

JB1



THE EMPLOYMENT TRIBUNALS

Claimant

Respondents

Ms M Shirin

v

**1) Wilson Barca LLP
2) Richard Barca
3) Lily Raj**

Heard at: London Central

On: 25, 26, 27 September 2017; 26 & 27
October 2017, in chambers

Before: Employment Judge Pearl

Members: Mrs HJ Bond
Mr J Carroll

Representation:

Claimant: Ms L Millin, Counsel

Respondent: Ms R Hodgkin, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The Claimant's claims of harassment succeed against the First and Third Respondents in respect of age; and against the First and Second Respondents in respect of sex, as set out in paragraphs 61 to 70 of the Reasons.
2. The claim of direct discrimination related to her constructive dismissal fails and is dismissed.
3. All remaining claims, either of harassment or direct discrimination, fail and are dismissed.

REASONS

1. By ET1 received on 1 October 2016 the Claimant, who states that the Respondent employed her as a "Paralegal/Office Assistant", claimed age, race and sex discrimination. She claimed that she was employed from 2 November 2015 to 10 June 2016, although, as will be seen, the effective date of termination has been subsequently agreed to be later. She also made a claim for notice pay. The particulars are short. She alleged bullying and harassment against the three Respondents and also that she had been verbally abused. She said this behaviour had caused a mental breakdown and also physical injury.
2. The ET3s are equally short. Mr Barca, Senior Partner and Second Respondent to the claim, accepted that he had shouted at her and he says that this is because the Claimant repeatedly failed to follow his instructions.
3. On 23 December 2016 EJ Lewis sought to define the issues. The allegations of bullying etc were put under the head of harassment; and the alleged constructive dismissal was said to be direct discrimination and/or harassment, the Claimant lacking qualifying service to bring an ordinary unfair dismissal claim.
4. On 17 March 2017, the Regional Employment Judge at a further case management hearing recorded that "the Respondents accept that many of the incidents complained of occurred; they were running a 'we treat everyone that way' defence."
5. On 28 March 2017, at the listed hearing, the matter was postponed and relisted. There was insufficient time to hear the case. The "core issues" were said by EJ Baty to be those at paragraph 2 of EJ Lewis' order. There was also a long discussion on this occasion and the outcome was that the "list of incidents" was reduced in scope. "It was agreed that the actual allegations of harassment are those in the 'List of incidents' and that what is in the electronic diary is merely detail relating to those incidents and there is no scope for the 'List of incidents' to be expanded. For example, entry 1 of the 'List of incidents' is "Mr Barca shouted at me violently using profanity for not making his tea to his liking." The electronic record gives details of precisely what Mr Barca is alleged to have said. However, the allegation is the shouting: there is no scope for widening this, for example, to a complaint that Mr Barca made the Claimant make tea; that she is female; and that a man would not be asked to make tea; which would be an allegation of direct sex discrimination not covered by the 'List of incidents'." The Judge went on to note in the next paragraph that for allegations of harassment, the alleged act has to be related to sex/race/age for the complaint to succeed. Mere unreasonable treatment is not enough.

6. In resolving the issues we have heard evidence from the Claimant; and from Mr Barca, Ms Rajananth, Mr Hall, Ms Rana, Mr Ali, Mr Sharif, Mr Canning, Mr Lo and from Mr Hall. We have studied a bundle of some 438 pages together with additional documents that were handed in. We should also note that the Claimant broke down on day two, 25 September, towards the end of her cross examination. She left the Tribunal and by agreement returned when Mr Barca had completed his evidence.

7. Turning to the effective date of termination, this was agreed to be 30 June 2016 up to and including the point at which Mr Barca completed his cross examination. After he had left, the suggestion was made by the Respondents' counsel that he had dismissed the Claimant before this date and during the period of notice that she had given him. The suggestion was ultimately not pursued. The Tribunal explained that if any further application was to be made, for example to amend the ET3, it would have to be based upon further evidence from Mr Barca and an opportunity for him to be cross examined. After taking instructions, it was decided to take the matter no further.

8. We are not required to determine each and every factual dispute between the parties. What follow are our necessary findings in relation to the issues. It will be apparent that the case involves an overall allegation that the Respondents, and Mr Barca in particular, subjected the Claimant to intolerable levels of humiliation and abuse. Some of the alleged conduct is admitted. Concerning other items, we need to make factual findings. As to all our findings we need to determine whether the Respondent has by tortious acts breached the Equality Act 2010, as alleged.

Facts

9. The Claimant is now aged 51 and she qualified in later life as a Barrister having taken a law degree. After some 2 years' work in a solicitors' firm she applied for the position Mr Barca advertised in his firm. The advertisement is at page 50. "We have a para legal vacancy that could lead to a training contract within 12 months." This excited the Claimant as she was looking for a training contract. She was interviewed by Mr Barca and accepted the post. He told her, as is agreed, that he had temper issues.

10. This case revolves around the question of Mr Barca's temper. It is not only agreed, but also an essential element in the defence, that he has a very short fuse, gets angry when he considers that things have not been done correctly and he shouts and swears. Before we turn to the evidence of the Claimant and others it is helpful to examine what Mr Barca himself told us.

