. He makes no reference to SB as the perpetrator or why it was harassment as opposed to for example a payroll issue. SB makes no refence at all to the issue in her statement. The same applies to PB. Under cross examination the Claimant endeavoured to assert that he understood he would be paid in full for the whole of April. Ms Lindford intervened to make clear the claim was confined to the first week. When asked by the Judge, Mr Williams conceded that if the Claimant had not been paid in full for that first week, then the Respondent would concede the point i.e. as being money due. But of course it is not a claim for unpaid wages, and the Claimant has never sought to amend his claim accordingly. Neither Counsel explored with any witness the harassment point. This particularly goes to Ms Lindford. Neither addressed it in closing submissions.

44. It follows that we have not been asked to adjudicate on the point. We therefore treat it as not being pursued as an act of harassment.

45. We did not address the issue as such in the extempore judgement by the Judge because it was not therefore an issue pursued for the Claimant. But for the sake of completeness, he has covered it in these reasons.

Age discrimination as alleged on the furlough issue: Direct discrimination as per paragraph 3.2; harassment as per 17.5; both as per the list of issues

46. At Bp 137a is the complete list of those furloughed. In itself, it would undermine fundamentally a claim based upon the Claimant having been singled out for furlough because of his age. You have only got to look at the age spread on said form completed by the Respondent in terms of the record of all furloughed staff.

47. So, Ms Linford understandably focuses only on the finance department noting that only the oldest were furloughed. We have referred to the Claimant (aged 66), LT (aged 62), Tina Thomas (aged 61),but also there was the cashier Marion Higgins (65). As to her PB decided given the crisis that although she was not in debt collection, her role could be absorbed for the time being. In due course she was not made redundant as to which we will return. She is not really the core focus of what the Claimant has been contending via Ms Linford. She has focussed on the credit control team answering to Marichu Hart who in turn reported to PB. Before furlough there were 8 in the team. Those not furloughed were all younger and not in the same age group as the Claimant, LT and TT. Thus, the inference is that the Claimant and his like comparators were treated less favourably because of their ages.

48. However, we come back to the prioritisation point. First explained by SB in terms of the overall focus on survival of the business and then persuasively corroborated by PB in terms of the specifics as to the finance department. And it flows through from the allocation of laptops issue. The pressing focus was on where can we get in money now and in so doing retain an existing customer base. Roles that did not meet that criteria would have to be furloughed or made redundant if the incumbent was not so willing. The Claimant was therefore treated no different to others in the business wide list of those selected at Bp137a. The same applies to his like comparators. PB was eloquent and the rationale makes abundant sense in the context in which so many businesses were

operating. It follows that we do not find a reason for the furloughing of the Claimant was because of his age. As per the list of issues direct discrimination because of the disability is not engaged over furlough[8] Neither is unfavourable treatment.

49. It is also alleged that the Claimant being placed on furlough was an act of harassment: see list of issues 17.5 and because:

> *"The Claimant was placed on furlough leave along with 3 other people in the department. The four of them were the eldest people in the department*."

50. Given there was no age discrimination how can what occurred be harassment as per s26? PB's announcement on the 6 April was not just to the Claimant. His letter personalised to the Claimant viz the furlough salary is otherwise as per those others received it seems across all departments. The fact that the alternative to agreeing was likely to be redundancy is objectively obvious. There was no behaviour in the context that therefore passes muster as constituting harassment as per the definition.

51. So the claims relating to the onset of furlough are dismissed.

Events thereafter leading up to the Claimant's resignation on 25 September 2020

52. The Claimant remained on furlough having signed up to the variation of his contract to that effect and not at that stage raising at all any complaint that he was being discriminated against in relation thereto. The inference to be drawn from the evidence is that he actually rather welcomed being on furlough and which would flow from him having flagged up the scheme and his willingness to be placed on it in the 24 March email/letter to which we have referred.

53. Lockdown was of course extended and with it the furlough scheme. In what was a changing picture as to optimism by the Government but then some false starts, circa 1 August the Respondent began to explore easing out some if not all homeworking. Hence the surveys to the employees which are before us. The first focussed on finding out how employees were coping with homeworking or in the case of such as the Claimant being furloughed[9]. The second[10] more focussed on returning to office working and such as being comfortable to do so in the context of emerging from lockdown; shielding or other precautions that might be needed; as whether to have rota's whereby employees could be eased over a period back to office working or possibly retain some homeworking; and such as concerns about travelling into the office, use of public transport etc.

