EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr J Omorotionmwan **v** **Amey Services Limited**

Heard at: London Central **On**: 5 – 11 September 2017

Before: Employment Judge Hodgson
Ms K Church
Ms S Boyce

Representation
For the Claimant: in person
For the Respondents: Ms G Leadbetter, counsel

JUDGMENT

1. **The claim of direct discrimination fails and is dismissed.**
2. **The claim of harassment fails and is dismissed.**
3. **The claim of unfair dismissal fails and is dismissed.**
4. **The breach of contract claim is dismissed on withdrawal.**
5. **The wages claim is dismissed on withdrawal.**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 20 March 2017 the claimant brought claims of direct discrimination, harassment, unfair dismissal, breach of contract, and failure to pay wages.

The Issues

2.1 The issues to be determined are now definitively recorded as set out below.

Constructive dismissal

2.2 Did the claimant's resignation amount to a dismissal? The tribunal will need to decide the following:

2.3 Did the respondent breach the claimant's contract of employment? The breach of contract is said to be by the respondent refusing the claimant keys to the Central Reference Library, a pass card, and the relevant pass codes.

2.4 Did the claimant resign as a result of the alleged breach?

2.5 The respondent relies on no potentially fair reason, but does allege that claimant would have been dismissed in any event and that the claimant contributed to his dismissal.

Direct discrimination - section 13 Equality Act 2010

2.6 Did the respondent treat the claimant less favourably than it treats or would treat others?

2.7 If so, was such treatment because of a protected characteristic?

2.8 The protected characteristic relied on is race.

2.9 The allegations of detriment relied on are as follows:

2.9.1 Allegation 1: on or around 2 August 2016, by Mr Chamberlain inventing untrue allegations about the claimant. The allegations are contained in the letter of 2 August 2016.

2.9.2 Allegation 2: on or about 2 August 2016, by Mr Chamberlain suspending the claimant.

2.9.3 Allegation 3: on 3 January 2017 by, Mr Chamberlain not allowing the claimant to return to work, to include asking the claimant for a copy of his disciplinary outcome letter, refusing to return the claimant ID pass, and asking the claimant to leave the building.

2.10 Allegation 4: on 16 January 2017, by Mr Chamberlain reducing the claimant's hours of work from seven days to 4 days and by giving no reason for this. It being the claimant's case that Mr Chamberlain was favouring other workers.

2.10.1 Allegation 5: on 16 January 2017, by Mr Chamberlain sending an individual to supervise the claimant with the express intention of harassing him. It is agreed the supervisor was Ms Luz Giraldo.

2.10.2 Allegation 6: by the respondent dismissing/constructively dismissing the claimant. It is agreed the claimant resigned his position on 1 February 2017.

Harassment - section 26 Equality Act 2010

2.11 Did the respondent engage in unwanted conduct which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

2.12 If so was it related to a relevant protected characteristic?

2.13 The protected characteristic relied on is race.

2.14 The following specific allegations of harassment are relied on:

2.14.1 Allegations 1 – 6 above.

Wages

2.15 The wages claim was dismissed on withdrawal.

2.16 Any breach of contract claim had been withdrawn before the hearing and is dismissed .

Evidence

3.1 We heard from the claimant, C1.

3.2 The claimant had obtained witness summonses for Ms Mil Deegan and Mr Austin Onyewesi; both were called.

3.3 For the respondent we heard from Mr Darren Chamberlain, R2; and Ms Julie Anderson, R3.

3.4 We received a bundle, R1.

Concessions/Applications

4.1 On day one of the hearing, the claimant confirmed he had claims of unfair dismissal, race discrimination and harassment. He did not refer on the first day to his wages claim.

4.2 We reviewed the issues as recorded by Employment Judge Auerbach and agreed that they needed clarifying. In particular, it was noted that paragraph 4(c) of the discussion from 18 May 2017 stated as an allegation "that all of Mr Chamberlain's conduct amounted to direct discrimination or

harassment because of race…" It is clear that the allegation lacks any meaningful detail and the claimant accepted it could not proceed in that form.

4.3 We spent some time identifying the specific factual allegations said to be either discrimination or harassment. The claimant sought to rely on specific allegations concerning a supervisor, Ms Luzgirlado and her alleged actions on 16 January 2017 in not providing a staff ID, confirmation door code, or a key to the library.

4.4 Ms Leadbetter indicated that a number of the allegations had not been anticipated by the respondent, despite the fact that they were in the claim form.

