Case Number 1302088/2022
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms B Bahia		**Send DM Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 2 – 6 October 2023

EMPLOYMENT JUDGE GASKELL **MEMBERS: Mrs J Whitehill**
Mr J Kelly

Representation
For the Claimant: **Mr P Wilson (Counsel)**
For the Respondent: **Mr T Perry (Counsel)**

JUDGMENT
(Issued to the parties on 6 October 2023. Set out here for ease of reference.)

The unanimous Judgement of the tribunal is that:

1 The claimant was not dismissed by the respondent. The claim for unfair dismissal is not well-founded and is dismissed.
2 The claimant was not dismissed by the respondent. The claim for wrongful dismissal is dismissed.
3 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaint of direct sex discrimination, pursuant to Section 120 of that Act, is dismissed.
4 There is an award to the claimant payable by the respondent in the sum of £269.23 (gross) for unpaid holiday pay.

REASONS

Introduction

1 The claimant in this case is Mrs Balraj Bal (ne Bahia) who was employed by the respondent, Send DM Limited, as Client Services Director from 19 June 2019 until 4 February 2022 when she resigned.

2 By a claim form presented to the tribunal on 23 April 2022, the claimant brought claims before the tribunal for unfair dismissal, and for discrimination on

the grounds of age, race, religion & belief, and sex. And that she was owed notice pay, holiday pay, arrears of pay, and other unspecified payments.

3 When the claimant provided further and better particulars of her claim on 5 October 2022, she withdrew her claims for discrimination on the grounds of age, race and religion & belief together with her claims for arrears of pay and other unspecified payments. The remaining claims which have been considered by this panel are the claims for unfair constructive dismissal, direct sex discrimination, wrongful dismissal and unpaid holiday pay.

4 The respondent's position is this that the claimant was not dismissed and that accordingly her claims for unfair and wrongful dismissal are misconceived. That no action taken by the respondent in relation to the claimant was in any way connected to her sex. Further the respondent's case is that there is no outstanding holiday pay.

5 In the event that the panel was to find that the claimant was dismissed, the respondent's case is that she was dismissed for the potentially fair reason of capability. And that her claim for wrongful dismissal is significantly undermined by fundamental breaches of the employment contract on the claimant's part prior to her resignation.

6 In advance of a preliminary hearing conducted by Employment Judge Hindmarch on 7 November 2022, the claimant prepared a draft list of issues which was agreed between the parties subject to a number of clarifications set out in Paragraph 19 of Judge Hindmarch's Order.

7 This final hearing was conducted face-to-face at the tribunal hearing centre in Birmingham save for one day, Wednesday, 4 October 2022, when Mrs Whitehill attended remotely by CVP because her travel to the hearing centre was affected by industrial action on the railway.

8 During the course of the hearing, the respondent conceded that the claimant was owed two days holiday pay in the sum of £269.23 gross. The claimant contends for a further four days unpaid holiday pay in the total sum of £538.46 gross.

The Evidence

9 The claimant gave evidence on her own account - she did not call any additional witnesses. The respondent relied on the evidence of four witnesses: its principal witness was Mr Bruce Thomson the owner and former Managing Director of the respondent which was sold in January 2023. In addition, the respondent called evidence from a Mrs Lynn Holman - Mailing Operative; Mr

Dean Evans - IT/Data Processing Manager and Mrs Louise Woodward - Receptionist/PA.

10 We were provided with an agreed hearing bundle running to in excess of 400 pages. We have considered those documents from within the bundle to which we were referred by the parties during the course of the hearing.

11 The evidence provided by Mrs Holman, Mr Evans and Mrs Woodward was largely uncontentious. Their honesty and credibility was not challenged.

