EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms AM Carreras	v	Thames Transit Ltd t/a Stagecoach West
Heard at: Reading		**On**: 6, 7, 8 July, 1 and 2 September 2022

Before: Employment Judge Hawksworth
Mrs E Bristow
Mrs F Tankard

Appearances:

For the Claimant: In person
For the Respondent: Mr C Ludlow (counsel)
Mr J Simpson (solicitor)

JUDGMENT

The unanimous decision of the tribunal is that the complaints of direct sex discrimination, harassment related to sex and constructive unfair dismissal fail and are dismissed.

REASONS

Claim, hearings and evidence

1. The claimant worked for the respondent as a bus driver from 27 November 2017 until she left on 16 December 2020.

2. The claim form was presented on 22 February 2021 after Acas early conciliation from 12 October 2020 to 21 October 2020. The claimant claimed direct sex discrimination, harassment related to sex and constructive unfair dismissal.

3. The respondent presented its response on 25 March 2021. The respondent defended the claim.

4. A preliminary hearing was held on 18 February 2022.

5. The final hearing started on 6 July 2022 as a fully video hearing (CVP) with a time allocation of three days. On the first day everyone attended by video. On the afternoon of the first day, the claimant experienced connection difficulties and these could not be resolved despite the assistance of the tribunal administration. We brought the day to an early close and converted the hearing to a hybrid hearing. The claimant and her supporter attended Reading employment tribunal in person on the second and third days. The respondent's representatives and witnesses chose to attend by video on all days. The judge attended in person on the second and third days; the non-legal members attended by CVP on all days. On the second day, there were problems with the connection in the room which was being used by the respondent's witnesses; the respondent's solicitor was able to resolve these issues after a break.

6. Despite the best efforts of the parties and the tribunal, the time lost to connection problems meant that there was insufficient time to complete the hearing. Also, during the hearing, the claimant had asked some questions of the respondent's witnesses about the treatment of six other employees; the respondent was unaware that these questions were to be asked and had not searched for or disclosed any evidence about these employees. (We refer to these other employees as the comparator employees.)

7. With the parties' agreement, two further hearing days were arranged for 1 and 2 September 2022 to finish hearing from all the witnesses, to allow the parties to make closing comments and to allow tribunal deliberation time. It was noted that this would also allow time for the respondent to produce any evidence on the comparator employees (identified in case management orders). Case management orders were made for this.

8. The hearing resumed on 1 September 2022. As with the previous days, the claimant, her supporter and the judge attended the tribunal in person. The respondent's representatives and witnesses and the non-legal tribunal members attended by video.

9. There was an agreed bundle of 257 pages. During the break between day 3 and day 4 of the hearing, the respondent produced documents relating to the comparator employees and these were added to the bundle as pages 258 to 271. Shortly before the hearing on day 4, the respondent disclosed an electronic excel spreadsheet about holiday pay (exhibit 2). The tribunal provided a paper copy for the claimant and the document was agreed. At the end of Mr Gibbon's evidence, the respondent disclosed an email which was added to the bundle as page 272. Page references in these reasons are references to the agreed bundle.

10. We were also provided with a short CCTV recording which we viewed, together with an agreed transcript of the recording (page 215). The recording was described as exhibit 1.

11. The respondent's representatives had prepared a chronology.

12. Over the course of the first four days of the hearing, we heard evidence from the following:

    a. the claimant
    b. Mr Henley-Burns
    c. Mr Bayliss
    d. Mr Hough
    e. Mr Gibbon
    f. Ms Meggett

13. Mr Bayliss gave evidence on 8 July 2022 and was recalled on 1 September 2022.

14. All the witnesses had exchanged witness statements. The claimant had prepared her witness statement as a continuation of her grievance document on page 95 so we treated that page as the first part of her witness statement. During the break between day 3 and day 4 of the hearing, Mr Gibbon provided a supplemental statement dealing with the comparator employees. The claimant served a supplemental statement (called part 3 of her statement) after Mr Gibbon's.

