



# EMPLOYMENT TRIBUNALS

BETWEEN  
AND

Claimant  
Mrs M Anea

Respondent  
(1) Atalian Serves  
Limited  
(2) Mr K Dove  
(3) Mr A Sales

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Birmingham **ON** 31 July – 4 August 2023  
7 August 2023 (Panel Only)  
8 August 2023

**EMPLOYMENT JUDGE GASKELL**

**MEMBERS:** Mr R Virdee  
Mr J Kelly

### Representation

**For the Claimant:** In Person  
**For the Respondent:** Mr I Ahmed (Counsel)

**Interpreters:**

Mrs G Niteanu	Romanian	31 July 2023, am
Mrs E Dubita	Romanian	1 & 2 August 2023
Miss AS Luca	Romanian	31 July 2023, pm; 3, 4 & 8 August 2023

## JUDGMENT

**The Judgement of the tribunal is that:**

- 1 The respondents did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaint of direct race discrimination, pursuant to Section 120 of that Act, is dismissed against all three respondents.
- 2 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 40 of the Equality Act 2010. The claimant's complaints of racial and sexual harassment, pursuant to Section 120 of that Act, are dismissed against all three respondents.
- 3 The claimant was not dismissed by the respondent. Her claim for constructive unfair dismissal is not well-founded and is dismissed.
- 4 The claimant's claim for unpaid holiday pay is not well-founded and is dismissed.

## REASONS

### **Background & Introduction**

1 The claimant in this case is Mrs Mariana-Christina Anea who commenced employment as a cleaner with Mitie Services Limited (Mitie) on 6 May 2019. At all material times the claimant was engaged on the contract to provide cleaning services at the Tesco Distribution Centre at Fradley Park in Lichfield. At immediately after midnight on 25 October 2021 the Tesco cleaning contract was taken over by the first respondent at Atalian Servest Limited. This was a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 with the effect that upon transfer the claimant's employment transferred to the first respondent. At 00.55 hours on 25 October 2021 the claimant resigned with immediate effect.

2 Throughout the period of the claimant's employment she worked alternate weeks of morning shifts (6am – 2pm) and afternoon shifts (2pm -10pm). The second respondent, Mr Kevin Dove, was employed as a supervisor and it would be part of his role to supervise the claimant when she was working the afternoon shift. The third respondent, Mr Andrew Sales, also commenced employment with Mitie in 2019. His employment commenced after that the claimant. At all times material to this claim, the third respondent was the claimant's line manager and that of the second respondent.

3 By a claim form presented on 28 January 2022, the claimant brings claims for direct race discrimination, racial harassment, sexual harassment, constructive unfair dismissal and unpaid holiday pay. When originally presented a claim form named Mitie as fourth respondent, but the claimant subsequently withdrew the claim against Mitie and upon such withdrawal that claim was dismissed by Legal Officer Metcalfe in a judgement dated 23 June 2022. All of the claims are pursued against the first respondent, the direct discrimination and racial harassment claims are pursued in addition against the second respondent and the sexual harassment claim is pursued against the third respondent.

4 All of the claims are resisted by all of the respondents.

### **The Claims and Issues**

5 It is the claimant's case that from January 2021 the second respondent embarked on a campaign of bullying and harassment of her. She claims that he consistently gave her the heaviest and dirtiest jobs to do including cleaning the toilets on Mondays and Tuesdays each week when she was working the afternoon shift. She maintains that the second respondent came down more heavily on her than on others for taking smoking breaks or for occasional late

arrival at work. Her case is that when the shift was nearly finished and colleagues had stopped working for the day, the second respondent would always find additional jobs for the claimant to complete. The claimant's case is that she frequently complained of the second respondent's behaviour to the third respondent but no action was ever taken.

6 The claimant relies on specific incidents occurring between her and the second respondent on 31 August 2021 and on 7 October 2021 following which she raised a formal grievance. She also relies on a specific instance of alleged sexual harassment between her and the third respondent occurring on 17 September 2021.

7 The claimant is of Romanian nationality and claims that the second respondent's behaviour towards her was because of her nationality. Her comparators co-workers who are Polish, Hungarian and British. She further suggests that the second respondent's behaviour towards her and the third respondent's failure to deal with it were a fundamental breach of the employment contract in response to which she resigned.

8 The claimant submits that at the time of her resignation she had accrued 20 days holiday during the 2021/2022 leave year and that she had taken 22 days her case is that because she was dismissed further holiday pay should be paid.

