Case Number: 3306659/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Paul	v	Mitie Security Limited

Heard at: Watford

On: 10, 11 and (in private) 12 February 2020

Before: Employment Judge Hyams

Members: Ms S Johnstone
Mr D Sagar

Representation:

For the claimant: Mr P Ward, of counsel
For the respondent: Mr N Pourghazi, of counsel

RESERVED LIABILITY JUDGMENT

The claimant's claims of a breach of sections 13 and/or 26 and 39 of the Equality Act 2010, are not well-founded and therefore do not succeed.

The claimant's claim that she was dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996 is not well-founded. Accordingly, she resigned and was not dismissed. Thus, her claim of unfair dismissal is not well-founded.

REASONS

Introduction: the claim, the parties, and the issues

1 In these proceedings, by the time of the hearing of 10 February 2020, the claimant claimed that

1.1 she was dismissed "constructively", i.e. within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996") and section 39(7)(b) of the Equality Act 2010 ("EqA 2010"),

1.2 that dismissal was unfair,

1.3 she had been discriminated against because of her sex, contrary to sections 13 and 39 of the EqA 2010, and

1.4 she had been harassed within the meaning of section 26 of that Act, the protected characteristic for the purposes of that section being her sex.

2 The claimant was employed by the respondent as a court security officer at Reading County Court. The respondent provides, under a contract, security officer services to Her Majesty's Courts and Tribunals Service ("HMCTS").

3 While the issues were stated after a preliminary hearing before Employment Judge George held on 27 February 2019, as discussed with the parties at the hearing on 10 February 2020, it was possible to simplify the issues to an extent. The claimant resigned in an email dated 29 January 2018 of which there was a copy at page 137 of the hearing bundle. (Any reference below to a page is to a page of that bundle.) While that email (to which we return in paragraph 53 below) did not state this in terms, it was the claimant's case by the end of the hearing before us that she resigned in response to conduct which she claimed was both a breach of the implied term of trust and confidence and unlawfully discriminatory in that it was directly discriminatory because of her sex and/or harassment of her contrary to section 26 of the EqA 2010. The implied term of trust and confidence is an obligation on both parties to a contract of employment not, without reasonable and proper cause, to act in a way which is calculated or likely seriously to damage or to destroy the relationship of trust and confidence that exists or should exist between employer and employee as employer and employee. The conduct on which the claimant relied was the same for all three elements of her claim. It was her case that she had been dismissed constructively as a result of the following things (to which we return in detail when stating our findings of fact):

3.1 an unjustifiable delay in considering a grievance of hers which she first stated in May 2016: the final outcome letter was at page 60 and was dated 6 September 2016;

3.2 a refusal in March and April 2017 (the final communication in that regard being the email dated 24 April 2017 at page 67) of a request to take three consecutive weeks of holiday in August 2017;

3.3 singling the claimant out in a mystery shopper test in October 2017;

3.4 in October and November 2017 suspending the claimant, subjecting her to a disciplinary investigation and then giving her a final written warning at the end of that investigation; and

3.5 by allowing her appeal against that final written warning and imposing no sanction for the matter for which she was given that warning, confirming that she had been discriminated against because of her sex since a male colleague who had also been subjected to the mystery shopper test had not been subjected to disciplinary action.

The procedure we followed, and the evidence we considered

4 We read the witness statements and some of the documents referred to in them during the morning of 10 February 2020. We read such documents in the hearing bundle (which was of approximately 200 pages) to which we were referred. We heard oral evidence from the claimant, and, on behalf of the respondent, from (1) Mr David Nielsen, the respondent's Operations Manager for the respondent's HMCTS security contract in the south of England, (2) Mr Nilesh Rajgor, who was at the material time the respondent's Account Manager for that contract, and (3) Mr Tony Baverstock, who was Mr Nielsen's line manager at the material time. We discussed with the parties the possibility of us reserving our decision rather than resuming the hearing on the following day and giving our judgment and reasons orally and eventually agreed with them that we would reserve our judgment. In the event, it took us until 4.10pm on 12 February 2012 to conclude our discussions, and it would not have been possible to give our judgment and reasons orally on that day.