4.5 There was a suggestion that the issues had been narrowed on 18 May 2017. The tribunal noted it was difficult to see how the issues, as framed on 18 May 2017, narrowed the allegations brought in the claim form as, for example, all of Mr Chamberlain's conduct appeared to be relied on. This certainly appeared to include all the conduct which may have been referred to in the claim form.

4.6 The tribunal confirmed that if the respondent believed it had been disadvantaged because claims were now being made which it could not reasonably have understood were in issue, it was open to the respondent to apply to adjourn. The respondent would need to identify any specific allegations which it indicated were new or which it could not have reasonably anticipated were pursued. No application was made on the first day.

4.7 On the first day, the tribunal also confirmed that the mere fact that the claimant now sought to put specific allegations before the tribunal did not mean that the tribunal had ruled they were admissible. If the respondent considered that there were allegations now advanced by the claimant which did not appear in the claim form, it was open to the respondent to object and identify any allegations which could only proceed by way of amendment. It was also possible for the respondent to allege that if any such allegations were allowed by amendment, that adjournment would be appropriate. Ms Leadbetter indicated that she would wish to take instructions. The tribunal directed that if objection was made, if practical, written application should be filed.

4.8 It follows that the issues were identified on the first day, subject to any objection by the respondent.

4.9 The claimant specifically agreed that there was no allegation of express dismissal. He resigned on 1 February 2017. The claimant conceded that when he resigned he relied on no allegation concerning his hours of work, as it was not an issue for him. He alleged specific breaches of contract being the failure to return his ID pass, the keys to the library, and to inform him of the relevant codes for the internal doors. These were the matters he relied on when resigning.

4.10 On the first day of the hearing, the claimant filed an application to strike out the response and prevent the respondent defending the claim further. He alleged that there had been some fabrication of the notes from 25 August 2016 as produced to the tribunal. He said the notes had been altered to remove the reference to an alleged recommendation by Mr Chamberlain that the respondent should dismiss the claimant. We indicated no further action would be taken on this until we had read all the statements.

4.11 On day two of the hearing, we heard the claimant's application to debar the respondent on the grounds that it had fabricated documentation. The claimant alleged that a record of the meeting of 25 August 2016 had been altered to remove the reference to Mr Chamberlain's recommendation that the claimant should be dismissed. The respondent agreed that the document had been changed, but alleged this was changed during the course of the claimant's employment because he received advice from HR that it was inappropriate for him to make the recommendation. It was said that the failure to disclose both versions was no more than oversight and entirely innocent.

4.12 We gave full oral reasons for refusing the claimant's application. In summary, we should note that even if the document were fabricated, there could still be a fair hearing. Proof of fabrication itself may be helpful to the claimant in that it may be a matter from which we could infer discrimination. It was necessary to hear all the evidence to determine whether the document was relevant and whether the explanation of innocence was well-founded. There was no good reason to debar the respondent from defending the claim.

4.13 We also considered the respondent's application. The application, which concerned the issues, was not clear. It involved an assertion that first, we should not vary the issues as set out by Dr Auerbach, and second, claims had been identified in the issues which were not in the claim form.

4.14 We considered the detail of this application and gave a full oral judgement. We should summarise the position in these reasons. We accepted that the claims in relation to Ms Giraldo were new. There was no specific allegation of discrimination against her in the claim form. They could not proceed without amendment. The claimant later confirmed that he was not seeking to amend the claim to include allegations against Mr Giraldo. As regards the remainder of the allegations concerning Mr Chamberlain, we found that the factual basis was contained in the claim form. Moreover, the specific factual allegations identified were put as acts of discrimination in the claim form. It was accepted that the issues as drafted by Dr Auerbach were not sufficiently clear. We did not accept the respondent's interpretation at 4(c) of his issues merely qualified $(a) and (b). We all agreed that 4(c), which referred generally to everything Mr Chamberlain had done, was an allegation which could not be decided by the tribunal, as it was simply unclear.

4.15 We rejected the respondent's allegation that the nature of the constructive dismissal claim had changed. The claimant relied on an allegation that the failure to give him a pass, keys, or passcodes amounted to a breach of contract. It may have been that was what was envisaged by the original issues which referred generally to "trust." The claim form itself does not refer to trust and confidence. The claim form did refer to those specific matters concerning failure to provide the pass and passcodes. All matters identified on the first day came from the claim form. There was no basis for the respondent to say that they had been taken by surprise and therefore, subject to the removal of the allegations concerning Ms Giraldo, we confirmed the case would proceed on the basis of the issues as set out on day one.

4.16 On day three the claimant applied for specific disclosure. His application was really a request for the respondent to give details of whether any manager was a black person. This was not an application for disclosure in our view. The matter could be dealt with by the claimant asking Mr Chamberlain in evidence.

