EMPLOYMENT TRIBUNALS

Claimant: Ms A Cleave-Wallace

Respondent: KPI Bridge Oil London Limited

Heard at: London (Central) **On:** 24 - 28 April 2017

Employment Judge: Professor A C Neal

Members: Ms O Stennet
Mr D Carter

Representation

Claimant: Mr J Bryan (of Counsel)
Respondent: Ms C Davies (of Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims alleging (1) unlawful harassment by reason of her sex, her age and/or her race; (2) direct discrimination by reason of her sex, her age and/or her race; and (3) "discriminatory constructive dismissal" are dismissed.

Employment Judge Neal
21 August 2017

REASONS

THE CLAIM

1 In this case the Claimant presented the following claims against the Respondent:

(1) The Claimant alleges that she was subjected to unlawful harassment by the Respondent by reason of her sex, her age and/or her race;

(2) The Claimant alleges that she suffered direct discrimination by the Respondent by reason of her sex, her age and/or her race;

(3) The Claimant alleges that she was subjected to discriminatory constructive dismissal by the Respondent.

THE ISSUES

2 The agreed issues for determination at this hearing were set out in directions issued by Employment Judge Tayler at a Preliminary Hearing (Case Management) held on 18 October 2016. During the course of that Preliminary Hearing it was agreed that the issues for trial were as set out in an Annex in the following terms:

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ANNEX

Harrassment

1. Did R's employees engage in unwanted conduct related to sex, age and/or race? In particular:

(a) Did R fail to provide C with a full and proper induction on the commencement of her employment?

(b) On 10 February 2015, 4 December 2015 and/or 9 February 2016, did Mr Ladekjaer and/or Ms Bendtsen tell C that she only got the job because she was attractive?

(c) In or around September 2015, did Ms Bendtsen comment judgmentally on C's appearance and dress sense?

(d) At meetings on 1 December 2015, 4 December 2015, 19 May 2016 and/or 20 May 2016, did Carsten Ladekjaer and Dorthe Bendtsen speak to each other in Danish while looking at C and laughing?

(e) On or around 4 December 2015, did Ms Bendtsen deliberately reserve C for herself in R's "Secret Santa" and buy C a book called "Marketing for Dummies"? Was C required to open the gift in front of other employees?

(f) At a staff function on 4 December 2015, did Mr Ladekjaer say to C "you're so hot, everyone says we've done well to hire you" and "why are you still single"?

(g) On or around 7 December 2015, did Ms Bendtsen say that the "Secret Santa" gift was not a joke but rather an appropriate gift?

(h) In or around December 2015, at a work function in Munich, did Mr Ladekjaer tell C to "fuck off" in front of other employees?

(i) In mid- to late December 2015, did Ms Bendtsen say to C that Elina Apostolakou had no experience in the industry but her looks would please the new managing director and other staff on the trading floor?

(j) In or around March or April 2016, did Ms Bendtsen say to C, in respect of Ms Apostolakou, "what she lacks in oil experience, she makes up with her looks" and "how pleasing her looks are"?

(k) In the last months of C's employment, did Ms Bendtsen comment judgmentally on C's loss of weight as a result of illness?

2. Did R's employees engage in unwanted conduct of a sexual nature? The issues at subparagraphs 1(c), 1(g), 1(j) and 1(k) above are repeated.

3. In either case, did the conduct have the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

4. Was it reasonable for the conduct to have that effect?

Direct discrimination

5. Did R treat C less favourably than it treats or would treat others? The issues at subparagraphs 1(a) to 1(k) above are repeated.

6. Was that treatment because of C's sex, age and/or race?

Discriminatory constructive dismissal

7. Was C constructively dismissed? In particular:

(a) Did R breach the implied term of mutual trust and confidence in C's contract of employment? C relies on the following allegations, whether taken individually or cumulatively:

(i) The allegations at subparagraphs 1(a) – 1(k) above.

(ii) Did R fail to provide any reasonable means for C to complain about the behaviour of two of R's most senior employees?

(iii) Did R require C to run everything past Ms Bendtsen, who would always find a way to involve herself in matters not directly concerning her, amounting to micromanagement?

(b) If so, did C waive any such breach and/or affirm his *(sic)* contract of employment?

(c) If not, did C resign in response to any such breach, or for some other reason?

8. If C was constructively dismissed, did R discriminate against C by dismissing her? C relies on the allegations at subparagraphs 1(a) – 1(k) above.

Remedy

9. If any of C's claims succeed, is C entitled to any remedy? In particular:

(a) Is C entitled to compensation for her losses and/or injury to feelings?

(b) Did either R or C fail to follow the Acas Code of Practice and, if so, should any award be, respectively, uplifted or reduced?

(c) Is C entitled to a declaration that she has been discriminated against?

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THE HEARING

3 This case was heard before a full tribunal over 5 hearing days, the last of which involved a full day of consideration by the Tribunal in Chambers.

4 During the course of the hearing the Claimant gave evidence in person. She also called one further witness, Ms Zara Eftekhar, to give evidence in support of her case. Ms Eftekhar attended the hearing under the terms of a Witness Order issued by the Tribunal (Employment Judge Tayler) on 18 April 2017. That Witness Order had been issued by reason of restrictive provisions included as part of the terms of a Settlement Agreement between Ms Eftekhar and the Respondent which had been entered into at the time of Ms Eftekhar's departure from the employment of the Respondent following disciplinary

proceedings being instigated against her.

5 The Respondent called five witnesses: Ms Dorthe Bendtsen, Mr James Enston, Ms Victoria Freeman, Mr Kenni Goldenbeck and Mr Carsten Ladekjaer.

6 All of the witnesses, apart from Ms Eftekhar, gave their evidence-in-chief on the basis of prepared written witness statements and were then subjected to cross-examination and to questioning from the panel. Ms Eftekhar gave her evidence-in-chief orally and was then subjected to cross-examination and to questioning from the panel.

7 An agreed Bundle of documents was produced for the benefit of the hearing, running to a total of 803 pages. This was supplemented by various additional documents drawn to the attention of the Tribunal during the course of the hearing.

