



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4102137/2023 & 4103923/2023

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**Held in Glasgow on 22-25 April 2024 &
Consideration of Written Submissions on 7 May 2024**

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**Employment Judge Sangster
Tribunal Member Anderson
Tribunal Member Burnett**

Miss N Reilly

**Claimant
Ms DM Gray -
Professional Representative**

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Pets at Home Limited

**Respondent
Represented by
Mr P Grant-Hutchison -
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's complaints of unfair dismissal, harassment of a sexual nature, direct sexual orientation discrimination and victimisation do not succeed and are dismissed.

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REASONS

Introduction

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1. The claimant presented complaints of constructive unfair dismissal, harassment of a sexual nature, direct sexual orientation discrimination and victimisation.
2. The respondent resisted the complaints.
3. A preliminary hearing for case management was held on 7 December 2023. At that hearing, the respondent's application for the final hearing to be held in private and, in the alternative, for a restricted reporting order was considered. The application was opposed by the claimant. The respondent expressly

stated that they were not seeking any anonymity orders. Having heard submissions from each party, EJ Macleod refused the application, for the reason set out in the note he issued following the preliminary hearing.

4. Prior to the commencement of the final hearing, it was agreed that witness statements would be used at the hearing. These were provided to the Tribunal on the morning of the first day of the hearing, in bundles extending to 101 pages, together with an agreed bundle of documents extending to 477 pages. After addressing preliminary matters, the Tribunal took the remainder of the first day of the hearing to review the witness statements and the documents referred to in those statements.
5. The claimant gave evidence on her own behalf, with reference to a witness statement extending to 11 pages.
6. The respondent's witness statement bundle extended to 90 pages. The following individuals, who are all employed by the respondent, were called by the respondent:
 - a. Martin Senior (**MS**), Store Manager, Pollockshaws;
 - b. Cameron Murray (**CM**), Store Manager, East Kilbride;
 - c. Caitlin Stewart (**CS**), Senior Store Manager;
 - d. Erika Crosbie (**EC**), currently Area Manager;
 - e. Blue Page (**BP**), Area Manager; and
 - f. Thomas Walker (TW), Assistant Store Manager, East Kilbride.

Issues to be determined

7. At the time the hearing commenced, there remained some dispute in relation to some isolated points on the list of issues which had been agreed between the parties. These were discussed between the parties and then the Tribunal. The list of issues then agreed was as follows:

Jurisdiction

8. Whether, in relation to any of the claimant's claims that are out of time (subject to any statutory extensions of time), it is just and equitable to extend time.

Sexual harassment - section 26 Equality Act 2010 (EqA)

- 5 9. Whether the following conduct occurred and if so, was unwanted conduct of a sexual nature which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her under section 26 of the EqA:
- 10 a. It is alleged that, whilst in the East Kilbride Pets at Home office on 9th October 2022 and during working hours, TW was encouraging the claimant to talk about her sexuality and was verbally pressurising the claimant to share inappropriate pictures that she had exchanged between herself and her girlfriend. It is alleged that TW was pushing the claimant to show him inappropriate pictures by saying the phrases "*come on*" and
- 15 "*show me.*" The claimant admits that she showed TW a picture of her breasts on her mobile phone.
- b. TW allegedly showing the claimant a picture of his penis on his own phone during working hours in the Pets at Home office minutes after the alleged exchange in issue a. above. TW is alleged to have said to the
- 20 claimant "*seeing as you showed me a picture of you, I'll show you a picture of myself*".
- c. TW allegedly asking the claimant if she was a "squirter" or a "creamer" on 17th October 2022, in TW's car outside the claimant's house.
- d. The respondent did not take action against rumours regarding the
- 25 claimant being in a sexual relationship with TW.
- e. The claimant alleges that TW called her on FaceTime (video call) and made sexual remarks after sending messages on WhatsApp on 5 October 2022 attaching a picture of a glass of wine whilst watching the 'Arcane' series on Netflix. It is accepted by the claimant that no sexual

remarks were made via WhatsApp messages on 5 October 2022. TW is alleged to have: talked to the claimant about confidential store matters and stores colleagues, informed the claimant that EC was trying to get her fired after she was investigated for allegedly hitting her dog, have informed the claimant about rumours in store of their relationship becoming sexual and who started these rumours, talked to the claimant and her partner's sex life and to have suggested the claimant breast feeds on facetime saying "*whip them out*" and "*I don't mind to watch.*"

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f. TW allegedly deliberately calling the claimant after he had been told by EC not to contact the claimant after the meeting held on 26th October 2022.

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g. TW allegedly discussing heterosexual sex with the claimant on separate dates which the claimant cannot remember. The claimant alleges that on one occasion TW asked the claimant what colleagues in store would she have sexual intercourse with, the claimant admits to answering this question hypothetically by naming a female colleague and alleges that TW said "*well that's my threesome sorted*". The claimant alleges on another occasion that TW asked the claimant if she and her girlfriend would do sexual things on video call with each other and whether the claimant was loud or quiet during sex.

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Direct sexual orientation discrimination – sections 12 and 13 EqA

10. Whether any of the actions or omissions listed below occurred and, if so, amounted to less favourable treatment of the claimant because of her sexual orientation. The claimant identifies as a homosexual female.

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11. The claimant relies upon a hypothetical comparator, such comparator being in materially the same circumstances as the claimant (section 23 EqA) but who is a heterosexual female.

