



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102011/2022 Hearing at Edinburgh on 20, 21, 22, 23 and 24 March 2023, and 1 and 2 August 2023; and Members' Meetings on 27 September and 30 October 2023

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Employment Judge: M A Macleod
Tribunal Member: L Grime
Tribunal Member: S Cardownie

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Santiago Cubillo

Claimant
In Person

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GL Attractions Ltd

Respondent
Represented by
Ms S Thompson Robertson

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that:

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1. The claimant's claim of constructive unfair dismissal succeeds;
2. The respondent is ordered to pay to the claimant the sum of Four Thousand Seven Hundred and Forty Eight Pounds and Forty Four Pence (£4,748.44) in compensation; and
3. The claimant's complaints of discrimination, harassment and
35 victimisation on the grounds of age fail, and are dismissed.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 11 April 2022, in which he complained that he had been constructively unfairly

dismissed and discriminated against on the grounds of age by the respondent.

2. The respondent submitted an ET3 in which they resisted all claims made by the claimant.
- 5 3. Following considerable procedure and case management, a Hearing was listed to take place on 20 to 24 March 2023 in the Employment Tribunal, Edinburgh. As it turned out, that Hearing did not conclude within the allocated dates, and accordingly 1 and 2 August were listed in order to complete the evidence and hear parties' submissions.
- 10 4. The claimant appeared on his own behalf at the Hearing, and Ms Thompson Robertson, solicitor, appeared for the respondent.
5. The parties presented a Joint Bundle of Productions, upon which both placed reliance during the course of the Hearing. During the Hearing, the claimant in particular sought to add documents to the Joint Bundle, and
15 the Tribunal dealt with each application to add those documents as it arose.
6. The claimant gave evidence on his own behalf, and called 2 witnesses, Amandine Le Marchant, his partner, and Lucia Rodriguez, a former colleague of the claimant's from his time employed by the respondent.
- 20 7. The respondent called as witnesses Dalbir Singh, General Manager; Edyta Konarska, Senior Manager; Jiji Rajagopal, HR and Payroll Administrator; and Patrycja Bitowska, HR Adviser and Recruitment Assistant.
8. it is useful to note that there were two significant applications made by the
25 claimant which required the Tribunal to take time from the hearing of evidence, and ultimately brought about the need for a continuation of the Hearing.
9. On the first morning of the Hearing, the Tribunal required to hear the claimant's application for strike out of the respondent's response. Having

done so, we retired to deliberate at 11.45am. At 12.45pm, the parties were asked to return to the Hearing, whereupon the Employment Judge read an oral decision to the parties, confirming the refusal of the claimant's application.

5 10. The evidence of the claimant then commenced at 2.10pm on the first day.

11. At the conclusion of the claimant's evidence, towards the end of the third day of the Hearing, a discussion took place about whether or not the claimant had effectively introduced a claim that he had been subjected to detriments as a result of having raised protected disclosures to the respondent. He maintained that he believed that such a claim had been included within the pleadings. The Tribunal granted the claimant the opportunity to consider his position overnight, and on the morning of 23 March 2023, the claimant submitted a written application for amendment of his claim, and spoke to that application before us. The respondent was granted the opportunity to oppose the application, having considered the terms of the written application, and did so. Once again, the Tribunal adjourned in order to deliberate upon the application, and having done so, an oral decision was read by the Employment Judge to the parties. The Tribunal decided that the application to amend should be refused, for the reasons set out in that oral decision.

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12. The evidence recommenced at 2pm on 23 March, but in effect, the afternoon of 22 March and the whole morning of 23 March were lost to the application.

13. The purpose of setting this out is not to imply or direct any criticism of the claimant, but to observe that the claimant's concern, expressed when the Hearing adjourned on 24 March 2023 in quite emotional terms, that further delay would be introduced to the proceedings while the Tribunal sought to find alternative dates on which to continue the Hearing, arose in fact from the delays in the Hearing which the two significant applications which he had raised. Those applications required to be taken seriously by the Tribunal, and considered carefully, inevitably giving rise to delays

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which consequently prevented the Hearing from concluding within the allotted dates.

14. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

5 **Findings in Fact**

15. The claimant, whose date of birth is 15 February 1992, commenced employment with the respondent as a Sales Assistant on 25 August 2019, working in the Tartan Weaving Mill, a shop located near Edinburgh Castle on Castlehill, at the top of the Royal Mile.
- 10 16. The Tartan Weaving Mill (“the Store”) is owned and operated by the respondent, and is one of a number of such shops operated by them in central Edinburgh. The Store comprises a large shop on several different floors, selling a variety of goods and offering tourist experiences, including an Armoury section and a Harry Potter section. In those
15 departments, customers could dress up in particular costumes and have photographs taken before suitable backdrops, as souvenirs.
17. The claimant was provided with a statement of terms and conditions (115) which was signed by the parties on 30 January 2020, and with a second statement of terms and conditions (117) signed by the parties on 25 May
20 2020. The claimant’s place of work was said to be *“555 Castlehill, EH1 2ND or at any of our other Edinburgh addresses. You may also be required to work at any other sites as requested by the Directors. You will not be required to work outside the United Kingdom.”*
18. The claimant’s working hours were 35 per week, with variable start times
25 between Monday and Sunday as necessitated by the needs of the business.
19. On 5 September 2021, the claimant submitted a complaint about conduct by colleagues towards him to Dalbir Singh (known as “Dee”) and Edyta Konarska (142):

"Dear Dee and Edyta,

I am writing to point out one conduct that has become, from my perspective, intolerable. One of my colleagues, Flor, and to a certain point, both of her daughters, Sara and Miriam, are accusing me of being sexist.

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I want to note that I am not a sexist at all. In all my professional career, this is the first time I am facing such a claim. I have always wanted health and friendly work environments and worked towards them. And that it is something that most of my colleagues at the shop will agree with.

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I have known Sara and Miriam for two years and, during most of that time, I considered them not just as colleagues, but as friends. Two months ago we have a barbecue plan at Portobello beach with Flor and my girlfriend. Our relation was quite close. So the question is: what the hell happened?

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The problems started when I was moved from the picking team to the armory. As far as I know, Flor was really happy working with both her daughters in the same department. My judgment here could be wrong, but it looked like she did not welcome the idea of being moved to other departments.

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And I became an obstacle.

I did not realize that until two weeks ago. Gee asked me to deal with a massive delivery of swords and Flor did not like it. That morning she fought over and over to be the one doing it. I mention to Edyta what I thought was the cause of the problem and that I would try to fix it. Sadly, I was not able to.

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On the shop floor, the ambient was changing. If before all of this we were congratulating each other for the sales of the day, now I was the only one doing that. They started writing their names on the record of each sword they were selling. The way they had to fill the armory space in every cash up depending on who was working there that day was kind of dodgy.

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5 *One week ago, last Sunday, is when everything exploded. I want to note that until that date the only thing that Sara had pointed me out is that I was being a little insistent on the number of poses they were taking in the photo experience. Miriam told me that she had problems with me, but despite I told her that I was there for whatever she needed, she never came back to it.*

10 *Last Sunday Flor told me I was a sexist. I was not expecting that and it left me quite sad and, to a certain degree, furious. Especially because she did not point out any attitude or case of sexist behavior, and that is a really severe accusation, something extremely insulting.*

15 *That same day, once I cooled down, I wrote to Flor. I offered her to go for a beer and talk about this. I believed that I acted in a very polite and diplomatic way. I am going to add my Whatsapp conversations with Flor and Sara. These are conversations in Spanish and, despite I could do the translation, probably is fairer if it is coming from a third party.*

Miriam and Sara didn't like this. For them, I was totally disrespectful to her mother. They were pretty out of tone, something that is pretty clear in the conversation I had with Sara. We agreed on speaking about this last Tuesday.

20 *That didn't happen, they couldn't do it that day. So we agreed on Thursday.*

That didn't happen. Again. We spoke about doing a phone call.

Again, nothing. So the talk would be today.

25 *I have to admit that I was quite intrigued by this conversation. On how, after more than one year of friendship, they had found so conveniently that I was a sexist. But I had to cancel it.*

Today some colleagues told me that they had been going around saying I was a sexist. That was quite devastating. Not one of them has ever told me one single case in which I had a sexist attitude.

They have used my goodwill and patience to start a smear campaign. And I find that extremely unfair.

This is a severe accusation that can stain my career for life.

5 *It is not the first time Flor uses these tactics to get rid of someone she doesn't like. This time, instead of someone 'pushing her' in a place conveniently without cameras, it is something more sneaky, but still serious.*

10 *I am not a manager, I am just one outnumbered sales assistant. I can show my hard work during my time in the company. So far this is my first big conflict with another colleague. I have the feeling that I have been a really good asset to the company. Every time I have been needed, in cases like the stocktake or to work extra time, I have been there.*

15 *I don't know if this can be solved with a conversation or is not far beyond that. I have been trying to solve this problem in a diplomatic way from the very start. But there are some red lines that I cannot accept.*

I am not asked to be favored in this case, just to be treated fairly.

Kind regards,

Santiago Cubillo"

20 20. Ms Bitowska responded on 7 September 2021 (145) to advise that most complaints are best resolved informally in discussion with the individual's immediate manager, and suggested that he should contact his manager in the first instance. If this approach failed, then the matter should be brought to the attention of Human Resources.

25 21. The claimant replied with thanks and indicated that he would proceed in that way (145).

22. He contacted Dalbir Singh to speak to him about this matter. As a result, a meeting was arranged, on 9 September 2021, so that the claimant could meet with Flor, Sara and Miriam to discuss the matter informally.

Sergio Jimenez was also present representing management, as was Mr Singh. Miriam was not present.

23. Mr Singh's evidence was that the upshot of this meeting was that it was understood that the situation between the claimant and Flor and her daughters had arisen as a result of a misunderstanding between long-standing friends. He considered that the matter was resolved satisfactorily. He did accept, under cross-examination by the claimant, that there was a discussion at the meeting about respecting one another and especially, given Asian culture, respecting someone because of their age. He said before us that "Just because someone is older than someone else, respect has to be earned." He did say that he had reference the age difference between the claimant and Flor during the meeting.

24. The claimant's evidence was that the meeting was a very difficult one, during which, he maintained, he was unable to finish a sentence without being interrupted by Flor in particular, and he was not given the opportunity to respond to the allegations of sexism about which he was so concerned. He also gave evidence that after the meeting he was very worried about the outcome of it.

25. He wrote to Ms Konarska and Mr Singh on 11 September 2021 (148) to say:

"Dear Edyta and Dee,

I am happy with the results of Thursday's informal meeting. My objective is, and always has been, to have a healthy work environment. With that on my mind, I did some concessions that I would love to sort out after my return from Spain. I have the feeling that the conversation we had two days ago was quite unfavorable for me, and not just because of my travel on the next day or the numerical disadvantage. The thing is, for most of the talk, I could not finish a point before being interrupted by Flor. The same person complaining about my lack of respect was not letting me talk at all. It took me four attempts to respond to one of the accusations on me

and, of course, on those three interruptions more accusations had come in.

I find normal for Flor to use this bullying tactics. What I find weird is the mediator not stopping them..."

5 26. He went on to point out that there were two issues arising from the meeting which caused him to consider the matter unsolved. Firstly, he said, there was the damage to his reputation caused by the "smear campaign".