THE LAW

8 Section 4 of the **Equality Act 2010** provides that:

> **The following characteristics are protected characteristics —**
>
> **…**
>
> - **age;**
> - **…**
> - **race**
> - **…**
> - **sex; …**

9 Section 13 of the same Act deals with "direct discrimination" and provides that:

> **(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. …**

10 Section 23 of the same Act provides that:

> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**

11 The relevant parts of Section 25 of the **Equality Act 2010** provide that:

> **…**
>
> **(1) Age discrimination is —**
>
> **(a) discrimination within section 13 because of age;**
>
> **(b) discrimination within section 19 where the relevant protected characteristic is age.**
>
> **…**
>
> **(6) Race discrimination is —**
>
> **(a) discrimination within section 13 because of race;**
>
> **(b) discrimination within section 19 where the relevant protected characteristic is race.**
>
> **…**
>
> **(8) Sex discrimination is —**
>
> **(a) discrimination within section 13 because of sex;**
>
> **(b) discrimination within section 19 where the relevant protected characteristic is sex.**

…

12 Section 26 of the 2010 Act deals with "harassment" and provides that:

> **(1) A person (A) harasses another (B) if —**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of —**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(2) A also harasses B if —**
>
> **(a) A engages in unwanted conduct of a sexual nature, and**
>
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b).**
>
> **(3) A also harasses B if —**
>
> **(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,**
>
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b), and**
>
> **(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account —**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are —**
>
> - **age; …**
> - **race; …**
> - **sex; …**

13 Section 39 of the **Equality Act 2010** provides that:

> **…**
>
> **(2) An employer (A) must not discriminate against an employee of A's (B) —**
>
> **…**
>
> **(c) by dismissing B;**
>
> **…**
>
> **(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment —**
>
> **…**
>
> **(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.**

14 Section 120(1) of the **Equality Act 2010** provides that:

> **(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to —**
>
> **(a) a contravention of Part 5 (work);**
>
> **(b) a contravention of section 108, 111 or 112 that relates to Part 5.**
>
> **…**

15 Section 136 of the **Equality Act 2010**, which is concerned with the burden of proof, provides that:

> **(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) …**
>
> **(6) A reference to the court includes a reference to —**
>
> **(a) an employment tribunal;**
>
> **(b) …**

BACKGROUND AND PRIMARY FINDINGS OF FACT

16 The context for these proceedings is not substantially in dispute, and the Tribunal makes the following primary findings of fact:

(1) The Claimant commenced employment with the Respondent in the role of Marketing Manager on 4 February 2015. This followed a recruitment process during which the Claimant had been interviewed in January 2015 and in the course of which she had given a presentation at a second interview on "Marketing Strategy 2015";

(2) During the early stages of her employment the Claimant was supervised by Ms Dorthe Bendtsen;

(3) The Claimant was provided with materials relating to the Respondent's "Talent Development Programme" in February 2015, and attended a course entitled "Basic Bunker Education" in Denmark between 4-7 May 2015;

(4) Between 6-8 November 2015 the Claimant attended a company "away weekend" in Munich;

(5) On 4 December 2015 there was an office Christmas party at Kensington Roof Gardens. During the course of that party a "Secret Santa" event took place;

(6) On 25 February 2016 the Claimant tendered her resignation by e-Mail, giving three months' notice;

(7) On 24 May 2016 the Claimant's employment came to an end;

(8) On 2 June 2016 the Respondent's solicitors wrote to the Claimant (1) in relation to an allegation that she had transferred the contents of her work "inbox" to a personal e-Mail account and (2) concerning comments which she had allegedly made about the Respondent in an interview memorandum;

(9) Arrangements were made to delete company data in the possession of the Claimant from her personal computer account on 23 June 2016;

(10) On 21 June 2016 the Claimant referred, in an e-Mail to the Respondent, to a "possible employment tribunal claim" being made;

(11) On 11 July 2016 ACAS pre-claim conciliation commenced, and continued until 10 August 2016;

(12) On 23 August 2016 the Claimant presented her claim form ET1 to the Office of the Employment Tribunals;

(13) On 18 October 2016 a Preliminary Hearing (Case Management) was held at the London (Central) Office of the Employment Tribunals, before Employment Judge Tayler.

THE SPECIFIC COMPLAINTS MADE BY THE CLAIMANT

17 Within the general context of the above findings of fact, the Tribunal turns now to consider the specific complaints made by the Claimant. Reference to the numbering of individual complaints is by way of the list forming an Annex to an agreed list of issues prepared at a Case Management Hearing before Employment Judge Tayler on 18 October 2016 [see above].

Allegation 1(a) – Failure to provide a full and proper induction

18 So far as the first allegation is concerned, there is no dispute, and the Tribunal finds, that "induction" was provided to the Claimant when she commenced her employment with the Respondent.

19 The first component of that induction was provided by way of a modularised training programme, described to the Tribunal in some detail by Ms Bendtsen and Mr Enston, known as the "Talent Development Programme". It is undisputed that the Claimant completed modules 1 and 2 of that programme. The induction provided through the programme was supplemented by "one on one" supervision and guidance provided by Ms Bendtsen. In addition to those elements, the Claimant attended a "Basic Bunker Education" course in Denmark during May 2015, designed to ensure familiarity with the business of trading and broking of oil. The Claimant was also furnished with a mini-library of reading materials to study at her own pace. The materials included with that mini-library were designed to provide "essential reading" for any employee without shipping industry knowledge to help them understand the industry and how it operates.

20 It was argued on behalf of the Claimant that she had not been provided with any "specific" marketing induction as such – and it was along this line that her complaint was eventually modified during the course of the hearing.

21 However, even having regard to the presentation of her complaint in those terms, the Tribunal notes that the Claimant was recruited with a specific skill-set (set out in the job specification) and experience (namely, a degree in marketing and relevant jobs on the CV). The Claimant's qualifications in these respects were confirmed through the presentation which she made during the course of her second interview.

22 The Tribunal finds it strange that the Claimant should be suggesting that she should have been provided with more guidance or leadership in respect of matters for which she was self-evidently already qualified and as regards which she already possessed relevant experience. This is particularly so, given that the programmed formal components of the induction programme provided for the Claimant were supplemented by close "one on one" supervision on the part of Ms Bendtsen – supervision which the Claimant eventually complained of as amounting to "micro-managing" of her job performance. It appears to the Tribunal that the Claimant is attempting "to have it both ways", and that whatever the Respondent did would be bound to attract criticism on her part.

23 In the view of the Tribunal it is clear from the evidence before them that there was both "adequate" and "proper" induction provided by the Respondent for the Claimant, and the Tribunal rejects the suggestion that the Respondent failed to provide a "full and proper" induction in the circumstances of the Claimant's commencement of employment. It therefore follows that the Tribunal unanimously finds that the Claimant's allegation in relation to the provision of induction is not made out.