12 The respondent contends that the claimant is an unsatisfactory witness whose evidence cannot be relied upon:

(a) We make no adverse finding in relation to the claimant's credibility by reference to her failure to give details of her new job when completing the claim form on 23 April 2022. She had recently been offered new employment to commence on 9 May 2022 but it was a genuine oversight on her part that she failed to include these details on the form which was completed by someone else on her behalf.
(b) We make no adverse finding in relation to the claimant's credibility regarding her minor manipulation in reporting sales figures on a daily basis. She did this to prevent there being reporting days where sales were unacceptably low. In doing this, she was following a practice which had been shown to her in previous employment and she did not intentionally mislead.
(c) However we find the claimant's explanation with regard to her part in the passing on of client details from her ex-employer in September 2019 is quite implausible. The claimant had only recently left the employment of Baker Goodchild (BG). She had signed a confidentiality and non-competition agreement and in August 2019 received correspondence from her former employer's solicitors reminding her of her obligations. However, in September 2019 she was the conduit of confidential information passing between another former BG employee and a competitor. We simply do not accept her assertion that she did not realise she may be in breach of her contractual obligations or that she was so reckless or naïve that she did not even consider the possibility.
(d) We find to be similarly implausible the claimant's explanation for attempting to access the respondent's client list whilst she was off sick in January 2022 shortly before her resignation. The claimant explained that she did this because she was anticipating her return to work and wished to "hit the ground running". She gave no satisfactory explanation as to why she did not simply ask for a handover or a briefing meeting in readiness for her return.

13 The claimant's credibility is also damaged with regard to her unauthorised access to Mr Bridge's email account. The claimant's suggestion that she routinely had access to the email accounts of her team is clearly and plainly untrue. We accept that she could request such authority for legitimate purposes particularly during a colleague's absence. But having made such a request in September 2021, the claimant well knew that she had no authority to access Mr Bridge's emails in January 2022 - effectively for the purpose of monitoring his conduct.

14 By contrast, we found the evidence of Mr Thomson to be clear and compelling. We reject the claimant's assertion that he was disingenuous when claiming that a recruitment exercise in December 2021/January 2022 was not conducted "behind the claimant's back". The claimant was well aware of the need to recruit and she had been conducting the recruitment exercise for several months without success. Mr Thomson did no more than to take over and do for himself that which he had been expecting the claimant to do. As soon as this was queried by the claimant, he fully explained what was happening.

15 Where there is a factual discrepancy between the evidence given by the claimant and that given by Mr Thomson, we prefer the evidence of Mr Thomson, and we have made our findings of fact accordingly.

The Facts

16 Mr Thomson is the de facto owner of BG since 1995 and of the respondent since 29 October 2020. The claimant was employed by BG from 2013 – 2019. She left the employment of BG and took new employment with the respondent at a time before Mr Thomson owned the respondent. It is clear that the claimant did not leave BG on the best of terms. There was a COT3 Agreement resolving a number of issues which as previously stated included confidentiality and non-competition clauses.

17 On 29 October 2020, a BG company acquired the assets of the respondent. This was a relevant transfer for the purposes of TUPE. And, from that date, the claimant was again effectively employed by Mr Thomson.

18 The claimant's employment with the respondent commenced on 26 June 2019 and she has had continuity of employment since then.

19 In August 2019, BG had suspicions that the claimant may be involved in the breach of her confidentiality/noncompetition clauses and sent correspondence to her to remind her of her obligations. Documentation now shows that in October 2019 the claimant was instrumental in the passing on of

confidential information from BG to a party. As previously indicated we do not accept the claimant's account of this being entirely innocent involvement.

20 Documentation shows that the claimant is well able to raise complaints and grievances if she is dissatisfied. She did so regarding her pay during a period of furlough and later regarding alleged non-payment of a bonus.

21 In April 2021 the claimant made a request for annual leave for a period of 14 days to be taken in October/November 2021 on the occasion of her daughter's wedding and a holiday to Dubai. Ordinarily the respondent does not allow employees to take more than two weeks annual leave at any one time and so, upon receipt of the request for nearly 3 weeks, Mr Thomson spoke to the claimant to point out the potential difficulty. We accept that he did not either approve or decline the holiday request. The claimant then modified the request to 11 days. The request was approved and there is absolutely no evidence before us to suggest that its status was anything other than approved thereafter.