10 27. He concluded his email by saying "*Despite all what happened, even with this extremely toxic and unfair behaviour, I don't want them to be punished. They have a lot of good things going on, like Flor's saleswoman skills or the care and attention to detail of the twins. I would like to talk about this with you. As I said two days ago, I have not problem in starting anew, like if nothing had happened, but I think that my concerns are quite legitimate, this should not happen again.*"

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28. The claimant did not complain in that email about Mr Singh having treated Flor more favourably because of her age, nor did he make reference to Mr Singh having told him to treat Flor with respect because of her age. In his evidence before us, the claimant did not specifically say that Mr Singh had treated him less favourably due to age.

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29. Both Mr Singh and Ms Konarska replied (148) expressing contentment that the meeting was productive and that an agreeable solution was reached. Ms Konarska advised the claimant not to worry about his reputation and sought to reassure him that nobody would think in a bad way about him. Similarly, Mr Singh advised that his name and reputation was not, and would not be, tainted.

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30. After the meeting, the claimant left to travel to Spain for a family wedding. On his return, he was anxious to have a document drawn up which would prove or confirm that his attitude was not sexist.

31. Sergio Jimenez prepared a document for signature by each of the participants in the meeting of 9 September (147), headed "Informal Meeting Conclusion" and set out in the following terms:

5 *"Hi Santiago Cubillo, Fior Celda Del Pozo, Miriam Hussein Celda and Sara Hussein Celda*

Thank you for your time during an informal meeting.

10 *Further to our informal discussion held on 09/09/2021 in the presence of Dee Singh, Sergio Jimenez, Santiago Cubillo, Flor Celda Del Pozo and Sara Hussein Celda, I am writing to confirm that the topic of the conversation was Flor, Sara and Miriam Hussein Celda (who was not present for the informal meeting) have claimed Santiago was making sexist remarks to them.*

Santiago explained that he had an issue with the way they are treating him because of this.

15 *Flor, Sara and Miriam explained they felt uncomfortable to the remarks made by Santiago.*

In conclusion from this informal meeting, I believe the accusation is not substantiated, and the issue arose from a misunderstanding.

20 *The proposed solution was that this issue is now concluded, and there is no further dispute between Santiago and Flor, Sara and Miriam. The four of you are comfortable to be working in the presence of each other.*

You have all expressed that you are satisfied with the informal chat and outcome, and did not have any further questions.

25 *If you agree to the statements in this letter, and that this issue has now been resolved, please sign below. .."*

32. The claimant signed on 6 October 2021, as did Flor, Sara and Miriam.

33. The respondent considered that that was an end to the matter, given the terms of the document and the fact that, having read it, the claimant and Flor, Sara and Miriam had all signed their agreement to its terms.
34. The claimant, in evidence, pointed out that the document “does not deal with the slander”, by which it was understood by the Tribunal that he meant that there was no reference to colleagues being informed, presumably by Flor, Sara or Miriam, that the claimant had been sexist towards them.
35. On 9 October 2021, the claimant met with Flor outwith the workplace. The claimant’s evidence was that Flor dismissed his concerns about the allegation of sexism, but was then critical of the manager, Maria, about whom she had previously raised criticisms.
36. The claimant raised a further complaint on 19 November 2021 in writing, by email to Human Resources (HR) (151).
37. The email included the following statements:

“To whom it may concern,

I am writing regarding the same problem that last time, a conflict with my colleague Flor and, to some degree, both of her daughters. After speaking with my manager I consider that this is the right step to take.

My past messages about all of this are going to be attached to this email. To summarize, back in the day my issue consisted of the smear campaign that Flor and her daughters conducted on me. They were bad-mouthing me about making sexist remarks and sexist behaviours, with not a single one of these accusations holding by itself. Furthermore, most of these stories were blatant lies.

They did not tell me or a manager a thing, but instead, went around the shop spreading these rumors, as mentioned earlier, a good old-fashioned smear campaign...

Flor is obsessed with a promotion, more specifically, she wants to be supervisor, or manager, of the Harry Potter department and the photo studio. Two departments I have been working for longer than her and of which I am known to be good at.

5 *I became an obstacle for her, an obstacle to be removed at all cost. ..*

My objective is not a promotion. I want a healthy work environment, where I can do my job properly. I had two big worries when this happened:

First, my reputation, the damage that these lies caused me.

io *Second, the tactics employed. It is not just that is toxic and illegal, is a complete lack of human decency.*

15 *I thought that a signed document, also attached, would be enough. But, two months later, I have already had three conversations regarding this issue, last time on my holidays. One person that was sure that I was not giving swords to women in the photo experience because of sexism, when, if you check my picture folder, you can see that all of the customers are holding swords.*

So my question is: why do I have to spend my free time cleaning my name for things I never did?

20 *It is extremely unfair and I got tired of it. I will follow this to the last consequences.*

Regarding the second point, it is happening again. A full smear campaign against one of the managers, Maria. It happened before the COVID, and Flor is back at it...

25 *This conduct of them is unacceptable and it has to stop."*

38. Essentially, the claimant believed that despite the agreement of 6 October 2021, Flor and (possibly) her daughters were continuing to tell colleagues that the claimant was acting in a sexist way.

39. An automatically generated reply was sent by HR that day (154) confirming that there may be a delay in responding, but that they aimed to get back to him in 5 days. No response had been received by two weeks later, so the claimant spoke to Ms Konarska, who suggested that HR might be affected by holidays.
40. On 9 December 2021, the claimant approached Ms Konarska and said that Flor, Sara and Miriam were continuing to make comments about his being sexist. She asked him if he wanted to continue working with the three women or preferred to move to another department. He confirmed that he was prepared to continue to work with them.
41. On 18 December 2021, the claimant arrived at the store and advised Ms Konarska that he intended to confront Flor about her behaviour. He maintained that Ms Konarska agreed he should do so. Ms Konarska was not asked about this in evidence. He then found Flor and Miriam. He produced his mobile phone and confirmed that he would be recording the discussion. He said that Flor was a miserable person and a liar, and that she had told lies about him in order to secure promotion. He told her he only wanted to have professional contact with her after that. He maintained that he had kept calm during this conversation. Flor responded to him by saying he had made discriminatory remarks about her age.
42. Flor is some years older than the claimant. It is not clear from the evidence precisely what age she is or was at the material time.
43. Miriam went to find Ms Konarska, to ask her to attend at the department. She did so, and when she arrived, she "stopped them fighting", a reference to an ongoing argument between the claimant and Flor. She described it as "quite intensive - they were shouting at each other - I heard the claimant calling Flor miserable." She told them that they were to stop shouting and then they could talk about it.
44. Ms Konarska arranged for the claimant, Flor, Miriam and Sara to meet together in the presence of herself and Mr Singh, that day. The claimant,

on the one hand, and Flor, Miriam and Sara, on the other, were each making accusations against each other, and were arguing about each having recorded the other.

- 5 45. The claimant left the meeting at one point in order to speak to his witness, who, he said, would confirm that Flor had called him sexist. Ms Konarska noted that both sides appeared to have recorded the argument. While the claimant was out of the room, they attempted to play the recording of the argument to Ms Konarska but after a very short time - a matter of seconds - Ms Konarska told them to stop playing it.
- 10 46. The claimant returned to the room. The meeting concluded and Ms Konarska resolved to report the matter to HR in order to seek their advice. In her evidence before us, she expressed some concern about the claimant's mental health, as he had been "a little bit intimidating" and "a bit over the top and paranoid about the whole situation".
- 15 47. Following the meeting, on 19 December, the claimant had an exchange of text messages with Ms Konarska (155). By that time, all parties had agreed to meet again, and when Ms Konarska expressed the hope that the second meeting clarify the situation better for all concerned, the claimant responded by saying that he hoped so as well.
- 20 48. On 21 December 2021, HR wrote to the claimant (162) apologising for the delay in responding to his email of 19 November 2021, and stating that once they had spoken to his manager, they had carried out a search of their inbox, and had discovered his email in the spam folder. They said that they did not know why it went to the spam folder. They confirmed that
25 a formal meeting could be scheduled if the matter was not yet resolved.
49. The following day, Jiji Rajagopal, from HR, wrote to the claimant (160ff) confirming that they understood that the claimant did not wish to proceed through the informal route, and accordingly the grievance would be dealt with through the formal process.

50. She confirmed that she would hear his grievance on 23 December 2021 at 2.30pm, accompanied by Ms Bitowska, who would take notes. The meeting was to be held remotely via an online platform.

51. She summarised the claimant's concerns as threefold:

5 *"1. You believe you have an issue with three staff members who are a family, bad-mouthing you about making sexist remarks and sexist behaviors.*

2. You believe one of those 3 staff members alleged that you were not giving swords to women in the photo experience because of sexism.

10 *3. You believe that they act as a group in conflicts and bully others."*

52. She enclosed a copy of the respondent's grievance procedure, and reminded him that it was forbidden to record a meeting.

53. The claimant responded quickly on 22 December 2021 (158ff).

15 54. He sought to expand upon the 3 points identified by Ms Rajagopal. With regard to the second point, he confirmed that this was true but incomplete, and that he would work on a complete list of accusations to present at the grievance hearing.

20 55. He also added, in addition to the 3 points, that he had been working for a very long time with 2 of the colleagues concerned without any problem, but the difficulties arose when "the third one decided that she deserved a promotion"; and that he had been trying to solve the problems in a diplomatic way since the start.

25 56. He confirmed that he had not asked for an informal meeting, but for a formal complaint about personal harassment. He believed he had been told that that was what he would have, and if this were not the case, he had been lied to and would have a grievance against Ms Konarska and Mr Singh. He suggested that if he had been lied to, he would take the "necessary legal steps".

57. He concluded by saying *"To sum up, I will gladly follow the grievance procedure with you regarding the email that I sent 32 days ago, but I won't go further until you get the formal complaint through the adequate way or my legal position is cleared."*
58. Ms Rajagopal responded at 11.02am the following day (157), seeking to incorporate his expanded points into the agenda for the grievance hearing. She enumerated 6 points now raised. She also offered him the opportunity to postpone the hearing until 27 December 2021 if he wished.
59. The claimant then contracted Covid-19 and notified the respondent by email (157). He confirmed that he was happy to continue with the hearing as his symptoms were mild. He also advised that *"All the points made are correct."*
60. Concurrent with this correspondence, the claimant also submitted another complaint on 22 December 2021, to HR (163).
61. He commenced by referring, again, to the 32 days it took the respondent to contact him. He stated that he had been forced to contact a legal adviser, and indicated that the "slander" mentioned in his previous emails had returned, in that he had been called a sexist again.
62. He went on:
- "My colleagues and I were subjected to discrimination. Flor, Sara and Miriam demanded a different treatment of Flor because of her age. They stated that being older made her superior. They bullied anyone that would not submit to their demands.*
- I told the pertinent manager, Edyta Konarska, about the slander as soon as I could. She was informed, as well, that I never got an answer from Human Resources, and about my intention of confronting my harassers directly, saying what I thought about the situation. This conversation happened more than one week ago..."*

63. The claimant then described the meeting which had taken place, at which, he alleged, that Ms Konarska and Mr Singh told him that they had been listening to a recording made by one of Flor, Sara or Miriam. He made certain assertions about the lawful use of secret recordings.

5 64. The claimant then complained about the “resolution” of this matter, on two bases:

10 *“The first one is that Dee admitted having told the details of my complaint to my harassers. That is a breach of confidence and it is going to interfere with the investigation. This action is not just against the company rules (Employee Handbook, p50) but against the law.*

I could understand someone to be unaware of this legislation, but the fact is that my harassers were told about my complaint, but neither Dee nor Edyta told me a word of the complaints Flor, Sara or Miriam did that day against me. So that breach of confidence was not only illegal but unfair.