Allegation 1(b) – Comment or comments that the Claimant only obtained her job because she was "attractive"

24 This allegation can be dealt with briefly.

25 Having regard to the evidence before the Tribunal, it is apparent, and the Tribunal finds, that any part of this allegation directed towards Mr Ladekjaer cannot be substantiated, since he was demonstrably elsewhere at the time (4 December 2015) when the comment attributed to him was alleged to have been made.

26 In so far as the allegation is directed towards Ms Bendtsen, the Tribunal have heard her evidence, given under oath and subjected to cross-examination, as to her activities and whereabouts on the dates in question, and are satisfied that no such comment was made by Ms Bendtsen on either occasion as alleged.

27 The Tribunal goes further, and finds, on the basis of the evidence pleaded before them, that, on a balance of probabilities, neither Mr Ladekjaer nor Ms Bendtsen made any such comment to a third party for eventual transmission to the Claimant.

28 In the light of those findings, therefore, the Tribunal unanimously finds that neither Mr Ladekjaer nor Ms Bendtsen told the Claimant that she only got the job because she was attractive. In consequence, the Claimant's allegation is not made out.

Allegation 1(c) – Alleged comment by Ms Bendtsen in September 2015

29 This allegation can also be dealt with shortly, in the light of the oral evidence given by the Claimant herself in cross-examination on the first morning of the hearing. The alleged comment was said to have concerned the appearance of the Claimant after she had suffered food poisoning during a holiday in Marrakesh and had taken time off by reason of illness.

30 When challenged on this matter during cross-examination, the Claimant conceded that "nothing was said directly to me". The best she could manage was to claim that "Zara told me about comments concerning how I look – that I was dishevelled and that my clothes were hanging off me". Then, when asked directly about Ms Bendtsen, the Claimant further conceded that "Ms Bendtsen never made comments directly to me".

31 The Tribunal are satisfied that there is no evidence to support the alleged hearsay claim regarding a comment made by Ms Bendtsen. We find that Ms Bendtsen did not comment judgmentally on the Claimant's appearance and/or dress sense as alleged – and, indeed, the Tribunal notes that no evidence was furnished to support the latter (dress sense) allegation at all. Ms Bendtsen denied under oath that she had made any such comment and the Tribunal accepts her evidence on that point without reservation.

32 It follows, therefore, that the Tribunal is unanimously of the view that the Claimant's allegation in this regard is not made out.

Allegation 1(d) – Speaking in Danish and laughing

33 A range of generic complaints was made by the Claimant, including matters set out in paragraphs 10, 11, 12, 13, 39, 40, 41, 42 and 75 of her prepared witness statement.

34 It became evident early on during the Claimant's cross-examination that there were significant problems in her identifying precise occasions and dates for any of the allegations – something which the Claimant endeavoured to explain in the terms of paragraph 75 of her witness statement.

35 The Claimant also sought to explain the absence of any documentary (for example, e-Mail communications) evidence in support of her allegations by way of her lack of access to the Respondent's internal systems following her termination of employment.

36 In essence, the Claimant's allegations were directed primarily towards Ms Bendtsen and Mr Ladekjaer, and consisted of complaints that the Danish language was used in the office in circumstances such as deliberately to disadvantage the Claimant, that Danish speakers consciously resorted to use of that language between themselves with a view to excluding the Claimant from understanding of or participation in workplace discussions of significance to her, and that utilisation of the Danish language was used as a vehicle with which to mock or belittle the Claimant.

37 After much effort, and some shifting of the ground on the part of the Claimant, the pertinent incidents were identified as allegedly having taken place on (1) 1 December 2015, (2) 4 December 2015, (3) 19 May 2016 and (4) 20 May 2016.

38 The Claimant accepted in cross-examination that she is not herself a Danish speaker and does not understand that language. She suggested, however, that "other people" (unspecified) had overheard comments made in Danish and had informed the Claimant that the comments were "rude".

39 Having had regard to all of the evidence before them, the Tribunal is satisfied that Danish was occasionally spoken, and that other languages (for example, Greek) were also used from time to time, in the office.

40 The Tribunal is also satisfied that, on the basis of the evidence before them, the Claimant's allegation of the Danish language being used to "mock" her is not made out.

41 Turning specifically to the alleged incident on 1 December 2015, which was said to have taken place at a business meeting with a third party ("Popcorn"), the Tribunal finds, on the balance of probabilities, that what was alleged by the Claimant did not occur. Both Ms Bendtsen and Mr Ladekjaer, so far as they could recall the events at that time, denied this to have been the case, and the Claimant's version of events lacked specific detail to satisfy the Tribunal to the contrary. From the Claimant's performance during cross-examination, the Tribunal formed a view that she was inferring something of which there was simply no evidence.

42 In relation to the alleged incident dated as having occurred on 4 December 2015, there is no evidence before the Tribunal of the Danish language having been used on that occasion.

43 So far as the alleged incidents said to have taken place on 19 and 20 May 2016 are concerned, the Tribunal finds that those alleged incidents cannot have taken place, since it has been established that Mr Ladekjaer was in Denmark at the relevant times and could not have been party to any meeting or conversation as alleged.

44 From the above, therefore, it follows that the Tribunal is unanimously of the view that Ms Bendtsen and Mr Ladekjaer did not speak to each other in Danish while looking at the Claimant and laughing. In consequence, the matters alleged by the Claimant in this allegation have not been made out.

Allegation 1(e) – "Secret Santa"

45 The original formulation of this allegation included the proposition that Ms Bendtsen had "deliberately reserved to herself" the Claimant as the recipient of a gift in a "Secret Santa" event. However, in the course of her evidence, and consistent with her witness statement, the Claimant drew back from the notion of "deliberate reservation". That proposition was also denied by Ms Bendtsen. The Tribunal finds that there was no such "deliberate reservation" if such is alleged.

46 It is conceded by the Respondent that Ms Bendtsen bought a present for the Claimant as part of the "Secret Santa" event, and that the item in question was a book entitled "Marketing for Dummies".

47 The Respondent also concedes that participants in the "Secret Santa" event were required to open their presents in front of other persons.

48 In the light of the Respondent's concessions, therefore, the Tribunal finds that Ms Bendtsen did not deliberately reserve the Claimant for herself in the Respondent's "Secret Santa", but finds it established that Ms Bendtsen bought the book "Marketing for Dummies" for the Claimant and that the Claimant was required to open the gift in front of other employees.