11. In his witness statement, Mr Barca accepts that he shouted and swore at the Claimant. His reason for doing so is throughout said to be her inability to follow instructions. He denies the number of incidents alleged and their frequency. He says he shouts and swears at all his staff and also clients. When read closely against the Claimant's allegations, it is clear that Mr Barca has only made limited admissions in the witness statement, but no point should be taken against him on this basis. The documents in the Tribunal file do not show that he ever saw the Claimant's witness statement in advance of drafting his own and it is not adverse

to Mr Barca that he omitted relevant evidence, because it is feasible that by 10 March 2017 (the date of his witness statement) he only had the December 2016 list of incidents compiled by the Claimant.

12. Nevertheless, in cross examination he gave much more detail as follows. He admitted that on the Claimant's third day at work he had said to her "how fucking difficult is it to make a cup of tea?" This is not appropriate but he said this is "how I talk."

13. Throughout his evidence, Mr Barca was at pains to deny using the formula "you fucking stupid", which is an allegation that the Claimant makes throughout her own statement. He was less clear about calling her "fucking stupid." In relation to the 5 November incident, below, he said he might have said this but thought that he had not. Later on in his evidence he agreed that he would have said on occasion "don't be fucking stupid" and also: "on some occasions (but not all) when the Claimant's alleges 'you fucking stupid' I would have used the words 'fucking stupid'."

14. As to the allegation that he called the Claimant "a stupid cunt" to her face, in January 2016, he said: "I don't remember ... I cant deny it, I don't remember."

15. The independent evidence was of considerable value. Mr Ali said in his witness statement that Mr Barca "sometimes shouts at me and other members of staff. I do not like this ... " He does not consider the shouting to be discriminatory. In cross examination he said that he had complained several times about Mr Barca's behaviour. He thought that these letters of complaint could be construed as grievances. In C2, which he subsequently produced for us, we can see the following:-

- On 3 October 2011 he wrote to Mr Barca: "I do not appreciate at all, you have used F-language to me."
- On 26 April 2012 he told the Partner Mr Wilson (who with the other and third Partner works at Archway): "Richard said fuck sake. I would like to have a meeting with you please."
- 11 minutes later he recorded that Mr Barca "used F-words to me last week ... I cannot work in this environment. I am really getting stressed ... I cannot take this anymore."
- On the same day, he put his complaint in writing to Mr Wilson. He asked him to speak to Mr Barca.
- On 1 November 2012, he made a written complaint to Mr Wilson that Mr Barca "shouted at me, abusive me, and used F-words ..."
- On 15 February 2013, he wrote to Mr Barca: "I am taking my lunch now, you told me to fuck off. This is unacceptable behaviour. I will report this to David on Monday." 51 minutes later he asked to go home because he was feeling sick and stressed.

- On 29 July 2013, Mr Barca wrote to him: “thanks you are doing well, I do appreciate your hard work even if I am shouting at you.” The next day Mr Ali complained in an email that Mr Barca “has been very abusive to me today, shouting, swearing and using F-words, this is unbearable behaviour.” He was stressed.

- On 30 September 2014, he said he did not want to go to the Soho Office where Mr Barca was: “... I would not like to mention reasons as you know, ... whenever in the past I have worked in Soho I have very bad experience with Richard.”

16. In evidence he agreed that Mr Barca has said to him “you’re fucking stupid.” Once or twice he had called him “a fucking cunt.” It had not happened recently. He said Mr Barca shouts and swears at everybody. He gets stressed if he thinks people have made mistakes. His behaviour towards him is “quite unusual” and he had never met anybody like him in a working environment. (He has had four jobs in 24 years.) He accepted that some people might leave because of this behaviour and that some had indeed left. Mr Barca is unpredictable but can also be very nice if one does a good job for him, but when he loses control he gets annoyed and swears. Sometimes Mr Ali had warned new starters in the firm and he did say to the Claimant during her induction that she should not take it personally. Subsequently he saw the Claimant in tears and she told him that it was because of the abuse that she had received.

17. Ms Rajananth (“Lily”) says in her witness statement that Mr Barca has raised his voice to the Claimant more often than to any other Office Assistant or other staff and this was because of the number of mistakes that the Claimant made. Otherwise, her only reference to shouting is at paragraph 73. “There are times when due to stress, the Second Respondent gets agitated and has raised his voice and swears at myself and other fee earners, particularly Martin Hall who often works on his files. However, these incidents are quite rare and usually occur when the Second Respondent’s instructions are not followed immediately ...” She also adds at paragraph 77 that she does not think that he shouts or swears at staff unnecessarily. In evidence, however, she said that other staff had left the firm and had complained about Mr Barca’s shouting and also his attitude. She agreed that calling somebody “a fucking cow” or “a fucking cunt” was unacceptable. She agreed that it is disrespectful, causes a terrible atmosphere and is humiliating for women. She insisted that Mr Barca treated men in the same way but went on to concede that his behaviour was “probably why women left – it was one of the reasons, there were others.” She also said she had never met anybody with a similar temper. “He has no control over his temper. People in the street can hear him. He calms down quickly.” One way she deals with the temper, over the telephone, is to put the receiver down. Mr Barca is very unpredictable. One man, Mr Winston, had left, she said, because of him. Overall, we find that when she drafted her witness statement, she sought to minimise the swearing and abuse.