15. Mr Ludlow produced a written closing comments document after the hearing on 1 September 2022. The claimant had time to look at the document overnight, and we allowed some extra time in the morning because the document was quite long. Mr Ludlow and the claimant made verbal submissions. At the claimant's request, we took a half hour break after Mr Ludlow's closing comments, before the claimant made hers.

16. We gave our judgment and reasons at the end of the day on 2 September 2022. In our reasons, we explained our findings of fact and the conclusions we reached, including a summary of the legal principles we applied. The claimant requested written reasons at the end of the hearing.

The Issues for us to decide

17. The issues were identified at the preliminary hearing on 18 February 2022 and at the start of the hearing before us. In our case management order of 13 July 2022 we set out a summary of the discussions about the issues, and a list of the issues it had been agreed that we would decide. The issues from that list relating to liability are included below in an appendix for ease of reference.

Findings of fact

18. This section sets out our findings of fact. We make these findings by deciding what we think is most likely to have happened, based on the evidence we heard and the documents that we read. We do not try to include everything we heard about. We focus on those facts that relate most closely to, and assist us in deciding, the issues that we have to decide as we identified at the start of the hearing.

19. The claimant was employed by the respondent as a bus driver based at Banbury Depot. She started work on 27 November 2017.

20. In about September 2019 Mr Henley-Burns became the acting assistant operations manager at Witney and Banbury depots. He spent three days a week at Banbury and two days at Witney. He was newly appointed as a manager and one of the reasons he moved to Witney and Banbury was because the respondent felt the culture at Banbury was not where they wanted it to be in terms of service delivery, complaints and accidents. They were finding it difficult to engage staff with the improvements they were trying to make and felt that this was due to management structure. Mr Gibbon, the operations director, told Mr Henley-Burns that he wanted him to improve these issues. He wanted more attention to performance and disciplinary issues and improved work culture and performance generally at Banbury.

The meeting on 1 October 2019

21. On 1 October 2019 there was a meeting between the claimant and Mr Henley-Burns. This meeting was central to the issues in the case. There was a dispute about whether it was a formal or informal meeting. We find that it was an informal meeting because that was how it was described in contemporaneous documentation, and it is also how the claimant described it in her grievance letter which was sent two days later.

22. The claimant attended the meeting with Mr Henley-Burns alone. He had asked for the meeting to discuss three customer complaints (although he did not tell her this before the meeting). The complaints he wanted to discuss were a complaint about driving, a complaint about a failure to stop and (the most recent of the three) a complaint by a customer about an interaction with the claimant on the bus.

23. Mr Henley-Burns and the claimant discussed the complaint about driving. We accept that, as the claimant said, this complaint did not actually relate to the claimant. An administrative error led to it being wrongly recorded as a complaint about her. We reach this finding because Trevor Bayliss, who was the depot manager, also thought this is what had happened. We also think it is unlikely that the claimant would have driven in the way described without being aware of it. Mr Henley-Burns said there was no need to have any detailed discussion about this complaint because it was stale or old and that no action would be taken about it.

24. In relation to the complaint about a failure to stop, the claimant remembered the incident and explained that the customer had only put their arm out after she had passed the bus stop, so it was not safe to stop the bus. Again, Mr Henley-Burns said this complaint did not need to be discussed in detail as said it was old and no further action was to be taken about it.

25. Mr Henley-Burns and the claimant then watched the CCTV clip of the more recent incident which had led to the complaint about the claimant's interaction with the customer. We also watched the clip during our reading. The CCTV showed that, following a short discussion between the claimant and the customer about where the customer wanted to go, the claimant issued the wrong ticket.

When this became apparent, the claimant cancelled the ticket and issued another. While issuing the new ticket, the claimant said to the customer that she had not been clear about where she wanted to go.

26. The claimant and Mr Henley-Burns had different perspectives of the incident and their discussion about it during their meeting became heated. The claimant thought that she had simply explained to the customer what had happened. She thought she had not done anything wrong and wanted to defend herself. Mr Henley-Burns though the claimant had been firm with the customer bordering on curt and that she was being very defensive in the meeting with him. He asked the claimant several times to stop talking and to let him finish his point. We do not find that he used the words, "Shut your mouth". Mr Henley-Burns saw the discussion as a coaching opportunity. He told her that he thought the complaint highlighted a customer care issue as the customer clearly did not understand the respondent's ticketing. He said the claimant could have taken a softer line and explained the ticketing, rather than making a comment which could have been seen as critical of the customer. We agree with the claimant that it is an exaggeration to describe her conduct in this interaction as abusive or confrontational.