Allegation 1(f) – Comments about "being hot" and "being single"

49 The alleged comments complained of by the Claimant ("You're so hot, everyone says we've done well to hire you", and "Why are you still single?") were said to have been uttered by Mr Ladekjaer at a staff function on 4 December 2015.

50 Mr Ladekjaer denied making any such comments.

51 Evidence in relation to the event in question was given by Ms Zara Eftekhar, who attended the hearing as the subject of a witness order. Ms Eftekhar told the Tribunal that she did not hear any comments being made by Mr Ladekjaer as alleged by the Claimant. She spoke of being positioned quite close to Mr Ladekjaer in an atmosphere of some noisiness.

52 The Tribunal have noted a number of shifts in the account of this alleged event given by the Claimant. Having had regard to the evidence furnished in relation to 4 December 2015, and in particular the reluctance of Ms Eftekhar to give any evidence supportive of any of the versions put forward by the Claimant, the Tribunal are unanimously of the view that the allegations relating to comments made by Mr Ladekjaer are not made out.

Allegation 1(g) – Ms Bendtsen's comment that the "Secret Santa" gift was not a joke but rather an appropriate gift

53 This allegation proceeds on the basis that the Claimant "was told of" the alleged comment. It was said that Ms Zara Eftekhar had so informed the Claimant. No direct evidence was given by the Claimant, who simply told the Tribunal that this had been "reported" to her.

54 Ms Eftekhar, who attended the hearing as the subject of a witness order and thus delivered her evidence-in-chief orally, was questioned by the Employment Judge on this matter, following initial cross-examination by Counsel for the Respondent.

55 Ms Eftekhar gave evidence that she had been at the party on Friday 4 December 2015, and that Ms Bendtsen had made the comment to her on the Monday after the party (ie. 7 December 2015). When pressed in relation to when exactly this would have been, Ms Eftekhar shifted her ground on being presented with evidence that Ms Bendtsen was out of the country (in Athens) between 7 and 11 December 2015. She then settled for the formulation that the comment had been made "on or around 7 December".

56 The Tribunal's attention was also drawn to a social media message on "Giff Gaff' [Bundle p.525] which, however, did not take the matter one way or the other. It is merely noted that there was no mention in that social media message of anything such as the alleged comment of which complaint has been made.

57 Having observed the performance and demeanour of Ms Eftekhar under cross-examination and in response to the questions put by the Employment Judge, the Tribunal is unanimously of the view that the evidence given by Ms Eftekhar is wrong and that her version of events is entirely unreliable. The Tribunal rejects that evidence and accepts the evidence given by Ms Bendtsen at paragraph 39 of her witness statement, that no such comment as alleged was made "to the Claimant or anyone else".

58 It therefore follows that the Tribunal unanimously finds that Ms Bendtsen did not say that the "Secret Santa" gift was not a joke but rather an appropriate gift, and this allegation is not made out.

Allegation 1(h) – The Claimant was told to "fuck off" in front of other employees

59 The alleged comment was said to have been made by Mr Ladekjaer to the Claimant at a work function in Munich in December 2015.

60 Mr Ladekjaer denied ever having made such a comment to the Claimant.

61 According to the Claimant's witness statement (at paragraph 21), the incident was witnessed by Mr Kenni Goldenbeck, the Managing Director of KPI Bridge Oil (Denmark) Limited.

62 Mr Goldenbeck gave evidence to the Tribunal under cross-examination, in which he stated unequivocally that he had not heard Mr Ladekjaer make any such a comment. He also made clear that he had at no time "intervened", as had been alleged by the Claimant.

63 During the course of giving evidence to the Tribunal the Claimant claimed that the incident had also been witnessed by Mr James Enston. She also claimed that she had raised the matter with Mr Enston at the time of her departure from the Respondent's employment.

64 Mr Enston gave evidence and was cross-examined on that evidence. He also denied, in reply to supplementary questions put to him by Counsel for the Respondent, that he had heard Mr Ladekjaer make any such comment as alleged [EJ Notes, p.25].

65 The Tribunal's attention was drawn to a social media message on "Giff Gaff' [Bundle p.530] in which, it was submitted, Ms Zara Eftekhar had made reference to the alleged comment by Mr Ladekjaer in December 2015. However, the Tribunal noted that this social media message was dated 23 June 2016 – that is to say, some considerable time after the alleged event and subsequent to the Claimant having departed from the Respondent's employment.

66 In the light of the evidence before them, the Tribunal is of the view that there is no direct evidence of the alleged comment having been made, that the purported social media message referring to an alleged incident was constructed much later and in circumstances which lend themselves to an allegation on the part of the Respondent that it was drafted specifically to bolster the Claimant's claim before the Tribunal, and that Mr Ladekjaer did not tell the Claimant to "fuck off" in front of other employees at a work function in Munich.

67 It follows, therefore, that the Tribunal finds unanimously that this allegation is not made out.

Allegation 1(i) – Statements by Ms Bendtsen concerning Elina Apostolakou

68 This allegation is that in December 2015 Ms Bendtsen made comments to the Claimant concerning Ms Elina Apostolakou, to the effect that she "has no experience within the industry but her looks would please the new Managing Director and the other members of the trading floor".

69 Ms Bendtsen categorically denied making this, or any other, comment about Ms Apostolakou or any other female member of staff. In answer to questions put in cross-examination, Ms Bendtsen told the Tribunal that she had been involved in the recruitment of Ms Apostolakou, and that Ms Apostolakou had been appointed because it was thought that she would make a good trader. Ms Bendtsen elaborated on the account of that recruitment procedure set out in paragraph 30 of her witness statement, and drew the attention of the Tribunal to supporting documentation which formed part of that recruitment process, including the fact that Ms Apostolakou had obtained a Masters degree in shipping, and had significant experience in the field.

70 In view of the evidence before them, and having observed both Ms Bendtsen and the Claimant under cross-examination, the Tribunal is unanimously of the view that Ms Bendtsen did not say to the Claimant that Elina Apostolakou had no experience in the industry but her looks would please the new managing director and other staff on the trading floor.

71 It follows, therefore, that this allegation is not made out.

Allegation 1(j) – Further statements by Ms Bendtsen concerning Ms Apostolakou

72 This allegation is similar in kind to the preceding allegation, and is to the effect that in or around March or April 2016 Ms Bendtsen said to the Claimant, by reference to Ms Apostolakou, "what she lacks in oil experience, she makes up with her looks", and "how pleasing her looks are".