15 *The second decision they took was to move me to another shop until things got resolved. They would not be moving the four people implied, but only me and Flor. I mentioned that the rules stated that in these cases the ‘alleged harassers’ are the ones that are moved. I was told that it was not their decision, but an HR one...*

20 *Moving to another shop would be against my reputation and the interest of my future legal case. Moreover, to punish someone for making a harassment complaint is not just against the company rules, but illegal...*

25 *I don’t have a personal grievance against Edyta or Dee. As an act of good faith, I am going to send this email to them as well. I understand there can be mistakes and misunderstandings, but don’t get this wrong. I could prove every single one of the points exposed in this mail in a courtroom.”*

65. On 22 December 2021, Ms Rajagopal wrote to the claimant (166). She said that she believed that he was responding to the automated email he had received, and said “Apologies we didn’t notice your email as it went

to the spam folder". She then invited him to attend a grievance hearing on 23 December 2021 at 2.30pm.

66. She sought to summarise the concerns he had raised, in addition to the matters raised in her previous letter:

- 5 *"1. You believe that the three staff members demanded a different behavior from one of them due to her age and they stated that being older made her superior.*
- 2. They made a secret voice recording of your conversation and presented it to the third party without your permission.*
- 10 *3. You believe you are harassed by those three mentioned staff members.*

This is the first time we are informed in regards to the harassment. Please see the attached policy that we will be making reference to.

15 *Yesterday you were informed about the temporary transfer to the other store for the time being of the formal proceedings and investigations as a measure to allow the formal process to finalize.*

We understand you do not have any grievance against Edyta and Dee. If it's different please let me know."

20 67. She attached the Personal Harassment Policy to that email to the claimant.

68. The grievance hearing took place on 23 December 2021. Ms Rajagopal chaired the meeting, and was accompanied by Ms Bitowska as note-taker. The claimant also attended. Notes were produced (168ff). The claimant provided to the respondent notes which he wished to have taken
25 into account in the grievance (172ff).

69. The claimant explained his concerns at length in that meeting, including his view that he was being harassed, in particular by the slander being spoken about him that he was sexist, within the workplace.

70. The minutes were sent to the claimant on 28 December 2021 (179). The claimant expressed concern about the unclear or uncertain points contained in them, and advised that he would work on a revised document (178).
- 5 71. On 13 January 2022, Ms Rajagopal wrote to the claimant to set out her findings in relation to his grievance (180).
72. She confirmed that following the meeting, she had conducted interviews with Lucia Maria Rodriguez Breijo, Cristina Villalba Herrera, Maria Jose Sanchez Rodriguez, Arianna Caradonna Maltese, Monica Isabelle Popovic, Edyta Konarska and Dalbir Singh.
- 10 73. She then set out her findings:
- “After a full investigation and due consideration of the facts, my findings are as follows. For ease of reference, I shall address each point in turn:*
1. You believe you have an issue with three staff members who are a family, bad-mouthing you about making sexist remarks and sexist behaviors. We have got witness statements supporting this allegation against Maria Flor De Lis Celda Del Pozo. Hence this is substantiated.
 - 15 2. You believe one of those 3 staff members alleged that you were not giving swords to women in the photo experience because of sexism. We have got witness statements supporting this allegation against Maria Flor De Lis Celda Del Pozo. Hence this is substantiated.
 - 20 3. You believe that they act as a group in conflicts and bully others. This is partially substantiated.
 - 25 4. You believe that the three staff members demanded a different behavior from one of them due to her age and they stated that being older made her superior. We have got witness statements supporting this allegation against Flor says this statement. Hence this is substantiated.

5. *They made a secret voice recording of your conversatoin and presented it to the third party without your permission. This is partially substantiated.*

6. *You believe you are harassed by those three mentioned staff members. This is substantiated.*

In conclusion, points one, two, four and six of your grievances are substantiated, and points three, and five of your grievance are partially substantiated and the company will be taking appropriate action.”

74. The claimant was granted the right to appeal against this decision.

10 75. On receipt of the resolution of his grievance, the claimant replied on 14 January 2022 (182):

“Dear Jiji and Patrycja,

I am satisfied with the resolution on this case. Thank you for your work and for your calls yesterday. I really appreciated them.

15 *I understand from the outcome that I will be back at the Tartan Weaving Mill as soon as possible and that harassment is considered gross misconduct. I believe it is a fair result, so I won't appeal.*

20 *I waas trying not to do this again, but there are some point I want to make. I know this is not helping your workload, so I am deeply sorry for another long email...”*

76. The claimant then embarked upon a lengthy statement setting out his views on the law of Scotland as to recordings. He then moved to discuss his own case. He maintained that there was “maliciousness” in the recording carried out by the three employees, of which he was unaware. He also complained that the full recording was not shared. He proceeded to ask about the reason why Ms Konarska and Mr Singh had accepted the recording.

77. He continued:

“Sara and Miriam could end with a really nasty stain on their record. Even with the things they have done to me, they are young. I believe that getting fired is enough punishment.

5 *With Edyta and Dee, espeically the latter, it could be worse. To be honest, I would say that they did not know what they were doing, that they don’t have the skills to deal with this kind of situation. The punishment for their conduct would be, in my opinion, too severe.*

10 *If the incompetency of a doctor kills one of the patients who is the one to blame? The doctor? The director of the hospital that hired him? Both? In any case, the hospital should make sure that is a case that it is not going to repeat again.*

15 *I have been protected Dee and Edyta this whole process, trying to make them awaare of the situation they had walked in. I still think they have no idea of what could have been the consequences of their actions if I had chosen a different approach to this case.*

20 *To sum up, I think that fairness is more important than rightfulness. And that is the reason I want to be constructive here. This should not happen to any other person. I strongly suggest giving the managers training on these issues, to give them tools to deal with this situation in a fair and confident way.”*

78. The claimant did not disclose what he meant by these paragraphs.

79. Notwithstanding the statement made by the claimant in his email to the effect that he considered the resolution of his grievance to have been satisfactory, he wrote again, almost immediately, on 15 January 2022 (185) to complain that it had come to his attention that, despite the outcome of the grievance, he was still working outside the Tartan Weaving Mill while one of his harassers was still working there. He considered this to be “disturbingly unfair”.

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80. He suggested that his “demands have been extremely generous considering the circumstances”, and said that his legal adviser had told him he should ask directly for “half of the indemnization I am entitled to.”
81. He asked if he should consider this “discrimination” against him as another act of bad faith, and insisted that he would not accept any more delays.
82. The claimant then submitted an appeal against the decision issued on 13 January 2022, on 17 January 2022 (186).
83. The basis upon which he submitted his appeal was set out in his letter:
- “1. This outcome is given with just a partially accepted meeting minute, its legitimacy is extremely questionable.*
- 2. The points were enunciated but not developed. Despite I received a phone call fleshing out the partially substantiated points, this should be written down.*
- 3. There is just an enumeration of the points that have been proved, without the intended solution. That was not even said on the phone call.*
- 4. On the phone call I understood that, regarding point five, I had not given enough proof about the secret recording. Legally speaking, I don’t have to prove that I was unaware of that recording or that I gave my consent to share it. It is the person that shares the recording the one that has to prove it. In case they are not able to, it is considered to share a secret recording without the consent of the recorded person. **To sum up, they failed to prove either my awareness or consent.** So the point should be fully substantiated.”*
84. Having submitted his appeal, the claimant then wrote to the respondent on 17 January 2022 to raise a grievance against Ms Konarska and Mr Singh (187). He maintained that he was forced to take this matter a step further, and that the individuals’ decisions had been “a display of malicious incompetence”.

85. He said that he set out his grievance under 3 headings, though in fact there were 2 in the letter.
86. Firstly, "Endangering the safety and health of an individual". He pointed to Mr Singh's promise to keep a lookout on Flor's behaviour in the future, which he did not keep; the refusal of the claimant's request not to work with Flor, Sara and Miriam; the failure to act on his allegation that there was a "new case of slander"; the failure to grant his request for a formal complaint about personal harassment; Mr Singh's breach of confidentiality in informing Flor, Sara and Miriam of the details of his complaint; and their acceptance of the audio recording, which Mr Singh encouraged.
87. Secondly, "Unlawful discrimination". He pointed to Mr Singh allowing Flor to interrupt him regularly during the first meeting in September 2021; Mr Singh admitting that he had disclosed the claimant's complaint to Flor, Sara and Miriam; the decision to remove him and Flor from the shop while allowing Sara and Miriam to remain there; and allowing Miriam and Sara to have a meeting on 23 December 2021, all of which amounted to unlawful discrimination.
88. He complained that there had been an "enormous display of blatant unfairness". He suspected that Mr Singh had told HR to ignore his email for 32 days.
89. The claimant wrote again on 24 January 2022 (190), raising again the fact that he remained employed outwith the Tartan Weaving Mill, while two of the people who harassed him were still working there.
90. He complained that he had been under investigation, but was never told about any allegations against him, which he regarded as illegal and unfair. He said that he was moved out of the shop because he was causing the problem, according to Mr Singh,
91. He reiterated his view that the failure to reply to his grievance for 32 days, and the explanation given that it had been in the spam folder, was not a

valid excuse. He spelled out in detail his view that he had been extremely patient in seeking a diplomatic resolution, but that he had been treated unfairly as a result.

92. He then set out his proposal for a "fair solution":

5 "1. *The future of Flor, Sara, and Miriam*

With the current decision of Human Resources, they should be dismissed for harassment. I understand that their behavior is also the responsibility of the company, they could and should have stopped them earlier.

10 *Despite their misconduct they have worked really hard for the company and that should be acknowledged. They should be offered a Settlement Agreement like the one I was offered. This money would ease the human disgrace of an entire household losing their income and would give them time to find another job.*

15 *2. I want full restitution to my previous position at the Tartan Weaving Mill. I consider this extremely important to restore my reputation.*

3. I want a public apology from Dee and Edyta. I consider this extremely important to restore my reputation.

20 *4. I want a face-to-face apology from Jiji and Patrycja, regarding the irregularities followed in my process. I consider this important for my mental health.*

5. I want economic compensation regarding two issues:

25 • *The victimization I was subjected to: My victimization started on 22/12/2021. I should be paid according to my contract £305.2 a week until I am moved back to the Tartan Weaving Mill. The days I worked in other shops can be counted as double paydays.*

* *My work regarding that case: I have spent a lot of time gathering on this case. Working, to some degree, as a consultant. I think that this case has been extremely useful for the company,*

revealing some systemic flaws. Thanks to my actions, the company will become stronger. £1000 sounds like a fair pay to that service.”

- 5 93. On 26 January 2022, the claimant submitted a Statement of Fitness for Work (204) in which his GP advised that he was not fit for work due to stress, and signed him off from 26 January to 8 February 2022.
- 10 94. The respondent wrote to the claimant on the same date (193), in which they said that they noted that the claimant off sick at the time and that settlement discussions were potentially in process. They believed that it was reasonable to wait to see if this could be concluded. If not, they confirmed that he would be invited to the appeal hearing and the grievance in terms of the company procedures.
- 15 95. On 28 January 2022, notwithstanding that reply, the claimant wrote again (198) to raise a formal complaint against Mr Singh, Ms Konarska, Ms Rajagopal and Ms Bitowska. He summarised his previous complaints, and reiterated that his mental health had been adversely affected by the treatment he regarded as unfair and unlawful.
- 20 96. At the conclusion of the email, he set out what he wanted. He repeated his wish that Flor, Sara and Miriam should be dismissed for gross misconduct, but with compensation for bad management decisions; to be fully reincorporated into the shop with a full public apology; and compensation for damages to his reputation and his mental health.
- 25 97. He went on, however, to add that he now wished Mr Singh to be dismissed for “repeated blatant gross misconduct”; Ms Konarska, Ms Rajagopal and Ms Bitowska to be given the opportunity to resign, failing which an investigation into the extent to which they were influenced by Mr Singh; and HR should count on “someone with actual skills to carry out this kind of investigation”.
- 30 98. On 4 February 2022, Ms Bitowska wrote to the claimant (205) noting his absence from work due to ill health from 18 January 2022, and

acknowledging his Statement of Fitness for Work. She requested his attendance at an informal welfare meeting either at the company's premises, his home or elsewhere. The purpose of the meeting was to establish the nature and extent of his illness, how long it was likely to be before he was well enough to return to work and what arrangements might be needed in order to ensure his safety. She proposed that the meeting take place at 2.30pm by telephone on 7 February 2022.

