EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs Julie Rider	AND	Launch Tech UK Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 23 and 24 October 2023

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mr K Sleeth
Mr I Ley

Representation:
For the Claimant: In person, Assisted by her husband Mr Rider
For the Respondent: Ms E Afriyie, Consultant

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are all hereby dismissed.

RESERVED REASONS

1. In this case the claimant Mrs Julie Rider claims that she has been unfairly constructively dismissed, and that she suffered discrimination because of two protected characteristics, namely sex and age. The claim is for direct discrimination, and harassment. The respondent denies the claims.
2. We have heard from the claimant. For the respondent we have heard from Mr David Richards and Mr Daniel Huggins.
3. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The Facts
5. The respondent is a company based in Plymouth which supplies goods to the motor trade, and in particular Launch diagnostic tools, air conditioning servicing equipment, and aftermarket garage equipment. The claimant Mrs Julie Rider was employed by the respondent as a Sales Administrator for 20 September 2011 until her resignation which took effect on 20 May 2022. She was aged 66 at that time.
6. The respondent is a small business with approximately nine employees. The managing director is Mr Dave Richards, from whom we have heard. Mr Daniel Huggins, from whom we have also heard, is the Warranty Manager. Mr Steve Russell is the Sales Manager. The claimant's duties involved all aspects of the paperwork relating to sales,

including issuing sales invoices, reconciliation of payments, and dealing with customer enquiries and complaints. She worked closely with Mr Mark Dunk, an Office Administrator, and Mr Martyn Ingham. Mr Ingham was an employee of the respondent's accountants, and he normally spent one day a week checking invoices, payments and accounts with the claimant. They had a close working relationship.

7. The claimant was a part-time employee who worked from her home in St Austell in Cornwall which is over an hour's drive from the respondent's premises in Plymouth. She was the only female employee. The other employees based in Plymouth were generally much more closely involved in sales. They were not all in the Plymouth office all of the time, because their duties required them to travel to customers, suppliers and trade fairs and so on. There was no need for the claimant to do this in order to undertake her normal duties.
8. The claimant's arrangements in working from home suited her very well because she was able to undertake her duties without having to travel to an office, and she was able to spend time with her grandchildren. The arrangement also suited the respondent because the claimant was good at her job and worked successfully without the need for detailed supervision.
9. When the arrangement commenced the respondent supplied the claimant with the necessary laptop and telephone equipment which she needed. When the claimant was working, she did so from her dining room table, which is how she chose to undertake her duties. Mr Richards only visited her house once when he accompanied a colleague to install the telephone. The respondent did not undertake any formal risk assessment or discussion of health and safety matters relating to the claimant's working environment, but equally at no stage did the claimant raise any concern or issue about health and safety generally, risk assessments, or the safety or otherwise of her working environment.
10. Mr Richards and the claimant had a good working relationship in which they usually communicated by email. The claimant often found it difficult to get hold of Mr Richards by telephone, but they were able to communicate regularly by email and did so in a sensible and courteous manner. Mr Richards accepts that there was more verbal communication with his colleagues in Plymouth, not least because they were all in the same office, but also because they were all more sales orientated and would have regular meetings for that purpose. The claimant accepted during a subsequent grievance investigation that her Line Manager was effectively Mr Russell the Sales Manager, save for matters relating to warranties in which case she referred to Mr Huggins the Warranty Manager. There was therefore no need for any constant or daily communication with Mr Richards the Managing Director.
11. This good working relationship was proceeding as normal until the events of 10 November 2021 when there was an argument in the Plymouth office between Mr Dunk the Office Administrator, and Mr Ingham the external accountant. On occasions Mr Dunk was known to have a difficult attitude, and the claimant often found him unhelpful, although she agreed that their email exchanges were always "polite and professional". In any event it is true that she had a much more positive working relationship with Mr Ingham. An argument arose in the office between Mr Dunk and Mr Ingham. Mr Ingham was talking on the speaker phone to the claimant, who was working from home, and Mr Dunk overheard the conversation. For some reason he became angry and went into the office where Mr Ingham was on the telephone to the claimant. They had an argument, and he was rude to Mr Ingham. The claimant heard this and became upset, and she terminated her telephone call at her end. As a result of this argument Mr Ingham decided that he no longer wished to work with the respondent, and it was some three or four weeks later before the respondent's accountants allocated a replacement to work on assignment at the respondent's premises as Mr Ingham had done. The claimant was upset and annoyed, not least because she had lost her close working relationship with Mr Ingham as a result of what she considered to be unacceptable behaviour by Mr Dunk.