73 Once again, there was a categorical denial in respect of these allegations on the part of Ms Bendtsen.

74 The Tribunal was concerned by an obvious lack of consistency in the evidence given by the Claimant in relation to this allegation. When pressed in cross-examination as to when the comments were said to have been made, the Claimant became increasingly vague, changed her version of events as one date after another was demonstrated not to have been tenable, and generally became increasingly unconvincing with her testimony [EJ Notes, p.14].

75 The Tribunal put the allegation directly to Ms Bendtsen during the course of questioning by the panel, and received a clear and unequivocal denial. We accept the evidence of Ms Bendtsen and find the version of events put forward by the Claimant to be vague, inconsistent and unconvincing.

76 It follows that the Tribunal is unanimously of view that, in respect of Ms Apostolakou, Ms Bendtsen did not say to the Claimant "what she lacks in oil experience, she makes up with her looks", and/or "how pleasing her looks are". Those allegations are not made out.

Allegation 1(k) – Judgmental comment by Ms Bendtsen about the Claimant's loss of weight

77 The allegation here is that in the last months of the Claimant's employment Ms Bendtsen commented "judgmentally" on the Claimant's loss of weight as a result of illness.

78 The Claimant maintained that such a comment (or comments) had been "reported" to her by other colleagues. However, no evidence was produced to the Tribunal from any other colleagues, and the Claimant was unable to offer her allegation on any more than a hearsay basis.

79 Ms Bendtsen made a clear and unequivocal denial of the allegation, which the Tribunal accepts without qualification.

80 In view of the evidence before them, the Tribunal is unanimously of the view that Ms Bendtsen did not comment judgmentally on the Claimant's loss of weight as a result of illness. That allegation is not made out.

DISCUSSION

81 For the reasons set out above the Tribunal has found that only allegation 1(e), relating to the "Secret Santa" event, has been made out by the Claimant as a matter of fact. It follows, therefore, that none of the Claimant's claims founded upon allegations other than those at 1(e) can succeed.

82 The Tribunal therefore turns to consideration of the "Secret Santa" allegations which have been made out by the Claimant. These are (1) that Ms Bendtsen bought the book "Marketing for Dummies" for the Claimant and (2) that the Claimant was required to open the gift in front of other employees. Those are said to amount both to unlawful harassment and to direct discrimination. They also form the basis of the Claimant's allegation of "discriminatory constructive dismissal".

(a) Harassment

83 In relation to the allegation of harassment, section 26(1)(a) of the **Equality Act 2010** first requires it to be established that the conduct of the Respondent (which is conceded) was "unwanted" by the Claimant. The Respondent challenged the Claimant's

evidence in her prepared witness statement as to the "unwanted" nature of the acts/events in question.

84 In particular, it was established – and the Claimant conceded during cross-examination that this was the case – that the book around which the complaint centred – "Marketing for Dummies" – was taken by the Claimant from the Kensington Roof Gardens location of the Christmas party after the event and placed on her desk in the office, where it remained until her eventual departure several months later from the Respondent's employment. The Claimant also conceded that she had never at any time voiced or otherwise raised any complaint about the book before she received, through the Respondent's solicitors, a letter of 2 June 2016 drawing her attention to breaches of her contract of employment in relation to downloading data onto a personal computer facility and the alleged making of disparaging comments about the Respondent.

85 The Claimant sought to play down the significance of having retained the book, taken it away from the party location, and having kept it on her desk. It was suggested that the book was not visible on her desk, as other papers and documents always covered it up. However, such suggestions lacked conviction as the Claimant was repeatedly pressed on the point, whereas a number of witnesses gave evidence that they had seen the book on the Claimant's office desk. The Claimant also denied – when the proposition was put to her in cross-examination – that any purported sense of "unwanted conduct" only surfaced as a contextual allegation to support her claim to the Employment Tribunal.

86 The Tribunal was also unimpressed by the evidence of Ms Zara Eftekhar in relation to events at the time of the opening of the "Secret Santa" gift by the Claimant. Ms Eftekhar conceded early in her cross-examination that she had "not left the Respondent on particularly happy terms", and expressed the view that she "would rather not be here". However, she denied that she was looking to "bite back" at the Respondent – contrary to an impression given by a comment at page 518 of the Bundle which was put to her by Counsel for the Respondent. This followed a question put to Ms Eftekhar concerning how she had found a solicitor – who happened to be the same solicitor who was then representing the Claimant in preparing a claim to the Employment Tribunal – to represent her in relation to the disciplinary proceedings instigated against her by the Respondent [see letter dated 22 July 2016 at p. 803 of the Bundle]. The answer to that question was that Ms Eftekhar had "found the solicitor on the internet" and that it was "a coincidence" that she should have stumbled upon the same legal representative as the Claimant was instructing. The Tribunal found this response, and the evasive manner in which it was given during cross-examination, wholly unconvincing, and formed the view, on a balance of probabilities, that Ms Eftekhar was not being entirely candid with the Tribunal.

87 All of the Respondent's witnesses gave evidence that the "Secret Santa" event was run in accordance with a set of "rules of the game" known to all (of which the Tribunal was shown a copy), which involved all participants opening their gift in front of the other employees present at the Christmas party. All of those witnesses testified to the "light hearted" ethos of the event, and all of them gave evidence that the Claimant had at no time indicated or expressed any sense of upset such as to signal that the situation might have been "unwanted" by her.

88 When Ms Eftekhar gave her recollection of the point at which the Claimant opened her gift, she stated that the Claimant thought that the gift was "a bit rude", and that the Claimant had smiled on opening it. However, Ms Eftekhar then sought to qualify that evidence with the comment that "I thought it was a 'forced smile'", and claimed to have spoken with Ms Bengtsen "on the Monday afterwards".

89 For the reasons set out at paragraphs 54 – 57 above, in relation to Allegation 1(g),

the Tribunal has found the evidence of Ms Eftekhar unsatisfactory. The Tribunal therefore rejects that evidence in relation both to the "forced smile" proposition and (as has already been set out) as regards the claim to have spoken with Ms Bengtsen "on the Monday afterwards".

90 In the view of the Tribunal, having regard to all of the evidence available to them, and having particular regard to the performance and demeanour of the Claimant and of Ms Eftekhar under cross-examination, there is nothing to suggest that the giving of the book "Marketing for Dummies" was unwanted by the Claimant, or that the conduct of the "Secret Santa" event according to the "rules of the game" set out before the Christmas party was in any way "unwanted" by the Claimant.

91 Even had the Tribunal taken a different view as to the alleged "unwanted" conduct, they are unable to satisfy themselves that the conduct arising in the context of the "Secret Santa" event was related to any of the protected characteristics relied upon by the Claimant.