The Facts

Introduction

5.1 The respondent employs approximately 20,000 employees at various locations in the UK, either directly or through other companies.

5.2 The claimant's continuous employment commenced in 1990. He was transferred to the respondent on 1 October 2013. He carried out cleaning duties at a number of premises including Westminster City Hall, the Central Reference Library, and Marylebone Library.

Background

5.3 Mr Darren Chamberlain joined the respondent as a facilities manager on 1 October 2013. He was the claimant's manager's manager. As a result of staffing issues, he managed the claimant directly from 11 July 2017, until the claimant's resignation on 1 February 2017.

5.4 In May 2016, the respondent carried out a review affecting a number of contracts, including that serviced by the claimant. Mr Chamberlain did not directly consult with the claimant, as the review occurred before Mr Chamberlain became the claimant's acting manager. As a result of the review, there was a rationalisation of the services provided to the Marylebone Library and the Central Reference Library.

5.5 On 11 July 2016, Mr Peter Strutton, senior accounts manager, wrote to the claimant informing him of his new hours and shift pattern, as cleaner for Marylebone Library and Central Reference Library. He would work from 18:00 to 20:00 for 10 hours a week at Marylebone Library and 15 hours a week from 06:00 to 08:00 at the Central Reference Library.

Subsequent events

5.6 There has been significant dispute between the parties as to the factual circumstances surrounding this case. We do not need to address individually each and every dispute. The claimant's evidence before us has been inconsistent and at times contradictory. For example, he claims that during a meeting on 4 January 2017, he refused to have any discussion with Mr Chamberlain. However, during his cross-examination of Mr Chamberlain he contradicted this position by seeking to ask him detailed questions about the content of that discussion, which on his own evidence never occurred.

5.7 Another conflict involves the events of 22 July 2016. It is the respondent's position that Mr Chamberlain called the claimant early in the morning, as the claimant had failed to attend the Central Reference Library for the morning shift. It is alleged the claimant stated he was in the building, but thereafter was abusive and hung up, when Mr Chamberlain confirmed that he knew the claimant was not there, because Mr Chamberlain was calling him from Central Reference Library. We have seen some contemporaneous documentation, in the form of a later text message from the claimant, which confirms some form of conversation took place. The claimant sought to suggest that he did not even know who Mr Chamberlain was on that day, and yet his evidence suggests that he attempted to call Mr Chamberlain, rather than the Mr Chamberlain contacting the claimant. On the balance of probability, Mr Chamberlain's account is correct. The claimant's account has been confused, contradictory, and inherently unlikely. In relation to each conflict of evidence, we have been able to resolve the conflict on the balance of probability and having regard to contemporaneous evidence.

5.8 As the disputes are so extensive, we will only need indicate, where necessary, and in broad terms, the reasons why we have resolved factual disputes in the respondent’s favour.

5.9 On 22 July 2016, Mr Chamberlain rang the claimant at 7:10 AM. The claimant alleged that he was at the Central Reference Library. Mr Chamberlain challenged the claimant, as Mr Chamberlain was at the library, and the claimant was not. The claimant swore and hung up. Three hours later, the claimant sent a text alleging that Mr Chamberlain had telephoned to ask when the claimant would be at the library and alleging Mr Chamberlain was abusive. The claimant's text confirms that he was not at the library at the time required by his contract.

5.10 Mr Chamberlain and the claimant met on 27 July 2017. The claimant indicated he wished to clean the basement and not the second floor. The basement did not require any cleaning, as the claimant acknowledged in cross examination.

5.11 On 28 July 2016, Mr Chamberlain asked the claimant to meet on 29 July to discuss his concerns. By text, the claimant refused to attend.

5.12 On 1 August 2016, Mr Chamberlain invited the claimant to a suspension meeting. This followed a number of texts from Mr Chamberlain requesting the claimant to comply with his contract and clean the third floor on 28 July 2016; Mr Chamberlain indicated he would commence a disciplinary process in relation to the claimant's refusal.

5.13 On 1 August 2016, the claimant refused to attend the meeting, citing that he needed to care for his daughter.

5.14 On 2 August 2016, Mr Chamberlain telephoned the claimant to confirm that he been suspended. He followed that with a text and required the claimant to return his ID pass and keys. Mr Chamberlain also sent a letter which contained the following allegations of misconduct: failure to follow reasonable management instructions; aggressive behaviour towards his supervisor and senior managers; failing to attend work at the correct contractual times; failing to attend work; serious breach of health and safety regulations; falsification of records and timesheets; and fraud and dishonesty. He was invited to an investigation meeting on 19 August 2016.