12. Allegedly breaching confidentiality on two occasions namely

- a. On or around 25 October 2022, in relation to a disciplinary investigation meeting that was held with the claimant for allegedly hitting her dog; it is alleged that MS allowed TW to review the notes of the meeting.
- b. On 25 January 2023 CM allegedly told the claimant on the telephone that her grievance had come to a conclusion and that she should telephone the people team. The claimant alleges that CM breached confidentiality because he spoke about the claimant's grievance outcome which he should not have known or spoken about.
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13. TW allegedly telling the claimant that he "*wishes he got her before she became a lesbian*" on a date she cannot remember but believes was 17 October 2022 in TW's car outside the claimant's house.
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14. TW allegedly showing pictures of his penis with the claimant on 9 October 2022 on his mobile phone after the claimant allegedly showed TW a picture of her breasts and saying "*seeing as you showed me a picture of you, I'll show you a picture of myself*".
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15. The acts complained of above are alleged to amount as an attempt by TW to "convert her to heterosexuality".

Victimisation - section 27 EqA

16. It is accepted by the parties that the following amounted to protected acts under section 27(2) of the EqA:
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- a. Raising a grievance against TW on 13 December 2022; and
- b. Raising an appeal against the outcome of the grievance on 31 January 2023.
17. Were these protected acts were done in bad faith?
- 25 18. Did the respondent subject the claimant to detriments by condoning sexual harassment because the claimant had complained of sexual harassment and the claimant's grievance was not upheld and, if so, was this because of one of the protected acts?

Constructive unfair dismissal – section 95 ERA 1996

19. Did one or more of the following acts occur, if so, did the act alone or acts taken together amount to a repudiatory breach of the claimant's contract of employment:
- 5 a. EC allegedly failing to investigate TW's conduct and colleagues allegedly spreading rumours about the nature of the claimant and TW's relationship.
- b. The grievance process taking 42 days rather than 14 days.
- c. Declining to uphold the grievance and declining to form a conclusion based on the evidence, which the claimant has characterised as declining to uphold the grievance because the grievance manager "did not believe the claimant"
- 10 d. Suggesting that the claimant move stores in the outcome to the grievance and suggesting that this was for the benefit of the claimant's mental health.
- 15 e. Declining to uphold the claimant's appeal.
- f. Referring to claimant's mental health when making suggestions about moving store.
- g. Suggesting mediation between the claimant and TW.
- 20 20. If there was a repudiatory breach of the claimant's contract of employment did the claimant accept this breach of contract and resign in response to it, did such resignation amount to a dismissal for the purposes of section 95 ERA.

Remedy

21. What awards should the Tribunal make in relation to the constructive unfair dismissal and sexual orientation discrimination / harassment claims, if successful, including losses, injury to feelings and mitigation of loss?
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22. Did either party breach the ACAS code of conduct?

23. Should any award be reduced?

Findings in Fact

24. This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if the claim succeeds or fails. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues to be determined. The relevant facts, which the Tribunal found to be admitted or proven, are set out below.
25. The respondent is involved in the retail industry, selling pet food and accessories. It also provides in-store veterinary practices, grooming salons and other services.
26. The claimant was employed by the respondent, from 30 July 2018, as a Sales Assistant/Store Colleague, at the respondent's East Kilbride store (**the Store**). She was contracted to work 16 hours per week.
27. The claimant had a baby in March 2021 and took a period of maternity leave, returning to work in September 2021. EC had become the Store Manager during the claimant's maternity leave. On 31 January 2022 TW started as Assistant Manager at the Store, having previously worked in another location.
28. The claimant enjoyed her work and, even when not working, the claimant would go into the store with her partner and son to chat to her colleagues. She would breastfeed her son in the canteen, if he needed fed during the visit.
29. Generally, colleagues in the Store were very friendly with each other and open in their discussions. Colleagues would talk openly about sex and their sex lives. They spoke about conversations and photographs of a sexual nature on their phones, occasionally showing these to each other. They engaged in dark humour and sexual jokes/innuendo.

30. In March 2022 the claimant's relationship with her son's father broke down. She required to move home as a result and her mental health deteriorated. Her ex-partner would look after their son, in her home, while she was working, but the relationship was acrimonious, and they would often have arguments
5 when the claimant arrived home after working.
31. To support the claimant in the workplace, TW would allow the claimant to sit in the staff room if she was experiencing difficulties, which occurred with increasing frequency. He would often sit with her to ensure that she was ok, particularly if she was experiencing a panic attack or was anxious. They would
10 talk a lot. He had also recently experienced the breakdown of a relationship and they both had young sons around the same age.
32. The claimant formed an attachment to TW and considered him a friend. She felt that he genuinely cared about her. She trusted him and felt like she could discuss anything with him. She would talk to him about difficulties with her ex-
15 partner and childcare arrangements, her personal life, her past and her new girlfriend, who she met in summer 2022. She felt entirely comfortable discussing those matters with him. The claimant would also engage in sexual banter and innuendo and discuss her sexuality and sex life with TW. For example, on one occasion in October 2022, TW asked her who she would
20 sleep with in the store. When the claimant gave a name, he laughed and said '*well that's my threesome sorted*'.
33. Despite the fact that the claimant lived near to the Store, and it would only take her 5-10 minutes to walk home, TW would often give her a lift home from work, sometimes with other colleagues also. The fact that TW did so, and she
25 sat for a while in the car chatting when she arrived at her home, caused arguments between the claimant and her ex-partner.
34. From the start of October 2022, the claimant would also contact TW by WhatsApp on days/evenings she was not working, and they would, on occasion, have discussions in the evenings by telephone or on video.