54. The Claimant completed both surveys. He was not comfortable about returning to the office at the "*current time, because of existing serious underlying medical conditions in accordance with government guidelines as I am still advised not to leave home"* and as illustrative and referring to travelling in: *This will have to be by Public Transport, and I am not comfortable to use this means at the present time*." This is a

[8] See the parenthesis at issue 3.2

[9] The Claimant replied to this section – Section 3 – of the survey on 16 May 2020 (Bp138).

[10] This was replied to by the Claimant also to CB in HR on 31 May 2020. His replies also start on Bp138 and continue overleaf.

summary of on the face of it justifiable concerns given his disabilities.

55. On the 27 May 2020, Toby Clegg e-mailed a communication (Bp 141- 143) to all staff. Albeit he thanked them for coping in a very difficult situation it cannot objectively be read to the effect that the problems for the business were now over. He referenced a dramatic downturn in the sale of new cars ("*registrations have fallen off a cliff")* and second hand vehicles and its impact given a core part of the business was providing insurance to the motor trade. And so, although some aspects of the business were beginning to recover, these were only "green shoots".

56. On 6 July, the Claimant, as we have already said keeping himself very much aware of developments viz coronavirus and the Government, informed the Respondent (see Bp 148) that from 1 August he was allowed back to work. But he flagged up that:

> *"I am not sure what time I can arrive in Romford as I have to travel by public transport and I live approximately half way along the bus route, I am not sure when I will be able to get on a bus.*
>
> *If the buses have the same restrictions, as now, they are only allowing 20 people on board so I won't be sure when I can get onboard a bus.*
>
> *The only other problem I have is travelling on the Central Line but hopefully that will be okay and not as overcrowded as usual"*.

57. What then happened is that on 17 July, there having been no previous consultation, he was informed in a letter (Bp 149) from SB following their conversation of "todays date" that she was enclosing a settlement agreement plus also confirming what would be the outstanding holiday entitlement. As frequently happens in this type of scenario the Claimant was thereby informed that should he wish to seek legal advice as to the settlement, then the first Respondent would pay a fee of up to £400 plus VAT *"as set out in section 9 of attached agreement."*

58. In passing the conversation took place on the 20 July as SB had difficulty making contact with the Claimant prior thereto and who can have problems with his mobile phone. So, the letter was predated and because SB had expected to tell the Claimant what was going to happen on the 17th.

59. The settlement agreement[11] set out terms for redundancy. SB it seems had been tasked by the Board with informing all those employees who were now redundant. The list is attachment SB 3 to her witness statement. There is no evidence to contradict that all the other 15 received similar proposed settlement agreements with of course in each case different details as to entitlements i.e. based on such as salary; age and length of service. Put it another way, and this is consistent treatment: all the staff concerned were treated in the same way.

60. As to the conversation on the 20th piecing together their evidence the conversation between SB and the Claimant lasted between 5 and 10 minutes. Although described as

[11] The approach including the employee obtaining legal advice mirrors s203 of the Employment Rights Act 1996.

"short" , a lot can be said in that time. The Claimant says SB simply said "you are being made redundant, agreement on its way". SB maintains that she briefly explained the reasoning behind the redundancies, that is to say that in the prevailing business circumstances there was a need it to make redundancies of non-core roles i.e. like the Claimant's and that she explained the settlement agreement would be coming through to him to read it and that of course he could then go and seek legal advice. We will come back to that.

61. So, SB 3 is the list of all the other 15 employees who were provided with proposed settlement agreements circa 17 -20 July. It is headed "*Compromise agreements 2020 following furlough"*. This is because they all accepted the terms and thus left the employ. The Claimant is the only one who did not sign up.

62. As per the list of those furloughed the age range again does not permit in itself of age discrimination because of the spread. It is back again to the contention on behalf of the Claimant of Ms Lindford that the focus should be confined to the finance department in that the same three who were furloughed are the subject of settlement agreements of whom two, namely LT and TT, signed up. But we factor in Marion Higgins who the Claimant on the furlough issue seemingly at least at first deployed as part of those discriminated against in the finance department because of their age, her being 65. But it is to be noted that Marion Higgins was not made redundant. So that in any event weakens this element of the claim. If PB as the selector is ageist, why has he kept Marion in the employ? And otherwise the rationale of PB as to why select bad debts (the Claimant) and Traditional Customer Credit Control (LT and TT) for furlough remained as per the laptop and furlough issues when it came to deciding the roles were redundant. The rationalisation as to what was not needed remained. The focus on essential workers as opposed to those not customer facing etc, had not changed. And given the way the business was otherwise developing i.e. away from payment by instalments for individual motor insurance, and a realisation that many of the bad debts should be written off and otherwise dealt with as part of the overarching role of Philip Boyle who had by now been recruited to be supervisor in charge of credit control. Part of the synergy for that was the need for a person with strong Excel analytical skills and which the business was lacking. So, these three roles were no longer needed: the residual elements thereof would form part of Philip Boyle's remit. The recruitment of Philip Boyle does not feature in the list of issues.