5.15 The investigation meeting proceeded on 25 August 2016 and was chaired by Mr Chamberlain. The claimant attended 3.5 hours after the original time specified and a least 1.5 hours after the revised time given to him that morning, when he said he would be late. When he arrived, he started to read a newspaper; we have preferred Mr Chamberlain's evidence on this, as we have found the claimant's account that he had no discussion, and that the minutes were invented (despite the independent note taker) to be so unlikely that his account of this meeting lacks any credibility.

5.16 The claimant agreed that he had failed to follow reasonable management instructions, but denied the other allegations. Mr Chamberlain expanded on the allegations. The claimant shouted at Mr Chamberlain.

5.17 The allegations concerning failure to follow reasonable management instructions were said to be evidenced by text messages. It is clear those text messages exist and demonstrate the claimant refused to comply with his contract.

5.18 The notes record that there were allegations of aggressive behaviour from Mr Gustovo Guzman and Mr Chamberlain. We find that there were genuine concerns about the claimant's apparent aggressive behaviour. He used swear words including "fuck." We also accept Mr Chamberlain's evidence that the claimant said of a supervisor that he would not work for that "fucking Colombian bastard."

5.19 There was evidence the claimant was not performing his duties in accordance with his contract and there were days he was not working despite the fact that there were time sheets showing he was working.

5.20 The Central Reference Library had a swipe card system which restricted entry through certain doors. Each authorized individual had a swipe card which was identified. This showed the date and time the doors were accessed. The claimant has suggested, during his evidence to us, that it would have been possible on a number of days not to use the swipe card because one door was propped open when the public were not there. We have considered the evidence on this and preferred Mr Chamberlain's evidence, as the claimant has failed to disclose to us the number of doors which were affected by the system or explain adequately how he could have moved around the building and undertake his duties, but not use his swipe card. We find had he been in the building it would have shown up on the COTAG record.

5.21 The report from 25 August 2016 noted the buildings COTAG management system, and the apparent absence of the claimant on days the manually time sheets recorded him as present. It was the apparent false claim for wages that was seen as fraudulent. There was evidence from the COTAG report that the claimant had failed to attend work on 23, 24, 25, and 30 July. However, there was a worksheet for that week claiming he had worked those days.

5.22 There was an allegation that the claimant had accessed areas alone during the evening when no other colleague was present. It was said this contravened the lone working regulations. It is clear the claimant was working alone. Mr Chamberlain had in mind the respondent's lone working policy, but he did not know the claimant was unaware of the policy.

5.23 As well as the evidence from the discrepancy between the COTAG report and the time sheet, Mr Chamberlain and a colleague had physically checked the building on 22 July 2016 which was evidence of the claimant not attending at work.

5.24 The claimant denied the allegations against him.

5.25 The report was completed on 7 October 2016. Mr Chamberlain recommended disciplinary action. We have been referred to two versions of the report. Both appear to be dated 25 August 2016. One contains a recommendation, from Mr Chamberlain, that the claimant should be dismissed. It includes the words, "I feel that we have no choice but to dismiss the employee." The version that appears in the bundle has that recommendation removed. The claimant alleges there has been some fraud in the production of this document and there has been a deliberate attempt to mislead the tribunal. The respondent's explanation was that Mr Chamberlain included the words originally, but removed them having received HR advice. The claimant never pursued the matter in cross examination and we have no reason to find that there has been any deliberate attempt to mislead. It is clear Mr Chamberlain was of the view at that time, and remains of the view now that the claimant should have been dismissed.

5.26 On 21 November 2016, the claimant was invited to attend at a disciplinary hearing. That hearing proceeded on 1 December 2016 before Ms Julie Anderson, facilities manager. On 22 December 2016 Ms Anderson wrote to the claimant sending minutes of the meeting and informing the claimant there was no case to answer. The minutes of the meeting in the document's conclusion do not set out in detail the findings. The conclusion reads as follows:

> **My findings are that [the claimant] is to return to work with immediate effect and that no further action will be undertaken.**

5.27 She rejected the allegations against the claimant, apart from the allegation that he had refused management instructions. There was clear evidence before her on which she could have, at least, upheld some of the serious allegations relating to false time keeping. We do not need to consider why she took such a lenient view.

5.28 On 3 January 2017, Mr Chamberlain and Mr Guzman (the claimant's new team leader) met with the claimant. The claimant refused to accept his new hours contained on his letter of 11 July 2016.

