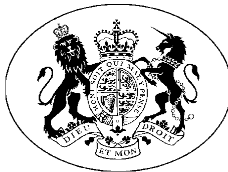

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Ayaz**

Respondent: **Plusnet Plc**

Heard at: **Leeds (by video)** **On:** **16, 17, 18 and 19 October 2023**

Before: **Employment Judge Bright**
Mr R Stead
Mr M Elwen

Representation
Claimant: Mr Morgan (Counsel)
Respondent: Ms Kight (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not dismissed. The complaint of unfair dismissal is not well founded and is dismissed.
2. The claimant was not wrongfully dismissed. The claimant is not entitled to damages for breach of contract and that complaint is dismissed.
3. The respondent did not make unauthorised deductions from the claimant's wages. That complaint is not well founded and is dismissed.
4. The complaint of direct sex discrimination is not well founded and is dismissed.
5. The complaints of sexual harassment, harassment related to sex and less favourable treatment because of rejection of or submission to harassment are not well founded and are dismissed.
6. The complaint of victimisation is not well founded and is dismissed.

REASONS

The hearing

1. The final hearing was heard by video (Cloud Video Platform or 'CVP') over four days, on 16, 17, 18 and 19 October 2023. There were some IT glitches but the hearing generally proceeded smoothly and the Tribunal, the parties, their

representatives and the witnesses were able to communicate clearly and effectively. There was insufficient time to deliver the Tribunal's decision on the final day and it was therefore necessary to reserve the Tribunal's judgment.

The claim

2. The claimant was employed by the respondent, a company that provides internet and telephone facilities, as a Sales and Retentions Adviser, from on or around 1 January 2011 until 19 May 2021. Early conciliation started on 13 April 2021 and ended on 25 May 2021. The claim form was presented on 10 June 2021.

3. In short, the claim was about alleged conduct towards the claimant from Ms Nicky Midgley, his manager, beginning with alleged inappropriate touching and comments then, when the claimant said he rejected that conduct, a series of matters which he alleged were detrimental treatment cumulating in his dismissal. The claimant appealed and was reinstated, but asserted that he was forced to resign because the respondent did not handle his grievance properly or pay him his back pay when he was reinstated.

4. The claimant claimed constructive unfair dismissal, wrongful dismissal, unauthorised deductions from wages, direct sex discrimination, sexual harassment and victimisation. The respondent denied the Claimant's claims but accepted that, if Ms Midgley was guilty of sexual harassment, it would be liable under section 109 of the Equality Act 2010 ("EQA").

The issues

5. The issues to be decided were originally defined at a preliminary hearing for case management held on 17 August 2021 with Employment Judge Knowles. The parties confirmed that those issues remained unchanged at the outset of the final hearing. As judgment was reserved, the issues on remedy were reserved for a remedy hearing should one be required. The issues for us to decide were therefore:

<u>Constructive unfair dismissal (ss. 94, 95, 98 and 111 Employment Rights Act 1996 ("ERA"))</u>

6. Did the claimant raise a grievance against his manager, Ms Midgley, in his notes for the disciplinary entitled "counter grievance" sent on 14 January, and/or his appeal letter dated 27 January 2021 entitled "Grievance against my manager Nicky Midgley"?
7. If a grievance was raised, did the respondent fail to investigate this grievance? If so, does this amount to a fundamental breach of the claimant's contract of employment entitling him to resign?
8. If the respondent did investigate the grievance, did it fail to confirm the nature of its investigations and provide the claimant with a detailed unambiguous outcome? If so, does this amount to a fundamental breach of the claimant's contract of employment entitling him to resign?
9. Did the respondent fail to pay the claimant his back pay for 3 months from 31 March until 30 June 2021, amount to a fundamental breach of the claimant's contract of employment entitling him to resign?
10. Did the respondent's fail to respond and / or ignore the claimant's emails requesting clarity on his grievance and back pay? If so, does this amount to a

fundamental breach of the claimant's contract of employment entitling him to resign?

11. If the above are not a series of fundamental breaches of contract, individually or collectively, do the above amount to a course of conduct, which taken together with other conduct cumulatively amounts to a course of conduct which is in breach of the implied term of trust and confidence? The other conduct alleged to have contributed to the course of conduct in breach of implied trust and confidence is sexual harassment, the disciplinary action taken against the claimant (in particular the manner of the disciplinary investigation and dismissal hearing) and delays within the appeal process?
12. If it is found that there was a breach of contract did the claimant resign in response to that breach or for some other reason?
13. Did the claimant affirm the breach of contract, either through delay or through his actions?
14. If the claimant was constructively dismissed, was that dismissal unfair?

<u>Wrongful dismissal (breach of contract)</u>

15. Did the claimant resign without notice?
16. Did the respondent fail to pay the claimant's notice pay as claimed or at all?
17. If so, what damages ought to be awarded to the claimant?

<u>Unlawful deduction from wages (s.23 ERA)</u>

18. Did the respondent make a deduction from the claimant's wages?
19. If so, was the deduction authorised under section 13 ERA?
20. If such deduction was not an authorised deduction, how much is owed to the claimant?

<u>Direct sex discrimination (s.13 EQA)</u>

21. Did the claimant raise a grievance on 14 January 2021 and/or 27 January 2021?
22. If so did the respondent fail to adequately investigate the claimant's grievance?
23. Was that less favourable treatment?
24. If so, was the less favourable treatment because of sex?
25. Who is the correct comparator?

<u>Sexual Harassment and/ or Sex Harassment and / or less favourable treatment on the grounds of rejecting or submitting to the Harassment (s.26 EqA)</u>

26. Did Ms Midgley (from December 2019 until May 2020):
    - 26.1. approach the claimant from behind whilst he was sitting at his desk and massage his shoulders and stroke his hair; and/or
    - 26.2. call him "babes" tell him that he was "good looking" and asked if she could be his "second wife"?
27. Did Ms Midgley (between May 2020 and May 2021):
    - 27.1. cancel the claimant's one-to-one meetings;
    - 27.2. fail to offer him support;
    - 27.3. ignore him
    - 27.4. investigate his performance;

28. Did the respondent (between May 2020 and May 2021):
    - 28.1. discipline the claimant;

28.2. fail to investigate his grievance;
28.3. fail to answer his questions about his appeal
28.4. deal with his back pay?

29. Was the conduct unwanted?
30. Did the conduct relate to sex or was it of a sexual nature?
31. If so, did the unwanted conduct have the purpose or effect of:
    31.1. violating the claimant's dignity; or
    31.2. creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
32. If so, having regard to all the circumstances of the case and the perception of the claimant, was it reasonable for the conduct to have that effect?
33. Did Ms Midgley engage in conduct of a sexual nature, or that related to sex and because of the claimant's rejection of or submission to the conduct, the respondent treated the claimant less favourably than if the claimant had not rejected or submitted to the conduct?
34. Was this complaint brought in time and if not, should time be extended (noting that the claimant claims the acts were a continuing course of conduct throughout)?

<u>Victimisation (s.27 EqA)</u>

35. Did the claimant do a protected act, namely raising a grievance of sex discrimination and harassment?
36. Did the respondent believe that the claimant had done a protected act?
37. Did the respondent repeatedly ignore the claimant’s questions or fail to clarify the outcome following his questions concerning his grievance after his appeal and fail to pay to him his back pay?
38. By doing so, did it subject the claimant to a detriment?
39. If so, was it because the claimant did a protected act or because the respondent believed the claimant had done a protected act?

The evidence

40. The claimant gave evidence on his own behalf and called Mr Thomas John Rainsford, who gave evidence under a witness order. Mr Rainsford and the claimant gave evidence from written witness statements.