12. The claimant then raised a formal grievance by email letter to Mr Richards on 14 November 2021. She complained about Mr Dunk's "bully boy" behaviour and complained that he was intimidating and threatening and asked Mr Richards to take action. She complained that her mental health was suffering as a result of Mr Dunk's aggressive and unhelpful attitude.
13. The respondent's written grievance procedure provides the opportunity of an informal grievance, but the claimant's letter was treated as a formal grievance. The procedure then suggests that the employee will be invited to a meeting within a reasonable time and that the decision would normally be notified in writing within 10 working days of the grievance meeting. Mr Richards referred the matter immediately to his HR advisers, and he replied to the claimant on 17 November 2021 confirming that the matter would be addressed through the respondent's formal grievance procedure. That letter confirmed that the claimant appeared to raise eight aspects of her grievance, which would now be investigated in full by the respondent's HR advisers. At that time Mr Richards was also advised not to become involved personally so that he would be available personally to deal with any subsequent appeal.
14. The respondent's HR advisers held a number of meetings on 23 November 2021, including a meeting with the claimant. They prepared a detailed written report which was dated 3 December 2021. The eight specific complaints, and their conclusions, were as follows.
15. "(1) You state that you are not at all happy at work these days - not upheld; (2) you feel that with Mark being so obnoxious with Martyn that this has pushed you over the edge - not upheld; (3) you state Mark had no right to barge into Martyn's office and start pushing his weight around - not upheld; (4) you state that there is a duty of care on your employer to ensure you are working in a safe environment - partially upheld; (5) you believe he cannot be allowed to go around intimidating people with his bully boy behaviour - not upheld; (6) you state you are not prepared to put up with his nasty temper any more - not upheld; (7) you believe the atmosphere in the company is toxic these days - not upheld; and (8) you state your mental health is suffering badly because of this - not upheld." However, the report also commented that there appeared to be some "damage to employer/employee relationship and that this is causing disturbance to the workplace". The report recommended considering possible mediation and the provision of training on "Effective Communication", and "Managing Behaviour and Harassment Awareness."
16. Mr Richards received this report on or about 3 December 2021, but took no immediate action on it. Approximately three weeks later the respondent company closed for Christmas until early January 2022. The claimant was disappointed that she had not heard anything, and by email dated 4 January 2022 she complained to Mr Richards that she had not received a reply to the grievance within the "ten working day deadline" envisaged in the grievance procedure. She confirmed that she was not "dropping her complaint" and raised a query about the deduction of one day's pay.
17. Mr Richards responded immediately on 4 January 2021 confirming he would check what had happened with the one day's pay, and also confirming that he been advised not to get involved with the grievance. He also included a copy of the report which the claimant then saw for the first time. He stated: "I attach a copy of their report. Please read it through, I will be happy to discuss how communication can be improved. If you are unhappy with the report, you have the right to appeal."
18. No further action was then taken. The respondent did not seek to introduce mediation or the training courses suggested. Equally the claimant did not suggest that she was unhappy with the report, and she did not exercise her right of appeal. The claimant suggested at this hearing that she did not receive a written conclusion to her grievance, but we find that this was not the case, because of the aforementioned written conclusions in that report.
19. Some three months later on 20 April 2022 the claimant then sent her written letter of resignation to Mr Richards. She gave four weeks' notice of the termination of her employment. She complained of a continuing lack of communication and felt that she

was “surplus to requirements” and felt that she had been treated badly after “almost 11 years of hard and loyal work”. She complained about the lack of a pay rise and concluded that the stress was making her ill. She complained: “Nothing has changed since you allowed Mark to push Martyn out of the business. Yet again you don’t seem able or bothered to do anything about it. Because of all this I have no other option than to resign.”