18. We have letters in the bundle from Ms D (24 February 2010) and Ms M (28 September 2005). Ms D said: “my decision to resign ... was not taken lightly, as I had to put my studies and my current situation first. Furthermore I tolerated your

constant belittling because I admired the hard work you do as a Partner. I understand that you are under a lot of pressure but that doesn't give you an excuse to bully your staff ... I do not wish to make a complaint but I do feel that since my departure I am able to express myself easily without fear of intimidation from you. There is clearly institutionalised bullying within Wilson Barca LLP. You not only espouse vitriolic comments on a daily basis but I feel that you use your physical structure to intimidate the women that work for you. It is shocking that a man of your position would use 'cunt' around women without a second thought. It appears to me that your employees have been conditioned to accept your behaviour..." She added that he treated employees with utter contempt.

19. Ms M wrote in her letter: "I have been forced to write you this letter after a particularly humiliating and very upsetting day... the final straw..." She said that Mr Barca had spoken to her in a most unacceptable manner and was extremely rude. "I also have to put up with the abuse and shouting from Richard and often been drawn to tears on many occasions for a matter that has been blown up out of all proportion (as it normally is) and could have been solved quietly and nicely together."

20. Mr Lo is a Consultant and has worked in the firm for over 20 years. He currently visits the office in Soho for three half-days a week. His witness statement makes no mention of Mr Barca's behaviour but he told us that he swears and he has heard this "every two months." He has been sworn at this year himself on two occasions.

21. Mr Hall's witness statement is much more forthcoming about behavioural issues. Mr Barca has a short temper. "... normally brought on by employees making stupid mistakes or not following his instructions." The Second Respondent has "repeatedly called me 'fucking stupid', a 'fucking stupid cunt', and shouted 'for fucks sake, man' 'what the fuck are you/have you been doing' at me during my employment, with particular frequency during the first six to nine months ..." He has experienced similar things before and he has "a tough skin." He agreed that "fucking cow" was not nice, but he did not think it was personal. He had been called a "fucking drongo." He agreed that the Claimant was more sensitive to these things than he is. He also said that office assistants were more sensitive, as was Mr Ali.

22. From the body of evidence, and leaving aside all questions related to discrimination or harassment at this point, we find that Mr Barca is unusual in the shortness of his temper. He gets angry and he loses control when he suspects that his staff have been incompetent. His loss of control can sometimes be volcanic. He erupts into a torrent of abuse, liberally spiced with very bad language, as recorded above. He accepts that he was "flawed" in this regard. He has other sides to his personality and witnesses have said that he can be kind and generous towards others. He will praise good work. However, the violence of his outbursts has been amply demonstrated in the evidence that we have received.

The Incidents

23. No 1, 4 November 2015. Page 185 is the Claimant's "journal of work" kept on her computer but often compiled from her own notes or other jottings. The Claimant was told that her duties included making tea for Mr Barca. He did not approve of how she made the tea and he shouted "how fucking difficult is it to make a fucking cup of tea? You fucking stupid why can't you get it into your fucking head." We find that with the amendment of "you are fucking stupid", these words were spoken, on the balance of probabilities. There is no real denial in Mr Barca's witness statement and we have no reason to doubt that the journal is broadly correct. The words are in character for Mr Barca and his reference to tea-making as an assignment is something that generally corroborates the Claimant's account. Mr Barca's tea seems to feature prominently in the life of the office.

24. On the "you fucking stupid" debate, Mr Barca's insistence that he did not use this phrase is, we find, semantically correct. However, we also find, with a high degree of certainty, that he called the Claimant and others "fucking stupid." This was his way.

25. No 2, 5 November 2015, page 187. Beyond the point dealt with in the paragraph immediately above, there is no denial of the allegations. The Claimant went upstairs and piled up various files on Mr Barca's desk. On his return, he called her up and said she was fucking stupid and carried on swearing in a similar way.

26. No 3, 12 November 2015, page 190. This is similar to the incident above and occurred when the Claimant raised an innocent enquiry about something that had to be posted, whereupon Mr Barca called her fucking stupid and repeated the swear word.

27. No 4, 16 November 2015, page 190. This follows a similar pattern with the Claimant being called fucking stupid, again in relation to filing.

28. No 5, 18 November 2015, page 191. We give a little more detail here as it is said to be race discrimination. The exchange started with Mr Barca asking the Claimant: "why didn't you pick up the fucking phone when I called from outside?" The Claimant had a response to give but she says, not improbably, that she was not given a chance to speak because Mr Barca was shouting violently. He said "this is not a fucking fish and chips shop, this is a solicitors office, you fucking stupid. When phone rings, you pick up the fucking phone." The response from Mr Barca is that he would have referred to a fruit and veg shop and not a fish and chip shop and he explained why he would have used that phrase in his statement.

29. The reason why the Claimant has maintained that this is a comment with a racial connotation is that Lily suggested that in a conversation that took place shortly after the incident. We deal with this in our conclusions.

30. No 6, 19 November 2015, pages 191 to 192. The allegation is that in relation to another work matter Mr Barca called the Claimant a "stupid melon." He then said of the document: "why the fuck did you not read it immediately? How fucking

difficult it is [sic] to bring the post upstairs? When a post comes upstairs immediately, don't just sit there like a fucking stupid melon." All of this is admitted save for the last three words and the only dispute is that Mr Barca says that he did not say 'stupid'. We are not sure how he can remember this point of detail and although the disputed word is largely irrelevant we find that the words recorded by the Claimant at the time are accurate.