41. The respondent called the following witnesses, who all gave evidence from written witness statements:

    41.1. Ms Nicola Midgley;
    41.2. Mr Nicholas Robert Graham Aldridge;
    41.3. Mrs Laura Thompson;
    41.4. Mr Mohammed Amir;
    41.5. Mr Matthew James Banks.

42. The parties also presented an agreed electronic file of documents of 401 pages. References to page numbers in these reasons are references to the page numbers in the electronic file of documents.

Findings of fact

43. We made the following unanimous findings of fact. Where there was a conflict of evidence we resolved it on the balance of probabilities, on the evidence before us, in accordance with the following findings.

44. The claimant joined the respondent on 6 September 2010 in the Residential Sales and Retentions department. He then moved to the Business Sales and Retentions department, where he worked in a call centre, taking inbound calls from business customers who wanted to place orders for business phone and broadband line or existing customers who wanted to cancel their service, whose custom he would try to retain.

45. Ms Nicky Midgley started managing the claimant in October 2019. The claimant was on dependant's leave from 1 October 2019 to 8 November 2019 and then on paternity leave until 22 November 2019.

46. The claimant alleged that Ms Midgley and he had a non-professional style of banter, including making crude jokes, giving prank gifts and poking fun at each other and calling each other nicknames. He alleged that Ms Midgley's banter with him crossed the line, and she called him "babe", told him he was "good looking", told him that she "found brown/Asian men attractive" and asked if she "could be his second wife", which made him extremely uncomfortable, offended and embarrassed.

47. We heard that the claimant worked in any open plan office, with banks of four desks, with Mrs Thompson sitting directly across from the claimant. We heard evidence from the claimant and Ms Midgley regarding their banter. We also heard evidence from Mr Rainsford and Mr Aldridge, who both sat close by and from Mrs Thompson, who sat across the desk. We found the evidence of Mr Rainsford particularly compelling, as he was called to give evidence by the claimant and was friends with both the claimant and Ms Midgley. We accepted Mr Rainsford's evidence that he observed the claimant and Ms Midgley's relationship to be mutually "jovial and friendly". His evidence was plausible and was corroborated by the contemporaneous evidence of an extensive set of Whatsapp messages between the claimant and Ms Midgley (pages 103 to 126). The Whatsapp messages covered almost the whole span of Ms Midgley's line management of the claimant and evidenced a warm friendship between the claimant and Ms Midgley, focusing mainly on their working relationship and, outside of work, the claimant's 3 young children.

48. The only use of the word 'babe' in the Whatsapp messages is by the claimant, who repeatedly calls Ms Midgely 'babe' or 'babes' or 'babs'. Ms Midgley does not use that term for the claimant. In addition, the only reference to sex is a message from the claimant, attached to a photograph of him wearing medical scrubs, shortly prior to the birth of his children, jokingly asking 'Sexy?' (page page 104). The claimant suggested that inappropriate messages may have been in evidence on the respondent's workplace messaging application Linc, which we accepted the respondent had been unable to disclose. However, we judged that, if Ms Midgely were making inappropriate comments of the type alleged, they would have been more likely to appear in informal Whatsapp messages than on a workplace platform, given the tone and content of the other messages appearing at pages 103 to 126. The claimant was unable to identify any specific occasion on which Ms Midgely used the language alleged or produce any evidence to support his allegation. Mrs Thompson and Mr Rainsford did not give evidence

that they heard Ms Midgley speak to the claimant as alleged. On the balance of probabilities, we find that Ms Midgley did not call the claimant "babes" or tell him he was "good looking", that she "found brown/Asian men attractive" or that she "could be his second wife".

49. The claimant alleged that Ms Midgley rubbed his arms, head and hair. He said this behaviour occurred between December 2019 to May 2020. Ms Midgley accepted in her evidence that she was a tactile person, but denied rubbing his arms, head or hair as alleged. The claimant stated at paragraphs 10 and 11 of his witness statement that the physical touching happened in front of other team members. We were therefore interested to hear the evidence of the other team members, in particular those who sat close by, such as Mrs Thompson, or those who were close friends, such as Mr Rainsford. While it was agreed that shoulder/neck massage devices were used generally in the department, there was no evidence from any of the other witnesses, including Mr Rainsford and Mrs Thompson, of Ms Midgley massaging the claimant or rubbing his arms. Nor could the claimant identify any specific occasions on which this was said to have occurred. In addition, the claimant was absent from the office for much of the period in question, owing to shielding during the Covid pandemic, so opportunities for physical contact were limited. We find, on the balance of probabilities, that it did not occur.

50. Ms Midgley accepted that she ruffled the claimant's hair on one occasion, in a non-sexual manner, and that she found out afterwards that he was upset by it and she apologised. There is a contemporaneous reference to Ms Midgley touching the claimant's hair on 5 February 2020 in the Whatsapp messages (page 105). We accepted Ms Midgley's evidence as to the manner in which she ruffled the claimant's hair, because it was corroborated by Mrs Thompson, who sat directly across the desk from the claimant. Mrs Thompson's account in cross examination was clear and persuasive and was that Ms Midgley ruffled the claimant's hair while saying, 'You're in Wrap, come on, what are you doing?'. We find that Ms Midgley was challenging the claimant about work in a friendly and jovial fashion.

51. We found the evidence of Mrs Thompson generally credible and reliable. She had some lapses in memory due to the intervening three years, but no apparent reason to be biased. We accepted her account that she neglected to mention the hair ruffling incident in her witness statement because she did not associate the claimant's allegation that Ms Midgely 'stroked' the claimant's hair in a sexual manner with the incident she now recalls of Ms Midgley ruffling the claimant's hair, because of the sexual characterisation the claimant gave the incident. Mr Morgan suggested that the similarities in the wording of her witness statement with that of Mr Aldridge rendered the evidence of both unreliable but, in our experience, where professional advisers have assisted with the drafting of witness statements it is unfortunately all too common to find repetitive wording which, while it captures a witness's evidence, may not necessarily represent their natural style of discourse. However, in cross examination, both witnesses gave evidence which was plausible and, more importantly, consistent with the contemporaneous documentary evidence available (in particular the Whatsapp messages).

52. We accepted Mr Rainsford's evidence that Mrs Thompson told Ms Midgley that the claimant wasn't comfortable with her ruffling his hair. We accepted the

evidence of Mrs Thompson and Mr Rainsford that the claimant was wearing a hairpiece and was therefore sensitive about his head being touched. The claimant said at paragraph 11 of his witness statement that he confided in teammates and they must have told Ms Midgley, that he was not comfortable with her touching his head, because she told him that she knew in the Whatsapp messages on 5 February 2020. He replied, saying he had had a hair transplant, to explain his sensitivity about being touched. We consider that the claimant's evidence in the Whatsapp message, referring to a hair transplant, supports the evidence of Mr Rainsford and Mrs Thompson that his sensitivity to Ms Midgley touching him was because of his hair, not because her touching him was sexual in nature.This conclusions is also supported by his actions afterwards. We find that there was no change in the tone of the Whatsapp messages at this time, nor did the claimant complain about Ms Midgley's behaviour towards him. While it is of course not uncommon for a victim of sexual harassment to remain silent, it is a factor which we can take into account. It is also of course quite plausible that a man on the receiving end of physical or sexual attentions from a female manager may be too embarrassed to express objections to management or colleagues. However, the lack of evidence of any distancing or change of tone on Whatsapp and the continued use of the term 'babes' to address Ms Midgely suggested to us that this was not the case.