20. Mr Richards was surprised to receive the claimant’s resignation at this stage. He assumed that the earlier matter had been resolved because the claimant had not complained about the findings of the investigation report and had not appealed against that conclusion to her grievance. He responded by letter dated 27 April 2022. He confirmed that he was surprised at her resignation and feared that it might have been “in the heat of the moment”, and he invited the claimant to reconsider her resignation. He offered to arrange an immediate meeting with the claimant to discuss her concerns informally or formally, and he suggested that if she wished she could be accompanied by a fellow employee. He asked for a decision within the next five days failing which he would respect the claimant’s wishes and would process her resignation. The claimant replied on 29 April 2022 pursuing her complaints and she declined to withdraw her resignation.
21. The claimant then commenced the Early Conciliation process with ACAS on 25 May 2022, and ACAS issued the Early Conciliation Certificate on 5 July 2022. The claimant presented the proceedings on 21 July 2022.
22. The claimant’s claims to be determined by this Tribunal were later agreed at a case management preliminary hearing and set out in the Case Management Order of Employment Judge Scott dated 6 April 2023. The claimant’s claims are for unfair constructive dismissal, for direct discrimination because of age and sex, and for harassment related to age and sex. There are seven specific allegations which are said to be fundamental breaches of contract and five of these are said to be alternatively acts of harassment or less favourable treatment. These allegations, and our findings of fact in each case are as follows.
23. Allegation 1: “Failing to support the claimant when a row occurred with Mark Dunk at work and the Accounts Manager left, in November 2021”.
24. We reject this allegation. The claimant’s criticism appears to be that Mr Richards failed to telephone her immediately to check that she was not too badly affected by the argument in the office. It is true that he did not do so, but upon receipt of the claimant’s formal grievance immediately thereafter he made the necessary arrangements for a full investigation and report, and acted on advice from his advisers that he should not become personally involved. We do not accept the respondent failed to support the claimant in these circumstances.
25. Allegation 2: “Failing to communicate with the claimant following this incident.”
26. The same point applies for this allegation, which is also rejected. Mr Richards communicated with the claimant immediately upon receipt of her grievance as noted above.
27. Allegation 3: “Failing to check the claimant’s workstation at home throughout her employment” and Allegation 4: “Failing to conduct health and safety checks on the claimant”, are linked allegations.
28. It is true that the respondent did not undertake any formal risk assessment or discussion of health and safety matters relating to the claimant’s working environment, but equally at no stage did the claimant raise any concern or issue about health and safety generally, risk assessments, or the safety or otherwise of her working environment. It is true that the respondent did not check the claimant’s workstation at home throughout her employment as alleged. Equally the claimant was happy with the arrangements which suited her. She chose to work from her dining room table, which is commonplace with home workers, particularly more recently both during and after the Covid pandemic. At no stage did the claimant complain about her chosen working environment, and neither did the respondent refuse or fail to take any appropriate action when requested. Indeed, the claimant confirmed in her evidence that she had

no health and safety concerns other than what she perceived to be Mr Dunk's inappropriate behaviour.

29. Allegation 5: "Telephoning male employees regularly (approximately weekly) but calling the claimant less frequently (approximately monthly) and then not at all after November 2021."
30. We find that this did occur. Mr Richards has confirmed as much, and the reasons are clear. The claimant was a remote worker away from the general office and her duties were limited to her Sales Administrator role. She was good at her job and she needed minimal supervision. They did not need to communicate by telephone on a frequent basis. They were able to communicate sensibly and courteously by email. This was different from the other employees who were present in the Plymouth office and who were more closely involved in the sales function. It was therefore perfectly natural that they would speak to each other much more frequently.
31. Allegation 6: "Referring to the claimant in an offhand way".
32. We reject this allegation. There is no evidence to support the contention that Mr Richards or others within the respondent's organisation referred to the claimant in an offhand way.
33. Allegation 7: "Ignoring/blanking the claimant as a way of getting rid of her."
34. Similarly, we reject the allegation that the claimant was ignored or blanked as a way of getting rid of her. When the claimant complained to Mr Richards or raised a grievance, the response was very prompt. Her grievance was investigated promptly upon receipt, and when he was chased for a reply after the Christmas break, he responded immediately with a copy of the report. Similarly, he responded to the claimant's resignation immediately by inviting her to reconsider and to retract it.
35. Having established the above facts, we now apply the law.
36. <u>The Law</u>
37. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she 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.
38. If the claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
39. This is also a claim alleging discrimination under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination and harassment.
40. The protected characteristics relied upon are age and sex, as set out in sections 4, 5 and 11 of the EqA.
41. As for the claim for direct discrimination, under section 13(1) of the EqA 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.
42. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
43. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A

shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

44. Under section 212(1) EqA the definition of detriment does not include conduct which amounts to harassment.
45. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
46. Unfair Constructive Dismissal:
47. We have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; and Upton-Hansen Architects ("UHA") v Gyftaki UKEAT/0278/18/RN.
48. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
49. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
50. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. It need not be the predominant, principal, major or main cause for the resignation.
51. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and

trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

52. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
53. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
54. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.
55. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and this does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
56. Our findings of fact in relation to the specific allegations which the claimant has raised to support her claim that there has been a fundamental breach of the implied term of trust and confidence are set out above. We also make the following observations.
57. The claimant admitted in her evidence that: "We wouldn't be here now if Dave had reprimanded him, and spoken to me about it". In other words, the background to the claimant's concerns and her resignation were that Mr Richards had not publicly reprimanded Mr Dunk and had not confirmed to the claimant or discussed it with her. That appears to feed into her allegations now to the effect that Mr Richards failed to communicate properly with her. In fact, the claimant had raised a formal grievance within two working days of the row between Mr Dunk and Mr Ingham. The claimant accepted in her evidence that her grievance effectively related to the argument in the office, and that if Mr Dunk had been reprimanded then she would have continued

working “as normal”. In response to the grievance, Mr Richards took immediate advice to the effect that he should deal with the grievance appropriately, and to set up a grievance investigation to be undertaken by his advisers, and that he should step back and not become involved at that stage so as to be available for a subsequent possible appeal. Mr Richards followed that advice. The claimant also accepted in her evidence that Mr Richards had not ignored her, but rather he had followed the relevant procedure, and that she had not tried to telephone Mr Richards either after the argument, or after her grievance.

58. We have already rejected Allegations numbered 1, 2, 6 and 7 to the effect that the respondent is said to have failed to support the claimant, failed to communicate with her, referred to her in an offhand way, and ignored or blanked in an attempt to get rid of her.
59. We have accepted as factually accurate Allegations 3 and 4 that the respondent did not specifically check the claimant’s workstation at her home, or carry out health and safety assessments. However, we have also found that at no stage did the claimant complain about her chosen working environment, and neither did the respondent refuse or fail to take any appropriate action when requested. Indeed, the claimant confirmed in her evidence that she had no health and safety concerns other than what she perceived to be Mr Dunk’s inappropriate behaviour. When the claimant raised this in her formal grievance, it was dealt with appropriately by the respondent.
60. We have also accepted as factually accurate Allegation 5: “Telephoning male employees regularly (approximately weekly) but calling the claimant less frequently (approximately monthly) and then not at all after November 2021.” However, this was because the claimant was a remote worker away from the general office and her duties were limited to her Sales Administrator role. She was good at her job and she needed minimal supervision. They did not need to communicate by telephone on a frequent basis. They were able to communicate sensibly and courteously by email. This was different from the other employees who were present in the Plymouth office and who were more closely involved in the sales function. It was therefore perfectly natural that they would speak to each other much more frequently.
61. Against this background we cannot find that the respondent can be said without reasonable and proper cause to have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. We do not accept that the respondent has committed any fundamental breach of the implied term of trust and confidence. In the circumstances we do not accept that the claimant’s resignation can be construed to have been her dismissal.
62. We find that the claimant was not dismissed, and accordingly her claim for unfair dismissal must fail, and it is hereby dismissed.
63. We now turn to the discrimination claims.
64. Duplication of Direct Discrimination and Harassment:
65. Five of the seven allegations raised by the claimant above are presented as both harassment and/or direct discrimination. We have determined these allegations in the following manner. In the first place these allegations have been considered as allegations of harassment. If any specific factual allegation is not proven, then it is dismissed as an allegation of both harassment and direct discrimination. If the factual allegation is proven, then the tribunal has applied the statutory test for harassment under section 26 EqA. If that allegation of harassment is made out, then it is dismissed as an allegation of direct discrimination because under section 212(1) EqA the definition of detriment does not include conduct which amounts to harassment.
66. We have considered the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry

[2011] EWCA Civ 769; and Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

67. Harassment:
68. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
69. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.
70. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." Similarly, Langstaff P emphasised in Betsi at para 12: "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc ..."
71. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: "one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."
72. The specific allegations of harassment which the claimant has raised are as follows:
73. Allegation 1: "Failing to support the claimant when a row occurred with Mark Dunk at work and the Accounts Manager left, in November 2021". Allegation 2: "Failing to communicate with the claimant by telephone following this incident." Allegation 3: "Ignoring/blanking the claimant as a way of getting rid of her." Allegation 4: "Telephoning male employees regularly (approximately weekly) but calling the claimant less frequently (approximately monthly) and then not at all after November 2021." And Allegation 5: "Referring to the claimant in an offhand way".