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99. The claimant replied on the same date (206), noting that Ms Bitowska had been "quite selective with the information" she had chosen to acknowledge, and accusing her of ignoring his emails of 17, 27 and 31 January. He did say, however, that "*I don't mind having that 'informal welfare meeting' at mine: 1f3, 2 Rossie Place EH7 5SG.*" He said that apart from discussing his mental health and arrangements, the "*constant dismissal I have been subjected to should be addressed.*" Ms Bitowska suggested that if the meeting were to take place other than by conference call, they would need longer to make arrangements, and offered him a google meet call instead (207).

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100. The claimant replied to confirm that *7 gladly accept to attend a meeting at my home address. How long would it take you to make the appropriate arrangements?*" He went on to say that he understood that the respondent wanted to address the claim to a paid suspension taken on 17 January 2022 due to the distress caused by the victimisation to which he said he was subject. He also said "*I understand that doing that meeting at my home is not a requirement, but I am asking it as an act of goodwill. I consider it extremely important for my mental health..Another phone call would just increase my level of stress, something I am trying to avoid.*"

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101. He observed that other than the meeting on his suspension - albeit that that was not explicitly the reason why the respondent had called the meeting, as an informal welfare meeting - he observed that there were other meetings which were pending, namely, in relation to his appeal, his grievance against Ms Konarska and Mr Singh, and his grievance against

Ms Rajagopal and Ms Bitowska (which was in fact against them and also Ms Konarska and Mr Singh).

102. On 9 February 2022, the claimant wrote to the respondent to confirm that he had been diagnosed with depression. He said that *“One of the main reasons for my stress and anxiety is the constant dismissal I am subjected to. Right now there are some issues that you have not addressed personally: the settlement agreement, the appeal, the suspension for health issues and the complaints against Edyta, Dalbir, Jiji and Patrycja.*

10 *I have been really patient with you, but I can’t do it anymore. I will set 11/022022 as a time limit. If any of these issues are not addressed within this time, I will consider that you are ignoring them deliberately and take the appropriate legal action.”*

103. On 11 February 2022, Ms Bitowska wrote to the claimant (214) to ask him a number of questions about his state of health, and to request his consent to approach his GP for a confidential medical report, or to refer him to Occupational Health.

104. HR also wrote to the claimant that day (210) to point out that he had not submitted a further Statement of Fitness for Work, and that he had not attended work on 9, 10 or 11 February following the expiry of his previous sick line. They asked him to send his further sick line, otherwise they may not be able to pay him SSP.

105. The claimant replied on 12 February (218) complaining that the dismissal and delay of the issues which he wished addressed by HR was *“disturbing”*. He also accused the respondent of having failed to comply with the deadline set in his letter of 9 February.

106. HR wrote on 16 February (220) to ask again for an updated doctors note. The claimant pointed out in reply (220) that he had never asked for sick leave but for a suspension, and related this to the fact that he was still not

reinstated to the shop while two of the people he had complained about were still working there.

5 107. HR responded on 22 February 2022 to confirm that she was aware that he had submitted an appeal and grievances, and that he had gone off sick. She confirmed that the company did not have any such thing as medical suspension, and that work in another location was offered to him to ensure an uninterrupted process. She then reiterated the respondent's request for a GP report or an OH referral and answers to questions set out in the email.

10 108. The claimant replied on 25 February (225) reiterating that he had not asked for SSP, and accusing the respondent of using his depression as an excuse to delay and dismiss his claims. He concluded the email with *"I will let professionals take it from here."*

15 109. Plainly, an impasse had arisen between the parties. On 6 April 2022, HR wrote again to the claimant (230) summarising his absence and observing that they had had no further correspondence from him since 25 February 2022. They wrote to him: *"Therefore, we have no alternative other than to assume that you no longer wish to work for the company and that you have terminated your employment by your own volition. If you feel that I have been incorrect in reaching this conclusion then it is important that you contact me immediately upon receipt of this letter in order that we may arrange a meeting to discuss the situation."*

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25 110. On 8 April 2022, the claimant responded (229). He set out further criticisms of the correspondence sent to him by the respondent, and reiterating that there was an outstanding appeal and outstanding grievances which the respondent had failed to address. He stated:

"Don't get me wrong, I am just interested in my case, but I can't overlook these wrongdoings, and hence they will be reported to the corresponding authority."

This rampant corruption of the company is probably one of the main reasons for the situation we are in. >Because of that, I can't consider Edyta, Dalbir, Jiji and Patrycja as rogue agents, but fully supported by the company. Especially when I have witnesses of clear breaches of confidentiality.

The full extent of this corruption was revealed to me recently. This corruption, your refusal to address my complaints, and your total failure to manage this situation lead me to no other option than consider myself constructively dismissed.

The way you have treated me goes beyond an employment tribunal. So I will follow the legal process and make sure that the ones involved take responsibility for their actions..."

111. In December 2021, Flor, Sara and Miriam submitted complaints to the respondent about the claimant's conduct towards them (242ff). The Tribunal had considerable difficulty with these documents as produced, since they were redacted to remove all names from them. It is entirely unclear to us why the documents were produced in a redacted form. If the complaints were about the claimant, there was no reason to redact them. However this hampered the Tribunal's ability to rely upon them as evidence before us. On the basis of the evidence of the respondent's witnesses, it appears that an investigation was carried out into the allegations against the claimant, but it is not clear what the outcome was.
112. The claimant was not aware of these allegations, nor of any investigation, until after he resigned.
113. The claimant had notified ACAS of his intention to submit a claim to the Employment Tribunal, engaging the Early Conciliation process, on 31 January 2022, and the Early Conciliation Certificate was issued by ACAS on 13 March 2022 (1).
114. He presented his claim to the Employment Tribunal on 11 April 2022 (2).

115. On 13 April, HR replied to say that they gathered from his email that he did not intend to resign from his position (228). The claimant replied the following day (228) to say that he could see that there was a misunderstanding, and repeated his statement that he considered himself constructively dismissed. The claimant sought to clarify the matter on 14 April 2022 (228):

"I can see there is a misunderstanding here. When I say that 'this corruption, your refusal to address my complaints, and your total failure to manage this situation lead me to no other option than consider myself constructively dismissed', I don't mean that I want to keep working for you, it means that this corruption, your refusal to address my complaints and your total failure to manage this situation lead me to no other option than consider myself constructively dismissed.

You have failed to comply with your own procedures for months.

I am aware of your tactics and legal creativity in previous cases. What will it be this time? Another sudden 'unsatisfactory performance'? Will you side with the ones who slandered me?

I have been honest and transparent during this process. I am ready for any lie that you want to use against me.

Bring it on.

Santiago Cubillo"

116. On 22 April HR replied (227) to note that they accepted his resignation and that his final payment would be processed on 20 May 2022.

117. The claimant's employment with the respondent came to an end with effect from 8 April 2022.

118. While employed with the respondent, the claimant earned £329.35 per week gross (£292.75 net).

119. Following the end of his employment with the respondent, the claimant gave himself 6 weeks to recover mentally and emotionally. He started an application for Universal Credit on 25 April 2022 but decided not to proceed with it. He did not, in the event, apply for or receive any state benefits after he left the respondent's employment.
120. He applied for a number of jobs in the finance and insurance sectors. He was interviewed and assessed by NatWest Group on 10 and 13 June 2022; he was interviewed by Lloyds Banking Group on 15 June 2022, and he was interviewed by Sykes on 20 June 2022.
121. On 1 July 2022, the claimant commenced employment with NatWest Bank, in their Customer Service department. He obtained that employment in the course of June 2022, though could not remember exactly when he was offered the position. He was employed for 28 hours per week and earned £10.97 per hour until 18 January 2023, when his pay rate was increased to £12.97 per hour. He left their employment on 2 March 2023, when he took up new employment as a kitchen porter/trainee chef with Edinburgh Street Food, working 4 days a week, earning £11 per hour.
122. The claimant attended at the Annandale Medical Practice, Huntingdon Place, Edinburgh, where he is registered as a patient. He produced a letter dated 28 July 2022, by Mahendra Shankar Gamare, Practice Mental Health Nurse (232), which stated:
- "This is to confirm that Mr Cubillo is registered with Annandale Medical Practice. I first interviewed Mr Cubillo on 09/02/2022. Mr Cubillo reported feeling low in mood, anxiety and sleep disturbances. He stated that these symptoms were triggered due to the work related stress. Mr Cubillo told me that he had episode of depression 7 years ago whilst in Spain and he was then seen by psychiatrist and treated with antidepressant medication at that time he was feeling suicidal also and had psychological therapy.*
- Mr Cubillo reported that his HR is trying to prove him wrong, his colleagues are calling him sexiest (sic), these kind of issues are*

disturbing him and he has been feeling more low in mood and anxious. Mr Cubillo were feeling very low in mood and significant anxiety causing him to have poor sleep. I therefore started him on Fluoxetine 20mg once a day. I have seen Mr Cubillo again on 09/03/2022 and on 06/05/2022. He has been compliant with medication and has been making steady progress. In my opinion Mr Santiago suffers from Depression and anxiety and needs period of treatment with antidepressant and periodic follow up."

123. He was able to stop taking his antidepressant medication at the start of June 2022 (49).

Submissions

124. Both parties presented submissions at the conclusion of the evidence. They were taken into careful consideration by the Tribunal in its deliberations and are referred to below as appropriate.

The Relevant Law

125. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, inter alia

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

...

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

126. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal

authority for claims of constructive dismissal is **Western Excavating -v- Sharp** (19781 ICR 221.

127. In considering the issues the Tribunal had regard to the guidance given in
5 **Western Excavating** and in particular to the speech of Lord Denning which gives the “classic” definition:

10 “An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in
15 either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.”

20 128. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

25 “...whether the employer’s conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably, if the employer’s conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract.”

30 129. What the Tribunal required to consider was whether or not there was evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

130. The Tribunal also took account of, the well-known decision in Malik v Bank of Credit & Commerce International SA [1997] IRLR 462, in which Lord Steyn stated that “The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.”

131. It is also helpful to consider the judgment of the High Court in BCCI v Ali (No 3) [1999] IRLR 508 HC, in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is “whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice.”

132. In Jones v Collegiate Academy Trust UKEAT/0011/10/SM, the EAT stated: “It is important to note that an objective test is to require whether the conduct complained of is calculated or likely to destroy or seriously damage the relationship; the subconscious of intent of the respondent is irrelevant as the Employment Tribunal correctly held... The subjective perception of the employee is also not relevant. The respondents’ conduct must be repudiatory in order to establish a breach of the implied term; it must be conduct by the respondent which objectively considered it likely to undermine the necessary trust and confidence in the employment relationship.”