27. Towards the end of the meeting Mr Henley-Burns tried to lighten the atmosphere. He said in what he thought was a jokey way, "For the future, try to avoid being argumentative with customers".

28. The next exchange between Mr Henley-Burns and the claimant was the subject of a factual dispute between them. Mr Henley-Burns said that the claimant responded to his last comment by saying: "My ex-husband always said I think before I speak" to which he responded: "You're divorced?" and she replied "Yes". The claimant's account was that after his last comment, Mr Henley-Burns had said: "I feel sorry for your husband," to which the claimant had replied, "I am not married". Both agreed that this exchange concluded with Mr Henley-Burns saying, "I'm not surprised", meaning that he was not surprised that the claimant was not married.

29. We accept the claimant's account of this exchange for two reasons. First, it was recorded in her grievance letter which she wrote two days later (and so it was an account made very shortly after the discussion, when her memory of it would have been fresh). Secondly, we accept the claimant's suggestion that it would have been unlikely for her to bring up the subject of her ex-husband in this context.

30. No further action was taken by the respondent following this meeting. The claimant was very upset by the meeting and booked off work early.

<u>The claimant's grievance</u>

31. Two days later, on 3 October 2019, the claimant raised a grievance about the meeting. Her grievance was dealt with by Mr Bayliss, the depot manager.

32. Mr Bayliss spoke to the claimant on 8 October 2019 with her union representative present. He spoke to Mr Henley-Burns on 10 October 2019. The claimant was signed off sick on that day and remained off sick for some time.

33. Another meeting took place between Mr Bayliss, the claimant and her union representative on 11 October 2019 at which Mr Bayliss told the claimant the outcome of her grievance. He also confirmed the outcome in a letter. He said that the discussion on 1 October should have been a coaching session rather than a debate. He said that the comment after the interview that it was unsurprising that the claimant wasn't married was unacceptable. He said Mr Henley-Burns was having further training to deal with this issue and that on his return he would not interview or contact the claimant without a third party being present, such as a union representative or trusted person.

Return to work in January 2020

34. In January 2020 the claimant was still certified unfit for work. She had a return to work meeting on 15 January with Mr Bayliss and her union representative. They agreed that she would return to work four days a week on Monday, Wednesday, Saturday and Sunday. These were all days when Mr Henley-Burns would not be present in the Banbury depot. This would mean that the claimant could attend work without having to have contact with Mr Henley-Burns. Mr Bayliss confirmed this arrangement and the agreement which had been reached in a letter on 24 January 2020. He said the arrangement would be reviewed on a three month basis. Mr Henley-Burns provided a written apology to the claimant on the same date.

35. The claimant's return to work took place on 28 January under the arrangement that had been agreed with Mr Bayliss. It worked well for several weeks until the Covid-19 pandemic intervened and she was put on furlough on 1 April 2020. She remained on furlough until 31 July.

The claimant's second grievance

36. The claimant met with Mr Bayliss together with her union representative on 27 and 31 July 2020 to discuss the arrangements for her to return to work after furlough. She was told that the previous arrangement under which she only worked in the Banbury depot on days when Mr Henley-Burns was not there could not be continued. This was because from 2 August 2020 Mr Henley-Burns was to be based five days a week at the Banbury depot. For operational reasons, he had been appointed as the manager of Banbury depot from that date.

37. Mr Bayliss suggested that the claimant should return to her normal roster. The claimant was unhappy about the fixed four day working week arrangement not being continued. She made a second formal grievance on 2 August 2020 and was signed off unfit for work on 4 August 2020.