22 The claimant was the head of a team of three which from June 2021 comprised the claimant, Mr Sean Bridge, and Ms Kassia Perkins. Throughout the summer of 2021, the respondent company was failing to achieve sales targets. The claimant was well aware of this underperformance and was clearly intended to be a central figure in the strategy to improve matters. She was instrumental in the recruitment of Mr Bridge; there was a desire on all parts to move Ms Perkins to another part of the business better suited to her skill set; however, this involved the recruitment of one or possibly two dynamic salespeople to join the claimant's team and turn matters around financially. We accept that at each monthly meeting the claimant was asked for progress on recruitment the reality is that little progress was made and Mr Thompson became quite frustrated at the position.

23 Matters came to a head in October 2021. It had been anticipated that the claimant had been successful in the recruitment of an excellent candidate Mr James Whitehurst: however ultimately Mr Whitehurst declined the respondent's offer of employment. This occurred shortly before the commencement of the claimant's leave for her daughter's wedding in October 2021. Fearing for the future viability of the company, Mr Thomson then took responsibility for recruitment. It is clear that Mr Thomson had a good relationship with Mr Bridge and together they undertook a recruitment campaign in November/December 2021 and into January 2022.

24 We do not accept the claimant's characterisation of this as having been done "behind her back". Although it is clear that she was not involved, she knew that the recruitment process was being undertaken and she raised no complaint

or concern. On 4 January 2022, when she asked Mr Thomson for an update, he provided truthful and accurate information as to how matters were progressing.

25 We accept Mr Thomson's evidence that his intention was to secure the services of one or two excellent candidates to strengthen the claimant's team taking some of the pressure from the claimant and allowing her to lead the team effectively. The emails to which we have been referred passing between Mr Thomson and Mr Bridge do not in our view suggest any intention to sideline the claimant or manage her out of the business.

26 Unknown to Mr Thomson and Mr Bridge, the claimant had secured unauthorised access to Mr Bridge's email account and in January 2022 she was monitoring communication between the two of them. We can accept and understand the some of these communications may have upset her - but clearly there was no intention by these email communications to undermine her as they were never intended to be seen by her. We accept that Mr Thomson's actions were prompted by the need to turn around the respondent's financial performance: he had been told by his Finance Director that he had two months to achieve this after which the company would become insolvent.

27 We do not accept the claimant's evidence that Mr Thomson made derogatory comments about female staff at a meeting in August 2021. The burden is upon the claimant to establish that this happened; there is no supporting evidence from any source other than the claimant's oral evidence; if Mr Thomson had the habit of making such comments we would have expected other female staff to have complained. However we heard from female staff who had never encountered such attitudes from Mr Thomson. Further claimant who was well able to make complaints, made no complaint about this at the time.

28 For the same reasons we reject the claimant's complaint that Mr Thomson shouted at her during a telephone call in September 2021.

29 The claimant alleges that following her return to work in November 2021 she was not copied into emails with operational updates. However we have seen a number of emails over this period into which she was copied. The claimant has been unable to identify any documents by reference to earlier periods from which she now claims to have been excluded.

30 The claimant complains that at an operational meeting on 12 November 2021 Mr Thomson directed questions to Mr Bridge about current operations which ordinarily would have been directed to her. There was no contemporaneous complaint from her about this and in any event this meeting took place just three days after her return from holiday and so it would be

unsurprising if Mr Bridge was actually more seized of the current operational situation than the claimant was.

31 Against the background of the respondent's failing financial performance, in November 2021 Mr Thomson raised a query regarding the claimants working hours. The respondent's case is that the claimant was leaving work at 4 - 4:30pm each day. Her contractual finish time was 5:30pm. The claimant's case is that she left at 5pm and had an arrangement to do this. However, again she has produced no evidence of such an arrangement. We find Mr Thomson's query in this regard was entirely reasonable.

32 In December 2021, between Christmas and New Year, the claimant took two days leave in addition to her allocated annual leave. It is the claimant's case that it was custom and practice for these extra days to be allowed. The respondent's case is that they were entirely discretionary and that Mr Thomson had made clear that in 2021 they were not to be taken. Again this was against the background of his concerns about the company's underperformance. In January 2022, Mr Thomson queried the claimant having taken these days additional leave - however no sanction was applied in the claimant's pay was not affected.