31. On the same day it is alleged that Lily called the Claimant "stupid" and "slow" and also said that she was too old for the job: "this is not a job for you, you are too old for this job. Marina was only 21 and she was very fast." Marina was an office assistant before the Claimant.

32. No 7, 20 November 2015, page 193. There are two allegations here in relation to paying in procedures. Mr Barca is alleged to have called the Claimant "fucking stupid" and then swore again. Lily is alleged to have called the Claimant stupid and slow and also to have mocked the way she speaks. In this latter regard, the journal records her laughing when the Claimant pronounced a certain word; and also telling her that she had "curry tongue." The Claimant, in her witness statement, gives further detail about this as follows: "she would make fun of my accent and say that I can't say English words correctly, because according to her daughter Asian people have curry tongue and they can't speak English properly."

33. No 8, 23 November 2015, pages 194 to 195. There is a another allegation directed against Mr Barca that he swore at the Claimant again and it is likely to be correct that he said what is alleged at page 194. However, there are also allegations against Lily at page 195, that she called the Claimant "stupid", "slow" and "clumsy". She also is said to have told the Claimant she was too old for the job and that Marina was better. She said she did not understand why Mr Barca had not offered Marina a training contract. In cross examination Lily accepted this last comment and we understand that she accepts some other comments although she denies the 'clumsy' allegation. Nor did she accept that she called the Claimant too old for the job. These are very difficult disputes of fact to resolve. Because we have found that a fair proportion of the detail contained at pages 194 to 195 is correct, largely because Lily accepts it, we have come to the conclusion that the Claimant has also accurately recorded the other matters. Some of her tasks did involve a degree of manual dexterity, for example hole punching, and that is why the clumsy allegation has arisen. On balance we accept that she was told she was too old for the job. A matter that informs our findings here is that it is clear from Lily's oral evidence that she did consider that the Claimant was inefficient and was not performing very well; and that she would not be offered a training contract. She herself told us that she is a bit of a perfectionist and that the mistakes being made by the Claimant were not minor. It is also relevant that she told us that: "I have a very strong personality. I say things bluntly sometimes. Perhaps I don't realise what is right or wrong. I don't know."

34. No 9, 24 November 2015, pages 195 to 196, relates to a day of some crisis for the Claimant. Neither in her witness statement nor in the journal entry is any specific allegation related for this day. The journal states that Mr Barca was in a bad mood during that week and "I cried almost every day and felt pathetic. He

treats me like a slave – the nitpicking, shouting, verbal abuse, name-calling ...” She says that the shouting was “too much today and I felt totally drained for living this nightmare for last 3 weeks, always walking on egg shells, always terrified ... It is just a horrible place to work ... Today I decided to resign.”

35. The very short letter of resignation is at page 68 and says that she resigned because she could take his abuse no longer. Mr Barca sent a three word response accepting the resignation. We would make two further findings for the period immediately after the resignation. First, we accept that Lily, who accepted that she had told the Claimant about the resignations of previous women, and also the reasons why they left, is likely to have shown the Claimant the two earlier letters of resignation to which we have referred. The Claimant’s journal records that in the days after the resignation Lily was supportive and kind towards the Claimant. The Claimant’s witness statement goes into some more detail. On the balance of probabilities we consider that it was in this spirit that Lily told her about the reasons why other women had left. We are not persuaded that the Claimant would have known where to go on the computer system to find these letters. There is also other evidence in the journal that Lily was advising the Claimant to keep copies of documents. In the context of the Claimant having just resigned, it is likely that Lily was drawing her attention to these previous resignations. We also consider it unlikely that Lily, who was Mr Barca’s personal assistant, a long-standing employee and a linchpin of the firm’s administration, would not have known where to find these letters on the system. Finally, there is an express reference in the journal, at page 198, to Lily showing the Claimant resignation letters.

36. It is evident that the first week of December was also difficult for the Claimant and her journal entry for that week refers to her perception of never having experienced such harassment and bullying before. She alleges that Mr Barca shouted at her every day, she was terrified by the shouting and name-calling and she says that she is glad to be leaving. The allegations in this week are that she was called fucking stupid again. Mr Barca used the same swearword in relation to documents and swore at her, calling her fucking arrogant and so forth. The further detail can be read on page 197. It is of note that Lily is said here to be supportive of the Claimant and she records the conversation, which has every appearance of being contemporaneously noted, in which Lily made some joking comments to the effect that she would not call an ambulance if Mr Barca had a heart attack. She told us that she may have said something like this. We also note that for this first week of December 2015 there is little or no corroborative evidence of any offensive comments made by Lily.

37. For the second week of December, there are similar allegations in relation to swearing made about Mr Barca and the swearing is again work-related and includes his annoyance about keeping papers in the wrong file. There is an allegation here that Lily still calls the Claimant stupid, clumsy and slow, but this needs to be read with the express recording of Lily being very worried about the Claimant’s financial situation; and suggesting that she ask Mr Barca to let her work until a replacement had been found. The overall tone is that Lily was being supportive of her.