38. Mr Hough was appointed to hear the claimant's second grievance. He took the following steps:

a. He held a grievance meeting with the claimant on 24 August 2020. The claimant was accompanied by a work colleague who was assisting her with her grievance;

b. He interviewed Mr Bayliss on 25 August 2020;

c. He sent the outcome letter to the claimant on 26 August 2020.

39. Mr Hough's decision was that it was reasonable to ask the claimant to return to work on the standard rostered work pattern, but, to ease her back to work, she would be allowed a four week period working two days a week on days when Mr Henley-Burns was not present. He recommended that the claimant enter into mediation with Mr Henley-Burns. The arrangement whereby Mr Henley-Burns would not meet the claimant without someone else present was to remain in place.

The appeal of the second grievance

40. On 1 September 2020 the claimant appealed the decision. Mr Gibbon was appointed to hear that appeal. He took the following steps to decide the appeal.

a. He met with the claimant who attended with her work colleague on 16 September 2020;

b. He sent the claimant a grievance outcome letter on 18 September.

41. Mr Gibbon's decision was that Mr Henley-Burns had to continue to work in the Banbury depot and so it was an inevitability that he and the claimant would have to be on the premises at the same time. He decided that the claimant would return to work with a short term arrangement with shifts reducing the likelihood of the claimant being in contact with Mr Henley-Burns and the arrangement whereby any issues would be dealt with by another member of staff also to remain in place. He decided that the short term arrangement should stay in place for eight weeks and after that the claimant would return to her normal roster pattern.

42. Mr Gibbon understood that at the end of the meeting with him the claimant had agreed to this arrangement.

43. There was a dispute between the parties about how often the claimant would run into Mr Henley-Burns when she was back at work. The respondent thought that even when the claimant was back on her normal roster and working in the same depot as Mr Henley-Burns, there would only be infrequent contact between them. While they might be on the premises at the same time and might see each other across the depot, on a normal routine day this would only be when the claimant was booking on and off for work at the start and the end of the day. For the rest of the working day, the claimant would be out driving the bus. The drivers' break room was in another location.

44. The claimant said she might have to see Mr Henley-Burns at other times, for example when there was a bus breakdown or when she had to return a bus to the depot during the day for another reason. We accept that these sorts of

occasions would have been limited, perhaps once or twice a month. The respondent had agreed to minimise direct contact between the claimant and Mr Henley-Burns by having another manager deal with any issues and if that was not possible a third party would be present and that was to continue.

45. We do not find that the circumstances of the comparator employees the claimant mentioned were the same as the claimants. In any event, we accept the evidence of Mr Gibbon that none of them were offered an arrangement whereby they would not come across a particular manager. Some were moved to different routes or different roles. These are not options that would have assisted in the claimant's case.

46. In his appeal outcome letter Mr Gibbon noted that the expectation was that the claimant was to return to work at the end of her current fit note on 5 October 2020. We find that date was not discussed with the claimant at the meeting.

The claimant's sick pay

47. The claimant remained off sick after 5 October 2020. She was certified sick again by her doctor and sent her fit note to the respondent but it was not processed as it should have been. We find that this was because of staff absence because of arrangements during the Covid-19 pandemic. The failure to process the claimant's fit note meant that she was not paid statutory sick pay. There were three weeks when statutory sick pay was not paid.

48. On 2 November 2020 the claimant notified Mr Bayliss in an email that her statutory sick pay had been stopped. He replied four days later apologising for the delay in replying and for the non-payment of statutory sick pay. He said the sick pay would be paid on 9 November 2020. The back payment of statutory sick pay for the three week period was paid on that date.

The claimant's resignation

49. On 8 November 2020 the claimant resigned. She said the failure to adhere to the agreement regarding the roster made after her original grievance meant that she did not feel safe and secure at Banbury. She relied as a last straw on the failure to pay sick pay (she also said the sick pay had since been reinstated and back paid).

50. The claimant's last day of employment with the respondent was 16 December 2020. She had spoken to Acas for advice in November 2019. She formally notified Acas for early conciliation on 12 October 2020 and received an Acas early conciliation certificate on 21 October 2020. She presented her claim on 22 February 2021.