33 On 4 January 2022, Mr Thompson exchanged emails with the claimant in which he confirmed that he expected to have one or two satisfactory candidates in place to start working with the claimant's team by the end of January 2022. On 5 January 2022, the respondent made an offer to Ms Bethany Hickey.

34 This the claimant was in the habit of having annual leave around the Christmas period. Mr Thomson was concerned that if the claimant had leave at this time other employees in her team were unable to do so. He had suggested to her that it might be inappropriate for her to have such leave in 2022. The claimant's case is that she discussed this with the team and they were happy for her to take the leave as usual. However an email we have seen suggest that Mr Bridge was certainly not happy. Accordingly, when the claimant made a formal request in January 2022 for annual leave in December 2022, Mr Thomson declined the request.

35 On 5 January 2022, the claimant became aware that she was likely to lose the business of her biggest client - BMW Sytner. This would clearly have a significant adverse effect on the team's performance. On that day, the claimant complained that she was suffering with back pain and she went home. The following day she stated that she was working from home because of her back pain. On 7 January 2022 she commenced a period of sick leave from which she did not return.

36 Later in January, whilst still off sick, the claimant made several attempts to access the respondent's database for customer information. We reject her explanation that this was done in anticipation of her return to work.

37 At the end of January 2022, the claimant received her salary but was only paid statutory sick pay for the period of her sickness absence. By reference to the contract and to the company handbook she was entitled to Company sick pay for this period. She did not raise a query regarding this until after her resignation on 4 February 2022.

38 A query regarding the pay was raised on the 23 February 2022. We are satisfied that the underpayment of been made by reason of a genuine misunderstanding and it was corrected as soon as it was pointed out.

39 In her resignation letter the claimant cites two reasons for her resignation:

(a) The failure to pay her company sick pay at the end of January 2022.
(b) That measures had been put in place to promote Mr Bridge into the claimant's position.

The claimant thereafter makes further general allegations of discrimination due to race and sex.

40 It is the claimant's case that she is owed 6 days unpaid holiday pay. Of this, 4 days are claimed to be dates which had accrued before 31 December 2021 for which she had an express agreement from Mr Thomson that the unused leave could be carried forward contrary to the respondent's general policy.

41 The respondent accepts that there are 2 days holiday pay due to the claimant, but denies that there are a further 4 days accrued or that any agreement was in place for these to be carried forward.

42 The claimant relies on a screenshot from the Citation system which monitors the respondent's employee holiday records. It suggests that there are 4 days to be carried forward. We accept Mr Thomson's explanation that this is a historical inaccuracy with these days having been carried forward from previous years. Furthermore, the screenshot cannot be relied upon as it shows the claimant having taken 25 days annual leave in 2021 when all parties are agreed that her allowance was only 23.

43 We are quite satisfied that if the claimant had secured an agreement to carry forward 4 days she would have confirmed this in writing. She has not persuaded us on the balance of probabilities that either she has 4 days accrued or that there was an agreement in place for her to carry them forward. It is the

claimant's case that this agreement was reached at a meeting between her, Mr Thomson and Mr Brian McCallion - but the claimant appears to have made no effort from to secure Mr McCallion's confirmation of this.

The Law

Unfair Constructive Dismissal

44 **The Employment Rights Act 1996 (ERA)**

Section 94 - The right [not to be unfairly dismissed]

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 95 - Circumstances in which an employee is dismissed

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

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal,*
(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 - *Constructive dismissal.*

Section 98 - General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

45 **Decided Cases**

There are many decided cases which provide guidance to employment tribunals with regard to the law of dismissal and of constructive dismissal. We found the following to be particularly relevant when considering the facts of this case:-

Western Excavating (ECC) Ltd, -v - Sharpe **[1978] IRLR 27 (CA)**
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 either case must be sufficiently serious to entitle him to leave at once.

The employee must make up his mind to leave soon after the conduct of which he complains if he continues the 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.

Garner -v- Grange Furnishing Ltd. **[1977] IRLR 206 (EAT)**
Conduct amounting to a repudiation can be a series of small incidents over a period of time. If the conduct of the employer is making it impossible for the employee to go on working that is plainly a repudiation of the contract of employment.