63. It is to be noted that PB made the final decision as to the redundancies having had the list through from the other heads of department at director level and added to the list those to be made redundant in his team. Furthermore, that all on the list would be offered settlement agreements. SB apart from being the MD was the head of HR in that CB reported to her. This is why she was given the task of issuing the letters and informing the effected employees.

64. This brings us back to the content of the discussion between SB and the Claimant on the 20th. It was clearly more than the Claimant suggested before us[12] as is obvious from that he may not have had the settlement agreement with the letter, hence why SB

[12] See penultimate para of the solicitor's letter before action (Bp170): ".. SB then proceed to state that the claimant would be receiving payment of £29,000, that the Claimant should not discuss the matter with anyone and that full details would be sent to the claimant by e-mail and by post."

sent him a further copy on the 21st. In any event on the 21st having had the proposed agreement, the Claimant was querying the start date of his employment as being wrong and that "… *I now await your amended redundancy payment together with a complete breakdown of the calculations.*

Regards Dave."

65. As to this chapter of events as per the list of issues first alleged as to the 20th July is direct discrimination because of age and disability because of SB "*failing to explain the reasons behind the alleged redundancy.*" But the Claimant has advanced no evidence in support. We have no evidence that he was treated any differently to the other 15 or that only his like comparators were treated as he was. He has called no evidence in support. That the employer thus failed to consult ahead of issuing the settlement proposal redundancy letters and which therefore might go to a poor or possibly unfair process does not in itself thereby mean that it is a discriminatory employer for the purpose of the EqA as to which the jurisprudence is established.[13]

66. Second alleged as per the list of issues is that this was unfavourable treatment as per s15 based on the same lack of explanation. Why? As per the Particulars of Claim at paragraph 38 (Bp277) pleaded as to the discussion on 20 July was:

> *"The unfavourable treatment was being told that the Claimant was being made redundant and the something arising in consequence of the Claimant's disability was a lower ability to attend work due to Covid-19 and the Claimant's medical conditions.".*

67. We have already now ruled out direct discrimination. SB was not cross examined to the effect that she dealt with the matter in the way she did realising that it would impact on the Claimant's disabilities. There is nothing in the correspondence to suggest it was a factor. It was never put to PB that it was. Finally, we received no submissions on a s15 argument on these issues from Ms Lindford. On the face of it, disability was not engaged. Accepting as we do the evidence of PB, the Claimant's medical history and thus sickness absence or the impact of Covid as to his attending work was not a factor at all.

68. Finally alleged is that it was harassment as per s26: see item 17.7 in the list of issues and again paragraph 28 continuing over to Bp 278.

> *"Further SB engaged in unwanted conduct related to the claimant's disability and age which had the purpose or effect of violating the claimant's dignity…"*

69. But why? How was that which occurred related to a protected characteristic? Nothing in the way SB conducted herself other than informing him that he was redundant but failing to explain why is alleged as being harassment within the definition. The Claimant might have been upset to learn that he was redundant, albeit his first recorded reaction in terms of pointing out the calculation was wrong as opposed to protesting at being told he was redundant isn't indicative of that. Bearing in mind the Claimant is quite

[13] Bahl v Law Society and ors (2004) EWCA Civ 1070.

capable of complaining as is by now obvious. Even if the first Respondent failed to consult before issuing the letters, the first Respondent via SB needed to inform the Claimant as per the other employees at risk of its proposal viz the settlement agreements, and it offered the right to paid legal advice in respect thereof. It is not alleged that SB in what she said put a proverbial pistol to the Claimant's head i.e. "take it or else…". It follows that harassment is not made out.