5.29 There was a further meeting on 4 January 2017 Mr Leon Van Dyke attended as notetaker. The claimant would not agree to work his new hours. When asked what hours he should work, he read his newspaper. The claimant referred to a text message of 19 July 2016 from Mr Rodriguez which said, "work two hours per day." Mr Chamberlain took the view that this was a reference to overtime. The claimant became angry and shouted, "I'm not going through this" and then threw the newspaper onto a chair. Despite this difficulty it is clear from the conclusions on the 4 January 2017 report that Mr Chamberlain remained supportive of finding a solution. His conclusion reads:

> **[The claimant] is very inconsistent with his answers and frequently changes his point of view. Although the cleaning restructure and his contractual hours have been explained to him in depth he fails to understand his contractual requirements and feels that he can work the total contractual hours on a flexible basis without agreeing to any fixed times or days. I have attempted to explain to [the claimant] that he cannot work on his own for security and H & S reasons. [The claimant] refuses to accept this.**
>
> **I will refer the matter to senior management… It is my opinion that [the claimant] has been mismanaged for many years prior to July 2016 and cannot understand the requirement to work set times and days from an operational or H & S perspective. In my opinion a subsequent meeting which senior management and HR should be arranged to witness the meeting and support John through the transition prior to further action being taken."**

5.30 On 9 January 2017, Mr Chamberlain wrote to the claimant. He referred to the meeting of 4 January 2017. He reiterated the claimant should work his contractual hours. He said specifically:

> **"Unfortunately, as you left the meeting without us reaching a resolution, I must make clear that it is no longer acceptable for you to work in the manner that you had been prior to the restructure. Specifically, it is not acceptable for you to attend work as and when it suits your personal circumstances as we need to provide our client with consistency in cleaning standards as well as satisfy our health and safety obligations around lone working."**

5.31 Mr Chamberlain asked the claimant to attend for work on Monday 16 January. He quoted the relevant times in accordance with his contract.

5.32 On 16 January 2017, Mr Guzman telephoned the claimant at 6:15 AM. The claimant simply said he would work as he had done before. The claimant talked over Mr Guzman; there was discussion about opening the library and the claimant told Mr Guzman, "Fuck off and fuck you." There was a contemporaneous report from Mr Guzman, and we have preferred that evidence.

5.33 Ms Giraldo also reported being sworn at on that day by the claimant. Again, we have accepted her contemporaneous report as true.

5.34 We find that there was a pass prepared for the claimant. He failed to collect it, albeit it is not clear it was specifically confirmed to him it was available. He did not enquire on 16 January if it would be made available. It is clear Ms Giraldo offered to assist the claimant on that day with door codes and access. The claimant never asked if this was a permanent arrangement. Had he enquired he would have learned that he was to be given all necessary keys, passes, or codes. He chose not to enquire. Instead he was rude and obstructive. The claimant's allegation that he would not be given a key, a pass, or the relevant codes is without merit.

5.35 On 24 January 2017, Mr Chamberlain wrote to the claimant inviting him to attend an investigation meeting concerning gross misconduct revolving around his swearing at the manager and the supervisor and his failing to attend work in accordance with his contract.

5.36 On 1 February 2017, the claimant sent a text to Mr Chamberlain stating that he had not received the letter of 24 January 2017 until the previous day, and so could not attend on 31 January 2017. He asked to rearrange the meeting.

5.37 On the same day, 1 February 2017, the claimant sent a letter of resignation. The letter reads as follows:

> **With great regret I have decided to resign my cleaning position with Amey.**
>
> **After a lot of effort from me to return back to work Mr Chamberlain had did his best for that not to happened.**
>
> **After a lot of letters and emails to Amey I have not received any reply back, not even one and I have been left to the mercy of Mr Chamberlain.**

> **As I am unable to return back to work because Mr Chamberlain actions. I hereby resign and hope to report a constructive dismissal case to employment tribunal.**

Grievances

5.38 It is apparent that a number of documents which may be seen as either responses to the allegations or possibly grievances were filed. The claimant's statement does not detail the grievances. The claimant's claim form does not give any detail.

5.39 There is a document in the bundle headed "My answers and respond to Mr D Chamberlain allegations." It is not clear if or when that was given to the respondent. This contains a number of complaints including the fact that his hours had changed, and he was required to complete a new timesheet. He alleged Mr Chamberlain had been angry and aggressive before the meeting on 25 August 2016 and continued the aggression on 25 August 2016. He denied there was any difficulty with health and safety and in particular with lone working. He accepted he was asked to attend a meeting on 31 July 2016, but he could not attend. He included a paragraph heading "violent tendencies." It is difficult to understand what point the claimant is trying to make. He stated, "If anyone in time from now read into what Mr Chamberlain have now wrote about me, it will not be wrong to be seen as a killer. That is his only way of winning by attacking my character with lies." As regards the failure to follow reasonable instructions, he said he did his best to meet Mr Chamberlain halfway as the text messages reveal. He alleged that the note taker lied.