5 In what follows, we first state our findings of fact so far as possible before stating our conclusions (some of our factual conclusions having been arrived at in the light of the application of the relevant case law, and are therefore stated in the final section of our reasons below). We then refer further to the applicable law, after which we state our conclusions on the claims identified in paragraphs 1 and 3 above.

The facts

The claimant's workplace and employment history with the respondent

6 The claimant's continuous employment with the respondent started on 25 April 2000, when she started as a Security Guard, working for Securitas. On 1 April 2007, the claimant's contract of employment was transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 when the respondent took over contractual responsibility for providing the services which Securitas had previously provided to HMCTS.

7 The claimant was employed as part of a small team of security officers at Reading County Court. Mr Nielsen told us, and we accepted, that there had been

at that court a small team of three such officers for a number of years until the events of 2016 which we describe below, and that the claimant had been part of that team. That team had worked well. It included Mr Joe Williams, to whom we refer further below.

8 At some point before May 2016, Mr Williams, who was a senior employee, started to work part-time. By the start of 2016 (if not before: it appeared from the opening passage of Mr Williams' report at page 59 which we set out in paragraph 26 below and the first sentence of paragraph 8 of Mr Nielsen's witness statement, which we set out in paragraph 13 below, that Mr Saidykhan was the third member of the team that had been harmonious while Mr Williams remained a full-time employee), the small team at Reading County Court of which the claimant was a member included Mr Seedy Saidykhan. The claimant was (as Mr Nielsen put it in paragraph 2 of his witness statement) informally line managed by Mr Anish Gohil, who was based at Reading Crown Court and whose job title was "Security Supervisor". However, Mr Nielsen was, he said in that paragraph, the claimant's "direct line manager". Mr Nielsen's unchallenged evidence was that Mr Gohil also informally managed the claimant's Security Officer colleagues, including Mr Saidykhan.

The events on which the claimant relied as constituting a breach of the implied term of trust and confidence and/or sex discrimination and/or harassment

<u>(1) The claimant's grievances of 2016 and the manner in which they were dealt with</u>

(A) The evidence

9 The claimant first stated a grievance by complaining in the email dated 12 May 2016 to Mr Anish Gohil (to whom the claimant referred as "Nish") and Mr Nielsen at pages 50-51 about the conduct of Mr Seedy Saidykhan (to whom the claimant referred as "Seedy"). The email was headed "Re: Ongoing Incidents at Reading County Court - URGENT". The text of the email was (precisely: all quotations set out below are precise quotations of the original text unless otherwise indicated) this:

> 'Dear Nish
>
> I refer to my telephone conversation with you this morning.
>
> As discussed I am becoming increasingly concerned by Seedy's unpredictable, aggressive, selfish and inconsiderate behaviour towards me and others.
>
> This morning before 9.25 am Mitie engineer's were on site and they had the keys for the building and fire alarm. I saw Seedy on the third floor in the Judges lift I asked him where he was going and he replied to the fourth floor. I then went downstairs and Seedy asked Nana if he had seen the

engineers with the keys. His reply was no. When Seedy came back downstairs I asked him when he had seen me outside the lift why he had not told me that he was looking for the engineers. His reply was "I don't have to tell you". I told him we work together and are a team. I then told him we cannot do the test now as court starts at 9.30am.

On 3rd May 2015 between 11.30am - 12.30 Nish was in the cupboard by security at Reading County Court - when I was about to help him - Seedy touched the front of my left shoulder and he indicated to leave Nish alone. I backed away. I reported this incident to Nish on the following day.

I genuinely believe that Seedy is discriminating against me because I am a female guard. This is becoming an ongoing issue since mid January 2016.

There are many other minor incidents which I have written down and will discuss once a meeting is arranged.

I require this matter to be dealt as a matter of urgency.