Woods -v- WM Car Services (Peterborough) Ltd. **[1981] IRLR 347 (EAT)**
It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct

themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

WE Cox Toner (International) Ltd. –v- Crook **[1981] IRLR 443 (EAT)**
The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between those two possible courses. If he once affirms the contract his right to accept the repudiation is at an end, but he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract since his conduct is only consistent with the continued existence of the contractual obligations.

Malik –v- BCCI **[1997] IRLR 462 (HL)**
The obligation (to observe the implied contractual term of mutual trust and confidence), extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct, objectively considered, is likely to cause damage to the relationship between employer and employee a breach of the implied obligation may arise. The motives of the employer cannot be determinative or even relevant.

BCCI –v- Ali (No.3) **[1999] IRLR 508 (HC)**
The conduct must impinge on the relationship of employer and employee in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is entitled to have in his employer. The term "likely" requires a higher degree of certainty than a reasonable prospect or indeed a 51% probability.

Nottinghamshire County Council –v- Meikle **[2004] IRLR 703 (CA)**
Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted the repudiation by

treating the contract of employment as at an end. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer.

GAB Robins (UK) Ltd. –v- Gillian Triggs **[2007] UKEAT/0111/07RN**
The question to be addressed is whether, taken alone or cumulatively, the respondent's actions amount to a breach of any express and/or implied terms of the claimant's contract of employment amounting to a repudiation of that contract.

Fereday –v- South Staffordshire Primary Care Trust **UKEAT/0513/10/ZT**
The claimant considered she was treated in a way which was in fundamental breach of the contract of employment. She invoked grievance procedure, which resulted in a decision adverse to her on 13 February 2009, but she only resigned by a letter dated 24 March 2009. The employment tribunal was entitled to hold that the claimant had affirmed the contract. The six-week delay between 13 February 2009 and 24 March 2009 was evidence of such affirmation.

Tullet Prebon PLC & Others -v- BCG Brokers LP & Others
[2011] IRLR 420 (CA)
A repudiatory breach of contract; conduct likely to damage the relationship of trust and confidence must be so serious that looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the putative innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

Waltham Forest LBC -v- Omilaju **[2005] IRLR 35 (CA)**
This case clarified the position where a complainant was lying on the "final straw" principle: if the final straw is not capable of contributing to a series of earlier acts which may cumulatively amount to a breach of the implied term of trust and confidence, then there is no need to examine the earlier history. If an employer has committed a series of acts which amount to a breach of the implied term; but the employee does not resign his employment In response thereto; he cannot subsequently rely on those acts to justify a constructive dismissal in the absence of a later act which enables him to do so. If the later act is entirely innocuous It is entirely unnecessary to examine the earlier conduct as the later act will not permit the employee to invoke the final straw principal. An entirely innocuous act on the part of the employer cannot be a final straw.

Hadji -v- St Lukes Plymouth **(2013) UKEAT 0095/12**
This case provides a recent re-statement of the law on affirmation:-

(a) The employee must make up his/her mind whether or not to resign soon after the conduct of which he/she complains. If he/she does not do so

he/she may be regarded as having elected to affirm the contract, or as having lost the right to treat himself/herself as dismissed.

(b) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay.

(c) If the employee calls on the employer to perform its obligations under the contract or otherwise initiates an intention to continue the contract; the Employment Tribunal may conclude that there has been affirmation.

(d) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts.

Cantor Fitzgerald International v Callaghan **[1999] IRLR 234**

An emphatic denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration' would normally be regarded as repudiatory. On the other hand, where the failure to pay or delay in paying represented 'no more than a temporary fault in the employer's technology, an accounting error or simple mistake' or was due to 'illness or accident or unexpected events', it would be is open to the court to conclude that the breach did not go to the root of the contract.

Wrongful Dismissal

46 The wrongful dismissal claim is a simple claim under the law of contract: under the terms of her employment contract the claimant was entitled to a period of notice of termination of her employment. If she was dismissed with a less than that period of notice she is entitled to claim damages for the losses arising from the breach of contract. Frequently such a claim can be quantified by a payment equivalent to the wages which the employee would have earned during the notice period.