53. We were particularly struck by the witness evidence regarding the claimant's Secret Santa present for Ms Midgley. The claimant, having drawn Ms Midgley as the recipient for his Secret Santa present at the end of 2019, bought her a sex toy. He told this Tribunal that he did so under peer pressure from the rest of his team, but we accepted the evidence of Mrs Thompson and Mr Rainsford that the other team members were shocked and embarrassed when Ms Midgley received the present and had not known about it beforehand. Mr Rainsford told us the claimant bought it, Mr Rainsford had kept it for him, but it was just between the two of them. The text messages from Mr Rainsford to the claimant corroborated his evidence that there had been no peer pressure and supported Mr Rainsford's evidence that the claimant alone was responsible. Mr Morgan submitted that Ms Midgley created a culture in which it was acceptable to buy a sex toy for a manager, but we accepted Ms Midgley's evidence, which was corroborated by Mrs Thompson and Mr Rainsford, that her immediate reaction was to laugh off and place it in the bin. It is entirely plausible, in our view, that the culture of a workplace may make a man afraid that colleagues would deride them for complaining about sexual harassment by a female manager. However, it is less plausible that, in those circumstances, the victim of sexual harassment would go out of their way to buy and publicly present a sex toy to that manager as a Secret Santa present.

54. Ms Kight submitted, and we agreed, that the claimant displayed certain hallmarks of an unreliable or incredible witness. There was the inconsistency of the allegation that Ms Midgley called him 'babes', when the documents showed the reverse, and his evidence that the sex toy was bought under peer pressure, which was not supported by the evidence of his own witness Mr Rainsford, or others. Mr Rainsford's text messages to the claimant (page 386) showed how Mr Rainsford found it difficult to understand how the claimant had come to view his banter with Ms Midgley as sexual harassment. We agreed with Ms Kight's submissions that the claimant's allegations appeared to have developed over time, in response to the investigation into his performance and the disciplinary action taken against him (see below), and pointed to a re-casting or re-writing of

his narrative, to place blame elsewhere and convince himself and others that he was the victim. In particular, the manner in which his defence to the disciplinary process and appeal metamorphosed over time into a grievance against Ms Midgley for sexual harassment (see below), in our judgment, was evidence of the way in which he sought to exculpate himself and rationalise his own failures by pointing the finger at his manager. While, in the ordinary course of proceedings, we are reluctant to make generic findings about the evidence of a witness overall, in this case we find that the reliability of the claimant's evidence was placed into real doubt.

55. Following the alleged hair stroking on 5 Feb 2020, the claimant said his relationship with Ms Midgley changed and she held fewer 121 meetings with him, failed to refer his IT problems to the IT department for resolution or support him with IT and held fewer coaching sessions with him. However, we did not see any evidence of a change in their relationship from the Whatsapp messages. They continued to be friendly, chatty and covered issues around work, IT problems and children. It was not disputed that the claimant had no 121 meetings from 15 January 2020 for almost a year, as shown in the Cipher notes (pages 127 – 143), during the Covid pandemic. During that time the claimant was working in the office from January 2020 until 26 March 2020 when his GP told him to cease going into work because of his respiratory condition and to commence shielding from 30 March 2020 (page 133). The claimant returned to the office from 19 June 2020 until 25 June 2020, when he commenced working from home. However, we accepted the claimant's evidence that his home arrangements (living with his mother, younger brother, wife and three children under the age of 3) meant working from home was problematic. It was not disputed that the claimant experienced ongoing IT and technical issues while working from home. He attended the office on 15 July to resolve IT issues and gain on 4 August for a meeting with Ms Midgley.

56. We accepted Ms Midgley's evidence that the Covid pandemic had caused chaos and her workload had increased meaning she was working late at night catching up on emails. We found that every member of her team had reduced 121s during this time. However, we accepted that she stayed in contact with the claimant while he was working from home, he raised issues and she provided support, and had regular conversations with him, as corroborated by her call record (page 121), although these were not formal 121 meetings. There was insufficient evidence for us to make a finding that Ms Midgley cancelled 121s for the claimant or that other team members had 121 meetings when the claimant's were cancelled. We accepted the respondent's evidence that any lack of 121 meetings or support or any difference in treatment was as a result of the Covid pandemic and also Ms Midgley's involvement in legal proceedings relating to a private personal tragedy (as explained at paragraph 41 of her witness statement).

57. We heard evidence that, at the onset of the Covid pandemic the respondent's business, including Ms Midgley's team, was slow to respond to the technical demands of working from home. By the time the claimant returned to work after shielding in June 2020, there remained IT issues which were not ironed out. We heard that there was a system of asking team members to initially restart their computers and deal with IT issues themselves, then investigating whether someone on their team could resolve the issue, before checking whether a team leader could help and finally requesting their team leader to log a call to an IT help desk. It was agreed that team members were not permitted to log calls to

the IT helpdesk themselves. The claimant alleged that Ms Midgley failed to refer his IT problems to the IT helpdesk. Although there were Whatsapp messages relating to the claimant's requests for IT help which were not followed up by a referral to the IT help desk, there was insufficient evidence for us to find that those issues were not resolved by some other means. We accepted Ms Midgley's evidence that she did not intentionally fail to refer IT issues nor was she aware of not referring IT issues. In our judgment, given the chaotic early months of the Covid pandemic and homeworking and the lack of clarity in the respondent's system for resolving IT issues, it was quite plausible that the IT problems of a homeworking team member got lost on his team leaders' desk. We do not find that Ms Midgley ignore or failed to offer support to the claimant.

58. It was accepted that there were no formal coaching sessions with the claimant until 3 September 2020, but the claimant was unable to point to any comparators who received formal coaching sessions during the period of the Covid pandemic. We find that the confusion in the respondent's business regarding how to respond to the demands of the pandemic and Ms Midgley's private personal tragedy contributed to her carrying out fewer 121s and coaching sessions than previously. If the claimant had fewer sessions than other employees (which there is insufficient evidence to find that he did), then in our judgment it is most likely attributable to the fact that he was working from home and was out of the office. There was insufficient evidence to suggest that it was because of a personal agenda.

59. We accepted Ms Midgley's evidence that, during a quieter period in December 2020, she took a look at the team's statistics and became concerned about the claimant's performance. She commenced an investigation into the amount of time he had customers on hold and also how long he spent between calls (in 'wrap'), as well as into negative comments left by customers about the claimant on the feedback software, CSAT. We accepted Ms Midgley's evidence that she picked random dates (18 and 22 December 2020) from which to examine data. Ms Midgley's evidence was that the statistics from those dates suggested that the claimant was avoiding calls by putting customers on hold for long periods or cutting them off, spending a long time in the 'wrap' function and failing to flag up IT issues. The claimant challenged the respondent's evidence, saying the wrong data was attributed to him (page 254), pointing to different team members' names on the CSAT data. However we accepted the evidence of Mr Amir and Mr Banks as to why different names appeared on that data and that this was a different system to that used to acquire the 'wrap' and 'hold' data, which could be accurately attributed to the claimant.

60. Ms Midgley held an investigation meeting with the claimant on 5 January 2021. The minutes of that meeting (pages 168 – 185) record the claimant saying he understood why Ms Midgley raised the issue with him and accepting that his wrap times were excessive. He disputed that he put customers on hold for long periods or cut them off and blamed the IT system, although he accepted that he should have flagged that up with his team leaders. He accepted that he sometimes put customers on hold so that he could attend to his children, and accepted that he was not trying to hit his targets before Christmas, saying he had "taken his foot of the pedal". As the meeting was held almost three years ago, we preferred the account given in the contemporaneous meeting minutes (the accuracy of which the claimant did not dispute at the time) to the account given in the claimant's witness statement, which was prepared for these proceedings and did not record

the claimant's admissions. We therefore find that the claimant made clear admissions in the meeting that he had been abusing the wrap system, putting customers on hold to deal with his children and had not been working to achieve his targets.