Yours sincerely,
MANJIT PAUL'

10 Although that email was sent to Mr Nielsen as an addressee, it was expressly written only to Mr Gohil (as it started "Dear Nish"). Mr Nielsen said during oral evidence (but not in his witness statement) that he had asked Mr Gohil to deal with the grievance set out in the email of 12 May 2016 at pages 50-51 and that he believed that Mr Gohil had dealt with it. However, at page 51A there was the following email exchange between him and Mr Gohil, dated 20 May 2016. At 13:31, Mr Gohil wrote:

"David,

Manjit need [sic] to speak to someone of your level regarding her grievances while working at Reading County.

When will you be available to attend or can somebody else go in your place?"

11 Three minutes later, Mr Nielsen replied:

"Anish,

What grievances?

Get her to put them in writing."

12 The result of that exchange was that the claimant wrote the letter dated 24 May 2016 at pages 52-54. In that letter (the heading to which stated that it was a

formal grievance), she set out a number of instances of conduct which she regarded as objectionable on the part of Mr Saidykhan (to whom she referred as "Seedy"), and concluded:

> "I genuinely believe that Seedy is discriminating against me because I am a female guard.
>
> I am very upset about this as I have been in this job for over 16 years and have not had any problems in the past. I enjoy my work and cannot understand why Seedy is behaving like this towards me.
>
> I am requesting a meeting to discuss this matter."

13 On that day, 24 May 2016, the claimant was certified by her GP to be not fit to work because of "Stress at work" (page 55). The claimant was again so certified on 3 June 2016 (page 56). She returned to work on 13 June 2016. It was Mr Nielsen's evidence (in paragraphs 5-8 of his witness statement) that after then, the following things happened:

> "5. From recollection Nish [i.e. Mr Gohil] spoke to Seedy about Manjit's [i.e. the claimant's] complaints and it came to light that he was not happy with her behaviour towards him and was close to raising a grievance himself. In isolation the incidents seemed to be fairly minor, so I asked Nish to spend a day at Reading County Court observing the interactions between the employees (Manjit and Seedy in particular) and to talk to as many people as possible to try and get to the bottom of the issues.
>
> 6. Nish reported back to me that there seemed to be a clash of personalities between Manjit and Seedy. From my discussions with Nish I was under the impression that the matter had been dealt with informally to everyone's satisfaction and that, as a result, no further action was needed.
>
> 7. I heard nothing further on the matter until 18 July 2016, when Manjit sent me a further email (pages 57 to 58). It was evident that, despite my understanding, Manjit was not happy with the outcome. She raised two additional complaints about Seedy, which again appeared fairly minor (singing and sarcastic comments). There was also a subsequent issue on 2 August 2016 whereby Manjit and Seedy had a disagreement (pages 58A - 58B).
>
> 8. In response to the above I arranged for Joe Williams, a very experienced security officer who had worked with both Manjit and Seedy for a long time, to spend a week at Reading County Court to try and mediate between the two and then report back to me. Joe's report is at page 59 and I was pleased to see that the week was very

successful, with the relationship between the two much improved by the end of that week."

14 That sequence of events was put to the claimant in cross-examination, and she denied that Mr Gohil had done the things described in paragraph 5 of Mr Nielsen's witness statement.

15 Mr Nielsen was cross-examined about his assertion in oral evidence for the first time that he had asked Mr Gohil to investigate the claimant's grievances stated in her email of 12 May 2016, and he insisted that he had done that, despite the fact that he had written in his email of 20 May 2016 at page 51A that he did not know what her grievances were. We were not persuaded by his oral evidence in this regard.

16 In paragraph 9 of his witness statement, Mr Nielsen said this:

> 'I wrote to Manjit on 6 September confirming that I considered the matter closed, albeit that the position at Reading County Court would continue to be monitored carefully (page 60). I referred in the letter to the "grievance meeting", by which I meant the discussions with Nish and Joe because a formal grievance was never arranged.'