The law

Direct discrimination because of sex

51. Sex is a protected characteristic under section 4 of the Equality Act 2010.

52. Section 13(1) of the Equality Act provides:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

53. Section 23(1) says:

"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

Harassment related to sex

54. Under section 26 of the Equality Act, 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."

55. The claimant relies on the protected characteristic of sex.

56. Because of the focus on the effect of the conduct (as an alternative to considering its purpose), lack of intent is not a defence to complaints of harassment.

57. In deciding whether conduct has the effect referred to, the tribunal must take 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."

58. There are therefore subjective and objective elements to the test. Overall the criterion is objective. The tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for them to do so (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336).

Burden of proof

59. Sub-sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) This does not apply if A shows that A did not contravene the provision."

60. This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent.

61. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic. The respondent would normally be required to produce "cogent evidence" of this. If there is a prima facie case and the respondent's explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

Constructive unfair dismissal

62. The definition of dismissal in section 95 of the Employment Rights Act includes constructive dismissal. Section 95(1)(c) provides that an employee is dismissed where:

> *"the employee terminates the contract under which [she] is employed (with or without notice) in circumstances in which [she] is entitled to terminate it without notice by reason of the employer's conduct."*

63. *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27 set out the elements which must be established by the employee in constructive dismissal cases. The employee must show:

    a. that there was a fundamental breach of contract on the part of the employer;

    b. that the employer's breach caused the employee to resign; and

    c. that the employee did not affirm the contract, for example by delaying too long before resigning.

64. The claimant in this case relies on breaches of the implied term of trust and confidence. The implied term was explained by the House of Lords in *Malik v Bank of Credit and Commerce International SA* 1997 ICR 606, HL as a term to the effect that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of the implied term of trust and confidence is a fundamental breach of contract, entitling the employee to treat the contract as being at an end.

65. Whether there has been a breach of the implied term is a highly context-specific question, and is to be considered objectively, from the perspective of a reasonable person in the claimant's position (*Tullett Prebon plc v BGC Brokers LP* 2011 IRLR 420).

Conclusions

Direct sex discrimination

66. We started by looking at the complaint of direct sex discrimination. The claimant said that there were five instances of direct sex discrimination, all of them by Mr Henley-Burns and all at the meeting on 1 October 2019. We first set out our findings of fact on each of these allegations.

67. The first allegation of direct sex discrimination was that Mr Henley-Burns did not allow the claimant to speak. We have found that Mr Henley-Burns did ask the claimant several times to stop talking and to let him finish his point. We have found that he did not allow her to discuss the two older complaints in detail, as he had decided that they were stale and that no further action would be taken.

68. The second allegation was accusing the claimant of an accident which she had nothing to do with. We have found that a complaint about driving was one of the complaints discussed with the claimant on 1 October 2019. We have found that the claimant was not involved in the incident which was the subject of that complaint.

69. We have found in relation to the third allegation that Mr Henley-Burns did use the word 'argumentative' when he said to the claimant, "For the future try to avoid being argumentative with customers".

70. In relation to the fourth allegation, we have found that Mr Henley-Burns said to the claimant, "I am sorry for your husband" and "I am not surprised" (in response to the claimant saying she was not married).

71. The claimant's fifth allegation of direct sex discrimination was the outcome which the claimant had. We have found that the outcome of the meeting was that no further action was taken by the respondent after the meeting.

72. The legal tests we have to apply in direct sex discrimination complaints require us to consider whether the things that we found to have happened amounted to less favourable treatment of the claimant compared to someone who is male in circumstances which are not materially different. 'Less favourable treatment' has a comparison built into it, in that someone else was or would have been treated better than the claimant.

73. The treatment complained of also has to be something which is a detriment or a disadvantage in some way to the claimant.

74. We have concluded that two of the allegations did not amount to a detriment or disadvantage such that it met the legal test of less favourable treatment. First, the comment about the claimant being argumentative was made in the context of a suggestion for learning for the future. We think that is part of the normal management discussion between a manager and an employee. We do not think that in the context in which it was said it amounted to less favourable treatment of the claimant.