61. We accepted Ms Midgley's evidence that she investigated the claimant's concerns about customers being put on hold by the IT system, by asking colleagues and other managers if they had experienced problems. She also relied on her own experience of the respondent's reporting suite and asked her line manager Mr Durrow about it. We also accepted Ms Midgley's evidence that, even if IT issues had been found to be the root of some of the statistical anomalies with the hold function, she would still have taken the matter forward to a disciplinary hearing because of the claimant's admissions in the investigatory meeting that he made excessive use of the wrap, put customers on hold to deal with his children and was not trying to hit his targets. We find that there was insufficient evidence that Ms Midgley's failed to pursue a proper investigation before moving the matter forward to a disciplinary hearing. Even if we found that she had failed to properly investigate, that alone would be insufficient for us to infer that she had a personal agenda against the claimant. In circumstances where an employee has accepted during the investigation that they have behaved wrongly in a number of ways, as the claimant did in this meeting, disciplinary proceedings are an almost inevitable consequence, in our judgment.

62. The meeting was reconvened on 6 January 2021 (page 178 – 184). Ms Midgley suspended the claimant and informed him that this was now an allegation of gross misconduct for call avoidance (page 177). The claimant accepted how bad it all looked (page 182). On 11 January 2021 the claimant was invited to a disciplinary hearing with Mr Amir, which was due to take place on 14 January 2021.

63. On the morning of the disciplinary hearing, the claimant sent an email headed 'Points for Disciplinary' raising 9 points for the disciplinary hearing (page 209 – 210). The claimant submitted that point 8 was a grievance against Ms Midgley. In point 8 he mentioned the lack of one to ones and coaching and stated, "I would like NM's failures as my manager to be investigated as a counter grievance as well as her biased and wrongful investigation into me". His case before this Tribunal is that he did not mention the sexual harassment by Ms Midgley in this grievance because he was embarrassed. We have been asked to judge whether this document was a grievance. We find that it was ambiguous. It was raised in the context of a disciplinary process against the claimant, in his defence, on the morning of the disciplinary hearing, labelled 'points for disciplinary'. It identified itself as a 'counter-grievance' (i.e. counter to the disciplinary) and appeared to be a complaint about the investigation and the investigatory manager. Further it contained no allegation of sexual harassment and, while it was characterised as a complaint against Ms Midgley, it was in fact a rebuttal of the complaints against the claimant. The claimant had worked for the respondent for 11 years and was aware of the grievance process. If this was intended to be a standalone grievance about Ms Midgley as the claimant's manager, it was misleading at best for the claimant to introduce it as part of the disciplinary process in this manner. We accepted the respondent's evidence that they understood it to be part of the claimant's submissions to the disciplinary process, rather than a standalone grievance. We find that it was raised by the claimant as a defence to the potential disciplinary action against him.

64. The disciplinary hearing was conducted by Mohammed Amir, team leader on 14 January 2021 over Skype**.** Mr Amir agreed that the meeting was 45 minutes (not 1 hour 45 as the minutes stated) (pages 211 – 217). The claimant says the hearing was lip service and neither it nor the outcome letter considered the 9 points he had raised (pages 229 and 231). We agreed that the meeting was certainly brief. However, all of the disciplinary allegations were put to the claimant and he was given an opportunity to say what he wished. In our judgment the disciplinary hearing was not lip service. While Mr Amir accepted in cross examination that he did no specific investigation into whether there were IT problems which led to the IT discrepancies the claimant alleged, we accepted his evidence that he listened to the calls himself and relied on his own knowledge of the respondent's IT systems which he considered to be sufficient. He also sent a series of questions to Ms Midgley putting the claimant's arguments and allegations from the disciplinary hearing to her. The claimant alleged at the hearing that the document disclosed by the respondent (pages 219-220) showing Mr Amir's questions to Ms Midgley and her answers in red was fraudulent and had been produced at a later date. However, there was insufficient evidence to support that allegation and we were satisfied with Mr Amir and Ms Midgley's explanation and evidence that this was an authentic contemporaneous document. We accepted that, in sending these questions to Ms Midgley, Mr Amir investigated the claimant's argument that not enough account was taken of the fact he was working from home and that his coaching and 1-2-1 sessions had been cancelled. Ms Midgley provided her response to Mr Amir's questions and we accepted his evidence that, having had no specifics from the claimant as to why the claimant believed Ms Midgley was biased, Mr Amir had no reason not to believe Ms Midgley's answers. Mr Amir accepted that he simply took Ms Midgley's word over the claimant's where there were conflicting versions. There was insufficient evidence for us to find that there was any collusion between Mr Amir and Ms Midgley as alleged or any ulterior motive attributable to Mr Amir.

65. The claimant was sent an outcome letter, notifying him of his dismissal dated 19 January 2021. We found that Mr Amir's conclusion that the claimant was avoiding calls and had committed gross misconduct deserving of dismissal was a genuine one which was not influenced by bias against the claimant or in favour of Ms Midgley or appreciation of an allegation of sexual harassment by the claimant against Ms Midgley.

66. The claimant appealed against his dismissal on 27 January 2021 (page 259). That document contains 19 points of appeal. Point 17 of the 19 points of appeal read:

> *Grievance against my Manager Nicky Midgley. I do strongly believe that my manager treated me differently and pushed through this disciplinary without a proper investigation because of something that happened between us in the past, that I have not previously mentioned. Nicky Midgley started as my manager towards the end of 2019, and we had a good working relationship. However, shortly after she started to manage me, I felt that there were occasions where she would behave improperly and unprofessionally towards me. For instance, when I was at my desk, she would approach me from behind and massage my shoulders and stroke my hair (she did this on a few occasions). She would also call me 'babes' tell me that I was 'good looking' and that she could be my 'second wife'. I am a happily married man, and felt uncomfortable with Nicky Midgely's advances to me, so I spoke to my work*

colleagues Laura Hughes and Nick Aldridge about this. My conversation with my work colleagues got back to Nicky Midgley and I recall she sent me a message on work skype and apologized for making me feel uncomfortable. However after this Nicky Midgley's attitude towards me changed she was no longer very supportive towards me and treated me different to the other people on my team. Whilst I have been working from home, Nicky Midgley has not been supportive and cancelled most of our coaching and 1-2-1s. I did not want to mention this before, as I felt a little uncomfortable and embarrassed talking about it. However, having given it more consideration, I now strongly believe that the disciplinary investigation (i.e. the biased nature of the investigation, Nicky Midgley's lack of empathy regarding my home and childcare situation, and the lack of investigation into my IT tuition) may have been motivated because of this".

67. We find that this statement related the claimant's concerns that he has been treated differently, in particular that the investigation and disciplinary action has been taken against him because he rejected Ms Midgley's advances. It clearly stated the claimant's allegations of physical and verbal sexual harassment, albeit that it did not use that terminology. It expressed that the claimant felt uncomfortable with Ms Midgley's behaviour. We find that this amounted to an expression of grievance about alleged actions by Ms Midgley which were capable of amounting to sexual harassment or harassment related to sex or less favourable treatment because of the rejection of sexual harassment. Although the grievance was buried at item 17 of 19 in the grounds of appeal in the disciplinary process, it was in our view, an expression of grievance nonetheless.