17 However, the letter at page 60 started with this passage:

> "**Outcome of your grievance**
>
> Following the grievance meeting held at Reading Crown Court and the various discussions held since, I am writing to confirm the outcome.
>
> During the meeting you raised concerns in that you felt your colleague at Reading County Court; Security Officer Seedy Saidykhan acted in an aggressive, selfish and inconsiderate manner towards you. I have now completed my investigations into your concerns and that although there was no evidence that Security Officer Seedy Saidykhan in anyway singled you out for any negative treatment. I believe there has been a history of you and S/O Saidykhan not communicating fully and discussing any potential misunderstandings before they escalated."

18 That was not a particularly precise passage, but it was plainly inconsistent with the second sentence of paragraph 9 of Mr Nielsen's witness statement, which we have set out in paragraph 16 above. Despite that, Mr Nielsen insisted that that sentence was accurate. That, if nothing else, meant that we approached Mr Nielsen's evidence with considerable caution. Nevertheless, we accepted the (unchallenged) evidence of Mr Nielsen in paragraph 3 of his witness statement that during the approximately five years that he was the claimant's line manager they "had a good working relationship".

19 In his letter of 6 September 2016 at page 60, Mr Nielsen did not refer to the claimant's complaint that she had been treated differently because of her sex. However, it was clear that by then the claimant's grievance had been resolved; in that regard we noted that the claimant's revised details of her claim (at pages 39-43) contained (in paragraph 4) this sentence:

> "Eventually, my grievance was satisfactorily resolved, however the period of time it took was wholly unreasonable and unsatisfactory." (Emphasis added.)

20 We saw that the first part of that paragraph was in these terms:

> "In May 2016 or thereabouts I lodged a grievance about a colleague, called Seedy Saidykhan. However nothing happened for several months, despite me repeatedly chasing the Respondent. Such lack of response caused me to go on sick-leave (during this period a threat was made to move me to the Magistrates' Court)."

21 That was plainly inaccurate, for the following reasons. The claimant raised a grievance on 12 May 2016 and went on sick leave on 24 May 2016: that period of 12 days was not a period of "several months". In addition, it was clear from the email exchange at page 51A that we have set out in paragraphs 10 and 11 above, that by 20 May 2016 Mr Gohil had spoken to the claimant about her grievances at least once.

22 Thus, while we found Mr Nielsen's evidence to be unreliable in two respects in regard to the precise sequence of events, we found that the claimant's own evidence was in some respects unreliable, and we concluded that what had happened was as follows.

(B) The sequence of events concerning the claimant's grievance of 2016 as we found them to be

23 Mr Gohil took the claimant's concerns in her email of 12 May 2016 seriously, and sought to discuss them with the claimant. Mr Nielsen did not notice, or if he did notice it, he ignored, the claimant's email of that date at pages 50-51. Mr Gohil then wrote the email of 20 May 2016 at page 51A which we have set out in paragraph 10 above. The claimant then, at Mr Nielsen's request, was asked by Mr Gohil to set the grievances out in more detail, and as a result she wrote the letter of 24 May 2016 at pages 52-54. She was then absent from work on account of sickness until 13 June 2016, after which Mr Gohil, at Mr Nielsen's request, spoke to the claimant about the matters which she had raised. Mr Nielsen thought that the claimant's concerns had been addressed until she sent the email of 18 July 2016 at pages 57-58 to him. It appears that it did not lead to any further action by Mr Nielsen at that time, and it led to the emails of 2 August 2016 at pages 58A to 58B, which concerned a further instance of conflict between the claimant and Mr Saidykhan.

24 In his email of that date in that sequence Mr Nielsen asked Mr Gohil to "please deal with this" as he (Mr Nielsen) was "tied up at the moment". Whatever Mr Nielsens' precise involvement was at that time, by 8 August 2016 (as can be seen from the report of Mr Williams at page 59), Mr Williams had started a week-long period of workplace mediation which we concluded was initiated by Mr Nielsen.