35. The claimant experiences Seasonal Affective Disorder in winter months. She was experiencing this in October 2022, and it was impacting her mental health, which was deteriorating further.
36. On 9 October 2022, the claimant was scrolling through her phone, in TW's vicinity. She had explicit messages and photos of herself and her girlfriend on there, which she swiped past while giggling, as she was aware he could see them. She had also done so in the past in front of other colleagues. She had also showed TW, and others, an app she had on her phone which controlled a sex toy.
37. That evening TW sent a picture to the claimant, which showed that he was about to start watching a TV series she had recommended to him. She messaged back in a very friendly manner – referencing his snacks and wine in the photo and reassuring him that he would like it. They then had a video call where they discussed work related issues. During the call, the claimant's child became fractious, and she indicated that she needed to breast feed him. TW stated that she should go ahead, he didn't mind. The claimant had breast fed her child several times in the store and he was used to seeing her do so. The claimant however ended the call, so she could attend to her son.
38. Over the course of the next week the claimant engaged in numerous WhatsApp exchanges with TW. These generally consisted of the claimant venting to TW about personal issues, and TW responding.
39. On 17 October 2022, the claimant sent WhatsApp messages to TW around midday stating *'really don't want to be here today in work, I'm not doing well mentally...Really considering walking out and just getting a sick line for two weeks because I genuinely cannot handle everything going on in my head'* TW responded that he was in the office and the claimant went to see him there.
40. TW gave the claimant a lift home after work that day. During their discussion in the car, TW stated that he understood that she had been really let down by men in past relationships and he wished he'd known her before that. Their discussion turned to sexual issues (TW asking about sexual relations

between the claimant and her partner and what the claimant was like during sex: squirter/creamer; loud/quiet?). The claimant engaged in that discussion.

41. The claimant sent TW further WhatsApp messages at 21:46 that evening stating *'got in and he went mental at me [three smiling face with hearts emojis]'*. She sent TW a screenshot of an exchange she had had with her ex-partner, who had been caring for their child that day, and then sent several messages to TW criticising her ex-partner and explaining the altercation they had had when she returned home. TW responded empathetically.
42. The following day there were numerous further exchanges between the claimant and TW, in which the claimant continued to vent her criticisms of her ex-partner.
43. Around 22 October 2022, a number of colleagues raised concerns with management that the claimant had informed them that she had physically hit her dog. The respondent commenced an investigation regarding this and the investigating manager, MS, met with the claimant on the afternoon of 25 October 2022. MS became concerned about the claimant's welfare during the meeting, as she became very upset. He adjourned the meeting and converted it into a welfare meeting, to discuss how the respondent could support the claimant during the difficult personal circumstances she was experiencing, which she discussed with MS. He explained to the claimant that the respondent had a hardship fund, which she could apply to for financial assistance. During the meeting the claimant was very complimentary about the support she had received from TW and EC and stated that she viewed work as her sanctuary.
44. Following the meeting, MS spoke to EC and explained that he had concerns for the claimant's welfare. He stated that he had not pursued the investigation, and would not do so, due to the clear distress of the claimant and the fact that he was satisfied that the claimant no longer had responsibility for the dog, as it had been re-homed.
45. Later that evening, claimant called TW. They spoke for around 50 minutes. She spoke mainly about the investigation and how she was upset about that.

TW listened to her vent about her day and tried to empathise. He stated that it seemed that EC was trying to get the claimant fired by proceeding with the investigation. There was a discussion about work generally. TW stated that TC had made a snide comment to him, insinuating that there was something going on between the claimant and TW. The claimant asked about this, and TW stated that TC stated to him *'I hope you got what you wanted'* and he said *'Yeah, I did'*. In discussion about why she would say that, TW told the claimant that there were rumours going round the workplace, started by three of her colleagues, that TW and the claimant were having a sexual relationship. The claimant was very upset to learn that there were rumours circulating in the workplace, started by her colleagues. The claimant felt embarrassed that there were rumours of this nature circulating about her. She left the work WhatsApp group chat and deleted her social media. She felt she could not return to work or face anyone until the rumours stopped.

46. The claimant spoke to her ex-partner about the rumours that she and TW were engaged in a sexual relationship. Her ex-partner told her that it was TW's behaviour towards her that was unacceptable, and that she was being sexually harassed and groomed by him.

47. On 26 October 2022, the claimant sent 5 messages to TW between 10:19 and 10:37. These related to: her application for the welfare fund being lost; her ex-partner not wanting to look after their child; not wanting to go to work (*'I would rather kill myself than go in tomorrow too, like you have no idea how much I've considered hurting myself to a point where I can still look after [my son] but can't go to work'*); and who to raise internal concerns with at work about the rumours in the workplace (*'who's a manager that I can trust outwith the store because I genuinely want to take all this further, and I'll take it to HR if I have to'*). TW had left his phone at home that day, but retrieved it at lunchtime. He tried to call the claimant at 2pm, when he read her messages. She did not pick up or respond. He then sent a message to her at 14:24 stating *'Left my phone at home I've had to nip back on my lunch'* and at 16:15 *'you ok'*. The claimant responded at 16:24 stating *'no, coming down to talk to [EC] at 6:30, don't want to be working there anymore'*.