133. Omilaju v Waltham Forest London Borough Council [2005] 1 All ER 75 is helpful in considering whether or not the resignation of an employee is a response to a last straw in a series of acts by the employer which amount, together, to a fundamental breach of contract. It is noted in that judgment: “The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that

breach, although what it adds may be relatively insignificant.” This endorses the view of the court in Lewis v Motorworld Garages Ltd [1985] IRLR 465: “The breach of this implied term of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?...This is the ‘last straw’ situation.”

134. The Tribunal also took into account the Employment Appeal Tribunal decision in Wright v North Ayrshire Council UKEATS/0017/13/BS from June 2013. In that case, having examined the line of authorities relating to claimants who resign for more than one reason, Langstaff J cautioned against seeking to find the “effective cause” of the claimant’s resignation, but found that Tribunals should ask whether the repudiatory breach played a part in the dismissal.

135. Finally, under this head, the Tribunal was referred by parties to Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 CA, and considered this as part of its reasoning.

136. Section 13(1) of the Equality Act 2010 (“the 2010 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.”

137. The Tribunal also had reference to section 26(1) of the 2010 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...*"

138. Section 27(1) of the 2010 also provides:

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"A person (A) victimises another person (B) if A subjects B to a detriment because -

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act."

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139. Section 27(2) confirms that a "protected act" includes *"making an allegation (whether or not express) that A or another person has contravened this Act."*

15 Discussion and Decision

140. It is important, at the outset, to set down the Issues before the Tribunal in this case, according to the List of Issues already established in this case. Unfortunately, it appears that the parties were unable to reach agreement as to the terms of that List of Issues.

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141. We have proceeded on the basis that the List of Issues set out at 63 is the appropriate formulation of the complaints before us. We do appreciate that the claimant disputed this, and that he took the view that the List of Issues should, or already did, include a complaint that he had been subjected to detriments or constructively dismissed on the grounds that he had made protected disclosures. However, that latter aspect of the matter was addressed and dealt with by the Tribunal in the course of the Hearing, and we have sought to consider the claimant's position with regard to the List of Issues set out at 66.

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142. We would observe that this is a case in which very little was agreed between the parties, and a spirit of suspicion and disputatiousness existed throughout the proceedings.

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143. However, the List of Issues which we consider to be properly before us is as follows:

Preliminary Issues

- 5 1. Are the claimant's claims of age discrimination and harassment relating to acts occurring in August and September 2021 time-barred? If so, should the claimant's claims of age discrimination and harassment in respect of these acts be dismissed?

Constructive Unfair Dismissal

- 10 2. Did the respondent act in breach of the claimant's employment contract? The claimant relies on the following alleged breaches:

a. The respondent's handling of his grievance complaints of 19 November 2021, including the appeal on 17 January 2022;

b. The respondent's handling of his grievance complaints of 21 December 2021;

15 c. The respondent's handling of his grievance complaints of 22 December 2021;

d. The respondent's handling of his grievance complaints of 17 January 2022;

20 e. The respondent's handling of his grievance complaints of 28 January 2022;

f. The respondent's handling of the investigation against the claimant started in December 2022;

g. The respondent's handling of the claimant's absence from 18 January 2022.

- 25 3. if so, was the breach sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement for the claimant to treat the contract as terminated with immediate effect?

4. If so, did the claimant's conduct have the effect of waiving any alleged breach? The respondent submits that the Following act waived any breach of contract which may have occurred: The claimant continued to be employed by the respondent and did not resign until 8 April 2022.

5. Did the claimant resign in response to the alleged breach?

Direct Discrimination

6. Was the claimant subjected to less favourable treatment by the respondent due to his age? The claimant relies on the following treatment:

a. To be called a sexist on 29 August 2021 by Maria Flor De Lis Celda Del Pozo;

b. The personal attacks on the claimant's age on 30 August 2021 by Miriam and Sara Hussein Celda;

c. The slander starting in August 2021 and extending into December of the same year by the 3 of them;

d. The informal meeting on 9 September 2021, with Dalbir Singh tolerating the constant interruptions and disrespect from Flor towards the claimant, even supporting her claims about her age giving her a special privilege;

e. The statements against the claimant's age done on 18 December 2021 when he confronted Flor and in the posterior meeting, where Flor claimed that she could not be treated like a normal colleague;

f. Dalbir Singh providing Flor and her daughters with confidential information about the claimant's complaints while telling him nothing about that;

- 5
- g. Flor and her daughters using bullying tactics against people she considered inferior because of her age, like Monica Isabelle Popovic or Cristina Villalba Herrera, which she did not use against people she considered of an “equal age”, such as Lucia Maria Rodriguez Brejo;
 - h. Maria Flor De Lis Celda Del Pozo, Miriam and Sara Hussein Celda declaring openly that their mother’s age made her superior, reinforced and rewarded by Dalbir Singh.

Harassment

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7. Did the respondent engage in the following unwanted conduct:
- 15 a. The slander starting in August 2021 and extending until December of the same year carried out by Maria Flor De Lis Celda Del Pozo, Miriam and Sara Hussein Celda; having promised to stop in September, did they continue to act in this way?
 - b. Sharing fragments of a secret recording with malicious intent by Maria Flor De Lis Celda Del Pozo, Miriam and Sara Hussein Celda on 18 December 2021;
 - 20 c. Unjustifiably dismissing the claimant’s grievances, especially in telling a lie about the initial email having gone to the respondent’s spam folder, the inaction of Dalbir Singh and Edyta Konarska and their showing total disregard for the claimant’s reputation or mental health, making them and HR accomplices to the harassment.
- 25
8. If so. was the conduct related to the claimant’s age?
9. If so, did the conduct have the purpose or effect of violating the claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Victimisation

10. Did the claimant do a protected act within the meaning of section 27 of the Equality Act 2010? The claimant relies upon the following acts:

- 5 a. On 19 November 2021, he raised a grievance for harassment against Maria Flor De Lis Celda Del Pozo;
- b. On 21 December 2021, he raised a grievance for harassment and discrimination against Maria Flor De Lis Celda Del Pozo, Miriam and Sara Hussein Celda;
- 10 c. On 22 December 2021, he raised a grievance for harassment and discrimination against Maria Flor De Lis Celda Del Pozo, Miriam and Sara Hussein Celda; pointing out some acts of misconduct on the part of managers in charge, Edyta Konarska and Dalbir Singh;
- 15 d. On 17 January 2022, he raised a grievance for discrimination and failure to comply with a legal obligation against Edyta Konarska and Dalbir Singh;
- e. On 28 January 2022, he raised a grievance for failure to comply with legal obligations against Jiji Rajagopal, Patrycja Bitowska,
20 Edyta Konarska and Dalbir Singh for failure to comply with a legal obligation.

11. Was the claimant subjected to the following detriments:

- 25 a. His grievance being ignored for 32 days from 19 November 2021, placing his mental health and reputation at unnecessary risk;
- b. Dalbir Singh giving Maria Flor De Lis Celda Del Pozo, Miriam and Sara Hussein Celda a detailed briefing of his complaint of 21 December 2021, while he learned nothing of their complaint

about him, both a breach of confidentiality and an unfair disadvantage;

5 c. Being moved to another shop while Sara and Miriam remain at the Tartan Weaving Mill, without being told what accusations he was facing;

d. Failing to grant the claimant the opportunity to have a meeting with Sara and Miriam as Mr Singh had on 23 December 2021, on the basis that he was advised that it could affect the investigation;

10 e. From 17 January 2022, having his appeal and grievances ignored systematically by the respondent; and despite the company admitting harassment in the outcome letter of 13 January 2022, no disciplinary action was taken against Maria Flor De Lis Celda Del Pozo, Miriam and Sara Hussein Celda;

15 f. Since raising a complaint against Mr Singh, the respondent refused to follow the corresponding legal procedures, causing the claimant to feel stress and helplessness.

12. If so, was the claimant subjected to the above detriments, or any of them, because he did the protected act or acts?

20 13. What award should be made for injury to feelings?

144. In addressing these Issues, we have chosen to take the preliminary issues at the conclusion of the Judgment, in order to do justice to the considerable evidence which we heard over the course of this Hearing.

145. Accordingly, we address the issues starting as follows.

25 2. Did the respondent act in breach of the claimant's employment contract? The claimant relies on the following alleged breaches:

a. The respondent's handling of his grievance complaints of 19 November 2021, including the appeal on 17 January 2022;

- b. **The respondent's handling of his grievance complaints of 21 December 2021;**
- c. **The respondent's handling of his grievance complaints of 22 December 2021;**
- 5 d. **The respondent's handling of his grievance complaints of 17 January 2022;**
- e. **The respondent's handling of his grievance complaints of 28 January 2022;**
- 10 f. **The respondent's handling of the investigation against the claimant started in December 2022;**
- g. **The respondent's handling of the claimant's absence from 18 January 2022.**

146. We are conscious that it is necessary to determine whether or not these individual breaches did in fact amount to breaches of the claimant's contract, but also to consider whether the claimant's resignation, in light of this sequence of events, justifies a finding of constructive dismissal.

147. The first grievance was dated 19 November 2021 (151) and raised the claimant's complaint that rumours were being put around the workplace to the effect that he was behaving in a sexist manner. The respondent did not respond until 21 December 2021, following a reminder from the claimant, but arranged a grievance meeting on 23 December 2021 by video, and issued its decision on 13 January 2022.

148. We understand the claimant's complaint about this aspect of the grievance to relate, firstly, to the delay in responding to it, and secondly, to the outcome which was issued.

149. There was a delay in responding to the grievance. The respondent's explanation was that the original email received from the claimant had been delivered to the spam folder in their inbox. The claimant clearly disbelieved this explanation, and pointed out that he had received an

automated email on receipt of the email, which would not have happened had it gone to the spam folder.

5 150. We are unable to draw any firm conclusions about this matter. We have not been presented with sufficient evidence to accept that the email could not have gone to the spam folder. It seems odd that the respondent does not routinely check its spam folder, but at the same time we have no evidence to persuade us that it is not possible for an email to go into a spam folder and at the same time generate an automatic receipt. In any event, we do not consider this to amount, on the evidence, to a deliberate
10 act or failure by the respondent.

15 151. The second aspect was the outcome of the grievance. The claimant appealed against the outcome, but only after writing to the respondent on 14 January 2022 to say that he was "satisfied with the resolution", and that he believed it was a fair result, and so he would not appeal. However, at the same time, he made clear that the reason for that was that he understood that he would be back at the store as soon as possible and that the harassment was considered to be gross misconduct.

20 152. However, having said that, the claimant unaccountably chose to embark on a lengthy statement about the legality of covert recordings and their use under the law of Scotland. It was not at all clear what purpose the claimant had in doing this, but it slightly obscured his reaction to the outcome of the grievance.

25 153. We considered that at that point the grievance might have been thought to have been concluded, but the claimant changed his mind and decided to appeal. His reason for doing so was that he was still working away from the store, whereas one of those against whom he had submitted his complaint was allowed to remain, and he regarded this as extremely unfair.

30 154. The appeal, submitted on 17 January 2022, only related to the terms of the letter of outcome, with which he had previously indicated that he was satisfied, the form of that letter without enumeration of detailed points, the

fact that he had not agreed the minute of the grievance hearing and the use of the covert recording. He did not raise the fact that he was working outwith the store and one of the others still working there, as a point of appeal.

5 155. The appeal was never heard. The claimant's absence from work due to ill health intervened, and thereafter an impasse developed between the parties as to whether or not any hearing could proceed in his absence from work, or before an Occupational Health assessment could take place.

10 156. We therefore considered whether or not the respondent's handling of this grievance could be said to amount to a breach of contract.