68. However, we agreed with the respondent's submissions that, on the facts, it was somewhat ambiguous. It was not a standalone grievance and the claimant did not use the term 'sexual harassment', nor did he expressly ask for the allegations to be investigated. The context in which the allegations were raised was the appeal against his dismissal and his intention in producing the document was evidently to have his dismissal overturned. He was a long-standing employee, being advised by an aunt who was a solicitor specialising in employment law. The allegations were being raised for the first time, more than a year after they were alleged to have occurred, in the context of an appeal against dismissal, rather than as a separate grievance. Moreover, the identification of the allegations as item 17 of the 19 points of appeal implied that they were less significant that the earlier points of appeal. In our judgment, the introduction of these allegations in the claimant's appeal represented the next step in the evolution of the narrative he was creating for himself to explain and defend himself against the disciplinary action against him. The respondent did not immediately identify the allegation at point 17 of the claimant's appeal document as being an allegation of sexual harassment against Ms Midgley, but treated it instead as a further strand of his defence to the disciplinary action against him.

69. The appeal hearing, which was originally scheduled for 12 February 2021, was postponed to 19 February 2021 because of the claimant's ill health. On 16 February 2021 the claimant began working on a temporary basis for another company.

70. The appeal hearing went ahead on 19 February 2021, heard by Mr Banks, Business Manager. The claimant says the respondent barely touched on his allegation at point 17, and the minutes of the appeal meeting support that

allegation (page 317). Neither Mr Banks nor the claimant read out the words used by the claimant in the points of appeal and Mr Banks merely asked the claimant, 'Do you have any evidence to support this?'. The claimant told Mr Banks that Ms Midgley was very cold with him and "the team would back him up on that". At the end of the meeting (page 318) Mr Banks invited the claimant to add anything else. The claimant therefore had the further opportunity to discuss the allegations but did not do so.

71. We find that Mr Banks looked at the claimant's performance and IT issues, but failed to address the claimant's allegation of bias. The claimant was not clearly alleging sexual harassment at this stage and it was not clear that he expected or wanted the allegations which he later alleged to be sexual harassment to be investigated. In our judgment the reason Mr Banks did not investigate point 17 of 19 was that he did not understand that the claimant wanted it investigated or had raised it as a grievance. During the appeal hearing, the claimant failed to give any indication, despite being given the opportunity, of the importance which he now attaches to his complaint at point 17. Mr Banks attached the same level of importance to that allegation as the claimant appeared to do in the meeting. Mr Banks therefore concluded there was not a need to look into the point further as a grievance outside the context of the appeal meeting. Although Mr Banks' responses in cross examination were confused, we were satisfied (as submitted by the respondent) that it was a result of the pressure of cross examination and we did not draw any inference that he was trying to hide a discriminatory motive.

72. A personal tragedy led to Mr Banks being absent from work immediately following the appeal meeting for a number of weeks and we had the impression from Mr Banks evidence before us and the contradictions and failure to correct errors in correspondence evidenced in the file of documents (see below) that during Mr Banks was distracted and his performance in his role was compromised by his personal issues throughout his handling of the claimant's appeal. In addition, Mr Banks' out of office notification was not turned on for part of that time, so the claimant was not aware of the reason for the delay in Mr Banks reaching a decision or notifying him of the outcome.

73. The claimant chased Mr Banks for a response on 6 March 2021, 18 March 2021 and 23 March 2021. Mr Banks telephoned the claimant on 31 March 2021 to inform him that the decision to dismiss him had been overturned and he would be reinstated. We accepted Mr Banks' evidence that he determined that the claimant's dismissal should be overturned because it was not clear that the proper procedures had been completed at the time the claimant began working from home and that the respondent's expectations had been made clear to the claimant. The claimant asked for written notification of the outcome to his grounds of appeal (page 326).

74. On 1 April 2021 the claimant was invited for interview for a permanent role as legal collections manager at another company (which he was subsequently offered before 26 April 2021). On 1 April 2021, Mr Banks emailed the claimant again confirming that he was reinstated and asking him to think about what wanted to do going forward (page 328). The claimant emailed Mr Banks saying he could not make a decision regarding what to do until he had seen the full outcome of the appeal including his grievance against Ms Midgley. We noted in particular, the timing of the claimant's email: he already knew that the respondent had reinstated him, but suggested for the first time that his return to work would

be contingent on the outcome of his complaint about Ms Midgley on the same day that he interviewed for a permanent role elsewhere. He had previously focused on having his dismissal overturned and made the allegations of bias against Ms Midgley to that end, but once he had achieved his aim those allegations threatened to complicate his return to work and he had the prospect of employment elsewhere. In our judgment, this had all the hallmarks of someone 'moving the goalposts'.

75. The claimant chased Mr Banks on 6 April 2021 and 19 April 2021 (page 330 – 331 and page 338) for the written outcome. On 13 April 2021 the claimant approached ACAS for early conciliation and was, therefore, clearly contemplating an Employment Tribunal claim.

76. On 19 April 2021, 2 months after the appeal hearing, Mr Banks sent a written response to the claimant's 19 points of appeal. The letter was titled "Formal Grievance Outcome" and dated 12 April 2021. It stated:

> *My decision is to overturn the dismissal due to the point that when you were originally sent home you were not set up correctly (in terms of expectations and setting up the equipment) I believe that if the assessment had been completed correctly and the expectations set then this would have prevented the level of performance seen and would have also ensured you were aware of expectations with clear accountability set. I do have to note that the level of excessive hold and wrap is beyond that expected in performance levels from those working from home and not in line with expectations. The point that this was not set is the technicality that has resulted in this being overturned rather than the dismissal based on performance being wrong.*

77. Paragraph 4 of the letter, stated, "*Thank you for bringing this matter to our attention, on considering all aspects of your grievance, I have concluded that I am upholding the Grievance.*"

78. Later in the letter, at point 17, it was stated, *"Grievance against my manager Nicky Midgley Finding – as above the performance measures are in an area where we would look to challenge performance. I hear your point around this but cannot find any factual evidence for me to uphold this point. Outcome – Not Upheld".*

79. We accepted the claimant's evidence that he was confused by the outcome letter and unable to understand whether the grievance aspect of his appeal had been upheld or not, given the contradictions and incoherence of the letter.

80. Mr Banks gave evidence that he told the claimant on 22 April 2021 that his grievance would be dealt with on his return to work. We were not persuaded that Mr Banks' recollection of that conversation was reliable so long after the event, particularly as the documentary evidence showed the claimant continuing to email him chasing an outcome to the grievance part of his appeal. We therefore preferred the claimant's evidence that this conversation did not take place.

81. On 26 April 2021 the claimant's contract of employment in his new role as Legal Collections manager was prepared and sent to him for signature. The claimant commenced his new permanent role on 4 May 2021.

82. On 4 May 2021 the claimant also emailed the respondent's human resources department and Mr Banks requesting his back pay (page 345) and clarity on whether his grievance of sexual harassment had been upheld and made a data protection subject access request. We accepted Mr Banks evidence that he did not receive that email, as he did not respond to it, although it was evident from later correspondence that the human resources department had done so. We find that it was in this email that the claimant for the first time labelled his allegation against Ms Midgley as sexual harassment.

83. On 12 May 2021 the claimant chased Mr Banks and the human resources department for a response and re-sent his email of 4 May 2021 to Mr Banks. After repeated exchanges on 12 May 2021 in which the claimant queried with Mr Banks' contradictory language in the letter of 19 April 2021, Mr Banks finally sent the claimant an amended version of that letter, which still contained the erroneous contradictory paragraphs. Mr Banks also requested that the claimant confirm when he would be returning to work. We accepted Mr Banks' evidence that he was going through a difficult time personally and was having counselling. We agreed with the respondent's submissions that his personal circumstances appeared to have impacted his ability to understand what the claimant wanted or be able to perform in his role. We find that, while he did not investigate the claimant's allegation of sexual harassment or provide a full explanation of his findings in relation to each point the claimant raised, he did not ignore the claimant or fail to respond to the claimant.