48. The claimant had sent a message to EC at around 13:00 that day, stating that she had issues which she wished to discuss with her and that she wasn't comfortable returning to work until they were sorted. EC, mindful that MS had indicated that he was concerned about the claimant's mental wellbeing, agreed to meet her that evening. That was the earliest she could do so, as she was working in Edinburgh that day.
49. Before meeting EC, the claimant reflected on her discussions the previous evening. She felt particularly aggrieved that TW, who she trusted and thought was a friend who cared about her, had 'added fuel to the fire' by making the comment he stated that he had made to TC. She felt betrayed by him for doing so. She googled the terms sexual harassment and grooming, which her ex-partner had mentioned the evening before, as she did not know what these meant. From that she understood that grooming meant gaining a person's trust over a period of time to take advantage of them at a later date. She accepted, without question, what her ex-partner had told her, that TW was grooming her, as being the truth. On understanding what grooming meant, she became scared about TW's future conduct towards her. While she had been previously been comfortable with conversations of a sexual nature between her and TW, she now concluded that these were acts of sexual harassment.
50. The claimant met with EC at 18:30 that evening. At the meeting the claimant stated to EC that she had been groomed and sexually harassed by TW and that she was concerned that TW may be thinking about making a pass at her. The rumours about the claimant's relationship with TW were discussed. EC stated that she had heard them, but explained that she had shut them down by speaking to members of staff and informing them that gossip of this nature was unacceptable. EC asked the claimant what she wanted her to do. They discussed that she could raise a formal grievance or there could be informal mediation. The claimant opted for the latter and TW then joined the meeting. He stated that there had been mutual 'banter' but denied inappropriate behaviour. The meeting ended with an understanding that contact in the workplace would be limited as much as possible. EC directing both the

claimant and TW not to have any contact with the other outside working hours. The claimant then left. TW remained in the room with EC and showed her his phone, to demonstrate that all his interactions with the claimant had been appropriate, and the majority instigated by her. When doing so, at 19:21, a few minutes after the claimant had left the meeting, he inadvertently called the claimant, then immediately pressed to cancel the call.

51. Later that evening, mindful of the instruction that he should not contact the claimant, TW asked one of the claimant's colleagues to contact her to check she was ok.

52. The claimant then commenced a period of sickness absence and did not return to work. On 29 November 2022, EC met with her to discuss her absence. The claimant explained that she was struggling with Seasonal Affective Disorder, as she did every winter. The claimant stated to EC that she now realised that TW didn't care about her, as she had been led to believe by him.

53. The claimant raised a grievance on 13 December 2022. In that she asserted that she had been groomed by TW and that he had made inappropriate comments towards her, which were listed (several of which are not referenced in these proceedings). She stated that she had no hard evidence and that she understood it was her word against his. She went on to say that *'I was also unaware of the fact that [TW] was grooming me/harassing me as I was extremely vulnerable with everything I was going through, until family helped me see what was really going on, and what [TW]'s true intentions were.'* She also raised a concern that colleagues had spread rumours about her, and no action was taken.

54. The claimant's grievance was investigated by CS. On 16 December 2022, she wrote to the claimant inviting her to a grievance meeting on 20 December 2022. In the letter she stated *'You will be informed in writing of the outcome of the grievance within 14 days of the hearing. However, should further time be needed to investigate your grievance, we will inform you of this.'* She interviewed 10 colleagues in the period from 20 December 2022 to 9 January

2023, including, on 20 December 2022, the claimant and TW. She then compiled an investigation report. The claimant was informed, by letter dated 4 January 2023, that the outcome of the grievance would be delayed, given the extent of the investigation required. The festive period (a peak trade period for the respondent) and the festive break was also a factor in this.

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55. CM had been notetaker during 6 of the meetings conducted by CS, namely those conducted on 20 December 2022 and 5 January 2023. On 25 January 2023, CM telephoned the claimant. This was a welfare call as she remained absent from work due to illness. CM was acting Manager for the Store at the time, so this fell within his remit. During the call, the claimant stated that she had not yet received the grievance outcome. CS suggested that she contact the People Team to ask about this, if she was concerned, as his understanding was that all the investigation interviews had been conducted.

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56. On 30 January 2023 the claimant was informed, in a letter from CS, that her grievance had not been upheld. CS's letter spanned 4 pages, setting out in detail her findings and the reasons for her conclusions in relation to each element of the claimant's grievance. In the introductory paragraphs, CS stated *'If I have found a point to be 'unsubstantiated' this is on the basis that I have not found any evidence to say for certain that your description is what happened. This does not mean that it did not happen, or that I don't believe your version, it simply means that I cannot be certain.'* In relation to the allegations that TW had behaved inappropriately towards the claimant, and harassed and groomed her, CS found this to be unsubstantiated. She noted in her letter that TW had denied all of the allegations and, as the claimant had not been able to provide dates or times in relation to the allegations made, she had not been able to review CCTV footage, to ascertain if this supported the claimant's position (this related to allegations not raised in these proceedings). She stated that she had been provided with the WhatsApp messages between the claimant and TW, which were 'appropriate and friendly'. She took these points into account in reaching the conclusions she did. She also concluded that the claimant had been appropriately supported

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by EW in relation the workplace rumours and the claimant's concerns in relation to these.