48 Often, the only effective defence to the wrongful dismissal claim is that, by her conduct, the claimant was herself in repudiatory breach of her employment contract; and that, by dismissing her, the respondent merely accepted the breach and chose not to waive it.

49 The test which the tribunal must apply to the claim for wrongful dismissal is very different from that to be applied to the claim for unfair dismissal. In the wrongful dismissal claim the tribunal is not concerned with the reasonableness or otherwise of the respondent's decision; but must make its own findings as to whether or not the claimant had acted in repudiatory breach of contract.

50 In this case the respondent denies that the claimant was dismissed. If we find that there was no dismissal, then the claim for wrongful dismissal must fail. If we find that the claimant was constructively dismissed by reason of the respondent's repudiatory a conduct, then we must consider the cases of ***Atkinson v Community Gateway Association*** **2015 ICR 1 (EAT)**, and ***Aberdeen City Council v McNeill*** ***2015 ICR 27, Ct Sess (Inner House)*** as to the effect which any repudiatory conduct on the claimant's part has on the question of her claim for wrongful dismissal.

Sex Discrimination

51 **The Equality Act 2010 (EqA)**

Section 4: Sets out the protected characteristics which include sex**.**

Section 13: Direct discrimination

(1) 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.

Section 39: Employees and applicants

This section prohibits discrimination by employers.

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

52 **Decided Cases – Discrimination**

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**
There can be no question of direct discrimination where everyone is treated the same.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If sex or had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**
Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Rihal –v- London Borough of Ealing **[2004] IRLR 642 (CA)**
Anya –v- University of Oxford **[2001] IRLR 377 (CA)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
R –v-Governing Body of JFS **[2010] IRLR 186 (SC)**
In a case involving a number of potentially related incidents the tribunal should not take a fragmented approach to individual complaints, but any inferences should be drawn on all relevant primary findings to assess the full picture. Any inference of discrimination must be founded on those primary findings. Where there is no actual comparator a better approach to determining whether there has been less favourable treatment on prescribed grounds is often not to dwell in isolation on the hypothetical comparator but to ask the crucial question "why did the treatment occur?" In deciding whether action complained of was taken on grounds of race a distinction is to be drawn between action which is inherently racially discriminatory and that which is not; to establish that the action was taken on racial grounds in the former case motive or intention of the perpetrator is not relevant - in the latter it is relevant.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**
The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence

adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Laing –v- Manchester City Council **[2006] IRLR 748**
In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

Holiday Pay

53 There are no disputed legal principles affecting the claim for holiday pay. The respondent concedes that there are two days holiday pay owing. The claimant concedes that a claim for the additional four days cannot succeed in the absence of an express agreement. We simply have to resolve the factual dispute as to whether such an agreement was made.

The Claimant's Case

Constructive Dismissal

54 The claimant relies on the following incidents as being acts in fundamental breach of employment contract:

(a) The respondent breached her contractual right to paid sick leave by failing to pay her contractual sick pay for the period 7 January – 4 February 2022.
(b) Mr Thomson making derogatory remarks about female staff in a meeting with the Claimant in August 2021
(c) Mr Thomson shouting at the Claimant and behaving aggressively in a call with her in September 2021.
(d) Mr Thomson withdrawing the Claimant's authorisation for annual leave and requiring her to reconfirm the leave in October 2021
(e) Mr Thomson excluding the Claimant from operational updates in November 2021.
(f) Mr Thomson addressing operational questions that would usually have been asked of the Claimant to the Claimant's (male) direct report in a meeting on 12 November 2021
(g) Mr Thomson directing operational queries to the Claimant's (male) direct report in December 2021
(h) Mr Thomson advertising for roles without the Claimant's input in December 2021.
(i) Mr Thomson criticising the Claimant for taking annual leave during

the Christmas period at the beginning of January 2022.

(j) Mr Thomson conspiring with Mr Bridge to exclude the Claimant from the recruitment process of new staff in January 2022

(k) Mr Thomson denigrating the Claimant in correspondence with Mr Bridge on 7 January 2022.