38. This is consistent with what Lily did at around this time. She records that she sent an email to Mr Barca saying that the Claimant had not found another job and asking whether he would continue to employ her. He agreed. In consequence, the Claimant wrote the email at page 269 on 18 December 2015 in which she thanked him for giving her another chance to work with him. She said: "all I need is you to be a bit kind towards me as you have been to me during the past few days."

39. By the second week of January (Issue No 12) the Claimant is alleging that Mr Barca shouted at her again and swore and also that Lily had called her derogatory names and compared her with the previous office administrator. It is not easy to match up the witness statement, which is not always chronologically coherent, with the Claimant's journal. Some of the allegations appear to relate to mid-January, or thereabouts, and we specifically refer to the occasion when Mr Barca made the Claimant repeat the name 'O'Sullivan' a number of times. He does not deny this. The swearing by this point had been continuing and it appears that the Claimant was alleging at the time that Lily was calling her stupid or slow and also saying that she was too for the job.

40. It was during the third week of January 2016 that Mr Barca called the Claimant "a stupid cunt" and carried on swearing in his customary manner. Apparently, the Claimant on this occasion shouted back at him and at some point she called him stupid. The allegations for this week in January against Lily are put on a generalised basis of name-calling.

41. This led to a letter being written to Mr Barca by the Claimant on 29 January 2016 at page 276 to 277. She noted that she was approaching three months from the start of employment and that this was the probation period. She said that he was a great teacher and she would be happy to stay on if he wanted her to but then, perhaps a little bizarrely, and we find in the light of the various matters we described, she made some proposals. First, she asked for the notice period to be reduced to one month, three months was oppressive. Second, she asked for a 'burnout bonus' as she had to remain on high alert at all times because "of your temper issues. It is like living in a war zone. The job holder is always under extremes stress ... I would ask for a £800 per month burnout bonus to compensate this." Third, as she was the butt of most of his shouting, and his extremely volatile temper caused her mental turmoil and stress, she suggested a penalty for every occasion when he either mistreated her or acted unreasonably. This would be from £50 £250 on each occasion. "I will spend the money to cheer up myself to forget the trauma. This will also give you some incentive to manage your extreme temper."

42. The third week of January is dealt with in Issue No 30 and we note that the week ran from 18 to 22 January. We have referred to the particularly offensive comment made to the Claimant in paragraph 40 above. There is no allegation that Lily made age-related comments to the Claimant during this period, either in the journal or in the witness statement.

43. The fourth week of January, 25 to 29 January, is summarised in issue 14. There are no allegations against Lily in the witness statement or the journal and it

is not clear whether any allegation is being made against Mr Barca. In our view, the summary of allegations in issue 14 have not been made out.

44. Issue No 15 in the list of issues has generalised allegations against Mr Barca and Lily for the third week of February 2016 which ran from Monday 15th to Friday 19th. The cross-reference is to the Schedule at page 389 and refers to the entry in the journal made on 21 February which is chronologically consistent with the above. We note that the Claimant says that both Mr Barca and Lily were swearing and using the “F word”. “However I must accept that things are better now than it was before” and this is because “Richard has called me derogatory names less number of times since I set penalty on him.” She says that the penalties were working, although there is no evidence that Mr Barca ever agreed to the same, and the prospect of his having agreed is remote. As to Lily, the journal contains many allegations against her, including swearing, but little that connotes age, except “she also compared with Marina” where the context is the time that the Claimant and Marina each took to make a cup of tea. There is no age-related comment alleged, in our view, and none is referred to in the summary in the list of issues.

45. Issue No 16 is the fourth week of February, i.e. 22nd to 26th. The short description in the list of issues is: “Mr Barca shouted violently one occasion, Mrs Raj called me derogatory names every day.” The journal entry, pages 212 to 213, detail shouting by Mr Barca; “obnoxious” behaviour by Lily, but no age-related comment.

46. Issue No 17 is the first week of March and the list of issues alleges age-related comments by Lily. The journal entry, made on 6 March, states that Lily asked another employee: “Marina was young and very fast was she not? “And then added that Marina “was so good. I just don’t understand why Richard did not offer the Training Contract. Poor girl!” This allegation is also contained in the witness statement but is said to have occurred during the last week of February. Other than this, there is no other allegation against Lily beyond calling Claimant names as usual. A particularly “horrible” act is said by the journal to be an exchange that the two women had about some emails.

47. Although the Marina comment is denied, we can see no indication that the Claimant has made this up and we consider that the comment was made on the balance of probabilities. As to whether or not this constitutes tortious harassment, we will turn to this in our conclusions.

48. Issue No 18 is the second week of March, which is 7 to 11 March 2016. The summary list of issues is that Mr Barca shouted violently; and Lily called the Claimant derogatory names “every day” and compared her negatively with a previous office administrator. We note in passing that the claim that derogatory names were used every day is a formula that appears throughout the list of issues.

49. The journal entry made on 12 March details no age-related comment at all, although Lily is said to have been obnoxious (an example is then given about a word that the Claimant was thought to have mispronounced.) The Claimant also

says that there is good news, in that Mr Barca now called her by her name and was being “rather nice for last 2 weeks.” She also said that she almost felt happy this week.

50. Issue No 19 relates to the 3rd week of March, 14th to 18th. This alleges that Lily made fun of her accent, but the journal says that this happened the week before, as noted above. There is no allegation against Mr Barca.