70. Thus, the heads of claim on this issue as per the list of issues engaging the EqA are dismissed.

The Pontius Pilate issue

71. As already rehearsed, the Claimant pointed out on 21 July to SB that she had given the wrong start date for him. Indeed, because he had now got 20 years under his belt, he had just received his "*fourth long service payment*". Her reply of the same date (Bp164) is this:

> *"Thanks for your acknowledgement Dave, you have received the maximum amount of statutory redundancy pay and we know you have been around since Pontius was a Pilate… We will amend the necessary information and get this over to you.*
>
> *All the best*
>
> *Shirley*

72. As per the list of issues at 17.8 this is claimed as harassment. Mr Williams submits this should be seen as a throwaway remark, it is to lighten the tone so to speak. But the picture we have got of SB is that she can be somewhat thoughtless in how she expresses herself and in ways which we have now found can be, on occasion, insensitive at least. The Employment Tribunal is unanimous that the reference to Pontius Pilate is objectively capable of being offensive. By analogy, it might be deeply offensive to a Christian. And it cannot in the circumstances really be other than at least an inference to be taken that the reference is because the Claimant has been around so long goes to his age. SBs motives are irrelevant. Given the context of the Claimant having been informed that he was redundant he was clearly was more than just upset. That he found in the context the remark to be humiliating and offensive was obvious. Thus, it created an "adverse environment" in that sense for him and particularly given the preceding remarks related to SB which we have now dealt with an example being the "may not be around remark" on the 19 March. As to it being reasonable for the conduct to have that effect, it follows given that context that it was. Thus, this was an act of harassment.

The last chapter of events

73. Following a period of silence from the Claimant as to whether he was going to sign up to the settlement agreement**,** his solicitors sent a long letter before action to the

first Respondent on 20 August 2020 (Bp 169-175). His solicitors set out there in all the allegations so far apropos the list of issues including as to SB. Reference was made to the EqA. Also alleged was unfair dismissal, but of course the Claimant had not been dismissed and that claim is not pursued anymore. The proposed settlement agreement was rejected but made clear was that the Respondent was invited to enter into discussions thereto. Implicit was that otherwise the matter would proceed to tribunal.

74. Employment Judge Buchanan ruled that letter as being admissible at the preliminary hearing on 1 November 2021 (Bp 82-89). The Respondent's reply thereto is privileged but suffice it to say that the reply that is in the bundle to it from the Claimant's solicitors was ruled in; it is obvious that the parties now were in a situation of dispute on material issues. But it would appear that negotiations carried on for a while but failed.

75. In that context on 23 September 2020 SB e-mailed the Claimant as follows (Bp176)[14]:

> *"Further to our correspondence addressed to your Solicitor dated 15th September 2020 we not we have not received a response from ELS solicitor nor yourself. We regret to say you are leaving us with no alternative than to withdraw the severance agreement offered to you originally in July 2020 and request you return to the office on 1 October 2020 to fulfil your employment contract. Whilst it is appreciated that the Govt furlough scheme currently runs up until the end of October, we do not wish to avail ourselves of this facility.*
>
> *Will you please confirm that you will be attending the office on 1 October 2020 so we may put the necessary arrangements in place.*
>
> *Kind regards*
>
> *Shirley Bellamy."*

76. Alleged by the Claimant as per paragraph 22.1 of the list of issues is that this letter is an act of victimisation by SB pursuant s27 of the EQA. The section reads:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because*
>
> *(a) B does a protected act*
>
> *…*
>
> *(2) Each of the following is a protected act*
>
> *…*
>
> *…*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act*

[14] This e-mail was ruled in as admissible by EJ Buchanan.

77. The protected act relied upon is the solicitor's letter before action. Not disputed by the Respondents is that it is a protected act. Not engaged is s27 (3) in that it is not alleged by the Respondents that it was inter alia written in bad faith.

78. In response to this letter the Claimant resigned on the 25th (Bp 177):

> *" In view of the way I have been treated as detailed within the letter from ELS Solicitors Ltd dated 20th August 2020, I hereby resign with immediate effect. Yours sincerely,*
>
> *David Finch*

79. In his evidence, albeit perhaps not plain from that letter. It is reasonably clear that the Claimant saw that letter in itself as a final reason for his resignation. This is also plain as the final act relied upon for the constructive dismissal as per paragraphs 22.1 and 33.1 of the list of issues. It of course does not itself have to be a fundamental breach whether it be on the EqA or the ERA front as long as it adds something to the previous acts relied upon.