15 157. In our judgment, the initial handling of the grievance was reasonable. Albeit that there was a delay in responding to the grievance, caused by confusion over the original email, once it was dealt with, the claimant pronounced himself satisfied with it. It is plain to us that the respondent found the claimant's correspondence confusing and difficult to deal with, at least partly because he appeared to change his response to the outcome. He said he would not appeal, then quickly decided to submit an
20 appeal, but on grounds which did not include what appeared to be his major complaint, namely that he was not allowed to return to his regular workplace while another continued to work there.

25 158. However, the major issue here appears to us to be the claimant's complaint that the respondent failed to deal with his appeal. The respondent's reason for not proceeding with the appeal was that they wanted medical confirmation from OH that he was fit to attend such a meeting.

159. This issue arises in relation to the handling of the claimant's other grievances, and accordingly we will address this more fully below.

30 160. We deal next with the claimant's grievance of 21 December 2021, in the list of issues. The correspondence became somewhat profuse at this

point, and we have not been able to discern a separate grievance submitted by the claimant on that date.

5 161. The next grievance was submitted on 22 December 2021 (163). In this complaint, the claimant appears to raise complaints about the result of the original grievance, though the written outcome had not yet been issued. What he does complain about is that Mr Singh admitted having told the details of his complaint to “my harassers”, a breach of confidence, and that he had been moved to another shop until things were resolved.

10 162. He maintained that it was a breach of the company handbook to have disclosed the details of his complaint, and a breach of confidence. We are unclear as to what particular aspect of the company handbook he was referring to. In the Personal Harassment Policy and Procedure (138ff), under paragraph 2 (Formal Complaint), there is nothing which prevents the employer disclosing the terms of the complaint to the alleged harasser, and indeed we find it difficult to understand how an employer
15 could carry out a credible investigation without presenting the allegations to the alleged harasser in order to follow a fair procedure in relation to them.

20 163. The policy goes on to say, however: “*On receipt of a formal complaint we will take action to separate you from the alleged harasser to enable an uninterrupted investigation to take place. This may involve a temporary transfer of the alleged harasser to another work area or suspension with contractual pay until the matter has been resolved...*

25 *...Those involved in the investigation will be expected to act in confidence and any breach of confidence will be a disciplinary matter...*”

30 164. We interpret this final statement as meaning that if an investigator were to disclose to a third party not involved in the matter that an allegation had been made by the claimant against another employee, that would amount to a breach of confidence and potentially a disciplinary act. We do not consider that this means that an investigator cannot ask an alleged harasser about an allegation made against them.

- 5 165. As to the move to another store, we understood that the claimant and Flor were both moved at the same time, owing to the complaints being made by each other. However, the claimant's grievance had been raised, and we consider that the relevant complaint before us was that the respondent failed to address it.
166. Again, the evidence demonstrates that the reason why the respondent did not specifically address and respond to this grievance was the claimant's absence on sick leave.
- 10 167. The claimant then submitted two further grievances, on 17 January 2022 (187ff) and 28 January 2022 (198ff).
- 15 168. On 17 January 2022, the claimant's grievance was raised against Ms Konarska and Mr Singh, and their handling of the original grievance. In this email the claimant commenced his complaint by referring to events in September 2021, prior to the agreement he signed and reached with his colleagues in early October 2021. He also complained about unlawful discrimination, referring to the disclosure of his complaint to the alleged harassers and to the decision to move him and Flor out of the store.
- 20 169. On 28 January 2022, the claimant's grievance was raised against Mr Singh, Ms Konarska, Ms Rajagopal and Ms Bitowska. His complaints related, again, to the handling of his first grievance and its outcome, to the correspondence with solicitors in relation to a potential settlement agreement and to the demands which he now saw fit to impose upon the respondent, and in particular the dismissal of Flor and her daughters, a public apology along with his full reincorporation into the store and
25 compensation for damages to his health. In addition, he went so far as to seek the dismissal of Mr Singh, and for Ms Konarska, Ms Rajagopal and Ms Bitowska to be given the opportunity to resign.
- 30 170. Neither of these grievances were ever resolved, for the same reason as the grievance submitted on 22 December, that is, that the claimant remained absent on sick leave and was not considered by the respondent to be fit to attend a grievance meeting.

171. We considered that the claimant's grievances were repetitive and increasingly hostile in their terms, and that some of his demands were unrealistic and unreasonable. However, at the same time, the fundamental question which we require to address is whether or not the respondent's failure to hear and resolve those grievances amounted to a breach of contract.
172. The respondent's grievance procedure (127) is notably concise, amounting to five short paragraphs. It is silent on how the respondent would deal with a situation where an individual was absent on ill health while outstanding grievances remain.
173. The claimant submitted his first Statement of Fitness for Work confirming he was unfit for work due to stress on 26 January 2022. The respondent attempted to arrange a welfare meeting on 4 February 2022, and from the start of that correspondence, the claimant insisted that such a meeting should also cover what he described as the "constant dismissal" to which he had been subjected. We understood the claimant to mean that his complaints had not, in his view, been taken seriously by the respondent nor properly dealt with. On 4 February, the claimant reminded the respondent that there were outstanding meetings about his grievances which had not been arranged. On 9 February he wrote again, to complain that his concerns were being constantly dismissed, and set a deadline of 11 February for them to respond, otherwise he would raise legal action.
174. On 11 February, the respondent wrote to the claimant to ask him a number of questions about his state of health, and to request his consent to approach his GP or OH for a medical report. They also wrote on that date to ask him to provide a further sick line.
175. In response, on 12 February, the claimant complained that the dismissal of his grievances, as he put it, was disturbing, and that the respondent had failed to comply with his deadline in the email of 11 February,
176. By this point, it was clear that the parties were communicating in parallel with each other. The claimant was constantly raising the fact that his

grievances had not been attended to; the respondent was repeatedly asking him to provide an updated Statement of Fitness for Work, and for consent to obtain medical advice as to his condition.

5 177. This process culminated in the claimant's resignation, in his email of 8 April 2022, when he confirmed that he regarded himself as constructively dismissed, without any effective break in the impasse which had developed between them.

10 178. As a result, we require to consider whether or not the respondent's failure to deal with the claimant's grievances of 22 December 2021 and 17 and 28 January 2022 amounted to a repudiatory breach of the claimant's contract of employment. The claimant was repeatedly insisting that the respondent had to address his grievances, and at no stage did they convene a hearing at which to hear and investigate those grievances.

15 179. We have concluded that the respondent did not arrange a grievance hearing because they wanted to obtain medical advice to inform themselves about the claimant's condition. The claimant spoke of a medical suspension, which was difficult to understand, since he submitted a medical certificate himself and absented himself from work due to illness, namely stress and depression. It appears to us that he associated
20 his condition with the actions or inactions of the respondent, and that his wish was to bring his grievances to the attention of the respondent properly so that the matters therein could be resolved.

25 180. Further, we are of the view that the respondent did not refuse to hear the claimant's grievances, but approached his sickness absence with some caution, and were unwilling to proceed with the grievance hearing until they had informed themselves about his medical condition.

30 181. It is our conclusion that while the claimant was clearly frustrated by what he perceived to be unreasonable delays on the part of the respondent in dealing with his grievances, the respondent did not act in breach of the fundamental terms of the contract of employment by not convening a grievance hearing for the claimant until they had more information about

his medical condition. They were acting very cautiously by this stage, and in our view this was entirely understandable. The claimant's correspondence was very lengthy and hostile, and his demands were becoming quite unreasonable, in essence seeking the dismissal of all those with whom he was displeased.

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182. The respondent clearly felt that it was necessary to be sure that the claimant was fit to attend a hearing about his grievances. It is not obvious that an employer who is faced with such grievances should press on with hearing them in spite of the employee's absence on sick leave. The claimant confirmed that he was suffering from depression, and therefore they wished to be sure that he was well enough to deal with the matters which, he said in evidence, were causing him to be unwell.

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183. We also concluded that the delay in dealing with the claimant's grievances was, at least in part, brought about by the manner in which the claimant corresponded with the respondent. He agreed initially that the welfare meeting could take place remotely, partly because the original letter sent to him suggested that it could take place at his home, and then changed his position to insist that the managers should attend at his home for such a meeting. We did accept that the respondent introduced some confusion into this matter by changing their position. He also refused to give permission for the respondent to seek medical advice from his GP or from OH, and he stopped submitting medical certificates altogether. In our view, his behaviour was inconsistent and obstructive, and he was responsible for the delay as much as the respondent was.

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184. However, there is one aspect of the claimant's grievances, and the way in which the respondent handled them, which requires to be considered in particular: the claimant was redeployed from the store to another location owned by the respondent, and once his original grievance was substantially upheld, he had the expectation, which he made explicit, that he would be allowed to return to the store. The respondent never returned him to that location. Their explanation for this was that another store was

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dependent upon him to complete their rota, and that it would take several weeks for them to rearrange the rota so as to allow him to be returned.

185. This explanation was curious, and not, in our view, sustainable, for two reasons: firstly, the claimant was moved from the store without delay; and
5 secondly, it was not at all clear from the evidence why the rota required to be arranged so far in advance in the other store. The claimant sought to bring copies of the rota from that store to the Tribunal, and to demonstrate that they were not listed for 3 weeks at a time. As a result, we did not accept that the reason why the claimant was not restored to
10 his home store was that given by the respondent.

186. There may well have been difficulties in bringing that into effect, in the event, since the claimant was unwilling to contemplate working with those whom he had accused of harassment, and ultimately demanded their
15 dismissals. There may also have been a difficulty in that the respondent gave evidence before us that there was an ongoing investigation into a complaint against the claimant, but we heard very little about that, and in any event it is clear that the claimant was unaware of that at the time he resigned. However, the respondent made no effort to engage with the claimant about returning to his home store, and as a result, his frustration
20 with that point, and his deep sense of injustice about this and other matters, led, in our judgment, to his resignation.

187. Accordingly, we have reached the conclusion that in this respect, the respondent did act in such a way as to undermine the implied term of
25 trust and confidence between employer and employee, and thus acted in breach of the contract of employment. The claimant was aware that Flor's daughters had never been moved from the store, and that while Flor remained elsewhere, his continued removal from the store led him to believe that the respondent considered that he was at fault for the issues which had arisen, notwithstanding the findings of the original grievance in
30 which they upheld his assertion that he had been subject to harassment by Flor, and to a lesser extent her daughters Sara and Miriam.

188. We then addressed the issue of whether or not the respondent's handling of the investigation against the claimant which was started in December 2022 amounted to a breach of the claimant's contract of employment.
189. We were unimpressed by the quality of the evidence presented on this matter, given that the original complaints submitted by the 3 complainants were all redacted. As a result, the Tribunal considered that very little weight could be placed upon them, or upon any of the documents produced thereafter in relation to the investigation.
190. However, it is our clear understanding from the evidence that the claimant was not aware of these allegations, nor of the investigation, until after he resigned. If that is correct, then the claimant cannot have had that matter in contemplation when he resigned, and therefore it cannot form part of his claim for constructive unfair dismissal.
191. Finally, the claimant regarded the handling of his absence from 18 January 2022 as amounting to a breach of his contract of employment. For the reasons we have set out above, we do not consider that the respondent's handling of his absence represented a repudiatory breach of contract. They sought to investigate his illness in order to meet with him and discuss his absence, and any possible return, but he acted in an inconsistent and obstructive manner in his correspondence about this matter with them. Further, he remained absent beyond the point when his medical certificate expired, and as a result, the respondent cannot be criticised for the way in which they dealt with him during this absence.
192. It is therefore our conclusion that the respondent did act in breach of the claimant's contract of employment by failing to take prompt action to arrange for the claimant to return to work in the Tartan Weaving Mill once his grievance had been substantially upheld, but that his other complaints of constructive dismissal fail, and are dismissed.
3. if so, was the breach sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement for the claimant to treat the contract as terminated with immediate effect?