51. The next issue, No 20, is almost 3 months on and is dated 1 June. However, there is a considerable amount of background evidence in the witness statement that bridges these two dates, between paragraphs 88 and 107. A relevant date is 24 April when she states, as we find happened, that Mr Barca called her a stupid cow before completing his criticism of her with the usual four lettered swearing. The Claimant states in her witness statement that by May she was at the end of her tether, but the journal does not support this chronology. On 4 May she recorded that Mr Barca did not shout much at her nowadays and that she had found a way to keep him calm. She even spoke about a nice part of him which comes out when he is not grumpy. Although there were ups and downs, by 18 May she was recording that she feels settled and confident in the job and that Mr Barca is nice when he does not shout. She had a short break and returned on 31 May and said it felt good to be back at the office; Mr Barca was nice and did not shout that day. Even Lily “was a bit better.” She thought Mr Barca might be changing.

52. This all went wrong again the next day, 1 June, when she was shouted and sworn at about alleged mistakes she had made. This was the last day at work and it ended with her writing a letter of resignation at 11:36 am, page 295. “I think I have had enough. I can’t take it anymore I am resigning. I am giving you four weeks notice you never done my end of probation review. I finish here on first of July.”

53. A letter to which we were not taken is the Claimant’s letter to Mr Barca dated 2 June at pages 85 to 87. We note the following points. First the allegation that he called her a melon is said to have occurred once. Second, she states that Lily called her names including stupid, dumb and slow, “continuously for first 4 months. When I protested and told her not call me names, she stopped but now treated with extreme hostility.” She says that they had not been on speaking terms for about two months. Third, she referred to the incident the day before and said that “... You exceeded even yourself and shouting and I lost it too ... I don’t like this kind of incident. It makes me physically ill.” She says it is better therefore that she leaves but if he wanted to stay they will have to have a meeting and discuss the issues in detail.

54. The Claimant refers to having had a form of breakdown on 1 June. The medical evidence (and again we were not taken to this) appears to indicate that the only GP visit that is relevant to the chronology we are considering was on 3 June when she told the GP that she was keen to take medication for anxiety. She referred to bullying and abuse by her boss. There are then approximately another 23 visits between that date and the end of August. She was diagnosed with anxiety with depression.

55. On 10 June the Claimant received a P45 through the post and she emailed Mr Barca. She said that her contract been terminated on that day. He responded (page 91) by saying that she had given notice to leave and that he had not terminated the contract. She replied that the original notice ended on 1 July to which he said that she had been absent without a sick certificate. As we have earlier noted, the formal position in the tribunal is that it is accepted that the Claimant's employment ended on 1 July pursuant to her notice.

56. The claim or claims made against Martin Hall, the assistant solicitor, appear only to relate to issue No 14. Although his name might appear to be incorporated in the next three matters, in which the people involved are said to be 'same as above', there are no allegations there against him and there appear to be no relevant allegations in the more detailed evidence that is put against these issues in the Schedule. The Respondent has identified nothing additional in the final submissions. However, Ms Millin in her final submissions, at paragraph 23, has said that the First Respondent is vicariously liable for the behaviour of Mr Hall because he gave the Claimant too many instructions and too much work, and then only agreed to see her on one occasion as he was busy. Furthermore his comments and behaviour also created a hostile atmosphere at work.

57. In the case of Mr Hall we are faced with rank confusion. (a) The factual matter at Issue 14 is pressurising the Claimant to obtain receipt for files lodged at the county court. (b) The evidence referred to in the Schedule at page 381 is something different, namely berating the Claimant about leaving a page of a document on the photocopier. The final submissions then add (c) giving the Claimant too many instructions and (d) only seeing her when he was busy, as well as (e) creating a hostile atmosphere. This is an unsatisfactory way to present issues for which it is said that the First Respondent is vicariously liable. However, we note that during the hearing we were taken to pages 284, 290 and 289 which seem to touch on some of these issues. There is nothing in Mr Hall's communications on these pages to suggest that he was writing in an inappropriate or rude manner to the Claimant.

58. During the course of the evidence a short dispute arose between the parties which can be summarised as the "One Source" issue. This concerns whether either the Claimant or Lily, or both of them, were responsible for the destruction of some documents that arrived in the post. In our view it is unnecessary to set out the detail of this dispute and it suffices to state our overall conclusion. On a consideration of all of the evidence that the parties gave to us, and also the relevant documents, we conclude that this is one of those uncommon factual disputes where the tribunal has no means of knowing with any degree of reliability what actually happened. The account given by each of the protagonists is equally likely to be correct or, put another way equally open to criticism. We have been able to find no evidence or analytical tool that permits us to make a finding based on what is more likely than not to have happened. We are unanimously of the view that no finding can be made that either assists or is adverse to either party.

The Law

59. Section 13(1) of the Equality Act 2010 provides that 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. Race is a protected characteristic.

Section 23(1) provides that: “On a comparison of cases for the purposes of section 13 ... or 19 there must be no material difference between the circumstances relating to each case.”

Section 27 of the 2010 Act in its material part provides that A victimises B if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.

Section 26 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 ...

(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.”

Section 136(2) provides that: 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. It is then provided that this subsection does not apply if A shows that A did not contravene the provision. This provision is mirrored in the antecedent legislation and there is no discernible difference in statutory intent.