57. The grievance outcome letter concluded with a recommendation that the claimant transfer to another store. CS stated that she believed that the change of environment and fresh start would be beneficial to the claimant and her mental health. This was not a requirement however: she explained that, if the claimant wished to move stores, or to proceed with mediation, she should make a request to EC. She informed the claimant of her right to appeal the grievance outcome.
58. The claimant appealed against her grievance appeal outcome by letter dated 31 January 2023. In her appeal she raised concerns about evidence being used to demonstrate support being provided to her by EC, the suggestion that she move stores, the delay in the grievance process (42 rather than 14 days) and CM knowing that the investigation had concluded. In her appeal meeting, which was held on 9 February 2023, the claimant raised a number of further issues. BP considered each of the issues raised by the claimant and conducted further meetings with CM and EC, before forming conclusions.
59. By letter dated 27 February 2023, BP informed the claimant that her appeal had been unsuccessful. His letter spanned 6 pages and set out in detail his findings and the reasons for his conclusions in relation to each element of the claimant's appeal. He appropriately addressed each element of the claimant's appeal and reached conclusions which were appropriate and reasonable in the circumstances. He concluded his letter by making recommendations. He stated that mediation between the claimant and TW could be arranged, if she wished to return to the Store. Alternatively, the respondent would consider transferring her to another nearby store.
60. By letter dated 3 March 2023, the claimant informed the respondent that she was resigning with effect from 10 March 2023. She stated that the reasons for her resignation were as follows:
- a. She was not physically well enough to continue working for the company, and she held the company responsible for that: she was absent from work

due to anxiety, stress and depression which was directly related to her employment;

b. Her numerous concerns in relation to her employment had not been adequately dealt with and remained outstanding;

5 c. She had taken legal advice and been advised that she had been treated differently to colleagues who do not suffer mental health issues, which was a breach of the Equality Act 2010 and the company had generally failed in its duties towards her as a disabled person;

10 d. She was the victim of bullying, intimidation, harassment and victimisation by her manager; and

e. She had been constructively dismissed and intended to present a claim to the Employment Tribunal.

Observations on evidence

15 61. As indicated above, evidence was given by reference to witness statements. The claimant's representative only cross-examined TW. The 5 other witnesses for the respondent were not cross examined. Their evidence was accordingly unchallenged by the claimant.

20 62. Whilst it was suggested in submissions for the claimant that she had been instructed, by EC, to delete all her WhatsApp messages, no evidence was led by the claimant to indicate that she had been instructed to do so and this was not put to EC, as she was not cross examined.

Submissions

25 63. The claimant's representative became unwell and was unable to attend the Tribunal on the last day of the hearing, when oral submissions were scheduled to be heard. In the circumstances, given that both parties had produced a written document which they had intended to speak to in submissions, it was agreed those documents could be updated, with any comments on the other party's submission incorporated, and lodged as written submissions, which the Tribunal would then consider. That was done

and the Tribunal met to consider the written submissions and deliberate on 7 May 2024.

64. The written submission for the claimant extended to 6 pages. In summary she submitted that:

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- a. The case turns on the credibility and reliability of the claimant, balanced against that of TW. The claimant's evidence should be preferred; and
 - b. The claimant was constructively dismissed by the respondent's actions, culminating in the suggestion that she move stores.

10 65. The written submission for the respondent extended to 16 pages. In summary they submitted that:

- a. The respondent's evidence should be preferred to that of the claimant;
- b. The claimant has not established a prima facie case in respect of the allegations of discrimination. The burden of proof has not, therefore, shifted to the respondent.
- 15 c. In relation to the harassment complaints, any established conduct was not unwanted and did not have the proscribed purpose or effect.
- d. In relation to the constructive dismissal, conflicting reasons for the claimant's resignation have been presented. She has not demonstrated what the reason was. The reasons relied upon cannot, either individually
20 or collectively, constitute a repudiatory breach of contract; and
- e. In relation to the victimisation complaint, the grievance was unsuccessful simply as a result of lack of sufficient evidence, not because the claimant raised a grievance. The decision makers were not cross examined regarding the motivation for their actions.

25 **Relevant Law**

Direct Discrimination

66. Section 13(1) EqA states:

'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.'

67. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council*** [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** [1999] IRLR 572. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan***, the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious), which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another*** [2009] UKSC 15.
68. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions), as explained in the Court of Appeal case of ***Anya v University of Oxford*** [2001] IRLR 377.
69. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

70. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *'but does not need to be the only or even the main cause'* (paragraph 3.11, ***EHRC: Code of Practice on Employment (2011)***). The protected characteristic does
5 however require to have a *'significant influence on the outcome'* (***Nagarajan v London Regional Transport*** 1999 ICR 877).

Harassment of a Sexual Nature

71. Section 26 EqA states:

'(1) A person (A) harasses another (B) if—

10 *(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

15 *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.'*

(2) A also harasses B if-

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

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

(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;

25 *(c) whether it is reasonable for the conduct to have that effect.'*

72. There are accordingly 2 essential elements of harassment claim under section 26(2) EqA, namely (i) unwanted conduct of a sexual nature, and (ii) that the conduct has the proscribed purpose or effect.

73. Not all unwanted conduct will be deemed to have the proscribed effect. In *Richmond Pharmacology v Dhaliwal* 2009 ICR 724, EAT, Mr Justice Underhill stated *'not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'*

74. Mr Justice Langstaff affirmed this view in *Betsi Cadwaladr University Health Board v Hughes and ors* EAT 0179/13, stating *'The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'*

75. An *'environment'* means a state of affairs. A one-off incident may amount to harassment, if it is sufficiently serious to have a continuing effect (*Weeks v Newham College of Further Education* EAT 0630/11).

25 *Victimisation*

76. Section 27 EqA states:

'(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-*

- (a) *bringing proceedings under this Act;*
- 5 (b) *giving evidence or information in connection with proceedings under this Act;*
- (c) *doing any other thing for the purposes of or in connection with this Act;*
- 10 (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,'*

Burden of proof

15 77. Section 136 EqA provides:

“If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.”

20 78. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by
25 reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent’s explanation is inadequate, it is necessary for the Tribunal to conclude that the

complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

79. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, of themselves, sufficient material on which the tribunal 'could conclude' that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748, an EAT authority approved by the Court of Appeal in ***Madarassy***.