92 In the first place, there is absolutely nothing to link this to the race (relied upon as "British nationality") of the Claimant.

93 Similarly, there is nothing in the evidence before the Tribunal to link this to the sex of the Claimant.

94 In relation to the protected characteristic of "age", the Tribunal has again struggled to identify an arguable case on this basis, and have noted that the Claimant has merely referred to herself as being "young". Put at its most inventive, it has been considered whether the "experience" (or, more accurately, the relative "inexperience") of a Claimant could be placed within this category. However, while a theoretical argument might be put that a young and inexperienced Claimant might be subjected to unlawful harassment through the giving of a book entitled "Marketing for Dummies", that scenario does not arise in these circumstances. As has clearly been established in the evidence, this Claimant was well qualified and experienced, and had demonstrated a high level of capability through her second interview performance and subsequently. The Tribunal is driven to the conclusion that there is no link to be made between the allegations arising out of the "Secret Santa" event and the "age" of the Claimant.

95 It therefore follows that the Tribunal concludes that the conduct complained of in Allegation 1(e) does not either amount to "unwanted conduct" or can be shown to be "related to a relevant protected characteristic", as required by section 26(1)(a) of the **Equality Act 2010**.

96 By way of completeness, the Tribunal also places on record that they find that the conduct complained of in Allegation 1(e) lacked the necessary quality of intention to constitute conduct which "has the purpose … of (i) violating [the Claimant's] dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for [the Claimant]", as provided for by section 26(1)(b) of the **Equality Act 2010**.

97 The Tribunal has already indicated its reasons for finding that the conduct complained of by the Claimant was not "unwanted", and for similar reasons the Tribunal places on record that it is unanimously of the view that the "effect" of that conduct was not such as to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant [the Claimant presented her case on the basis that the conduct had been "humiliating" to her], as provided for by section 26(1)(b) of the **Equality Act 2010**.

98 Furthermore, even had the Tribunal been inclined to favour the Claimant on all of the above matters, and taken the allegations in 1(e) at their highest, the eventual

outcome would equally have been unfavourable to the Claimant.

99 First, the conduct in question was not "sexual", so that section 26(2) of the **Equality Act 2010** is not engaged.

100 Second, having regard to the provisions of section 26(4) of that Act, while the Tribunal might have been content to accept that the "perception" [section 26(4)(a)] of the Claimant was as she described it, the "other circumstances of the case" [section 26(4)(b)] do not, in the view of the Tribunal, tend in the direction of supporting the Claimant's case.

101 For the reasons set out in detail above, the Tribunal has found that a series of alleged acts going to claimed harassment on the part of the Respondent – and in particular on the part of Mr Carsten Ladekjaer – simply did not take place. It has become increasingly evident to the Tribunal, having observed the performance and demeanour of the Claimant under cross-examination and when responding to questioning from the panel that, over time, she has come to regard almost everything that happened during her employment with the Respondent as in some way intended to belittle, bully, demean or humiliate her. The Tribunal has noted the Claimant's retention of the book "Marketing for Dummies" and its presence on her office work-desk, seemingly without comment or complaint, until her eventual resignation, along with the absence of any comment or complaint about the "Secret Santa" event for over 6 months. The Tribunal has also noted that these matters were only raised after the Claimant had received the letter dated 2 June 2016 from solicitors acting on behalf of the Respondent taking her to task over breaches of her contract of employment. The Tribunal has also had regard to the social media messages on "Giff Gaff", and noted in particular the Claimant's proposition (made to an ex-colleague, Ms Charly Clayton) that she had "helped Zara Eftekhar to bite back" [see pages 517 and 518 of the Bundle]. Furthermore, it has been noted that, when the Claimant was cross-examined in relation to this, and the expression "bite back" was put to her in the context of the suggestion that she had put Ms Eftekhar in touch with her solicitors, she not only denied that to have been the case, but also claimed that the expression was "just a phrase".

102 All of these "other circumstances" have been taken into account by the Tribunal, and, placed in the context of the evidence in the round, they underline the unconvincing nature of the Claimant's evidence and go some way towards indicating, as has been submitted on behalf of the Respondent, that the allegations set out in the Claimant's claim before the Employment Tribunal were only developed as a response to the Respondent's letter, through their solicitors, of 2 June 2016.

103 Finally, having regard to section 26(2)(c) of the **Equality Act 2010**, the Tribunal asked itself whether it could have been said that it was reasonable for the conduct in question to have the effect as alleged by the Claimant.

104 The Tribunal was made aware of the nature of the "Secret Santa" event, and, as has been noted above, all of the witnesses apart from the Claimant had expressed the view that this was "light-hearted". It was also accepted that the "rules of the game" had been set out in an e-Mail which had been circulated to all staff including the Claimant. The Tribunal has already made a finding that there was no discernible reaction by the Claimant at the time of receiving and opening her gift or subsequently, and that there is no evidence to support the suggestion that she had been adversely affected in the manner described at paragraph 22 of her witness statement, at that time or subsequently. As has been mentioned already, this matter only came into play following receipt by the Claimant of the solicitor's letter dated 2 June 2016. In addressing the objective question of whether it could be said to be reasonable for the conduct in question to have the effect referred to in section 26 of the **Equality Act 2010**, the Tribunal has been assisted by noting the view of Ms Victoria Freeman (at paragraph 26

of her witness statement) that she found the suggestion relating to the book in question "quite funny", and stated (in her capacity as an experienced accountant) that "if I had received an "Accountancy for Dummies" I would have found it funny". While recognizing that the statutory provision has regard to the subjective impact felt by the Claimant, this Tribunal is of the view that, in light of the evidence before them, any claimed "effect" was only said to have arisen once a reaction had been provoked after receipt of the solicitor's letter dated 2 June 2016.

105 Taking all of these matters in the round, this Tribunal, drawing upon their long professional experience and many years of adjudication in the Employment Tribunals, is firmly of the view that it was not reasonable in these particular circumstances for the conduct complained of to have an effect, in the Claimant's own words, causing her to have been "completely humiliated".

106 Indeed, in the light of the Claimant having failed to satisfy the Tribunal that the associated narrative at paragraph 22 of the Claimant's witness statement actually took place at all, the Tribunal is further reinforced in that view.

107 The unanimous decision of the Tribunal is therefore that the Claimant did not suffer unlawful harassment by reason of her sex, her age and/or her race, as provided for by reference to section 26 of the **Equality Act 2010**, or sexual harassment, by reference to section 26(2) of that Act, and her claims to that effect are dismissed.