25 The claimant herself accepted that Mr Nielsen had had a meeting with her at Reading Crown Court during that period: paragraph 13 of her witness statement was in these terms:

> "At paragraph 2.3 [of the respondent's grounds of resistance] the length of time for resolution is explained by Mr Nielsen's attempt to resolve it informally. However, he never approached me until I had chased him, and there was certainly no date and time ever set down. On one occasion, at Reading Crown Court, I met Mr Nielsen after several attempts to contact him. He spoke with me at the Reading Crown Court but didn't say it was about the grievance. So much so that when the outcome letter was received it came as a shock. I had no idea that any alleged investigation was taking place, which I contend is another example, of the lack of support the Respondent offered."

26 As we say in paragraph 8 above, it appeared from the opening passage of Mr Williams' report at page 59 that the claimant and Mr Saidykhan had previously worked together harmoniously, when Mr Williams was still working full-time. That passage was in these terms:

> "During the week commencing Monday 8th August 2016 to Friday 12th August 2016 when assigned to work at Reading County Court, various discussion took place with myself, Manjit and Seedy on an individual basis. Because of the historical relationship we had in the past they both spoke to me in an open and frank manner." (Emphasis added.)

27 In any event, once the relationship difficulties had been resolved, Mr Nielsen's focus moved away from the claimant's grievance. When he did eventually write to her formally concluding her grievance, he did not refer to her complaint of discrimination because he thought that he had dealt with it satisfactorily. We have set out the first part of the letter at page 60 in paragraph 17 above. It concluded in these terms:

> "I instructed senior officer Joe Williams to compile a full report of his findings after spending a week with both you and S/O Saidykhan and this shows a failure to communicate as being the root cause of the issues recently raised by you and S/O Saidykhan. S/O Williams has stated that he has carried out detailed conversations with you both separately and jointly and believes that the working relationship between you and S/O Saidykhan has improved

dramatically, from a management point of view your working relationship with S/O Saidykhan does indeed seem to have improved, with positive feedback now coming for the client.

Given the above, I now propose to close your grievance, although the position at Reading County will continue to be closely monitored.

You have the right to appeal against my decision. If you feel that the situation has not improved, or if you feel you are the subject of any further negative treatment, please notify me at once. I will then carry out a more formal grievance hearing."

28 The claimant did not, it was common ground, appeal that outcome letter.

(2) The holiday leave request and its refusal

29 The sequence of events concerning the claimant's holiday request of 2017 was shown clearly by the emails at pages 67-68. On 29 March 2017, the claimant wrote to Mr Nielsen:

"Dear Mr Nielsen

I am requesting three continuous weeks of paid holiday leave from 31/7/17 to 18/8/17 of which the first and third week is approved. The week commencing 7/8/17 to 11/8/17 is not. I would like to request the week above as it is the school holidays and I will be looking after my children and going overseas. I cannot take the children out of school during term times and have nobody to look after them for those three weeks. I would like to request the additional weeks so that I have three weeks together.

I understand that I this would need this to be approved by the regional manager. I have been trying to contact you. Please advise if you are able to approve this week."

30 On 24 April 2017, the claimant wrote to Mr Rajgor:

"Id no 7001620

Can you please see email below leave sent several emails to David Nielsen and cc nish into them regarding my holiday request to which he has not responded. I can forward you the emails if requested. when David requested further information I provided it for the second time. When holiday was rebooked for the second time David put a note on the system these were his comments , please email full details of why extended period is required off and why alternative arrangements cannot be made. In the past I have been given three weeks holidays in August without any questions and returned with in the time. They for [i.e. therefore] i fail to

understand why these questions are been [i.e. being] raised and my holidays are been [i.e. being] given in a manner which had made it difficult for me to plan, going overseas.
If you require further clarification please contact me on 07584132182"

31 Although Mr Rajgor was the Account Manager, he was treated for this purpose as the respondent's regional manager. He had, he told us, approximately 1000 employees in his region. He responded to the claimant's email of 24 April 2017 only a few minutes later. His email was in these terms:

"Manjit

Many thanks for your email.