Wrongful Dismissal

55 The claimant's case is simple if she was dismissed by reason of the above contact then inevitably she was wrongfully dismissed and entitled to be paid her notice.

Sex Discrimination

56 The claimant repeats her allegations with regard to the respondent's conduct as set out at paragraph 54 above and claims that these actions amounted to unfavourable treatment by reason of her sex compared with the treatment which would have been afforded to a male employee in the same circumstances.

Holiday Pay

57 Again the claimant's case is simple she states that she had an express agreement that there were four days holiday owing to her and that these could be carried forward from 2021 to 2022 she resigned in early 2022 with the four-day still untaken accordingly she is entitled to be paid for them.

Discussion & Conclusions

Constructive Dismissal

58 We find that the failure to pay company sick pay at the end of January 2022 occurred by reason of a misunderstanding of the position as soon as the failure was pointed out it was corrected. Applying the case of ***Cantor Fitzgerald International***, we have no hesitation in finding that this failure did not constitute a fundamental breach of the employment contract.

59 As explained earlier we find that the matters alleged at Paragraph 54 (b) – (g) did not happen.

60 The allegations at Paragraph 54 (h), (j) & (k) relate to Mr Thomson's control of the recruitment process from November 2021 to January 2022.We find that Mr Thomson is actions were justified because of the existential threat to the respondent company if satisfactory recruitment did not occur. The claimant had

been given every opportunity to run this process and had failed. It may be that Mr Thomson would have been entitled to take some form of disciplinary or performance management action against her but he did not do so, instead he got on and dealt with the task himself with a view to strengthening the claimant's team. The emails which have caused such upset were never intended for the claimant's consumption she only saw them because of her own unauthorised conduct. The position was explained to her on 4 January 2022. In our judgement these actions were not such as to fundamentally undermine trust and confidence between the parties and in any event Mr Thomson's actions were with reasonable and proper cause.

61 With regard to Paragraph 54(i), Mr Thomson was perfectly entitled to question the claimant's absence for unbooked annual leave. He did nothing more than enquire about it. He did not apply any kind of sanction.

62 Accordingly, we find that the respondent did not act in fundamental breach of the employment contract. Absent a breach of contract there can be no constructive dismissal. We find that the claimant was not dismissed.

63 For completeness, we should add that in our judgement even if there were breaches of contract in the period to December 2021 and early January 2022 the claimant affirmed the contract by continuing in employment and indeed requesting her leave for December 2022. What the claimant says was the final straw was the failure to pay her sick pay at the end of January 2022. Applying ***Omilaju***, we find that this failure was not a breach of contract, it was an innocuous mistake, and accordingly it is not sufficient to enable the claimant to go behind any earlier waiver.

64 For these reasons we find that the claimant was not dismissed her claim for unfair dismissal is not well founded and is dismissed.

Wrongful Dismissal

65 We have found that the claimant was not dismissed accordingly her claim for wrongful dismissal has no merit and is dismissed. It is unnecessary for us to consider the complex arguments arising from the cases of ***Atkinson*** *and* ***Aberdeen City Council***.

Sex Discrimination

66 Although we have found that the respondent did not act in fundamental breach of the employment contract it is still open to us to find that the claimant was unfavourably treated and thus find in her favour on the claim for sex discrimination. The question we must answer is very simple: would a male

employee employed as Client Services Director in otherwise identical circumstances to those of the claimant have been treated any differently. The claimant has advanced before us no basis upon which we could conclude that this would be the case. This is particularly so as we have found against her on the allegation of Mr Thomson having made disparaging remarks about female employees.

67 It would follow therefore that no matter how unfair or unreasonable we may find Mr Thomson's behaviour (in fact we find neither) it would not amount to sex discrimination. The claimant is not established facts which even transfer the burden of proof onto the respondent. The claim for sex discrimination is therefore dismissed.

Holiday Pay

68 We will make an award in the agreed sum of £269.23 in respect of the two days holiday pay conceded by the respondent to be owing. However we find against the claimant as to the existence of an express agreement with regard to the carry forward of a further four days. Accordingly, beyond the two days which will be awarded, the claim for unpaid holiday pay is dismissed.

Employment Judge Gaskell
5 December 2023