4. **If so, did the claimant's conduct have the effect of waiving any alleged breach? The respondent submits that the following act waived any breach of contract which may have occurred: The claimant continued to be employed by the respondent and did not resign until 8 April 2022.**

5. Did the claimant resign in response to the alleged breach?

193. We considered, then, whether the breach which we have identified was sufficiently serious as to constitute a repudiatory breach of the contract, giving the claimant the right to treat the contract as terminated with immediate effect.

194. The respondent moved the claimant out of the Tartan Weaving Mill in order to carry out their investigation into the dispute which had arisen between him and Flor, Sara and Miriam. They told him it was a temporary measure, and once his grievance had been substantially upheld, he had, in our view, a reasonable expectation that the respondent would take steps to return him to his home store. The grievance process was complete. We accept that there may have been some difficulties in returning him to the store, particularly given the claimant's desire to see formal action taken against all those whom he felt had wronged him. However, the complete failure to address this issue, or even to communicate with him about it, together with the explanations which were presented to us by the respondent and which we rejected, led us to the conclusion that the failure to take steps to return the claimant to the Tartan Weaving Mill did undermine the claimant's trust and confidence in the respondent because it contradicted the findings of the grievance process (which had substantially upheld his complaints), and was not based on any good reason put forward by the respondent.

195. We take into account the provision in the claimant's contract of employment that he would be required to work at 555 Castlehill, Edinburgh (the Tartan Weaving Mill), or at any of the respondent's other addresses (115). However, it is critical that in this case the reason why he

was moved to another store was that the respondent required him to be absent while they investigated his complaints; and their failure to allow him to return, without good reason, undermined his trust and confidence in the company.

5 196. We did not conclude that the claimant could be said to have waived the breach. This was a situation which arose following the findings of the grievance hearing, and persisted until the claimant resigned, for a period during which the respondent took no action to return the claimant to the store or to communicate with him about that in an effective manner.

10 197. Finally, did the claimant resign in response to the alleged breach? We require to consider, where there may be a number of causes of a resignation, what may be said to be the effective cause of the resignation. In our view, the claimant's resignation email, dated 8 April 2022 (229/30) refers to the failure of the respondent to address the claimant's
15 grievances, the respondent's "corruption" and their total failure to manage the situation were what led to the claimant's resignation. He did not refer to the respondent's failure to return him to the Tartan Weaving Mill, albeit that that had formed a significant part of his correspondence to that date. It is reasonable, in our view, to conclude that the claimant resigned owing
20 to a build-up of frustration with the respondent due to the impasse which had arisen, and that their failure to return him to the store was part of that.

198. In our judgment, therefore, the claimant resigned in part because of the failure to return him to the Tartan Weaving Mill, notwithstanding that he did not refer to it in the resignation email, as it had clearly been part of his
25 complaints to the respondent to that date.

199. It is our judgment that the claimant was unfairly constructively dismissed by the respondent in respect of the fundamental breach of contract.

Direct Discrimination

8. Was the claimant subjected to less favourable treatment by the respondent due to his age? The claimant relies on the following treatment:

- 5 a. To be called a sexist on 29 August 2021 by Maria Flor De Lis Ceida Del Pozo;
- b. The personal attacks on the claimant's age on 30 August 2021 by Miriam and Sara Hussein Ceida;
- 10 c. The slander starting in August 2021 and extending into December of the same year by the 3 of them;
- d. The informal meeting on 9 September 2021, with Dalbir Singh tolerating the constant interruptions and disrespect from Flor towards the claimant, even supporting her claims about her age giving her a special privilege;
- 15 e. The statements against the claimant's age done on 18 December 2021 when he confronted Flor and in the posterior meeting, where Flor claimed that she could not be treated like a normal colleague;
- 20 f. Dalbir Singh providing Flor and her daughters with confidential information about the claimant's complaints while telling him nothing about that;
- g. Flor and her daughters using bullying tactics against people she considered inferior because of her age, like Monica Isabelle Popovic or Cristina Villalba Herrera, which she did not use against people she considered of an "equal age",
25 such as Lucia Maria Rodriguez Brejo;
- h. Maria Flor De Lis Ceida Del Pozo, Miriam and Sara Hussein Ceida declaring openly that their mother's age made her superior, reinforced and rewarded by Dalbir Singh.

200. The claimant raised a large number of complaints under this heading, and we seek to deal with them as concisely as possible.

201. The fact that the claimant may have been accused of being sexist by Flor on 29 August 2021 is irrelevant to the question of age, in our view. There is no basis upon which we could find that this was, in any event, an act of the respondent, who were unaware of it at the time, and when it was drawn to their attention, they addressed it in a manner which led to a written agreement signed by all parties, including the claimant.

202. Again, the alleged personal attacks on the claimant's age on 30 August 2021 were not acts of the respondent, and once dealt with, reached an apparently satisfactory solution. In any event, we do not accept that the claimant's age was attacked by Sara and Miriam; they simply asserted that their mother's age entitled her to be treated with respect. He may have taken it that that amounted to a negative comparison with his own age, but these comments did not, in our judgment, amount to less favourable treatment on the grounds of the claimant's age by the respondent.

203. The claimant referred to "the slander" by Flor, Sara and Miriam from August to December 2021. Once again, we do not consider that this amounted to less favourable treatment by the respondent against the claimant on the grounds of his age. The reality is that this situation was related to allegations of sexism, but no claim of sex discrimination was brought by the claimant.

204. The claimant raised the informal meeting of 9 September 2021 as demonstrating that Mr Singh showed more respect to Flor due to her age, and allowed her and her daughters to interrupt the claimant. In our judgment, this meeting was one characterised by both the claimant and Flor interrupting each other, and in any event, the respondent dealt with this dispute by obtaining their mutual agreement that the matter was based on a misunderstanding and to work constructively together.

205. Further, although the claimant put to Mr Singh in cross-examination that he had made reference to Flor's age during that meeting, he himself gave no evidence to the effect that Mr Singh had treated Flor better in that meeting specifically because of her age. He did not raise that in his email following the meeting dated 11 September 2021 (148). Given that the claimant has demonstrated his ability and willingness to raise complaints about his treatment at the time throughout this case, we find that there is no basis for his assertion that Mr Singh supported Flor's demand to be treated with greater respect due to her age.

206. Mr Singh did accept that he had made reference to the age difference during the meeting, but also said that he had confirmed that regardless of age, respect has to be earned.

207. We accept that section 13(1) of the 2010 Act provides that discrimination can arise where a person is treated less favourably "because of a protected characteristic", and not on the grounds of the claimant's age. It is therefore open to the Tribunal to find that less favourable treatment could have taken place if the respondent had acted as it did because of Flor's age. In any event, reference to Flor's age is, by implication, a reference to the claimant's age, since it differs from hers.

208. That said, we have not found that Mr Singh acted in such a way at the meeting of 9 September 2021 as to treat the claimant less favourably because of the protected characteristic of age, nor have we concluded that he supported Flor's assertion that she should be accorded greater respect because of her age. Accordingly, we are unable to find that this was an example of the respondent treating the claimant less favourably due to his age.

209. The claimant complained about the statements about his age made by Flor on 18 September 2021 and in the "posterior" (which we think means subsequent) meeting, where Flor claimed that she could not be treated like a normal colleague. We do not consider that the respondent treated the claimant less favourably than any other due to his age, in this

encounter. There is no doubt that there was bad behaviour by Flor around this time, and this led to her being investigated under the claimant's grievance. The respondent addressed the claimant's concern that he had been subjected to unfair accusations of sexism, and upheld them. There is no basis for his constant assertion that he was treated less favourably by the respondent due to his age.

210. The claimant's allegation that Mr Singh provided Flor and her daughters with confidential information about the claimant's complaints without telling him is an allegation unrelated to age. In any event, we are unable to discern any unlawful act committed by Mr Singh here. There is no basis to find that Mr Singh did what he did because of his age, and the claimant does not allege that clearly in any event.

211. The allegation that Flor and her daughters used bullying tactics against people she considered inferior because of her age is not an allegation that the claimant himself was treated less favourably because of his age, but relates to others within the business. We heard no direct evidence about this allegation, but it is in any event irrelevant to his claim.

212. The final allegation under this heading, the Flor's daughters proclaimed that their mother's age entitled her to special treatment, is unrelated to the claimant and does not amount to an allegation that he was treated less favourably because of his age.

213. As a result we are unable to conclude that the claimant has proved that he was directly discriminated against on the grounds of his age. This is a set of allegations without merit and we dismiss them.

25 **Harassment**

7. Did the respondent engage in the following unwanted conduct:

- a. The slander starting in August 2021 and extending until December of the same year carried out by Maria Flor De Lis Celda Del Pozo, Miriam and Sara Hussein Celda; having

promised to stop in September, did they continue to act in this way?

b. Sharing fragments of a secret recording with malicious intent by Maria Flor De Us Celda Del Pozo, Miriam and Sara Hussein Celda on 18 December 2021;

c. Unjustifiably dismissing the claimant's grievances, especially in telling a lie about the initial email having gone to the respondent's spam folder, the inaction of Dalbir Singh and Edyta Konarska and their showing total disregard for the claimant's reputation or mental health, making them and HR accomplices to the harassment.

8. If so, was the conduct related to the claimant's age?

9. If so, did the conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

214. We take these allegations together. The claimant repeatedly used the word "slander" throughout these proceedings, as indeed he used a number of legal phrases and terms, without being entirely clear as to what such legal terms meant. We interpreted his use of the word slander to mean, simply, that Flor, Sara and Miriam directed insulting or derogatory remarks to him or to others about him.

215. The difficulty for the claimant is that his complaints essentially related to the ongoing dispute between himself and Flor, and her daughters, that she had called him sexist, and continued to do so after she had promised not to. There is no basis, in our judgment, for finding that these allegations or remarks were made on the grounds of his age. They were directed at his being sexist, in the workplace.

216. The claimant has regularly asserted that the respondent shared fragments of a secret recording with malicious intent. We found the claimant's complaints here difficult to follow. There is no doubt that he

was upset when he discovered that the 3 individuals he complained about had made a recording of a conversation, but he himself had recorded that same conversation, at least in part, and in his evidence, with their knowledge. We found his attitude rather unaccountable. In any event, we found that Mr Singh insisted that when the recording was played it should be switched off within seconds. We accepted that evidence, which was supported by Ms Konarska, who was present. The claimant was not.

217. In any event, why this was said to be related to the claimant's age, even if it were a wrongful act, was never made clear by the claimant.

218. The third allegation under this heading is an extraordinarily broad allegation, effectively encompassing the entire grievance procedure, but does not suggest that any of these actions were in any way related to the claimant's age.

219. We formed the view that the claimant wanted to make as many allegations as possible against those with whom he was most angry, and as a result lost some focus and coherence in his complaints. There was no basis for his suggestion that these acts were such as to amount to harassment on the grounds of age.