Constructive dismissal

80. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).
81. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the

mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Ltd* [1998] AC 20).

82. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (*Lewis v Motorworld Garages Ltd* [1986] ICR 157).
83. As to what can constitute the last straw, the Court of Appeal in *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy (although it will usually be so), but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.
84. In order for there to be a constructive dismissal, there must be a breach by the employer of an essential term, such as the trust and confidence obligation, and the employee must resign in response to that breach (although that need not be the sole reason - see *Nottinghamshire County Council v Meikle* [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.
85. The Court of Appeal in *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR 833 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:
- a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - b. Has he or she affirmed the contract since that act?

- c. If not, was that act (or omission) by itself a repudiatory breach of contract?
- d. If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence?
- e. Did the employee resign in response (or partly in response) to that breach?
86. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

Discussion & Decision

Harassment of a sexual nature

87. The Tribunal considered each allegation of harassment, considering whether there was unwanted conduct of a sexual nature and, if so, whether the conduct had the proscribed purpose or effect.
88. Whilst the claimant attributed events to certain dates in her pleadings and list of issues, it became clear in evidence that some of these dates were not correct. The Tribunal's findings in relation to each alleged act of harassment are set out below, in chronological order:

- a. **Various/unknown dates in October 2022 – discussing the claimant’s sexuality, her sex life with her partner, heterosexual sex, who in the Store she would have sex with.** The Tribunal’s findings relevant to this complaint are set out in paragraphs 29 & 32. The Tribunal concluded that, whilst it was clear that there were conversations of a sexual nature occurring between TW and the claimant, the claimant fully participated in these: they were not unwanted by the claimant, and they did not have the proscribed purpose or effect at the time. TW and the claimant had a good relationship up to 26 October 2022. She trusted him. She felt she could discuss anything with him and did so, including in relation to sexual matters. She initiated and engaged in WhatsApp discussions with him and spent time in the evenings chatting to him on video calls. She informed MS on 25 October 2022 that she was well supported by TW and work was her sanctuary. It was only in hindsight, through the filter of the suggestion by her ex-partner, and her feeling that TW had betrayed her by ‘adding fuel to the fire’ of the rumours with his comment, that she formed a different conclusion on what had occurred between them and how she felt about that. The complaint under s26 EqA in relation to this accordingly does not succeed.
- b. **9 October 2022 – TW pressurising the claimant to share photos of herself/her girlfriend.** The Tribunal’s findings relevant to this complaint are set out in paragraph 36 above. The Tribunal did not accept that this conduct was established: TW did not pressurise the claimant to share photos of her/her girlfriend. The claimant did so willingly, while giggling, as she had done with others. There was no request from TW that she do so, nor any pressure placed on her by him. In reaching this conclusion, the Tribunal also took into account the fact that, later that evening (as set out in paragraph 88.d. below), the claimant engaged in amicable discussions with TW via WhatsApp and then a video call. The Tribunal concluded that, had the claimant been pressured by TW to share photographs of herself/her partner earlier that day, and had this had the proscribed purpose or effect, she would not have engaged in amicable

messaging and then discussion by video with TW that evening. The complaint under s26 EqA in relation to this accordingly does not succeed.

c. **9 October 2022 – TW showing the claimant a picture of his penis.**

5 The Tribunal did not accept that this conduct was established. In reaching this conclusion, the Tribunal took into account that the claimant's position in relation to this allegation has not remained entirely consistent: Her evidence was that she was simply shown a picture of TW's penis (*'seeing as you showed me a picture of you, I'll show you a picture of myself'*). However, in her grievance the claimant stated *'he also asked me if I*
10 *wanted to see pictures of him and other women that he had on his phone. Again, he would pressure me, and I would agree'*. The Tribunal concluded that this undermined the claimant's evidence on this point. The Tribunal also took into account the fact that, later that evening (as set out in paragraph 88.d. below), the claimant engaged in amicable discussions
15 with TW via WhatsApp and then a video call. The Tribunal concluded that, had the claimant, contrary to her wishes, been shown a picture of TW's penis earlier that day, and had this had the proscribed purpose or effect, she would not have engaged in amicable messaging and then discussion by video with TW that evening. The complaint under s26 EqA in relation
20 to this accordingly does not succeed.

d. **9 October 2022 – TW making inappropriate comments in a video call after an exchange of WhatsApp messages about the 'Arcane' series.**

25 While the claimant initially stated that this occurred on 5 October 2022, the messages produced to the Tribunal demonstrated that TW sent a screenshot depicting that he was about to start watching Arcane on 9 October 2022. As set out in paragraph 37 above, the Tribunal accepted that TW and the claimant had a discussion by video that night. The Tribunal found that the WhatsApp messages and the subsequent discussion by video were amicable. The Tribunal concluded that TW's
30 comments about the claimant feeding her son were not unwanted conduct of a sexual nature and they did not have the proscribed purpose

or effect. The complaint under s26 EqA in relation to this accordingly does not succeed.

5 e. **17 October 2022 – TW’s comments to the claimant in the car** The Tribunal’s findings relevant to this complaint are set out in paragraph 40 above. The Tribunal concluded that, whilst it was clear that there were conversations of a sexual nature occurring between TW and the claimant, the claimant fully participated in these: They were not unwanted by the claimant, and they have the proscribed purpose or effect at the time. In reaching this conclusion, the Tribunal also took into account the fact that, 10 later that evening, as set out in paragraph 41, the claimant initiated WhatsApp discussions with TW, which continued the following day (paragraph 42). The Tribunal concluded that, had TW’s comments been unwanted and had the proscribed purpose or effect, she would not have initiated amicable messaging with TW that evening and thereafter. As 15 stated in paragraph 88.a. above, the Tribunal concluded that TW and the claimant had a good relationship up to 26 October 2022. It was only in hindsight, through the filter of the suggestion by her ex-partner, and her feeling that TW had betrayed her by ‘adding fuel to the fire’ of the rumours with his comment, that she formed a different conclusion on what had 20 occurred between them and how she felt about that. The complaint under s26 EqA in relation to this accordingly does not succeed.