75. Also, in respect of the fifth allegation, the outcome the claimant had, we have found that no further action was taken by the respondent. The outcome could not amount to any kind of disadvantage, because there was not any outcome following the meeting. An omission can be a detriment, but this is not a case

where the claimant has said that the respondent failed to do something it should have done after the meeting.

76. We have found therefore that three of the allegations could amount to less favourable treatment, namely the way that Mr Henley-Burns asked the claimant to stop talking, the complaint about driving being included when it was not a complaint relating to the claimant and the comments made by Mr Henley-Burns, "I'm sorry for your husband" and "I'm not surprised".

77. When considering these allegations, we have to consider not just whether the treatment was unprofessional or unacceptable, but whether it was treatment which would not have been afforded to a man in the same or similar circumstances. The law recognises that it is difficult for someone to prove that they have been treated differently because of their sex, and so the law includes something called the shifting burden of proof. This means that if the claimant has shown anything from which we could conclude that there was sex discrimination, we look to the respondent to prove that there was no sex discrimination.

78. We have thought about this very carefully. We have concluded that there was no evidence that a man in the same circumstances was or would have been treated any differently by Mr Henley-Burns. We are not looking to see if his treatment of the claimant was reasonable or if he should have behaved as he did. Rather, we are looking to see whether a man would have been treated differently. Ultimately we have concluded that in this situation Mr Henley-Burns would not have treated a man any differently.

79. There is a reference to gender built into the word "husband" but we felt that was a comment that could equally have been said to a man in the same way, such as by saying to a (heterosexual) man, "I feel sorry for your wife".

80. We have not found that any of the comparator employees were in circumstances that were not materially different to the claimant's, such that a difference in treatment of them was evidence from which we could have concluded that there was sex discrimination. Also, the treatment of the comparator employees was not treatment which would have assisted the claimant.

81. We reach the conclusion in relation to the direct sex discrimination complaints that the burden of proof has not shifted to the respondent to prove there was no discrimination. We did not find anything from which we could conclude that a man would have been treated differently. If we had done, we would have accepted that the treatment of the claimant was because Mr Henley-Burns was taking steps to put in place the new working culture he had been instructed to implement, albeit in quite a heavy handed and (in relation to the comments) ill-judged way.

82. This means that the complaints of direct sex discrimination do not succeed.

<u>Harassment related to sex</u>

83. We went on to consider whether any of the claimant's five allegations amounted to harassment related to sex. The legal test for harassment is different. We have

to look to see if the treatment amounted to unwanted conduct related to sex which had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and, if it did not have that purpose, whether it had that effect.

84. For reasons similar to those set out above, we do not consider that using the word argumentative (in the context in which it was used) and the outcome of the meeting would amount to unwanted conduct. However, we conclude that the claimant's other three allegations amount to unwanted conduct. It was conduct that the claimant would rather had not happened. She would rather not have been treated in that way.

85. What we do not think is met is the requirement that the conduct be related to sex in some way. This is for similar reasons that we have explained in terms of the complaints of direct sex discrimination. We accept that the comments made at the end of the meeting were not professional, not a good way to have dealt with an employee, and were comments that should not really have been made. However, that is not the test that we have to apply. The test that we apply is whether the comments (and the other treatment) were related to sex. We have concluded that they were not related to sex in any way.

86. We have gone on to consider the next elements of the test. We do not think the unwanted conduct was done with the purpose of violating the claimant's dignity or creating the required negative environment for her. However, we are very clear that the treatment did have the effect of creating an intimidating and hostile environment for the claimant. We entirely accept and understand that in the claimant's particular circumstances as she explained them to us in her evidence, that negative environment was created.

87. We have to consider the objective as well as the subjective element of the test. In doing so, we have taken into account that Mr Henley-Burns did not know about the claimant's particular circumstances and was not aware that the impact of the conduct on the claimant could be substantially more than it might have been on someone else without her experiences. We have concluded that, even if we had found that Mr Henley-Burn's conduct was related to sex, we would have found that it did not meet the objective element of the test, as the particular effect on the claimant in her circumstances was proportionately more than it would have been on someone else without her background. Overall the effect was disproportionate.