220. Accordingly, we dismissed the claimant's claims that he was harassed by the respondent on the grounds of age.

Victimisation

10. Did the claimant do a protected act within the meaning of section 27 of the Equality Act 2010? The claimant relies upon the following acts:

- a. On 19 November 2021, he raised a grievance for harassment against Maria Flor De Lis Celda Dei Pozo;
- b. On 21 December 2021, he raised a grievance for harassment and discrimination against Maria Flor De Lis Celda Del Pozo, Miriam and Sara Hussein Celda;

- 5
- c. On 22 December 2021, he raised a grievance for harassment and discrimination against Maria Flor De Lis Celda Dei Pozo, Miriam and Sara Hussein Celda; pointing out some acts of misconduct on the part of managers in charge, Edyta Konarska and Dalbir Singh;
- d. On 17 January 2022, he raised a grievance for discrimination and failure to comply with a legal obligation against Edyta Konarska and Dalbir Singh;
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- e. On 28 January 2022, he raised a grievance for failure to comply with legal obligations against Jiji Rajagopal, Patrycja Bitowska, Edyta Konarska and Dalbir Singh for failure to comply with a legal obligation.

11. Was the claimant subjected to the following detriments:

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- a. His grievance being ignored for 32 days from 19 November 2021, placing his mental health and reputation at unnecessary risk;
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- b. Dalbir Singh giving Maria Flor De Lis Celda Del Pozo, Miriam and Sara Hussein Celda a detailed briefing of his complaint of 21 December 2021, while he learned nothing of their complaint about him, both a breach of confidentiality and an unfair disadvantage;
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- c. Being moved to another shop while Sara and Miriam remain at the Tartan Weaving Mill, without being told what accusations he was facing;
- d. Failing to grant the claimant the opportunity to have a meeting with Sara and Miriam as Mr Singh had on 23 December 2021, on the basis that he was advised that it could affect the investigation;

e. **From 17 January 2022, having his appeal and grievances ignored systematically by the respondent; and despite the company admitting harassment in the outcome letter of 13 January 2022, no disciplinary action was taken against Maria Flor De Lis Ceida Del Pozo, Miriam and Sara Hussein Celda;**

f. **Since raising a complaint against Mr Singh, the respondent refused to follow the corresponding legal procedures, causing the claimant to feel stress and helplessness.**

12. If so, was the claimant subjected to the above detriments, or any of them, because he did the protected act or acts?

221. Section 27(2) sets out the types of act which may be determined to be protected acts, of which the claimant appears to be complaining about making an allegation, whether or not express, that "A or another person" has contravened the Equality Act 2010.

222. It must be borne in mind that the claimant's claim is one of discrimination on the grounds of age, when considering all of the matters under this heading.

223. Dealing with each of the protected acts alleged by the claimant, we considered as follows:

- The claimant's grievance of 19 November 2021 (151) focused on the allegation that Flor and her daughters were alleging, untruthfully, that he had been making sexist remarks and sexist behaviours. That is not an allegation, as we read it, that others had contravened the Equality Act 2010, but that they had accused him of doing so. This is not, in our view, a protected act.

- » The claimant's complaint on 21 December 2021 appears to have been made verbally, and not in writing. There were, by the claimant's account, 3 meetings on that date. His evidence was that he had requested a formal meeting about harassment, and discrimination. It appears that the harassment and discrimination

of which he was complaining related to the allegations being made by Flor and her daughters that he had acted in a sexist manner. Again, these are not accusations that someone had acted in contravention of the Equality Act 2010, but that they had accused him of doing so, and he felt unfairly treated, and harassed, by those accusations. We do not consider this to be a protected act.

- On 22 December 2021, the claimant submitted a further grievance (163). He complained about being called sexist again, and went on to say that Flor, Sara and Miriam demanded different treatment of Flor because of her age, insisting that being older made her superior. Again, the claimant's complaint consistently referred to Flor's age, but we accept that in terms of section 13(1) of the 2010 Act, less favourable treatment on the grounds of a protected characteristic is unlawful. The age does not require to be the age of the person complaining of the less favourable treatment, but in this case we considered that the claimant's allegation was that he was treated less favourably on the grounds of age due to the fact that, in his view, preferential treatment was accorded to Flor because she was older than he was. As a result, we are prepared to accept that this grievance amounted to a protected act under section 27.

- On 17 January 2022, the claimant's grievance (187) against Mr Singh and Ms Konarska referred to endangering the safety and health of an individual (the claimant) and failing to comply with a legal obligation, which appears to be a criticism about breaching confidentiality and accepting the audio recording taken by Flor, Sara and Miriam. He went on, however, to complain of unlawful discrimination, in the form of Flor being allowed to disrespect him in front of Mr Singh, disclosing his complaint to the 3 alleged harassers and allowing Sara and Miriam to continue working in the shop while he and Flor were moved out. He maintained that this amounted to unlawful discrimination. There is no mention in

5 this email of the claimant's age, nor anyone else's. He was plainly complaining about unfair treatment, but not about age discrimination. His complaint, moreover, focused on both Flor and her daughters, who are of different ages, and therefore it appears that he was not complaining of unfair treatment on the grounds of age. He may well have been intending to complain about treatment based on sex, but he did not say so, and indeed his claim does not raise such a head of claim. Accordingly, we do not consider this grievance to amount to a protected act in this case.

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- On 28 January 2022, the claimant raised another complaint, this time against Ms Rajagopal, Ms Bitowska, Ms Konarska and Mr Singh (198). This complaint relates to the same issues as the earlier complaint, but at no stage did the claimant make any reference to age as the basis for the complaint. He did refer to victimisation, but we considered that to use the term in its
- 15 ordinary meaning, rather than that borne by section 27 of the Equality Act 2010. Accordingly, we do not consider this to be a protected act in this case.

20 224. We have concluded, therefore, that the claimant did do a protected act, namely raising a grievance about discrimination on the grounds of age on 22 December 2021.

225. We must therefore consider whether or not the claimant was thereafter subjected to detriments as a result of having done that protected act.

25 226. The first two alleged detriments related to his grievance of 19 November having been ignored for 32 days, and Mr Singh having given the 3 alleged harassers a briefing about his complaint, on 21 December 2021, took place before he did the protected act on 22 December 2021. As a result, they cannot amount to detriments visited upon him because of the protected act.

30 227. He complains then that being moved to another store while Sara and Miriam remained at the Tartan Weaving Mill without being told what

accusations he was facing amounted to a detriment as a result of the protected act. We did not conclude that this was correct. The claimant was moved to another store, as was Flor, in order to keep them separate while his complaint was being investigated. Of itself, while communications could have been much better, this did not amount to a detriment to the claimant on the grounds of age, or for having done a protected act. The claimant's original grievance was being investigated. Flor and the claimant were both moved at the same time, and accordingly he was not treated differently to her on the grounds of age.

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10 228. In any event, we did accept that there was a rational basis for the claimant and Flor being moved to different stores, on a temporary basis, so that the investigation into the claimant's grievance could be conducted outwith their presence. It did not, therefore, amount to a detriment to which the claimant was subjected as a result of having raised an issue about differential treatment to Flor due to age.
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229. As to the claimant's allegation that he was subjected to a further detriment, by the respondent failing to grant him the opportunity to meet with Sara and Miriam as Mr Singh had on 23 December, we simply do not understand why the claimant would regard this as a detriment. It was entirely understandable, in our judgment, that the respondent would treat cautiously the relationships between the claimant and Flor, Sara and Miriam, in the circumstances where they had observed what appeared to be a significant personal dispute between them. We are unclear as to what purpose such a meeting would have served, and we do not consider it to amount to a detriment to have declined to have offered the claimant that opportunity. In any event, we do not accept that the evidence shows that such a decision was taken as a result of his having raised a grievance in which he complained about being treated less favourably on the grounds of age, in comparison with Flor.
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30 230. The next detriment complained of by the claimant was that his grievances and appeal were ignored systematically by the respondent, and no disciplinary action was taken against Flor, Sara and Miriam. We do not

5 accept that his grievances and appeal were ignored systematically, or at all, by the respondent. They sought to establish the claimant's medical condition, and to ensure that he was fit enough to attend a meeting about these matters. While we accept that the claimant became very frustrated by this approach, we considered that there was a justification for the respondent to be cautious about the claimant's health in considering how to deal with these matters. We do not consider that the respondent acted the way they did because he had raised the complaint about being treated less favourably on the grounds of age. Rather, we came to the
10 conclusion that the respondent's managers and HR staff were very cautious in dealing with the claimant as they wished to ensure that he was treated fairly.

231. We cannot sustain the claimant's submission that the respondent's failure to take disciplinary action against Flor, Sara and Miriam could amount to a detriment to him. In fact, we are unsure, from the evidence, what if any
15 steps were taken against Flor in particular as a result of the grievance outcome. It is not for the claimant to demand the dismissal of any other member of staff, and as a result, we do not consider this to amount to a detriment.

20 232. The claimant's final alleged detriment was that since raising a complaint against Mr Singh, the respondent refused to follow the corresponding legal procedures. We are unaware of the particular legal procedures which the claimant was referring to here, but it seems to relate to the respondent's failure to investigate and act upon his grievances and
25 appeal. We have already found that this did not amount to a detriment arising from the protected act.

233. The claimant's claim of victimisation therefore fails.

13. What award should be made for injury to feelings?

234. On the basis that the claimant's claims of discrimination on the grounds of
30 age have not been upheld, no award is made for injury to feelings.

1. Are the claimant's claims of age discrimination and harassment relating to acts occurring in August and September 2021 time-barred? If so, should the claimant's claims of age discrimination and harassment in respect of these acts be dismissed?

- 5 235. On the basis that we have not upheld the claimant's complaints of age discrimination and harassment relating to acts in August and September 2021, we do not address the question of time bar at this stage.

10 **Remedy**

236. One matter does remain, however. The Tribunal has found that the claimant was constructively unfairly dismissed by the respondent. An award of compensation requires to be made by the Tribunal in recognition of this finding.
- 15 237. No evidence was heard, nor was any challenge made to the claimant, to the effect that he would have been dismissed anyway, had the claimant remained in employment with the respondent beyond his resignation date. As a result, we must consider the compensation which it would be just and equitable to award to the claimant.
- 20 238. The parties submitted schedules of loss (275 and 277) which enabled us to calculate the figures sought.
239. The claimant is entitled to a basic award. His gross weekly pay was £329.35, and net weekly pay was £292.75 (the respondent's figures were slightly higher than the claimant's, and accordingly we have accepted them).
- 25 240. The claimant was born on 15 February 1992 and was employed by the respondent for 2 complete years. As at the date of his resignation, 8 April 2022, the claimant was 30 years of age. Accordingly, the claimant's basic award is £329.35 x 2, which brings out a figure of **£658.70**.

241. With regard to a compensatory award, the claimant's employment ended on 8 April 2022. He commenced new employment on 1 July 2022. He was therefore out of work following his resignation for a period of 12 weeks.

5 242. On 1 July 2022, he commenced employment with NatWest Bank, working in their Customer Service department. He worked 28 hours per week, earning £10.97 per hour, which increased to £12.97 per hour from 18 January 2023. Accordingly, his weekly gross pay on commencement was £307.16.

io 243. The claimant did not apply for nor receive any state benefits following his resignation from the respondent's employment.

15 244. In his schedule of loss, the claimant does not seek payment beyond 1 July 2022. We consider this to be reasonable. His losses consequent upon his constructive dismissal are therefore 12 weeks at £292.75, which brings out a figure of £3,513.

245. In addition, the claimant seeks the loss of his employer pension contributions for that period, which amounts to 12 x £6.37, a figure of **£76.44.**

20 246. Finally, we accept that the claimant should receive a sum in respect of loss of employment rights, of £500.

247. Accordingly, the respondent is ordered to pay to the claimant the sum of **£4,748.44.**

248. On the basis that we have not upheld the claimant's complaints of discrimination on the grounds of age, no award for injury to feelings is made.

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Employment Judge: Macleod
Date of Judgment: 01 November 2023
Entered in register: 02 November 2023
and copied to parties

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