5.40 The claimant wrote a letter on 18 January 2017 to Mr Andy Milner the chief executive. In this he alleged that he had received a letter from Mr Chamberlain asking him to return to work on 16 January 2017. He alleged the supervisor told him that he could not have a staff pass or a code that opened any door and that this was a new condition. He alleged Mr Chamberlain was using company money to carry out a personal vendetta.

The law

6.1 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.

6.2 The leading authority is **Western Excavating ECC Ltd -v- Sharp [1978] ICR 221**. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

> **If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from**

> **any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed.**

6.3 In summary there must be established first that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract as evidenced by delaying or expressly.

6.4 In so called last straw dismissals there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

6.5 The question of waiver has to be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.

6.6 In cases where there has been a course of conduct, the tribunal may need to consider whether the last straw incident is a sufficient trigger to revive the earlier ones. In doing so, we may take account of the nature of the incident, the overall time spent, the length of time between the incidents and any factors that may have amounted to waiver of any earlier breaches. The nature of waiver is also relevant in the sense of was it a once and for all waiver or was it simply conditional upon the conduct not being repeated.

6.7 **Omilaju v London Borough of Waltham Forrest 2005 ICR 481 CA** is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable, but yet satisfies the last straw test.

6.8 We must consider causation, the employee must show that he has accepted the breach, the resignation must have been caused by the breach and if there is a different reason causing the employee to resign in any event irrespective of the employer's conduct there can be no constructive dismissal.

6.9 We note that where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the

contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principle reason for the resignation, but it must be part of it and the breach must be accepted. (see **Logan – v Celyn House UKEAT/069/12** and in particular paragraphs 11 and 12.)

6.10 We note the case of **Bournemouth University v Buckland 2010 IRLR 445, CA**. the head note reads:

> **"(1) In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.**
>
> **The following stages apply to the analysis of a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applied; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.**
>
> **It is nevertheless arguable that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement…"**

6.11 In **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

> **"the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

6.12 We would note that it is generally accepted that it is not necessary that the employer's actions should be calculated *and* likely to destroy the relationship of confidence and trust, either requirement is sufficient.

6.13 In **Malik** the House of Lords held that the trust and confidence may be undermined even if the conduct in question is not directed specifically at the employee and second, it was not necessary for the employee to be aware of the wrongdoing whilst employed. Third, the term may be broken even if subjectively the employee's trust and confidence is not undermined. Whether the term is broken must be viewed objectively.

6.14 Direct discrimination is defined by section 13 Equality Act 2010.

> **Section 13 - Direct discrimination**
>
> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. …**

6.15 Harassment is defined by se 26 Equality Act 2010.

> **Section 26 - Harassment**
>
> **(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.**
> **…**
>
> **(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.**

6.16 The relevant protected characteristics include race.

6.17 The burden of proof is found at section 136 Equality Act 2010

> **Section 136 Equality Act 2010 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.18 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Annex
(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on

the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Conclusions

7.1 We first consider the allegations in the context of direct discrimination, albeit for the reason we will come to the explanations provided are equally applicable to the alternative claims of harassment.

Allegation 1: on or around 2 August 2016, by Mr Chamberlain inventing untrue allegations about the claimant. The allegations are contained in the letter of 2 August 2016.

7.2 For claims where the respondent has identified clear reasons for any alleged conduct, it may not be necessary to engage with detailed questions about the burden of proof under section 136 Equality Act 2010. Where a respondent has demonstrated that it did not contravene the relevant provision, it is not necessary to identify whether there are facts from which, in the absence of any other explanation, it could be found the provision had been contravened. Further, where the explanation is clear, it is not always necessary to identify the detail of a hypothetical comparator.

7.3 In this case, to the extent the claimant has demonstrated that allegations were made against him by Mr Chamberlain, Mr Chamberlain has provided full explanations, supported where necessary by appropriate documentation, which on the balance of probability demonstrate that he in no sense whatsoever contravened the relevant provision, namely direct race discrimination.

7.4 We will deal with each allegation made by the claimant which he says amounts to invention by Mr Chamberlain. Each of the allegations appears in Mr Chamberlain's letter of 2 August 2016; it is necessary to have regard to all of the evidence and surrounding documentation to understand the detail.