9 The issues for determination by the tribunal are set out in Paragraphs 16 - 33 of an order made by Employment Judge Faulkner at a preliminary hearing conducted on 18 August 2022. There appears to have been a degree of misunderstanding at that hearing as Judge Faulkner recorded the claimant's case as being that some of the second respondent's behaviour was sex discrimination. At the outset of this hearing, the claimant confirmed that the second respondent's behaviour was alleged to be race discrimination and racial harassment compounded by the third respondent's failure to take action or even to properly investigate. The only case involving sex discrimination is a claim for sexual harassment against the third respondent relating specifically to an incident which occurred on 17 September 2021.

### **The Evidence**

10 The claimant gave evidence on her own account. She did not call any additional witnesses. The second and third respondents both gave oral evidence on behalf of themselves on behalf of each other and on behalf of the first respondent.

11 In addition we were provided with an agreed hearing bundle running to approximately 300 pages we have considered those documents from within the bundle to which we were referred by the parties during the course of the hearing.

12 We found the evidence given by the second and third respondents to be clear, uncomplicated and accurate. The evidence they gave was consistent with each other; it remain consistent through detailed cross examination by the claimant; and it was consistent with contemporaneous documents.

13 We take full account of the fact that the claimant does not speak English as her first language and throughout the hearing she required the assistance of a Romanian interpreter. But by contrast we found the claimant to be a far less straightforward witness. She embellished her evidence by referring to incidents not previously mentioned in her claim form or her witness statement. Her evidence was inconsistent with contemporaneous documents: in particular we find it quite unbelievable that the incident about which she complains on 17 September 2021 could have happened without her making a formal complaint. Although the claimant has consistently stated that she was unfavourably treated because of the Romanian nationality, it was only during the course of oral evidence that she complained that other workers of Romanian nationality were also treated badly. Not a single colleague of Romanian or any other nationality ever made a complaint about how the claimant was treated or about the treatment of other Romanian nationals. In our judgement, the claimant's credibility was damaged by the fact that notwithstanding that she received the trial bundle seven months before the hearing in December 2022 there were documents within it such as the record of her grievance hearing conducted by Jason Gibbins on 6 January 2022 which she claimed never to have read - but notwithstanding that she had not read the record, and notwithstanding that she had no contemporaneous notes of her own, there were elements of the written record which she disputed. The claimant's credibility was further undermined by the readiness with which she makes serious allegations of wrongdoing against other people for which there is no evidence. In particular for the claimant's account to be correct there must have been a wide-ranging conspiracy against her involving at least the second and third respondents together with Ms Maria Chirita, Ms Amanda Tyler, Ms Agnieszle Szymenolerske, Ms Carolyn Radley and Mr Jason Gibbins.

14 Where there is a factual clash between the evidence given by the claimant and that given by the second and third respondents we prefer the evidence of the second and third respondent and have made our findings of fact accordingly.

## **The Facts**

15 As stated previously, the claimant was employed to work morning shifts on one week and afternoon shifts the next. The second respondent was her supervisor when working the afternoon shift. The claimant's contract required her to work a 37.5 hour week over 5/7 days this included working at weekends on rota.

16 Although it is the claimant's case that the unacceptable behaviour of the second respondent started in January 2021, the first documented record of any complaint by the claimant was on the evening of 31 August 2021 when she complained by text message to Mr Krystian Mierzwa who was the night shift supervisor. Mr Mierzwa had no management or supervisory responsibilities towards the claimant but she explained in evidence that she trusted him. On 31 August 2021, the claimant was working a morning shift; her complaint to Mr Mierzwa was that shortly before the end of her shift the second respondent had come on duty for the afternoon shift and he required the claimant to undertake a number of finishing off jobs before she went off shift. In so doing so he was rude to her and he shouted at her. It is the claimant's case that other workers could have been asked to perform the required tasks but they were not. Mr Mierzwa responded to the claimant saying that he would raise this matter with the third respondent.

17 It is the claimant's evidence that the following day she raised her complaint with the third respondent but no action was taken. We reject the claimant's evidence because we accept the third respondent's evidence that he was away from the workplace on holiday at the time. We accept that upon his return from holiday on 13 September 2021, Mr Mierzwa informed the third respondent of the claimant's text complaint. The third respondent spoke to the claimant and asked her to put a complaint in writing by letter or by email. The claimant did not do so. Accordingly no action was taken and there was no investigation. There is no record of any complaint from any of the claimant's co-workers notwithstanding the extreme behaviour which the claimant alleged against the second respondent.