Holiday requests over weeks [plainly, he meant to refer to 2 weeks] are only granted in exceptional circumstances at management discretion depending on circumstances and available supporting evidence.

Reasons you have provided for extended leave cannot be considered reasonable and therefore your request cannot be approved; if your request is approved, the same principle would need to be applied to everyone who has children and this is not as considered exceptional circumstances.

Your request will be rejected and as such you will be expected to attend work as scheduled; failure to attend work as scheduled will be treated as unauthorised absence and may lead to disciplinary action.

I am including David in this communication for transparency purpose.

David, please see above/below and do the necessary"

32 Mr Nielsen's evidence about what had happened was in paragraphs 11-13 of his witness statement. In those paragraphs, he referred to the respondent's "online platform for booking holiday called Workplace Plus". It was clear that the claimant had indeed had two periods of holiday of three consecutive weeks (in 2013 and 2015), but how that came about was not clear, since, as Mr Nielsen said (and, taking into account the fact that the respondent's standard contract of employment contained the sentence in clause 3.4 at page 162 to this effect, we accepted), "Permission is always required for holiday in excess of two weeks". However, for the first time during the hearing before us, after overnight searches, the respondent told us through Mr Pourghazi that Mr Jamal Uddin, who was also employed by the respondent as a security officer and was based at Reading Crown Court, had in each of 2016, 2017, 2018 and 2019, taken at least three continuous weeks of holiday (sometimes a few days more than three weeks). Those holidays had been taken in October and November only. Mr Rajgor was asked about those holidays and it was his oral evidence that he would have allowed Mr Uddin to take that holiday at those times because October and

November are "very quiet in terms of people taking time off" so that he (Mr Rajgor) would not have seen it as being problematic operationally for the business. However, he could not recall the "extenuating circumstances of Mr Uddin at the time".

33 Mr Rajgor also said that he did not know the claimant's sex at the time when she wrote her email of 24 April 2017 set out in paragraph 30 above. That was because he had not (he said) met her before and Manjit is as much a man's name as that of a woman. When it was put to him that he must have inferred from the email of the claimant of 29 March 2017 set out in paragraph 29 above that the writer was a woman, he said that he and his wife shared the responsibility of looking after their children during school holidays and that he did not infer that the writer was female. Thus, he implied, he could not have discriminated against the claimant because of her sex because he did not know whether or not she was female. We return to this evidence below, when drawing our conclusions on the claim of sex discrimination.

(3) The mystery shopper test and its aftermath, up to and including the claimant's resignation

34 On 11 October 2017, Mr Rajgor went to Reading County Court and carried out what he called a "mystery shopper" test by attending the court as a member of the public. He attended the court at about 1pm and at 14:23 sent the email at pages 73-74. He sent it to Mr Gohil, Mr Nielsen, Mr Baverstock and Mr Mark Driscoll, to whom we refer further below. Almost all of that email is highly material. It was headed "Subject: Reading County - FAIL" and its importance was stated to be "High". So far as relevant the text of the email was this:

> "Guys
>
> I visited Reading County earlier today around 1pm. It was busy with a few people in the queue. The only thing the officer got right was that she didn't put her hands in my bag.
>
> I was searched by Manjit Paul 7001620. Second officer, Osama Ftesi 2087284 was present at search point however he was too occupied with paperwork for prohibited items rather than helping out with searching. I have listed below main failures;
>
> - I was asked to open my bag and the officer looked in my bag however didn't ask for anything to be removed – no one can see the bottom of my bag without items being removed
> - I walked through with my mobile phone in my pocket and the AMD activated; I was searched with a wand however the technique was very poor as the officer went too fast and too far away from me

- The AMD in this court is really good; it shows a picture of the person and provides indication of where the metal item is however no one was looking at this

- I observed at [least] 6 other people being searched and their search was no better than mine

Once I identified myself, I got M Paul to search me again and she found the mobile phone straight away. She couldn't offer any valid reason for her failures to search me properly. O Ftesi didn't seem to care and told me that he works for another security company and only works for us for bit of overtime. I wasn't able to train them further as the search area was getting too busy and it would not be appropriate to train them in presence of others.