7.5 The first concerns the allegation the claimant failed to follow reasonable management instruction. Mr Chamberlain did make that allegation. He had met with the claimant on several occasions. The claimant was not complying with his contractual obligations to attend at Marylebone Library at specific times. There had been several conversations. The claimant had made clear his refusal in text messages and in person. The allegation was made by Mr Chamberlain because it was true and supported by valid evidence.

7.6 The second allegation concerned the claimant's alleged aggression towards a manager and a supervisor. Mr Chamberlain had received a specific complaint from a supervisor. The claimant had been aggressive to Mr Chamberlain. The claimant had sworn at Mr Chamberlain. Mr Chamberlain had ample grounds for his accusation that the claimant's behaviour was aggressive, and that is why he made the allegation.

7.7 The third allegation was failure to attend work at the correct times. Mr Chamberlain had direct first-hand evidence of the claimant's failure because the claimant had lied to Mr Chamberlain about being at Central Reference Library. On 22 July 2017, Mr Chamberlain knew the claimant was not at work because Mr Chamberlain was at Central Reference Library. We would note that this was one of the occasions when the claimant was aggressive to Mr Chamberlain. Further, Mr Chamberlain had ample evidence of the claimant's failure to attend at appropriate times having regard to the COTAG report. The claimant had not sought to explain that he could access the building without triggering the COTAG report. The evidence appeared clear and damning. The claimant suggested before us that Mr Chamberlain should not proceed unless he was absolutely certain. This argument is unsustainable. Reporting the misconduct was the first stage of a formal investigation, and Mr Chamberlain had ample evidence.

7.8 The next allegation was that the claimant failed to attend work. There was ample evidence both from his own personal knowledge of the events of 22 July 2016 and the COTAG report. It is clear the allegation was made because it appeared to be true.

7.9 The next allegation concerned the breach of health and safety regulations. Mr Chamberlain had in mind the fact that there was an obligation to prevent dangerous lone working. The claimant was working alone in the building late at night. Mr Chamberlain had no reason to believe the claimant was not aware of the policy. He had proper grounds for reporting his concern.

7.10 The next allegation concerned falsification of records and timesheets. The manual times sheets conflicted with the COTAG report. The conflicts related both to time of attendance and the fact of attendance. Mr Chamberlain had ample evidence to suggest that there had been falsification.

7.11 There was a further allegation of fraud and dishonesty. This related to claiming, on the manual timesheets, that the claimant was working at times when he did not appear to be working having regard to the COTAG report. The claimant has suggested that only one timesheet was signed by him and another timesheet was signed by somebody else. That may be right. It is possible there was an innocent explanation. However, the primary evidence appeared to be damning. It at least called for an explanation, as to why there was a discrepancy, and it was appropriate and reasonable to make the accusation

7.12 We find that there was clear and compelling evidence for each of the allegations made by Mr Chamberlain. This fully explains why he made the allegations, and it had nothing to do with the claimant's race.

Allegation 2: on or about 2 August 2016 by Mr Chamberlain suspending the claimant.

7.13 The claimant was suspended because of serious allegations of misconduct against him, as set out above. The allegations were serious, including allegations of fraud. The seriousness of the allegations, and the cogency of the evidence against the claimant, explained why Mr Chamberlain suspended the claimant. In no sense whatsoever was this because of the claimant's race.

Allegation 3: on 3 January 2017 by Mr Chamberlain not allowing the claimant to return to work, to include asking the claimant for a copy of his disciplinary outcome letter, refusing to return the claimant ID pass, and asking the claimant to leave the building.

7.14 We find that at the meeting on 3 January 2017, Mr Chamberlain did ask for a copy of the disciplinary outcome letter. The claimant had it with him and referred to it generally. Mr Chamberlain asked to read it. The claimant would not hand it over. Mr Chamberlain wanted a copy so that he could read it properly. It appears to be the claimant's case that Mr Chamberlain should have had a copy. That may or may not be right. However, he did not have a copy. It was appropriate for him to read it. There was no reason at all why he should not copy it. Reading it was potentially material to the meeting, its progress, and the outcome. In no sense whatsoever was this because of the claimant race.

7.15 We find that Mr Chamberlain never refused to return the claimant ID. This claim therefore fails factually.

7.16 Mr Chamberlain brought the meeting to an end because of the claimant's anger. The reason for ending the meeting and asking the claimant to leave was because the claimant acted inappropriately and was angry and aggressive. It had nothing to do with the claimant's race.

Allegation 4: on 16 January 2017 by Mr Chamberlain reducing the claimant's hours of work from 7 days to 4 days and by giving no reason for this. It being the claimant's case that Mr Chamberlain was favouring other workers.