(b) Direct Discrimination

108 The Claimant's claim in this respect falls to be determined only by reference to the "Secret Santa" matters as alleged in Allegation 1(e), since the Tribunal has found that none of the other allegations has been made out by the Claimant.

109 Once again, the Claimant seeks to relate this complaint to the protected characteristics of age, sex and/or race.

110 The Claimant has not put forward any evidence to link the "Secret Santa" circumstances to any of those protected characteristics. No actual comparator has been suggested, nor has there been any attempt to profile a "hypothetical comparator".

111 It is also the case that the Claimant has failed to establish that she was less favourably treated than any other person in relation to the "Secret Santa" event, other than by reference to the implicit suggestion that the choice of the book "Marketing for Dummies" constituted an act amounting to such. However, given the evidence before them, the Tribunal is unanimously of the view that no such suggestion can be made out on these facts, and finds that no less favourable treatment has been established in these circumstances.

112 In the absence of anything to suggest that the "Secret Santa" event itself, or the choice of the book "Marketing for Dummies", or the circumstances of opening the gift in front of other employees is linked in any meaningful way to the claimant's age, sex, or race (British nationality), and in the absence of evidence to establish less favourable treatment by reference to a named or a hypothetical comparator, the Tribunal is unanimously of the view that the allegation of direct discrimination by reference to Allegation 1(e) falls a long way short of the standard required to get anywhere near the establishment of facts such as to affect the burden of proof as provided for by section 136 of the **Equality Act 2010**.

113 Quite simply, the Claimant has completely failed to establish "facts from which the court could decide, in the absence of any other explanation, that [the Respondent] contravened the provision concerned".

114 It must therefore follow that the unanimous decision of the Tribunal is that the Claimant did not suffer unlawful direct discrimination by reason of her sex, her age and/or her race, as provided for by reference to section 13 of the **Equality Act 2010**, and her claim to that effect is dismissed.

(c) "Discriminatory Constructive Dismissal"

115 It remains for the Tribunal to deal with the Claimant's allegation that she was unlawfully dismissed by reference to section 39(2)(c) of the **Equality Act 2010**. This is the allegation pleaded in the terminology of "discriminatory constructive dismissal", having regard to the extended definition of "dismissal" set out in section 39(7)(b) of the same Act.

116 The Claimant's case is put on the basis that she resigned in response to a repudiatory breach of contract on the part of the Respondent, consisting in one or more elements of Allegation 1(e), the "Secret Santa" allegation – given that all of the other allegations have been found not to have been made out by the Claimant; a "failure by the Respondent to provide any reasonable means for [the Claimant] to complain about the behavior of two of [the Respondent's] most senior employees"; or a "requirement on the part of [the Respondent] to run everything past Ms Bendtsen, who would always find a way to involve herself in matters not directly concerning her, amounting to micromanagement".

117 The Tribunal finds that no breach of contract (repudiatory or otherwise) has been established in relation to the allegations [(a) – (k)] set out in the Annex to the Case Management Directions issued by Employment Judge Tayler at the hearing on 18 October 2016. The reasons for that finding have already been set out in relation to Allegation 1(e) above, and earlier in relation to the remainder of those allegations, which were found not to have been made out. It must follow, therefore, and the Tribunal finds, that the Claimant did not resign in response to any of those matters.

118 In relation to the allegation of a "failure by the Respondent to provide any reasonable means for [the Claimant] to complain about the behavior of two of [the Respondent's] most senior employees", the evidence before the Tribunal simply does not bear this out. If anything, the available evidence – whether from the witness testimony of Mr Enston, borne out by that of Ms Bendtsen and Mr Ladekjaer, or from documentation setting out the Respondent company's procedures – points to a variety of formal and informal means for raising complaints concerning colleagues (however senior in the organisation), including access to senior management in both the United Kingdom and in Denmark. It became clear during the course of the Claimant giving evidence and responding to cross-examination that she was aware of those channels, but chose to present all of them as "not suitable". The Tribunal is unanimously of the view that there was no failure in this regard on the part of the Respondent as alleged, and that no breach of contract (repudiatory or otherwise) has been made out. It therefore follows that the Claimant did not resign in response to any such alleged breach of contract.

119 So far as the final alleged breach of contract is concerned, the Tribunal has heard in detail from Ms Bendtsen about her "management style", and the steps she took to (as she saw it) induct, supervise, and support the Claimant in her work. Strong criticism has also been directed towards Ms Bendtsen on the part of the Claimant, with clear evidence of a sharp "clash of personalities" being shown. The Tribunal has already set out its view in relation to the Claimant's allegation that she was not provided with "full and proper induction", and finds it puzzling that, on the one hand, there should be a complaint of Ms Bendtsen not doing enough in relation to the Claimant, yet, at the same time, there should be a complaint that she was guilty of "micromanagement" of the Claimant. At paragraph 22 of our reasons the Tribunal has already expressed the view that: "It

appears to the Tribunal that the Claimant is attempting "to have it both ways", and that whatever the Respondent did would be bound to attract criticism on her part." The Tribunal has also expressed its view, at paragraph 101 above, that: "It has become increasingly evident to the Tribunal, having observed the performance and demeanour of the Claimant under cross-examination and when responding to questioning from the panel that, over time, she has come to regard almost everything that happened during her employment with the Respondent as in some way intended to belittle, bully, demean or humiliate her." Taking those matters into account, and considering the evidence before them as a whole, the unanimous view of the Tribunal is that it has not been established that there was "a requirement to run everything past Ms Bendtsen", nor has it been established that Ms Bendtsen "would always find a way to involve herself in matters not directly concerning her", and the allegation of "micromanagement" has similarly not been made out. It therefore follows that – even if one or more of those matters might properly be said to constitute a contractual term or that the establishment of one or more of them could be considered to amount to a breach of the implied term of mutual trust and confidence in the contract of employment of the Claimant – no breach of contract has been established on the part of the Respondent as alleged, and the Claimant did not resign in response to any such breach.