Anish, please arrange both to re-attend CSO training this Saturday in Bristol; if they refuse without a valid reason, I would suggest that you speak to HR and move them to a bigger court where they can be better supervised until they re-attend. Please log this with HR and start formal investigation procedure ASAP."

35 Mr Gohil and the claimant discussed her attending the CSO training in Bristol and she agreed that she would do so. That was clear from the email sequence of that day at pages 75-76C. However, at the end of that day (at 20:28), 11 October 2017, Mr Driscoll, who was the respondent's "Director of Key Accounts, Total Security Management", wrote this (at page 76A) to Mr Gohil, Mr Nielsen, Mr Baverstock and Mr Rajgor:

"All,

Having thought about this additional CSO training will be a waste of time as the course is predominantly physical intervention with a small theoretical element on the powers of search. On the basis that she has failed a number of times to undertake basic search standards (which aren't difficult) she has to be taken off the MOJ contract with immediate effect please.

You need to ensure HR are kept up to date and that we do this by the book please. I'm happy to authorise suspension if needed."

36 The claimant's witness statement contained at the end of paragraph 29 this sentence:

'The fact that I was told to, "*leave and go home -you've been suspended*" in front of male officers was particularly humiliating.'

37 The claimant was not cross-examined on this aspect of her witness statement. However, in the notes of the appeal hearing of 20 December 2017 to which we

return below, we saw that (at pages 109-110) the claimant had been recorded to have said this about the sequence of events that occurred on 12 October 2017:

37.1 On 11 October 2017, Mr Gohil "told [her by telephone] to go to Reading Crown court for 2 days training on 12 and 13 October 2017".

37.2 She attended there for "training" at 9.00am the next day, 12 October 2017.

37.3 "Nobody trained [her on that day, she] was just watched"

37.4 Then she "got a call at 1500 from [Mr Gohil]", and he "told [her] that as of today [she was] suspended and would not be going to Bristol for training because [she] was suspended".

38 The claimant attended an investigation meeting conducted by Mr Gohil on 17 October 2017, the notes of which were at pages 82-89. The claimant was sent the letter dated 13 October 2017 from Mr Gohil at pages 77-78 and received it in hard copy only during the morning of Tuesday 17 October 2017, but by then she had already received it by email on Sunday 15 October 2017: that was clear from the exchange at the top of page 83. In the letter dated 13 October 2017, Mr Gohil wrote this at the start:

> "Dear Manjit
>
> **Suspension & Invite to Investigatory meeting**
>
> In accordance with MITIE's disciplinary policy and procedure and following the conversation of 12/10/17 at 15.22pm, I confirm that you are suspended on full pay pending an investigation into the allegations below made against you.
>
> Gross Misconduct:
>
> - Serious failure to follow the client search procedures
> - Serious breach of security
> - Serious breach of trust and confidence
> - Bringing company into serious disrepute
>
> This suspension is in order to allow us to conduct the investigation impartially and fairly, and is in no way a form of disciplinary action against you."

39 That letter referred to Mr Gohil's conversation with the claimant of 15:22, which showed that the claimant's recollection of 20 December 2017 that she had "got a call at 1500" was consistent with the most contemporaneous document. Having

taken those factors into account, we concluded that the claimant's assertion that she was told that she was suspended "in front of male officers" was inaccurate as it was inconsistent with the claimant's own account at a time which was much closer to the events in question than the date when she made her witness statement (13 December 2019, i.e. almost two years after the appeal hearing of 20 December 2019). As a result, we rejected the claimant's evidence in paragraph 29 of her witness statement set out in paragraph 36 above.