88. We have concluded that the conduct did not meet the legal test for harassment because it was not related to sex and did not have the required effect, assessed objectively. This means that the complaints of harassment related to sex do not succeed.

<u>Constructive unfair dismissal</u>

89. We next explain our conclusions on the complaint of constructive unfair dismissal. The claimant relies on four points as the reasons which led her to leave her employment. The test we have to apply here is whether all or any of those four things (individually or together) were conduct for which the employer

had no reasonable and proper cause and which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Broadly, we consider whether the employer's conduct was likely to destroy or damage the working relationship to such an extent that it was the equivalent of the employer telling the employee they were dismissed.

90. We have considered each of the four matters that the claimant relied on.

91. The first matter relied on by the claimant is the comments made by Mr Henley-Burns on 1 October 2019. We have considered the way in which those comments affected the wider relationship between the claimant and respondent as employer and employee. It is important that the respondent took steps promptly to address the concerns the claimant raised about the comments that were made and that it accepted that some of the comments were inappropriate. Mr Henley-Burns himself gave the claimant an apology. Although the apology was given three months later, it was given soon after the claimant had returned from sick leave, and it might have been inappropriate to have given it during sick leave in any event. The respondent provided Mr Henley-Burns with additional training. They made arrangements so that the claimant could work without coming across him (and it was made clear that this would be subject to review). Overall, this was a reasonable way to respond to what had happened. It meant that the conduct at the meeting, did not amount to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

92. The second matter relied by the claimant is that after her return to work from furlough, the respondent withdrew the fixed four day working arrangement. We have concluded that the respondent did their best in the circumstances. It was not possible for the respondent to maintain the previous agreement indefinitely, because Mr Henley-Burns had by then been moved to a role which required him to work at Banbury for five days rather than three days. It was not possible for the claimant's roster to be arranged so that she never came across Mr Henley-Burns. We concluded that the proposal that the respondent put forward to enable contact to be reduced as far as possible was a reasonable one, bearing in mind that contact was likely to be limited to the start and end of the day and unusual non-routine occasions like bus breakdowns. The only other option to have guaranteed that the claimant would never run into Mr Henley-Burns would have been to move him from Banbury depot. There were operational reasons for him to be there. The failure to move Mr Henley-Burns did not amount to a fundamental breach of the claimant's contract of employment.

93. The third point relied on by the claimant is that her sick pay was stopped. We have found that this happened for a three-week period. We have accepted that this was an administrative error. We have taken into account that the error was resolved promptly and an apology given promptly after the problem was raised with the respondent. We do not think that the administrative error in itself was a breach of the contract of employment between the claimant and the respondent entitling the claimant to resign and claim constructive dismissal. The claimant relied on this as her last straw. However, by the time the claimant resigned, her sick pay had been reinstated and she had been paid back pay for the period which was missed.

94. Finally, the claimant relies on the way in which her second grievance was dealt with by Mr Hough and Mr Gibbon. We did not think it was inappropriate for Mr Gibbon, as someone who had appointed Mr Henley-Burns to his role, to hear the grievance appeal. That was not a close enough connection to mean that Mr Gibbon was not impartial. Considering our findings as to the steps Mr Hough and Mr Gibbon took to deal with the claimant's grievance, we have concluded that they dealt with her grievance in a reasonable way and addressed her concerns as best they could. The claimant did not agree with the outcome but that does not mean there was a breach of trust and confidence.

95. For those reasons, we have concluded that the matters relied on by the claimant, as we found them to have happened, were not conduct (either individually or together) for which the employer had no reasonable and proper cause or which was calculated or likely to destroy or damage the trust and confidence between the claimant and the respondent. We make this assessment on an objective basis. We do not look at the actual damage to the relationship between the claimant and the respondent: the legal test requires us to consider whether the treatment complained of, looked at objectively, was conduct which was calculated or likely to destroy or damage the relationship between the claimant and the respondent, such that it fundamentally undermined the employment relationship. We have concluded that the treatment as we found it to have happened did not reach that threshold.

96. This means that the claimant resigned, and was not dismissed. For that reason, the complaint of unfair dismissal claim cannot succeed.