74. For the reasons set out above, we have already rejected Allegations 1, 2, 3 and 5 of these Allegations as being factually inaccurate, or put another way, have not been established as factually correct. They are therefore dismissed as allegations of harassment.
75. We have accepted Allegation 4 as being factually accurate, namely that Mr Richards would telephone male employees more frequently than he would telephone the claimant (was the only female employee). However, we have found that the reasons for this are clear, namely that the claimant was a remote worker away from the general office and her duties were limited to her Sales Administrator role. She was good at her job and she needed minimal supervision. They did not need to communicate by telephone on a frequent basis. They were able to communicate sensibly and courteously by email. This was different from the other employees who were present in the Plymouth office and who were more closely involved in the sales function. It was therefore perfectly natural that they would speak to each other much more frequently.
76. This was a perfectly normal working environment with a straightforward and clearly explicable reason why the claimant as a trusted remote worker had fewer discussions or telephone conversations than the sales team who were all present together in the Plymouth office or travelling in connection with their duties and reporting back.
77. Against this background we cannot accept that the respondent's conduct in this respect was in any way unwanted conduct related to either relevant protected characteristic (age and/or sex), nor that it had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for the claimant. The claimant did not give evidence to the effect that she perceived that this was the case, and in any event, we do not accept that it would have been reasonable for her to have done so.
78. Accordingly, we dismiss the claimant's claim of harassment related to age and/or sex.
79. Direct Discrimination:
80. Finally, with regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her age and/or sex than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant. As for the comparators relied upon, for her sex discrimination claim the claimant relies on the respondent's other employees all of whom were male, and for her age discrimination claim, the other employees who (unlike the claimant) were all beneath retirement age.
81. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.
82. The allegations of harassment are repeated as specific allegations of direct discrimination on the ground of both age and sex. These are: Allegation 1: "Failing to support the claimant when a row occurred with Mark Dunk at work and the Accounts Manager left, in November 2021". Allegation 2: "Failing to communicate with the claimant by telephone following this incident." Allegation 3: "Ignoring/blanking the claimant as a way of getting rid of her." Allegation 4: "Telephoning male employees regularly (approximately weekly) but calling the claimant less frequently (approximately

monthly) and then not at all after November 2021." And Allegation 5: "Referring to the claimant in an offhand way".

83. For the reasons set out above, we have already rejected Allegations 1, 2, 3 and 5 of these Allegations as being factually inaccurate, or put another way, have not been established as factually correct. We do not accept that the claimant suffered less favourable treatment or any detriment in this respect, and they are therefore dismissed as allegations of direct discrimination.
84. We have accepted Allegation 4 as being factually accurate, namely that Mr Richards would telephone male employees more frequently than he would telephone the claimant (who was the only female employee). However, we have found that the reasons for this are clear, namely that the claimant was a remote worker away from the general office and her duties were limited to her Sales Administrator role. She was good at her job and she needed minimal supervision. They did not need to communicate by telephone on a frequent basis. They were able to communicate sensibly and courteously by email. This was different from the other employees who were present in the Plymouth office and who were more closely involved in the sales function. It was therefore perfectly natural that they would speak to each other much more frequently.
85. This was a perfectly normal working environment with a straightforward and clearly explicable reason why the claimant as a trusted remote worker had fewer discussions or telephone conversations than the sales team who were all present together in the Plymouth office or travelling in connection with their duties and reporting back.
86. Although the claimant was the only female employee, and was older than the other employees, we do not accept that this was less favourable treatment, in the sense that the respondent communicated with the claimant whenever necessary, and it cannot be said that the respondent failed or refused to communicate with the claimant when it should otherwise have done so. In any event, there is a sensible and straightforward explanation as to why the respondent communicated less often with the claimant than it did with the others, as set out above. Even if there were less favourable treatment, which we do not accept, we cannot accept that this was because of the claimant's sex or her age.
87. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination on the grounds of age and/or sex fails, and it is also hereby dismissed.
88. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 34; a concise identification of the relevant law is at paragraphs 36 to 45; how that law has been applied to those findings in order to decide the issues is at paragraphs 46 to 87.

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Employment Judge N J Roper
Dated: 24 October 2023
Judgment sent to Parties on 16 November 2023

For the Tribunal Office