84. On 14 May 2021 the claimant again wrote to Mr Banks and human resources for clarification about grievance and chased his back pay. On 18 May 2021 Mr Banks send the claimant a further email confirming that his dismissal was overturned and again failing to address the claimant's query about his sexual harassment allegation against Ms Midgley (page 355). In our judgment Mr Banks would have dealt with an appeal and/or grievance raised by a woman in materially the same circumstances in the same way and would have dealt with the claimant's appeal and grievance in exactly the same way had he been a woman. The reason for Mr Banks' treatment of the claimant was Mr Banks' personal difficulties and not because of the claimant's sex or in any way related to sex or because Mr Banks believed the claimant had rejected sexual advances from Ms Midgley.

85. On 19 May 2021 the claimant submitted his resignation (page 354), asserting that Mr Banks' email of 19 May 2021 was the final straw. However, by this time, he had already been working in his new permanent role for two weeks. While finding temporary employment was not incompatible with hoping to be reinstated on appeal, in our judgment, obtaining a permanent position elsewhere was more so. We considered the fact the claimant had obtained permanent employment, in combination with the timing of his letter on 4 May 2021, the timing of his resignation and the wording of his emails. We concluded, on the balance of probabilities, that he resigned from the respondent because he had already started working elsewhere, rather than because of the respondent's failure to address his grievance. While the failure to address the grievance and obtaining work elsewhere may be combined reasons, in this instance, in our judgment, the evidence suggested that it was the new employment which caused the claimant to resign having been reinstated, rather than the respondent's failure to investigate or provide an outcome to his grievance.

86. We were particularly struck by the way in which the claimant re-defined his relationship with Ms Midgley during the timeline of the disciplinary action against him: they started out with friendly banter, the claimant bought her a sex toy for a Secret Santa and he made no mention of any concerns about her behaviour prior to the investigation into his performance; at the disciplinary stage he moved on to stating that she had ‘failed as a manager’ and conducted a ‘biased and wrongful investigation’; at the appeal stage, fighting to get his job back, he made more specific allegations of sexual attraction, rejection and bias; and finally, after having been reinstated and on the very day he commenced permanent employment elsewhere, he began using the term ‘sexual harassment’. In our judgment, the claimant constructed the narrative of the sexual harassment by Ms Midgley to explain the disciplinary action and dismissal. When he was reinstated, he was already pursuing employment elsewhere and the story of sexual attraction, rejection and bias he had created meant his reinstatement would present problems. We find that he resigned to pursue his new employment.

87. The claimant obtained his early conciliation certificate on 25 May 2021. He approached ACAS a second time for early conciliation on 26 May 2021 and obtained a second early conciliation certificate on 10 June 2021. His claim was submitted to the Tribunal on 10 June 2021.

88. On 30 June 2021 the claimant received basic pay, commission and holiday representing his back pay for the period 19 January 2021 to 31 March 2021, totalling £4,728.63 net.

The law

89. Section 95(1)(c) of the Employment Rights Act 1996 (“ERA”) provides that an employee is constructively dismissed by their employer if the employee terminates the contract of employment with or without notice in circumstances in which they are entitled to terminate it without notice by reason of the employer’s conduct.

90. The case of **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 CA held that, to show there has been a constructive dismissal the employee must establish that:

    90.1. There has been a fundamental breach of contract on the part of the employer. A breach of contract may be a breach of the implied term of trust and confidence between employer and employee. In **Malik v BCCI** 1997 ICR 606 HL it was established that this meant that neither party would without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. In **Johnson v Unisys Ltd** 2001 ICR 480 HL this was held not to apply in connection with the manner of a dismissal. The test is objective (**Omilaju v Waltham Forest London Borough Council** [2005] EWCA Civ 1493, [2005] IRLR 35). There is no breach simply because the employee subjectively feels that a breach has occurred, no matter how genuinely the employee holds that view.

    90.2. The employer’s breach caused the employee to resign, in other words it played a part in the dismissal (**Wright v North Ayrshire Council** 2014 ICR 77 EAT)

90.3. The employee did not delay too long before resigning, thus waiving the breach/affirming the contract and losing the right to claim constructive dismissal.

91. A Tribunal must reach its own conclusion on the question of whether a breach of contract has occurred. The test is an objective one. It does not make any difference to the question of whether there has been a fundamental breach that the employer did not intend to end the contract. The test is not whether a reasonable employer might have concluded that a breach had occurred.

92. In **Kaur v Leeds Teaching Hospitals** 2019 ICR 1 CA the Court of Appeal gave guidance on 'last straw' cases, telling Tribunals to consider:

    92.1. What was the most recent act which caused the resignation?
    92.2. Did the claimant affirm the contract since then?
    92.3. If the claimant has not affirmed the contract, was that act by itself a repudiatory breach?
    92.4. If not, was it part of a course of conduct?
    92.5. Did the employee resign in response (or partly in response) to that breach?

93. Mr Morgan for the claimant directed us to the case of **Folkestone Nursing Home Ltd v Patel** 2019 ICR 273 CA which held that the purpose of having a contractual appeal process is to enable an employee to ask an employer to reopen a decision to dismiss. However, if a letter granting the appeal fails to deal with a serious allegation against the employee, this could amount to a breach of the implied term of trust and confidence.

94. We also had regard to the provisions of section 98 ERA regarding unfair dismissal, in particular section 98(1) and (2) on the fair reason for dismissal and section 98(4) ERA on the reasonableness of the respondent's actions which, in the context of a constructive dismissal apply to the actions which caused the claimant to resign.

95. We had regard to the provisions of section 13 ERA on unauthorised deductions from wages.

96. We had regard to section 123 of the Equality Act 2010 ("EQA") which sets out the time limit for presentation of a complaint of discrimination, harassment and/or victimisation. We also had regard to section 136 EQA which sets out the two-stage burden of proof. We had regard to the principles in **Igen Ltd v Wong and ors** [2005] IRLR 258 CA (in particular that the claimant's sex need not be the only reason, it is sufficient for it to be more than a trivial reason) and note in particular that, following **Madarassy v Nomura International** [2007] IRLR 246, the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination and 'something more' is required. 'Could conclude' must mean that a reasonable Tribunal could properly conclude from all the evidence before it, including the respondent's explanation. The claimant also directed us to the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11 which established that it is not always necessary to apply the two-stage test, but may be permissible to look at all the

circumstances and decide the reason for the treatment of the claimant (the 'reason why' test).

97. Section 39(2) EQA reads

An employer (A) must not discriminate against an employee of A's (B) –

…
(c) by dismissing B;
(d) by subjecting B to any other detriment.

98. Section 13 EQA reads

(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

99. Section 23(1) EQA reads

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

100. The respondent directed us to the cases of:

100.1. **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065, HL, and the principle that the EQA outlaws less favourable, not different, treatment, and the two are not synonymous.

100.2. **Jhuti v Royal Mail Group Limited** [2019] UKSC 55, which established that, where there is an invented reason for the dismissal then the real reason can be imputed to the decision-maker, though there must be some evidential basis for such imputation.

100.3. **Burrett v West Birmingham Health Authority** [1994] IRLR 7, EAT and the principle that the fact that a claimant believes that he or she has been treated less favourably than a comparator does not of itself establish that there has been less favourable treatment: The test is an objective one.

100.4. **Glasgow City Council v Zafar** [1998] ICR 120, which established that a tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably.

100.5. **Bahl v Law Society** 2003 IRLR 640 EAT, in which, at paragraph 101, Elias J stated, *"The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example that the true reason casts then in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, them the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself".*

101. Section 40 EQA reads,

An employer (A) must not, in relation to employment by A, harass a person (B) –

(a) who is an employee of A's;
(b) who has applied to A for employment.

102. Section 26 EQA reads,

(1)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.