Time limit

97. In relation to direct sex discrimination and harassment related to sex, we considered the time limit. The complaints related to a meeting which took place on 1 October 2019. There was no allegation that any later treatment was discriminatory. We have not found there to have been a constructive discriminatory dismissal.

98. A complaint about things that happened on 1 October 2019 should have been submitted to the tribunal within 3 months less a day, that is by 31 December 2019. The claimant notified Acas for early conciliation on 12 October 2020. This was after the time limit had passed (over 9 months after), and so there is no extension of time as a result of Acas early conciliation. The claim was presented on 22 February 2021, around 14 months out of time. This is a very significant period in the context of a complaint which has a three month time limit.

99. The claimant did not give an explanation for the delay or any reason why it would be just and equitable to extend time. If the complaints of direct sex discrimination or harassment had succeeded, we would have found that it was not just and equitable to hear the complaints out of time. We decided that time should not have been extended because of the length of the delay, the absence of reasons for the delay and the fact that the claimant had access to union advice and spoke to Acas during the period when the claim could have been brought in time.

Concluding points

100. Overall, we accept entirely that the incident on 1 October 2019 was extremely upsetting for the claimant and had a very significant impact on her. The meeting was not handled well, and the comments made at the end of it were ill advised and unprofessional and were not on any basis funny or jovial. However, we have not found that anything that happened at that meeting met the legal tests that we have to apply when considering whether something is direct sex discrimination or harassment related to sex. In relation to the constructive unfair dismissal complaint, while the issues clearly impacted the claimant considerably, we have concluded that they were not, viewed on an objective basis, matters which breached the trust and confidence in the employment relationship.

101. Finally, we record our thanks to Ms Carreras and Mr Ludlow, both of whom took a pragmatic and co-operative approach during the hearing and put their cases to us clearly and well. We are grateful for their assistance to us with the conduct of the hearing.

_____
Employment Judge Hawksworth

Date: 27 September 2022

10/10/2022
Sent to the parties on: .....
J Moossavi
.....
For the Tribunal Office

Appendix – list of issues from case management orders of 13 July 2022

1. Direct sex discrimination (Equality Act 2010 section 13)

1.1 The claimant complains about the following things which she says Mr Henley-Burns did at the meeting on 1 October 2019:

1.1.1 Not allowing the claimant to speak;
1.1.2 Accusing the claimant of an accident which she was nothing to do with;
1.1.3 Calling the claimant 'argumentative;'
1.1.4 Telling the claimant 'I am sorry for your husband;'
1.1.5 Telling the claimant 'That figures;' in reply to information about a divorce;
1.1.6 The outcome which the claimant had.

1.2 Did these things happen as the claimant said?

1.3 Were these things less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

1.4 If so, was it because of sex?

2. Alternatively, harassment related to sex (Equality Act 2010 section 26)

2.1 Did the things in paragraph 1.1 above happen as the claimant said?

2.2 Were these things unwanted conduct?

2.3 Did they relate to sex?

2.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

2.5 If not, did the conduct have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3. Constructive unfair dismissal

3.1 Was the claimant dismissed?

3.1.1 The claimant says the following things led her to decide she had to leave:

3.1.1.1 Comments made by Mr Henley-Burns at the disciplinary meeting on 1 October 2019;
3.1.1.2 After the claimant's return to work from furlough, the respondent did not contine with the agreement that the claimant could work a 4 day working week so that she did not have to work with Mr Henley-Burns;
3.1.1.3 The claimant's sick pay was stopped;
3.1.1.4 The way the claimant's subsequent grievance was dealt with by Mr Hough and Mr Gibbon.

3.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

3.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
3.1.2.2 whether it had reasonable and proper cause for doing so.

3.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

3.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

3.2 If the claimant was dismissed, what was the reason or principal reason for dismissal, in other words what was the reason for the breach of contract by the respondent?

3.3 Was it a potentially fair reason?

3.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

4. Time limits

4.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

4.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
4.1.2 If not, was there conduct extending over a period?
4.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
4.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
4.1.4.1 Why were the complaints not made to the Tribunal in time?
4.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?