120 As a matter of completeness, the Tribunal also places on record its view that, had it been necessary positively to have determined the true reason for the Claimant's resignation, this lay in clearly evidenced difficulties on the part of the Claimant in coping with the requirements of the job into which she had been recruited by the Respondent. Evidence, including medical records, was produced during the course of the hearing which demonstrated the Claimant's increasing concerns and problems in this regard – matters which the Claimant was unable to "explain away" during the course of her cross-examination. Furthermore, the Tribunal was shown clear evidence that the Claimant, following the tendering of her resignation with notice, had endeavoured to enter into discussions about the possibility of working for the Respondent on a "part-time" or limited duties basis – something which ran entirely counter to the Claimant's claims about "intolerable" conditions of work with the Respondent, and a matter which the Tribunal bore in mind when reaching its fact-finding decisions concerning the relationship between the Claimant and Ms Bendtsen, as well as in relation to its findings on the alleged "unwanted" nature of particular conduct occurring during the course of the employment relationship.

121 In the light of those findings, therefore, it follows that there was no "dismissal" of the Claimant, within the extended definition provided for in section 39(7)(b) of the **Equality Act 2010**.

122 That being the case, there can have been no unlawful discrimination by the Respondent within the meaning of section 39(2)(c) of the same Act. The Claimant's claim in that respect is therefore dismissed.

JURISDICTION – CLAIM OUT OF TIME

123 The Tribunal places on record a final point in relation to the Respondent's submission that some or all of the Claimant's claims were presented to the Tribunal out of time.

124 Section 123 of the **Equality Act 2010** provides that:

> **(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of —**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**

> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **(2) …**
>
> **(3) For the purposes of this section —**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something —**
>
> **(a) when P does an act inconsistent with doing it, or**
>
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

125 In relation to the allegation of "discriminatory constructive dismissal", which, for the reasons set out above, the Tribunal has dismissed, the act complained of was the act of dismissal, which it is agreed took place on the ending of the Claimant's period of notice – namely, 24 May 2016.

126 Pre-claim conciliation through ACAS began on 11 July 2016, and ended on 10 August 2016. Following this, the Claimant presented her claim form ET1 to the Employment Tribunals on 23 August 2016.

127 In the light of the foregoing, the Tribunal is satisfied that the Claimant's claim relating to alleged "discriminatory constructive dismissal" was presented within the time provided for by section 123 of the **Equality Act 2010**.

128 So far as the Claimant's claims alleging unlawful harassment and direct discrimination are concerned, in the light of the Tribunal's findings of fact, these rest solely upon the matters set out in Allegation 1(e) – namely, the "Secret Santa" event. That event took place on 4 December 2015.

129 This claim relates to a single discrete alleged act, so that there is no question of section 123(3)(a) of the **Equality Act 2010** (relating to what is sometimes referred to as a "continuing act") being engaged.

130 Having regard to the agreed finding that the Claimant presented her claim on 23 August 2016, it follows that her claim was not brought before the end of "the period of 3 months starting with the date of the act to which the complaint relates", as provided for by section 123(1(a) of the **Equality Act 2010**.

131 The question therefore arises as to whether the Claimant's claim was brought within "such other period as the employment tribunal thinks just and equitable" as provided for by section 123(1(b) of the **Equality Act 2010**.

132 The case-law in relation to the "just and equitable" jurisdiction of an Employment Tribunal when considering a claim presented out of time has been developed over many years and is well known. In considering the present circumstances, this Tribunal has been assisted by a helpful recent overview of the decided law provided by Elisabeth Laing J. sitting in the Employment Appeal Tribunal in the case of **Edomobi v. La Retraite RC Girls School [UKEAT/0180/16/DA]** (at paragraphs 21 - 25 of her judgment in that case). The Tribunal has reminded itself of, and borne in mind, the principles distilled there, and has addressed this case by reference to those, as well as to the same Judge's resume of the relevant principles set out in her judgment in the earlier case (handed down on 15 March 2016) of **Miller v. Ministry of Justice & Others [UKEAT/0003/15/LA]**.

133 The Tribunal has also sought to take account, so far as these might be relevant, of the matters set out in section 33(3) of the **Limitation Act 1980**, which provides that:

> **In acting under this section the court shall have regard to all the circumstances of the case and in particular to —**
>
> **(a) the length of, and the reasons for, the delay on the part of the plaintiff;**
>
> **(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;**
>
> **(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;**
>
> **(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;**
>
> **(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;**
>
> **(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.**

134 Surprisingly, no direct evidence was given by the Claimant to explain why her claim in Allegation 1(e) was not presented within the time provided. Although Counsel for the Claimant valiantly included a number of generic submissions in his final written submissions produced for the Tribunal, these did not explain why nothing had been done after the "Secret Santa" event on 4 December 2015 for over half a year.

135 Nor, in particular, did the evidence given in relation to the submission at paragraph 39(c) of Counsel's final written submissions establish any link between the fact that "C was in therapy" (as referred to in counselling records from April 2016) and any claimed impediment to the Claimant proceeding with a timely complaint to the Tribunal in relation to the alleged matters of December 2015.

136 The Tribunal finds that the Claimant has failed to establish that there was any impediment to progressing a timely claim in respect of the "Secret Santa" event, and has furnished no explanation as to why there was a failure so to progress the matter.

137 Having considered all of the matters referred to above, the Tribunal is not persuaded to afford to the Claimant "all due leeway", as submitted by her Counsel, to the extent of considering it just and equitable not to trigger ACAS pre-claim conciliation until July 2016 and thereafter to present a claim on 23 August 2016 – more than eight months after the alleged act.

138 The Tribunal reminds itself of the proposition first enunciated at paragraph 25 of the judgment of the Court of Appeal in **Robertson v. Bexley Community Centre [2003] EWCA Civ 576**, and cited with approval in **Miller** (at paragraph 10), to the effect that:

> **"Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule;…"**

In the view of this Tribunal, the submission made on behalf of the Claimant goes too far. This Tribunal is not prepared to exercise its discretion under section 123 of the **Equality**

Act 2010 without more, and is unanimously of the view that, in the particular circumstances of this case and having regard to the failure of the Claimant to explain or excuse her palpable inaction, it is not just and equitable that the time for presenting her claim in respect of the "Secret Santa" allegations should be extended further than provided for in subsection (a) of section 123.

139 It therefore follows that, even had the Claimant's claims in relation to Allegation 1(e) been made out – which, for the reasons already set out above, has not been the case – the Tribunal would have had no jurisdiction to deal with those claims, by reason that they were presented out of time and the Tribunal considers that it is not just and equitable to extend time for a further period.

DISPOSAL

140 Having regard to the foregoing, **the unanimous judgment of the Tribunal is that the Claimant's claims alleging (1) unlawful harassment by reason of her sex, her age and/or her race; (2) direct discrimination by reason of her sex, her age and/or her race; and (3) "discriminatory constructive dismissal" are dismissed**.

Employment Judge Neal
21 August 2017