(2)A also harasses B if—

(a)A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

103. The respondent referred us to guidance in the case of **Driskel v Penninsula Business Services Ltd and ors** 2000 IRLR 151 EAT.

104. Section 39(3) EQA reads

An employer (A) must not victimise an employee of A's (B) –
…
(c) by dismissing B;
(d) by subjecting B to any other detriment.

105. Section 27 EQA reads

(1) 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.

(2) Each of the following is a protected act –

…

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

106. The respondent directed us to the relevant considerations in relation to bad faith allegations in **Saad v Southampton University Hospitals NHS Trust** 2019 ICR 311 EAT.

Determinations

Sexual harassment and/or harassment related to sex and/or less favourable treatment on grounds of rejecting or submitting to harassment

107. We find that the allegations which form the basis of his sexual harassment complaint did not occur as described by the claimant. We find that there was a level of playful banter and a friendly and warm relationship between the claimant and Ms Midgley prior to her investigation into his performance, with the claimant a willing participant in that relationship. However, there was insufficient evidence for us to find that she called him 'babes', or told him that she "found brown/Asian men attractive" or that she "could be his second wife". On the evidence, he was responsible for the only sexualised banter, calling her 'babes' and asking if she thought he was sexy. In addition, it was him who bought her a sex toy for a secret Santa present. We find Ms Midgley did not do these acts alleged to be sexual harassment.

108. We find that Ms Midgley touched the claimant's hair on one occasion, in a non-sexual manner while challenging him about a work matter. He was not happy about it because he was wearing a hairpiece. We find that the physical contact was unwanted. However, we find that it was not related to sex or of a sexual nature. Both Mr Rainsford and Ms Thompson confirmed that it was not sexual behaviour, Ms Midgley was talking about work and it was agreed that Ms Midgley is generally a tactile person who gives colleagues hugs. Ms Midgley's Whatsapp message (page 105) to the claimant following the event supported this interpretation, in that she apologised and he explained it was to do with his sensitivity about his hair. We find this conduct by Ms Midgley was not of a sexual nature or related to sex.

109. We find as a fact above that Ms Midgley did not treat the claimant detrimentally by cancelling his one-to-ones, failing to offer support or ignoring him. Their working relationship commenced against the backdrop of the claimant having a new young family, Ms Midgley coping with the aftermath of a personal tragedy, the start of the Covid pandemic, and the claimant shielding for 12 weeks and subsequently working from home. We accepted Ms Midgley's evidence that she continued to speak to the claimant regularly and offered him support, albeit that it was not on such a documented, formal basis as would have been usual in the pre-Covid era. There was insufficient evidence for us to find that she treated him detrimentally as alleged.

110. Ms Midgley investigated the claimant's performance and referred him for disciplinary action. We find that these actions were not related to sex. We accepted the respondent's evidence that Ms Midgley commenced the investigation because she was alerted to his poor performance when she examined the team's statistics during a quieter period in December 2020. We accepted her evidence that she suspended the claimant and referred the matter for disciplinary proceedings because of his admissions during the investigatory meeting that he had made excessive use of the wrap function, put customers on hold to deal with his children and had not been trying to hit his targets. In addition, we consider that, if the claimant genuinely believed his rejection of Ms Midgley's advances was a factor in her investigating his performance, he would have explicitly made that allegation at a stage sooner than the appeal against his dismissal.

111. We therefore find that there was no unwanted treatment of the claimant by Ms Midgley of a sexual nature or related to sex. In the absence of harassment, there can be no argument that the claimant was treated less favourably because he rejected or submitted to such conduct.

112. Further, and separately, the complaint of sexual harassment/harassment related to sex in respect of the allegations against Ms Midgley was presented significantly outside the limitation period. The harassment allegations against Ms Midgley relate to the period November 2019 to May 2020. The claimant first approached ACAS in April 2021. Despite having access to advice from his aunt, who is apparently a solicitor practising in employment law, throughout his employment and these proceedings, the claimant did not demonstrate how this was said to be conducted extending over a period nor present sufficient evidence as to why it would be just and equitable to extend time. We therefore find that it would not be just and equitable to extend time and the complaint was presented outside the limitation period.

113. The complaint under section 26 of the Equality Act 2010 fails and is dismissed.

Victimisation

114. We find that the claimant raised a grievance on 27 January 2021, albeit that it did not expressly state that it was a grievance of sexual harassment. However, we find that the claimant's grievance was raised in bad faith, in that it was a knowingly false allegation, dishonestly raised. We find that the claimant's allegations against Ms Midgley throughout were not made in good faith. We find as a fact, above, that he progressively re-defined his friendly banter with her as sexual attraction, harassment, rejection and victimisation. Prior to her investigation into his performance, his relationship with her was friendly and warm. At the disciplinary stage he alleged that she had 'failed as a manager' and conducted a 'biased and wrongful investigation'. Having been dismissed, at the appeal stage he made allegations of sexual contact, language, rejection and bias and contacted ACAS with a view to commencing Employment Tribunal proceedings. Having been reinstated, but already commenced permanent employment elsewhere he alleged sexual harassment. The inconsistencies in the claimant's evidence, in particular that it was he, not the claimant, who used sexual language and bought her a sex toy, and the inconsistencies with the contemporaneous documentary evidence, in particular the tone of the

conversations in the Whatsapp messages and the evidence of the other witnesses, cast serious doubt over the veracity of the claimant's claim.

115. Section 27(3) EQA establishes that, where an allegation is made in bad faith or false evidence or information is given or a false allegation is made, it is not a protected act for the purposes of a section 27 EQA victimisation complaint. We agreed with the respondent's submissions that, even if the grievance were a protected act, the raising of the grievance was not the reason why the claimant's questions about his grievance/appeal and/or back pay were ignored, not clarified or paid. The reasons for those failures were Mr Banks' compromised performance in his role as a result of his personal difficulties and failure to appreciate what the claimant required.

116. The complaint of victimisation fails and is dismissed.

Direct sex discrimination

117. We find above that the claimant did not raise a grievance on 14 January 2021 before Mr Amir. In any event Mr Amir took steps to investigate what he understood the claimant's complaint to be about. We find that the claimant's email of 27 January 2021 was a statement of grievance about allegations capable of amounting to sexual harassment, albeit that it was somewhat ambiguous. It was not a standalone grievance, did not use the term 'sexual harassment', nor ask for the allegations to be investigated and was buried in his appeal against dismissal. We find that the respondent failed to investigate the claimant's grievance. However, we find as a fact that that failure to investigate was the result of Mr Banks' compromised performance in his role as a result of his personal difficulties and failure to appreciate what the claimant required.

118. In our judgment there was no less favourable treatment of the claimant. Although the claimant mentioned an actual female comparator in passing during cross examination, he had not named a comparator during these proceedings previously and his representative did not seek to add an actual comparator and made no reference to one in submissions. The focus therefore was on a hypothetical comparator, but there was insufficient evidence that Mr Banks would have treated a woman in materially the same circumstances and/or the claimant (had he been a woman) any differently. We find that the claimant's treatment had nothing to do with the fact that he was a man.

119. The complaint of direct sex discrimination fails and is dismissed.

Constructive unfair dismissal

120. As set out above, we find that Mr Banks failed to properly investigate the claimant's grievance of sexual harassment and failed to set out a detailed unambiguous outcome. A failure to investigate a grievance about sexual harassment would ordinarily be capable of being a breach of an implied term of the contract, or a breach of the implied term of trust and confidence. However, in this case the facts speak otherwise in our view. The claimant's grievance was buried in the his appeal against dismissal and it was not clear that he expected it to be investigated. The respondent overturned the dismissal and reinstated the claimant and Mr Banks did not fully appreciate what the claimant required, as the claimant was 'moving the goal posts'. Secondly, and separately, we find as a fact

that the claimant was not acting in good faith in raising the grievance against Ms Midgley. It was not a genuine grievance and he himself was acting in breach of the implied term of trust and confidence between employer and employee, in making false allegations against his line manager. The respondent's failure to properly investigate the grievance did not, in these circumstances, amount to a fundamental breach of the Claimant's contract of employment entitling him to resign, in our judgment.