7.17 This allegation fails factually. Mr Chamberlain never reduced the claimant's hours of work. His hours of work had been set on 11 July 2016. Mr Chamberlain, at all times, sought to apply the contractual hours. Moreover, during the course of the total interactions between the claimant and Mr Chamberlain, he made it clear that the company would seek to accommodate the claimant, perhaps on a different contract, if the hours were inconvenient.

7.18 As this allegation fails factually, there is no detrimental treatment for Mr Chamberlain to explain.

Allegation 5: on 16 January 2017 by Mr Chamberlain sending an individual to supervise the claimant with the express intention of harassing him. It is agreed the supervisor was Ms Luz Giraldo.

7.19 The claimant was to return to work on 16 January 2017. It is not surprising that on his return his supervisors sought to meet him. The claimant has not pursued in his witness statement, or in his cross-examination of Mr Chamberlain any allegation that Mr Chamberlain sent the supervisor with the express intention of harassing the claimant because of his race. The supervisor was sent because it was appropriate for the supervisor to manage the claimant. It had nothing to do with the claimant's race.

Allegation 6: by the respondent dismissing/constructively dismissing the claimant. It is agreed the claimant resigned his position on 1 February 2017.

7.20 On the first day of the hearing, the claimant clarified that he did not allege that any change to his hours was a breach of contract on which he relied. The specific breaches of contract were said to be the failure to give him a security pass, the failure to give him keys to the Central Reference Library and the failure to give him passcodes to enable him to do his work at Central Reference Library.

7.21 We need to decide whether those allegations are made out factually, and if so, whether they amount to a breach of contract.

7.22 We reject the suggestion that the claimant was not given a security pass. A security pass was prepared for him and made ready for him to collect. There may been some confusion as to his collecting it which has contributed to by the fact that the claimant failed to make appropriate enquiries either just before or on 16 January. Had he asked Miss Geraldo, we have no doubt she could have made enquiries and told the claimant the pass was waiting for him. There was never any intention that he should not have keys. He failed to make specific enquiry of Ms Giraldo. There was no question of his not having any relevant passcodes to move around the building. It appears be the claimant's case that he was only to be allowed to do his work when the supervisor was there opening doors for him. That was never the intention of any of the respondent's managers. It would be impracticable. Had the claimant made specific enquiry, we have no doubt it would have been explained to him.

7.23 It follows that the respondent never refused to provide the claimant with a security pass, keys, or passcodes. It follows that there is no factual basis for the alleged breach. It follows the respondent was never in breach. As the respondent was not in breach, there was no breach of contract to be accepted by the claimant, so there was no dismissal. As there was no dismissal, the claim of constructive dismissal must fail. As there was no dismissal, the alleged dismissal cannot be an act of discrimination.

7.24 We would note that the claimant has not sought to rely on other potential breaches such as any change to his hours, or any failure to deal with grievances.

7.25 Moreover, we find that the claimant did not resign specifically because of any difficulties relating to security pass, keys to a building, or passcodes. The claimant was facing disciplinary action and it is more likely than not that he wished to avoid that disciplinary action. Moreover, it is clear that this claimant had a clear sense of having been wronged by the changes to his contract which were implemented on 11 January 2016. For around 26 years, the claimant had been undertaking cleaning, including cleaning at Central Reference Library; he had had significant autonomy. He largely chose when he wanted to work. He resented the control that the respondent sought to exercise over him. He found it intolerable. This no doubt explains why he was hostile to managerial action and why he refused, expressly, to cooperate on a number of occasions. He resigned because he viewed the respondent's legitimate and reasonable attempts to manage him, and to ensure his compliance with his contractual terms, to be intolerable. He felt "wronged," as he termed it, by the respondent's requirement he work specific hours.

7.26 We have considered the harassment claim. We do not need to reconsider each of the allegations individually. It is clear that Mr Chamberlain, at all times, behaved reasonably and appropriately. It was the claimant who was aggressive. It was the claimant who, at least on one occasion, used racially offensive language. Despite this, Mr Chamberlain sought to accommodate the claimant. In his letter of 9 January 2017, he even asked the claimant to identify the hours he could work to see if any other position could be offered. The reasonable and appropriate way in which Mr Chamberlain proceeded is the antithesis of a violation of dignity or of behaviour which could be said to be intimidating, hostile, degrading, humiliating or offensive.

7.27 Further, clear explanations have been produced for each of the relevant allegations, as we have considered in detail above. We need not repeat that analysis again. The reality is no allegation related to race any more than any allegation was because of race. All claims of harassment fail.

Employment Judge Hodgson on 8 December 2017