25 f. **26 October 2022 – TW deliberately calling the claimant after being instructed by EC not to do so.** The Tribunal’s findings relevant to this complaint are set out in paragraph 50 above. The Tribunal did not accept that this conduct was established: TW did not deliberately call the claimant. He did so by accident and immediately cancelled the call. While it may have been unwanted, it was not conduct of a sexual nature and did not have the proscribed purpose or effect. The complaint under s26 EqA in relation to this accordingly does not succeed.

30 g. **Various dates in October 2022 – the respondent failing to take action in relation to rumours of a sexual relationship between TW and the claimant** The Tribunal did not accept that this conduct was established.

5 EC was not cross examined. She gave unchallenged evidence that she had taken steps to address the rumours, when she heard of them. At the meeting with the claimant on 26 October 2022, she asked the claimant what further action she wanted to be taken. As soon as a grievance was ultimately raised, an investigation was conducted. Even if the conduct in this complaint had been established however, it was not conduct of a sexual nature. The complaint under s26 EqA in relation to this accordingly does not succeed.

Direct discrimination

10 89. The Tribunal considered the allegation of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less favourable treatment and, if so, what the reason for that treatment was: was it because of sexual orientation?

15 90. The Tribunal reached the following conclusions in relation to each asserted act of direct discrimination:

a. **On or around 25 October 2022, MS breaching confidentiality by allowing TW to review the notes of the investigation meeting.** MS was not cross examined. He gave unchallenged evidence (which was consistent with TW's evidence) that he did not show TW the notes of the meeting. It was not put to him that he had in fact done so, that this amounted to less favourable treatment or that he had done so because of the claimant's sexual orientation. In these circumstances, the Tribunal did not accept that the conduct alleged was established. As the claimant did not establish a prima facie case, the burden of proof did not shift to the respondent.

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b. **On 25 January 2023, CM breaching confidentiality by speaking about the claimant's grievance outcome which he should not have known or spoken about.** CM was not cross examined. He gave unchallenged evidence that he stated to the claimant that he understood that all the statements in relation to her grievance had been taken, and she should therefore contact the People Team if she was concerned

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about her grievance outcome being delayed. It was not put to him that he knew what the grievance outcome was, that this amounted to less favourable treatment or that he had done so because of the claimant's sexual orientation. In these circumstances, the Tribunal did not accept that the conduct alleged was established. As the claimant did not establish a prima facie case, the burden of proof did not shift to the respondent.

- c. **TW allegedly telling the claimant, in an attempt to convert her to heterosexuality, that he “wishes he got her before she became a lesbian”, on a date she cannot remember but believes was 17 October 2022 in TW’s car outside the claimant’s house.** The claimant described this interaction in a number of ways - as above in her grievance and, in her grievance meeting, as *‘there was one night in his car where he said he wished he had got to me before I had a girlfriend because I had been very let down by men’*. As set out in paragraph 40 above, the Tribunal concluded, on balance, that what TW actually stated was that he understood that she had been really let down by men in past relationships and he wished he’d known her before that. In this context, the Tribunal concluded that this did not amount to less favourable treatment. It was an acknowledgement of personal information which the claimant had told TW about the significant difficulties she had experienced in her previous relationships with men and the impact this had had on her. In effect, TW was stating to her that this should not have happened, and she ought to have been treated differently. It was not an ‘attempt to convert her to heterosexuality’ as the claimant asserted. He would have said the same to anyone who had been treated poorly in previous relationships, regardless of their sexual orientation. The complaint of direct discrimination in relation to this accordingly does not succeed.

- d. **In an attempt to convert her to heterosexuality, TW showing pictures of his penis to the claimant on 9 October 2022 and saying “seeing as you showed me a picture of you, I’ll show you a picture of myself”** As set out in paragraph 88.c. above, the Tribunal concluded that this did

not occur. As the asserted treatment has not been established, the complaint of direct discrimination in relation to this does not succeed.

91. Given these findings, the Tribunal concluded that the claimant's complaints of direct discrimination because of sexual orientation do not succeed and are dismissed.

Victimisation/Detriment/Discrimination

92. It was accepted by the respondent that the claimant's grievance and appeal were protected acts for the purposes of s27(2) EqA. They stated however that the allegations were made in bad faith, so should not be treated as such, given the terms of s27(3) EqA.

93. The Tribunal did not accept the respondent's assertion that the allegations were made by the claimant in bad faith. Instead, the Tribunal concluded that the claimant genuinely believed what she was stating, at the time she did so.

94. The Tribunal concluded however that the complaint of victimisation could not succeed. In essence, the complaint is that the claimant's grievance and appeal were not upheld because the claimant raised a grievance and appealed against the findings. Failure to uphold complaint of discrimination or harassment will not constitute victimisation unless there is a link between the fact of the employee making the complaint and the failure to uphold it (**A v Chief Constable of West Midlands Police** EAT 0313/14). No causal link between the grievance and appeal decisions has been established: Neither CS, nor BP (responsible for the grievance and appeal respectively), were cross examined as to why they reached the decisions they did and it was not put to them that they reached the decisions they did because of the protected acts. In these circumstances, the complaint of victimisation must fail.