As to burden of proof, the older law in Igen Ltd v Wong [2005] IRLR 258 still applies and the guidance is as follows (all references to sex discrimination apply equally to all the protected characteristics):

“ (1) Pursuant to section 63A of the Sex Discrimination Act 1975, 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 section 41 or 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 Applicant 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 section 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 section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 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 section 56A(10) 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."

There was further analysis of the burden of proof provisions made by Elias J in **Laing v Manchester City Council** [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in **Madarassy**. This case has confirmed the **Laing** analysis. In particular, we refer to paragraphs 56 to 58 and 68 to 79. Paragraph 57, in relation to the first stage analysis, directs us to consider all the evidence. "‘Could conclude’ ... must mean that ‘a reasonable tribunal could properly conclude’ from all the evidence before it." All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation.

Submissions

60. There were relatively short submissions from counsel and we will return to some of these below.

Conclusions

Harassment

61. Ms Millin makes a series of submissions about the acts of harassment, but they reflect one of the prime difficulties for the Claimant, which is that the unwanted conduct under section 26(1) must be related to a protected characteristic. On the detail of the case, she refers to “fucking cow” comments (paragraphs 18 and 19 of the submission) and comments related to age and, arguably, race by Lily (paragraph 22). Otherwise, Ms Millen makes generalised comments about the effect of the unwanted conduct. She further submits that we might have to follow the EAT decision in Efobi. We do not think she has correctly characterised that case but, in any event, it has now been superseded and can be safely ignored. A further questionable submission is that discrimination can be inferred from unfair or unreasonable behaviour. The established law is that such behaviour alone will not be the basis for a finding of harassment or discrimination.

62. Ms Hodgkin’s submissions include the following. (a) The incidents of harassment are not related to protected characteristics. (b) A formal two stage test involving the reverse burden of proof is not always necessary. (c) Everyone was treated rudely by Mr Barca. (d) The claim of discriminatory constructive dismissal fails if the treatment was discriminatory.

63 There is no question that the Second Respondent’s behaviour was unconscionably boorish. It is, nevertheless, a fair assessment of the evidence that he “treats everyone rudely if they make a mistake”, as Ms Hodgkin submits, using a certain degree of understatement. It is the Claimant’s misfortune that she found herself in such an offensive environment, but the essential question for all the harassment claims is whether the unwanted conduct related to a relevant protected characteristic. For the most part, it did not. To give an example, calling the Claimant “fucking stupid” does not relate to her gender and the evidence is that anyone in the office whose conduct fell short of Mr Barca’s standard received the same abusive description. It is indefensible, grossly offensive, relevant to a claim for constructive unfair dismissal, but it is not harassment in law.

64 The consequence is that this will dispose of all the harassment claims, save where there is a comment, abusive or otherwise, which amounts to “unwanted conduct related to a relevant protected characteristic”. The burden of proof has nothing to do with this: the conduct either is or is not so related. If it is, we then go on to consider the remainder of section 26.

65 The fifth incident, paragraphs 28 and 29 above, has nothing to do with race. The suggestion of any racial connotation only arose because of something suggested after the event to the Claimant by Lily, which in itself is hard to fathom, as it relates to a notion that Asian people would be more likely to work in fish and

chip shops. Looking at the plain words uttered, and regardless of the nature of the shop that Mr Barca was referring to, the unwanted conduct was not related to race.

66 In relation to the 'curry tongue' allegation against Lily, this is a relatively slight and vague allegation that appears to be Lily retelling something her daughter said. Both here and in the other allegation relating to the Claimant's accent, there is no basis for a finding that the any hostile environment was created for her, or could reasonably have been thought to be created.

67 The various claims that Lily mocked the Claimant for being either too slow or too old or not as good as the previous, younger assistant start at the sixth incident, paragraph 31 above. We have found these factual allegations to be made out. There is a pattern of such remarks and the Claimant recorded some of them at the time. Her evidence about these comments is secure, at least where she has set out some detail.

68 Associated with this general denigration of the Claimant on the ground that she was either too old, alternatively not as efficient as the younger comparator, are the allegations against Lily under No 8 (paragraph 33 above); and the somewhat more generalised allegations under No 12 (paragraph 39 above); together with No 17 (paragraph 46 above.) At paragraph 37 we recorded even more generalised age -related allegation against Lily (December 2015) but we noted that the context is that Lily was being supportive of the Claimant. We do not accept that the remarks reasonably had the effect that is prohibited by section 26. In paragraph 44 (February 2016) the allegations against Lily are largely not age-related. In paragraph 48 we note that derogatory abuse is alleged against Lily but, again, in generalised terms.

69 We accordingly consider that the age-related harassment is made out in respect of numbers 6, 8, 12, and 17 only. These comments were related to age. They had the effect of creating a degrading or offensive environment for the Claimant. It is reasonable for the Claimant to have formed the view that it had that effect, indeed it seems to us obvious that the effect of these comments was to demoralise her. We reject the submission that she was oversensitive to an extent that put her outside the statutory protection. In our view, Lily was prone to make intermittent criticism related to the Claimant's age which falls within the provisions of section 26. Where the age allegations made by the Claimant otherwise appear, we have concluded that the evidence is too imprecise or generalised for her to succeed in establishing tortious conduct.