80. In any event from the evidence, and particularly that of PB the following is clear. First, PB was not consulted at all by SB before this letter was issued. Second, he was unhappy about that and under questioning, and including from the Judge, accepted as follows: that given the Claimant was surplus to requirements in his current role, before a return to work there would have needed to be a discussion including the Claimant about what role he could be perform if any. Second, given his health, and reverting back to the issues as per the file note of Claire Banks in HR (CB) dated 13 February 2020, if there was a genuine prospect of a role the obtaining of an occupational health report and also in that context discussing with the Claimant his working hours, the issues he had with travel etc. Had he been involved, it is obvious from that evidence that this would have all been on the agenda and thus covered by the letter or explained at a meeting or in conversation to the Claimant when issuing a letter viz his return to work. And if of course, following discussions there was no role, the Respondent would then have had to go down a formal process of dismissal, including consultation with the Claimant beforehand. In passing, and as an observation, the Tribunal points out that given the roles retained in the finance department this may well have meant identifying a possible pool for selection purposes and then an objective scoring process to decide which individual would be the one made redundant. This observation is not detracted because of the settlement agreement proposal. The Tribunal given its extensive employment experience, in terms of the Judge in his extensive career and the lay panels members expertise in the world of work, is well aware that settlement agreements are frequently offered, thus avoiding if accepted these kind of selection issues. The quid pro quo usually being an enhanced exit package. But it does not mean that if a settlement agreement is not accepted that the process would then not have to be followed.

81. Leaving aside that observation which is more likely to engage at the remedy stage and in terms of such as a Polkey[15], it follows that if SB was genuinely wanting the Claimant to return to work rather than calling his bluff, we found concerning that PB who had responsible for the furloughing of the Claimant and thence the redundancy list and incepting the settlement agreement process, was not in the loop. We bear in mind his

[15] Polkey v E A Dayton Services Ltd (1987) IRLR 503 HL.

long-standing working relationship with the Claimant and his sympathy for his health conditions and that if the settlement agreement had not happened that he as finance Director is likely to have wanted to deal with the issue in the way we have now set out.

82. He was not even cc'd to SB's letter, and which is abrupt in tone and not signed off with "all the best, Shirley" as per that of the of the 21 July 2020. It says nothing about all those things we have just referred to. So, the Claimant in the circumstances first of all read that letter given what had gone on before as meaning that the employer via SB as the MD really had no genuine interest in his return to work. The way in which this letter had been phrased given that which had gone on before, meant as articulated in the list of issues, that this was also an act of victimisation[16]. That is to say, as per the submissions of Ms Lindford, SB having been a principal subject of critical complaint in the letter before action and the Claimant via his solicitors having rejected the settlement agreement, that she was going to deliberately phrase this letter as an ultimatum and within it giving no positive signals at all about the way forward in terms of the role or his health concerns etc.

83. Mr Williams submits that a letter requiring a return to work given settlement negotiations have failed, is not in itself acting without reasonable and proper cause viz the test for constructive unfair dismissal as per s95 of the ERA. He is in that sense of course correct. But the letter and its contents have to be seen in the context as we have now found it to be. That letter held out no reassurances as we have already said. It was not couched in terms of holding out an olive branch in what was described by Ms Lindley as by now a "toxic environment" as per SB and the Claimant. Finally, we found SBs explanation as to the content of the letter unconvincing: essentially that she did not think about the contents and as to adding in such as we have now rehearsed. We conclude given what we have found in relation to previous issues and her manner, that she gave no thought because she was offended by the accusations made against her and that she had no intention of couching her letter in a way that was conciliatory or constructive in terms of a return to work, we conclude that Ms Lindley is correct when she put it to SB that she was about " forcing his hand". It fits with our other findings on this issue. Thus, it was an act of victimisation.

Final conclusions

84. The rest is obvious. Given that is an act of victimisation and taken together with the other adverse findings as to harassment that we have made, thus these acts of discrimination were cumulatively serious enough to justify the Claimant in resigning and treating himself as constructively dismissed because of this discrimination. The relatively short span of events means these were "continuing acts". Mr Williams has not submitted to the contrary.

85. As to constructive unfair dismissal as per s95 of the ERA, obviously none of the actions viz the laptop or furlough or indeed the settlement agreement approach in themselves constitute acting without reasonable and proper cause given the context. But of course, these acts of discrimination cannot but fundamentally undermine the implied terms of trust and confidence. Thus, in that respect the s95 ERA claim succeeds as well.

The way forward

86. There will now have to be a remedy hearing. Of course, as to the measure of loss in terms of earnings, the Polkey issue is likely to be engaged in terms of how long the employment would have lasted in any event. We understand the Claimant would have retired in any event in March 2021.

87. As to an award for injury to feelings, apart from assessing the amount, the Tribunal will have to determine apportionment i.e. does the Claimant seek that part of any award should be against SB personally given the first Respondent has accepted vicarious liability?

Employment Judge Britton
Date: 7 September 2022