18 The claimant complains of a similar incident which occurred on 7 October 2021. Again she states that the second respondent unfairly insisted that she undertake a particular task and that when she refused he swore at her and humiliated her in front of colleagues. Once again, there was no complaint raised by anyone else in support of the claimant. The claimant did later exchange text messages with a Mr Scott Reeves who is a Tesco employee. Mr Reeves indicated in a text message that he thought the second respondent's behaviour towards the claimant was disgusting - but significantly he did not hear any

swearing. We find this curious because swearing is the main thrust of the claimant's complaint. Mr Reeves was not called to give evidence.

19 On 8 October 2021 the claimant raised a formal grievance against the second respondent she addressed her grievance to the third respondent and others. We find that the third respondent intended to deal with the grievance promptly he arranged a grievance meeting with the claimant to take place on 12 October 2021 and he undertook interviews with the second respondent, Ms Maria Chirita, Ms Amanda Tyler and Ms Agnieszka Szymenolerske. The third respondent also viewed CCTV footage of the previous day. The footage did not confirm the claimant's account, to the contrary showed the claimant running after the second respondent and appearing to be shouting at him. The claimant attended for the grievance meeting on 12 October 2021, but before the meeting could take place the third respondent was advised by HR that he had acted prematurely and that the meeting should only take place after the claimant had received a formal letter from HR advising her of the grievance process. The third respondent therefore cancelled the meeting and advised the claimant that she could expect a letter from HR within the next 2 to 3 days. We are quite satisfied that it was the third respondent's intention to rearrange the meeting as soon as possible.

20 The claimant left the workplace immediately following the cancellation of the meeting on 12 October 2021 notwithstanding that she was on an AM shift and should have worked until 2pm. 13 and 14 October 2021 were weekend dates when the third respondent was not working and it was the claimant's weekend off. On 15, 16 and 17 October 2021 the claimant remained absent from work without leave. On 16 October 2021 the claimant's husband had a telephone conversation with the third respondent in which he asked if the claimant could be transferred to a permanent AM shift with no weekend working. The respondent is adamant that the reason given by the claimant's husband was that the claimant had acquired a new puppy and it needed care in the afternoons and evenings. The claimant is adamant that the puppy played no part in her request. The claimant claimed in evidence that she needed to be removed from the second respondent's supervision but she admits that she did not at any stage make this clear (the respondents cases that the mere removal of the claimant from the PM shift would not have removed her entirely from the second respondent's supervision). During the conversation with the claimant's husband the third respondent did tentatively suggest that the claimant could move to alternative AM shifts and night shifts thus avoiding the PM shift but this proposal was rejected.

21 On 17 October 2021, the claimant sent an email to the third respondent again asking if she could move to permanent AM shifts - she made no mention of

the need to remove herself from the second respondent. On 21 October 2021 the claimant sent a further email making the same request.

22 On 18 October 2021 the claimant commenced a period of prearranged annual leave. Thus she had not returned to the workplace since the cancellation of the grievance meeting on 12 October 2021. She was due to return on 25 October 2021 but at 00:55 hours, before her shift was due to commence, she tendered her resignation with immediate effect. The claimant explained in her resignation email that she considered herself to have been constructively dismissed.

23 In her closing submissions before us the claimant gave the following as the reasons for her resignation:

- (a) Her complaints were ignored.
- (b) Her request to change shift was ignored.
- (c) The meeting of 12 October 2021 was cancelled and was not rearranged.
- (d) Her emails of 17 and 25 October 2021 requesting a change of shift pattern were ignored.
- (e) No action was taken against the second respondent.
- (f) Her grievance was rejected.

24 Some weeks after the claimant's resignation her grievance was investigated by Mr Jason Gibbins - Operations Manager who only joined the respondent in November 2021. In our judgement, the respondent had no obligation to pursue such an investigation once the claimant had resigned. We are bound to say that it appears that the investigation was less than satisfactory because Mr Gibbins was not made aware of the interviews which the third respondent had already conducted. The claimant attended a grievance meeting on 6 January 2022 at which she sought reinstatement on the basis of a permanent AM shift with no weekend working. The claimant's grievance was rejected and an outcome letter was sent to her by email on 18 January 2022.