Constructive Unfair Dismissal Claim – s94 ERA

95. In considering the claimant's claim of constructive dismissal, the Tribunal considered the tests set out in **Kaur v Leeds Teaching Hospital NHS Trust**. The Tribunal's conclusions in relation to each element are set out below.

96. **What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?** The Tribunal noted that the most recent act on the part of the respondent, which the claimant relied upon as causing or triggering his resignation, was the appeal outcome, sent to the claimant on 27 February 2023, and the recommendations within this.
97. **Has he or she affirmed the contract since that act?** The Tribunal noted that the claimant resigned on 3 March 2023. The Tribunal found that the claimant had not affirmed the contract since the most recent act on the part of the respondent, which the claimant stated caused, or triggered, her resignation.
98. **If not, was that act (or omission) by itself a repudiatory breach of contract?** The Tribunal concluded that the respondent declining to uphold the claimant's appeal, and suggesting mediation between the claimant and TW, did not amount to a breach of contract, let alone a repudiatory breach. BP had taken appropriate steps to consider and address the claimant's appeal. He set out in detail his findings and the reasons for his conclusions in relation to each element of the claimant's appeal and made appropriate recommendations. He had reasonable and proper cause for rejecting the claimant's appeal and making the recommendations he did.
99. **If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?** As indicated above, the Tribunal concluded that the respondent had reasonable and proper cause for their conclusions in relation to the appeal and the recommendations made. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence. The test of whether the employee's trust and confidence has been undermined is objective. The appeal outcome cannot, viewed objectively, contribute in any way to a series of actions which cumulatively constitute a repudiatory breach of contract.

100. **Did the employee resign in response (or partly in response) to that breach?** Given the Tribunal's conclusions above, this did not fall to be answered. The Tribunal's concluded that there was no breach.
101. The Tribunal then considered the other acts relied upon, to ascertain whether there was any prior repudiatory breach, and if so, whether the contract had been affirmed or not following that breach. The Tribunal reached the following conclusions in relation to the other acts relied upon by the claimant as either individually or cumulatively amounting to a repudiatory breach:
- a. **EC failing to investigate TW's conduct and colleagues allegedly spreading rumours about the nature of the claimant and TW's relationship.** For the reasons set out in paragraph 88.g. above, the Tribunal concluded that this conduct was not established.
 - b. **The grievance process taking 42 days rather than 14 days.** It was a matter of agreement that the grievance process took 42 days, rather than the 14 envisaged in the respondent's letter of 16 December 2022. This was due to the fact that the respondent required to interview 10 people in relation to the allegations, the festive period (a peak trade period for the respondent) and the festive break. They informed the claimant that there would be a delay. In those circumstances, the respondent had reasonable and proper cause for taking longer than envisaged to investigate and reach an outcome in relation to the grievance. The conduct complained could not be said to be calculated or likely to destroy or seriously damage trust and confidence.
 - c. **Declining to uphold the grievance and declining to form a conclusion based on the evidence, which the claimant has characterised as declining to uphold the grievance because the grievance manager "did not believe the claimant".** CS had interviewed the claimant to understand the nature of her grievance and then put the allegations to TW. CS then required to undertake the task of considering whether to uphold the claimant's complaints, in circumstances where the claimant had herself stated in her grievance that

there was no 'hard evidence' to support her allegations and understood it was her word against TW's. CS formed conclusions based on the evidence. She detailed her conclusions, and the basis for them, in her letter to the claimant dated 30 January 2023. The Tribunal accordingly found that the assertions that CS '*declined to form a conclusion based on the evidence*', and that the grievance was rejected simply because the grievance manager '*did not believe the claimant*' were not established. CS did decline to uphold the grievance. The Tribunal found however that the respondent had reasonable and proper cause for reaching the conclusions they did in relation to the grievance.

d. **Suggesting that the claimant move stores in the outcome to the grievance and suggesting that this was for the benefit of the claimant's mental health.** The claimant had herself referenced her mental health a number of times in her grievance, stating that seasonal affective disorder and recent events had impacted her mental health to such a degree that she remained unable to attend work. Her grievance was not upheld. When she was fit to do so, the claimant would require to return to the Store, where TW continued to work. The respondent was concerned that that requirement may be detrimental to the claimant's mental health. In these circumstances, it was entirely appropriate for the respondent to suggest that the claimant may, for the benefit of her mental health, wish to consider moving stores. The respondent's suggestion was not conduct which was calculated or likely to destroy or seriously damage trust and confidence. They had reasonable and proper cause for making this suggestion.

e. **Suggesting mediation between the claimant and TW.** If the claimant did not wish to move stores (which was always framed as an option for her, not a requirement) she would return to work at the Store, where TW continued to work. It was entirely appropriate for the respondent to suggest mediation between the claimant and TW in these circumstances. The respondent's suggestion was not conduct which was calculated or

likely to destroy or seriously damage trust and confidence. They had reasonable and proper cause for making this suggestion.

102. The Tribunal accordingly concluded that the other conduct relied upon by the claimant did not, either individually or cumulatively, constitute a repudiatory
5 breach of contract. As no prior repudiatory breach was established, the issue of affirmation did not fall to be considered.

103. Given these findings the Tribunal concluded that the claimant was not constructively dismissed by the respondent. Her claim of unfair dismissal is accordingly not successful and is dismissed.

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Employment Judge Sangster

Employment Judge

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28 June 2024

Date of Judgment

01 July 2024

Date sent to parties

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