70 Mr Barca was unrestrained in abusing employees. The instances where he engaged in unwanted conduct related to gender are two: where he called the Claimant "a stupid cow" (24 April 2016, paragraph 51 above) and "a stupid cunt" (January 2016, paragraph 40.) There is no question that these remarks had the effect of creating a degrading and hostile environment for her and no defence can be raised on the basis of the reasonableness provision of the section.

71 We deal with the claims of harassment made against Mr Hall in paragraphs 56 and 57 above. The Claimant has failed to adduce, or point to evidence on

which any finding of harassment could be based. His conduct did not have the effect of creating a hostile etc. environment and it was not reasonable for the Claimant to come to that view.

The constructive dismissal

72 This is said to be direct discrimination, although it is possible that there has been a misunderstanding of the law by Ms Millin. She has not addressed the discrimination aspect at all in her written submission, but instead notes section 39(7)(b) which provides that dismissing an employee, within the terms of subsection (2)(c), includes “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.” This, of course, is a reference to constructive dismissal, but it is not a free standing right to claim discriminatory constructive dismissal. Such a claim of direct discrimination still has to be brought within the terms of section 13. Ms Hodgkin also deals with this fleetingly in her written submission, but she makes the important point that the constructive dismissal claim (as she calls it) must fail if the treatment of the Claimant is not found to be discriminatory. In paragraph 2 of her written submission she submits, in effect, that the tribunal must first decide whether there is a constructive dismissal on usual principles; and then decide whether the resignation was as a result of the discrimination in any real causative sense. She submits that the test is: “did it play material part in any breach in response to which, if found, the Claimant resigned?” We consider that this is the correct test.

73 The conduct of the Respondent and, preeminently, Mr Barca, unquestionably, in the view of the tribunal, amounted to repudiatory conduct, or fundamental breach of the implied term of trust and confidence. In the chronology we have noted the gaps get between: (a) approximately 18 March 2016 and 24 April; and 24 April and 1 June. Our conclusion is that the final incident of swearing and shouting on 1 June was the reason why the Claimant resigned. She says that she had some sort of breakdown on this day and was clearly ill enough with anxiety to visit the doctor two days later. This mirrors her first resignation, when she said she was resigning because she could take the abuse no longer.

74 Section 95(1)(c) brings in the concept of constructive dismissal and the Western Excavating v Sharp principle. This is that there must be a breach going to the root of the contract (a repudiatory breach) by the Respondent; the employee must leave in response to the breach, without affirmation, waiver, or undue delay. Employees are further entitled to rely upon the “last straw” doctrine and the Respondent correctly draws attention to London Borough of Waltham Forest v Omilaju [2005] IRLR 35 which also refers to a much earlier Court of Appeal decision, Lewis v Motor World Garages Ltd. Dyson LJ began by setting out the implied term:

‘That the employer should not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.’

The test of whether there has been a breach of the implied term of trust and confidence is objective. In this regard, Lord Nicholls' speech in Malik v BCCI [1997] IRLR 462, 464 is apt:

'The conduct relied on as constituting the breach must impinge on the relationship in the sense that looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.'

75 A relatively minor act may be sufficient to entitle the employee to resign. Some of the series of acts may be quite trivial but cumulatively the acts taken together must amount to a breach of the implied term. The final straw act does not have to have the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw used in isolation need not be unreasonable or blameworthy conduct. If the act relied upon is entirely innocuous, it cannot be a final straw, even if it is so interpreted by the employee. The test of whether the employee's trust and confidence have been undermined is objective. These principles are taken from the headnote in Omilaju in the IRLR.

76 We conclude that this is a classic case in which the Omilaju principles apply. There had been a long accumulation of abuse of the Claimant, during the course of which some tortious acts can be identified in terms of harassment. However, after some gaps in the chronology the Claimant finally snapped, and her health went into decline, on or after 1 June 2016. Taken in conjunction with all the earlier acts there was a breach of the implied term of trust and confidence. This was therefore a last straw, in the sense recognised in employment law, and the Claimant was entitled to resign and claim a constructive dismissal.

77 Where the discrimination claim fails is that it has not been established, and we are unable to conclude that the resignation was the result of the harassment or was otherwise because of the protected characteristic of gender. The catalogue of abuse and swearing directed at the Claimant was substantial and relatively prolonged, over a period of some months. It was this that, in our view, finally ground the Claimant down. That there were acts of tortious harassment along the way does not mean that her resignation and constructive dismissal were because of gender (or age). These incidents and the protected characteristics were incidental to the real reason for which she resigned, which was the constant barrage of abuse, principally from Mr Barca, and most of which did not infringe the Equality Act. We would, accordingly, hold that the constructive dismissal was not an act of direct discrimination. To the extent that any claim of harassment is being made, this must fail, as section 39 does not apply to harassment. In any event, on our findings there is no possibility that harassment could apply to the resignation.

78 It follows that the Claimant succeeds only in respect of the harassment related to sex and also harassment related to age, as identified above. There will be a need for a remedy hearing unless the parties can agree terms. We would invite them to submit their proposals in terms of directions within 14 days of

receiving this judgement. If a telephone case management hearing is required, they need only ask for it.

Employment Judge Pearl on 6 February 2018