25 In the claim form presented to the tribunal, and at no earlier time, the claimant also makes a complaint about the third respondent's behaviour on 17 September 2021. The claimant was late for work on that day, and she had been brought to work by a male colleague. Her complaint was that the third respondent suggested that she was late because she had been committing a sexual act with a male colleague in his car and he made a sexually offensive gesture to accompany this remark. The claimant's case is that these words were said and the gesture was made in front of a number of her colleagues. As before, there is no record of any complaint or adverse comment from anyone else. The claimant made no complaint about this at the time and did not even include details of this

incident in her subsequent grievance nor did she mention it to Mr Gibbins at the grievance meeting in January 2022.

26 In December 2021 the respondent engaged some new workers via an agency they were working on an AM shift pattern only. Their engagement was temporary to cover the busy Christmas/New Year period.

27 So far as holiday pay is concerned, we accept the respondent's evidence to the effect that during the leave year to October 2021 the claimant had accrued 20 days annual leave and had actually taken 22 there was no further leave outstanding to her and indeed the respondent could technically have recouped two days pay from her.

## **The Law**

### *Discrimination & Harassment*

28 We have considered the following provisions of the Equality Act 2010 (EqA):

- Section 13: Direct discrimination**
- Section 26: Harassment**
- Section 39: Employees and applicants**
- Section 40: Employees and applicants - harassment**
- Section 136: Burden of proof**

29 We have considered the following cases decided by the higher courts:

- Ladele –v- London Borough of Islington [2010] IRLR 211 (CA)**
- Richmond Pharmacology Limited v Dhaliwa [2009] IRLR 336 (EAT)**
- Nagarajan v London Regional Transport [1999] IRLR 572 (HL)**
- Villalba v Merrill Lynch & Co [2006] IRLR 437 (EAT)**
- Igen Limited –v- Wong [2005] IRLR 258 (CA)**
- Madarassy v Nomura International Plc [2007] IRLR 245 (CA)**
- Khan -v- The Home Office [2008] EWCA Civ 578 (CA)**
- Hewage -v- Grampian Health Board [2012] UKSC 37 (SC)**

30 The claimant must establish that she has been treated less favourably than her comparators or less favourably than a hypothetical comparator. She must also provide evidence from which we could properly conclude that the reason for the disparity in treatment was a difference in nationality. Section 136 EqA provides that if the claimant establishes facts from which we could properly conclude she had suffered discrimination then the respondent must prove that the reason for any disparity was unrelated to the claimant's nationality. If the



respondent fails to satisfy us in this regard then we must find in favour of the claimant.

31 Although Section 136 EqA provides for a two-stage process, we are entitled to consider the evidence as a whole, including evidence given by the respondent, before determining whether the claimant has discharged the primary burden of proof to establish facts from which we could properly conclude that discrimination has occurred. If she fails to establish such facts then the burden of proof does not shift.

32 With regard to the claim for sexual harassment, the claimant must prove that the respondent engaged in unwanted behaviour which had the effect of humiliating or degrading her. The claimant must prove that the behaviour took place. If she proves this then we must consider whether in all the circumstances it was reasonable for the behaviour to have the proscribed effect upon her.

#### *Constructive Dismissal*

33 We have considered the following provisions of the Employment Rights Act 1996 (ERA):

**Section 94 - The right [not to be unfairly dismissed]**  
**Section 95 - Circumstances in which an employee is dismissed**  
**Section 98 - General Fairness**

34 We have considered the following cases decided in the higher courts:

**Western Excavating (ECC) Ltd, -v- Sharpe [1978] IRLR 27 (CA)**  
**Garner -v- Grange Furnishing Ltd. [1977] IRLR 206 (EAT)**  
**Woods -v- WM Car Services (Peterborough) Ltd. [1981] IRLR 347 (EAT)**  
**WE Cox Toner (International) Ltd. -v- Crook [1981] IRLR 443 (EAT)**  
**Malik -v- BCCI [1997] IRLR 462 (HL)**  
**Waltons & Morse -v- Dorrington [1997] IRLR 488 (EAT)**  
**Nottinghamshire County Council -v- Meikle [2004] IRLR 703 (CA)**  
**GAB Robins (UK) Ltd. -v- Gillian Triggs [2007] UKEAT/0111/07RN**  
**Fereday -v- South Staffordshire Primary Care Trust UKEAT/0513/10/ZT**  
**Tullet Prebon PLC & Others -v- BCG Brokers LP & Others**  
**[2011] IRLR 420 (CA)**  
**Waltham Forest LBC -v- Omilaju [2005] IRLR 35 (CA)**  
**Hadji -v- St Lukes Plymouth (2013) UKEAT 0095/12**

35 The claimant will have been constructively dismissed if the respondent behaved towards her in such a way as to demonstrate that it no longer intended to be bound by the terms of the employment contract including the implied term

of mutual trust and confidence. The burden of proof is upon the claimant to establish such behaviour on the part of the respondent.