121. The respondent made a payment to the claimant on 30 June 2021 of £4,728.63 which represented his back pay for the period of his dismissal to his resignation. The claimant submitted that the respondent's failure to pay his back pay upon reinstatement was a fundamental breach of contract entitling him to resign. The claimant resigned on 19 May 2021, six weeks after his reinstatement. During that time Mr Banks was trying to establish when the claimant was intending to return and we accepted Mr Banks' evidence that he was unable to calculate the correct figures for the claimant's back pay without assistance from the Human Resources department owing to the nature of the claimant's role and complexity of the pay arrangements. In the circumstances therefore, we find, missing one monthly payroll opportunity was not a fundamental breach and, in this case, there was a reasonable and proper cause for the lost time. We find that it did not amount to a fundamental breach of contract, particularly where the claimant was not, in fact, working. In reality, the claimant was already working elsewhere without the respondent's permission, in breach of contract.

122. We find that the respondent did not fail to respond and/or ignore the claimant's emails requesting clarity on his grievance and back pay. We accepted Mr Banks' evidence that he did not receive the claimant's email of 4 May 2021 (page 341), he responded to the claimant on 12 May 2021 (page 347 – 353) and responded to the claimant on 14 May (page 355). The back pay element required resolution by the Human Resources department and Mr Banks sought to put that in place. Mr Banks made a mess of the grievance aspect (as detailed above in our findings of fact), but did not fail to respond or ignore the claimant. In part, confusion was caused by the claimant changing the focus of what he wanted on 4 May 2021. Mr Banks's performance was compromised by his personal difficulties and he struggled to understand what the claimant was seeking. We find there was no fundamental breach of the claimant's contract in this respect.

123. We find that there was not conduct, which taken together, cumulatively amounted to a course of conduct which was in breach of the implied term of trust and confidence. The other conduct alleged to have contributed to the course of conduct in breach of implied trust and confidence was the alleged sexual harassment, the disciplinary action taken against the claimant (in particular the manner of the disciplinary investigation and dismissal hearing) and the delays within the appeal process. Our factual findings in relation to the acts alleged to be sexual harassment are set out above. We find that those incidents did not occur as alleged and were not therefore capable of forming part or all of a breach of the implied term of trust and confidence. While the investigation and disciplinary process contained procedural flaws (as set out above), in our judgment they were not such as to amount to a course of conduct which was calculated or likely to destroy or seriously damage the employment relationship. On the contrary, the respondent upheld the claimant's appeal, overturned his dismissal and reinstated him to his position. While that in itself is not determinative, and we remind ourselves that the respondent's good intention does not prevent there being a

breach of the implied term, we consider that it is evidentially relevant to the objective test we must apply in asking ourselves whether the respondent acted in a manner which was calculated or likely to destroy or seriously damage the employment relationship. We note that **Patel** was decided on a different point (that if an appeal is lodged, pursued to its conclusion and successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout, although a failure to resolve allegations against an employee satisfactorily may be grounds for a complaint of constructive dismissal) and we agree with Ms Kight that it is to be distinguished from this case. Separately, following **Johnson v Unisys**, the manner of dismissal cannot be a breach of contract for the purpose of a constructive dismissal claim. In any event, we find that the respondent had entirely proper reasons for invoking the disciplinary process, being the claimant's admissions about excessive use of the wrap function, putting customers on hold to deal with his children and not trying to hit his targets. The delays in the appeal process were lengthy but not such that they amounted, in our view, to part of a cumulative course of conduct which breached the implied term of trust and confidence. Mr Banks was in touch with the claimant for part of that time, during which the claimant knew he had been reinstated and some of the confusion was due to the claimant 'moving the goal posts'. There was no conduct, in our judgment, which cumulatively amounted to a course of conduct which breached the implied term of trust and confidence.

124. Even if we are wrong and the above could be said to amount cumulatively to a course of conduct which breached the implied term of trust and confidence, or any of the other alleged breaches were fundamental, we find that the claimant did not resign in response to anything the respondent did, but because he had already taken up permanent employment elsewhere and the narrative he had constructed for himself to explain the disciplinary action and dismissal would make reinstatement difficult.

125. We agree with the respondent's submissions that, although the claimant's resignation letter states that he is resigning in response to a breach of his contract, the facts speak otherwise. At this point he had already been to ACAS for early conciliation, he had switched from temporary to permanent employment, he had raised the stakes on the sexual harassment allegation and, we find, was not intending to return. He had taken no steps to return to work after 31 March 2021, despite being told that his dismissal had been overturned. He avoided returning to work, even though he was in any event working from home, and refocused his sights on the outcome of the grievance paragraph (previously 17 of 19), rather than the appeal. The fact that he approached ACAS on 13 April 2021 indicated that he was at the very least considering pursuing a claim at that point, before he received the written outcome. We agreed with the respondent's submissions that these appeared to be the actions of someone trying to construct a claim. Although the claimant resigned following Mr Banks' email purporting but failing to clarify the position on the grievance we find that the claimant had already decided to resign and had no intention of returning to work.

126. In summary, we find that the respondent did not fundamentally breach the claimant's contract of employment. Even if we are wrong in that regard and the cumulative or individual actions or failures of the respondent could be found to be in breach of the implied term of trust and confidence or fundamental breach of another term of the claimant's contract, we find that the claimant did not resign in

response to any such breach, but rather, because he had found alternative work elsewhere. We find that the claimant was not constructively dismissed and the complaint of unfair dismissal therefore fails and is dismissed.

Wrongful dismissal (breach of contract)

127. As the respondent's submissions acknowledged, the picture was somewhat blurred by the fact that that claimant was not actually working or receiving wages at the time of his resignation, owing to the ambiguous situation created by Mr Banks' enquiry about how the claimant wanted to proceed with his reinstatement and the claimant's refocusing of his grievance.

128. However, in our view the underlying contractual picture was straightforward. Following his dismissal on 18 January 2021 the claimant was reinstated on 31 March 2021. He then resigned without notice on 19 May 2021. We find that his resignation was not a constructive dismissal and therefore it was not capable of being a wrongful dismissal. It was the claimant himself who was in breach of his contract on 19 May 2021 by failing to give notice of termination of his contract. Separately, we note he was also in breach of his contract of employment by working elsewhere while employed by the respondent without written consent, meaning the respondent may have had the right to terminate his contract without notice and, even if the respondent had breached his contract, he may have mitigated his losses through his new employment and had no loss.

129. We therefore find that the claim for wrongful dismissal fails and is dismissed.

Unauthorised deductions from wages

130. The respondent made a payment to the claimant in June 2021 of £4,728.63, which the respondent submitted represented the monies owed to the claimant for backpay during the period 18 January to 19 May 2021. The claimant maintained that this was an underpayment, but there was insufficient evidence for us to find that the respondent made unauthorised deductions. The claimant pointed us to his payslips (page 360 onwards). Based on the basic pay and holiday pay totals shown on those documents, the respondent's calculation of £4,728.63 net appeared to us to be approximately correct for the period 18 January 2021 to 19 May 2021. The claimant was unable to identify in what way it was incorrect. There was therefore insufficient evidence for us to make a finding that there had been an unauthorised deduction from the claimant's wages. That claim therefore fails and is dismissed.

EJ Bright

8 January 2024