36 If the claimant does establish such behaviour she must then also establish that it was in response to such behaviour that she tendered her resignation. Finally she will need to show that she did so promptly and that she did not affirm the contract beforehand.

37 In some cases, even if the claimant establishes that he/she has been dismissed, it would be relevant for the tribunal to examine any reasons for the respondent's repudiatory behaviour and to consider the possibility that such a dismissal was fair. No potentially fair reason has been advanced in this case.

### **Discussion & Conclusions**

#### *General*

38 Based on the evidence we have heard, in our judgement, the incidents which occurred on 31 August 2021 and 7 October 2021 were nothing more than routine workplace disputes. We find on the evidence that the claimant contributed to what happened by her lack of respect for the second respondent's authority over her. We find that the incident on 31 August 2021 ceased to have any importance a few days later and that is why the claimant did not put the complaint in writing even when invited to do so by the third respondent.

39 Following the incident on 7 October 2021, the claimant did make a complaint in writing (about that incident only she did not mention the earlier incident) and an investigation commenced. It would have proceeded promptly save that after the cancellation of the meeting on 12 October 2021 for good reason there was no opportunity to proceed before the claimant resigned on 25 October 2021. We accept the respondent's explanation that he did not consider it proper for HR to write to the claimant about her grievance while she was either absent without leave or period of annual leave.

#### *Direct Discrimination*

40 Even if it were the case that the second respondent's behaviour on 31 August and/or 7 October 2021 was unacceptable, there is no evidence at all upon which we could conclude that the reason for his behaviour was in any way related to the claimant's nationality. If this was the case we would have expected other workers to have noticed and to have complained - including and especially the other Romanian workers.

41 Accordingly the claimant has not established before us any basis upon which we could properly conclude the discrimination has taken place. The burden of proof does not shift to the respondent and the claim for direct discrimination is accordingly dismissed.

*Racial Harassment*

42 Having found as we have that any conduct by the second respondent was wholly unrelated to the claimant's nationality, it follows that the claim for racial harassment is simply not made out and that claim is also dismissed.

*Sexual Harassment*

43 On the evidence before us we are not satisfied that the incident of 17 September 2021 occurred as described by the claimant. If the third respondent had made the comment attributed to him, accompanied by the gesture attributed to him, then firstly we fully expect that the claimant would have made a complaint at the time further and perhaps more importantly we would have expected others to have complained. In particular, other female employees who on the claimant's account saw what happened.

44 Accordingly the claimant is not established before us the simple fact upon which we could find that she was sexually harassed that day. Her claim for sexual harassment is therefore dismissed.

*Constructive Dismissal*

45 The incidents of 31 August and 7 October 2021 as described by the claimant were in our view routine workplace disputes between a supervisor and a worker. There is nothing to indicate that the second respondent had decided that he would no longer be bound by the implied term of mutual trust and confidence. If his behaviour was so bad as to justify such a conclusion then our expectation is that others would have complained.

46 The claimant did not resign in response to either incident, instead quite properly, she raised a grievance. The principal reason for her resignation was that she failed to secure the changing shift pattern which she wanted.

47 We are satisfied that the third respondent had commenced an investigation. He did not make any decision with regard to the grievance and certainly he did not reject it. He was given advice by HR and this led to the cancellation of the meeting on 12 October 2021. Thereafter the respondent was given no proper opportunity to complete the grievance investigation before the claimant resigned.

48 The claimant was not entitled to a change of shift pattern. Certainly not unless the respondent concluded that this was necessary after a full investigation into her grievance. The fact that the respondent may have employed workers on an AM only contract two months after the claimant's resignation is irrelevant. But nevertheless we accept that those workers were employed on a temporary basis through an agency to cover the busy Christmas/New Year period.

49 Accordingly, we conclude that the respondent did not breach the claimant's contract of employment and absent such a breach there can be no claim for constructive dismissal.

50 The claimant was not dismissed by the respondent. Her claim for unfair dismissal is not well-founded and is dismissed.

*Holiday Pay*

51 During the course of her evidence, the claimant effectively conceded that the claim for unpaid holiday pay is wholly misconceived. She had in fact been overpaid. The claim for unpaid holiday pay is not well-founded and is dismissed.

Employment Judge Gaskell  
9 August 2023