40 After the investigation meeting conducted by Mr Gohil, the claimant was required to attend a disciplinary hearing conducted by Mr Nielsen. The letter inviting her to that meeting was dated 20 October 2017 and was at pages 90-91. It enclosed the notes at pages 82-89. The meeting took place on 24 October 2017. There were notes of that meeting at pages 93-96. On page 94, this exchange was recorded:

> "[Mr Nielsen]: Could you confirm that you are aware that searching is the absolute top priority on the MOJ Contract and that you have received further training and it has been highlighted to you on numerous occasions
>
> [Claimant]: Yes I can confirm, but I do not feel I did a poor search"

41 After viewing the CCTV footage, there was this exchange recorded at page 95:

> [Mr Nielsen]: The CCTV shows that when searching the front, you start at chest height and move across to the left arm and then down the body, as you can see, by the time you get down towards ankle height, the wand is 6 to 8 inches away from the person, you then come up and ask him to turn around, you do not [go] to the right side and his pocket, that contained the mobile phone
>
> [Claimant]: I thought I had gone close enough to pick anything up
>
> [Mr Nielsen] The whole search of the front of the person took less than four seconds; do you believe this is adequate time to complete a full search?
>
> [Claimant]: I thought it was
>
> [Mr Nielsen] You then ask him to turn around and search the back, for this you just run the wand straight down the back, taking about one second, do you believe this was an adequate search
>
> [Claimant]: I thought I would have picked anything up

[Mr Nielsen]	Nilesh then retrieves his belongings and stands in the corner and watched several other searches being completed, the CCTV shows these searches all fail to meet [the] required standard, with no items being removed from bags and limited wanding being used, the average search taking less than three seconds. These searches are not completed to the required standard
[Claimant]:	I thought it was being done correctly
[Mr Nielsen]	When Nilesh makes his identity known to you, he asks you to research him, this can be seen on CCTV and is shown to [be] very detailed, taking considerably longer in which you find all metal items. This shows you fully understand the required standard and are able to complete and [sic] full detailed search. Why did you do it on this occasion and not initially?
[Claimant]	He had identified himself to me and I knew him to be a Mitie Manager
[Mr Nielsen]	Surely the search you complete on a court user you don't know should be detailed and thorough and if anything the search on a Mitie manager could be less stringent
[Claimant]:	Yes I understand"

42 At no time during that meeting did the claimant say that she should not have been the subject of a disciplinary investigation (or be the subject of a disciplinary sanction) because a male employee (or any other employee in a comparable situation) had not been so subject: at no time did the claimant assert that she had been discriminated against because of her sex by being subjected to a disciplinary investigation and therefore by being put at risk of being subjected to a disciplinary sanction.

43 Mr Nielsen then considered the matter carefully and sent the claimant the outcome letter dated 30 November 2017 at pages 99-100. In fact, the claimant was by then on a period of sickness absence because of (as recorded in the certificates on pages 97 and 98) "Stress at work".

44 The letter of 30 November 2017 at pages 99-100 stated that the claimant was being given a "first and final warning" and that she could appeal "against the decision to terminate [her] employment". Those things being inconsistent, it was not surprising that they were queried by the claimant, in fact through a firm of solicitors, to whom Mr Nielsen initially refused to correspond without the claimant's express notification that the firm was acting on her behalf. The query was raised in the letter dated 1 December 2017 at page 102. The initial refusal

to respond to it was in the email of Mr Nielsen at page 101D, in which he wrote in addition that an amended copy of the outcome letter had been sent to the claimant "correcting the clerical error" in it suggesting that the claimant had been dismissed.

45 The solicitors then, on 7 December 2017, under cover of the email at page 102A, sent some grounds of appeal on the claimant's behalf. Those grounds were at pages 102B-102D and concluded:

> "The Employee is aware that if a male comparator was placed in a similar situation that he would not have been subjected to disciplinary procedures or sanctioned therefore there is a differential implementation and discrepancy in the implementation of company policies to different employees.
> Even if the facts are proven it is claimed that this is an act of unlawful sexual harassment and /discrimination and racial discrimination against the employee."

46 Thus, only after the claimant's disciplinary hearing of 24 October 2017 was it asserted that the claimant had been treated less favourably than she would have been if she had been a man. Nowhere in the grounds of appeal was it said why that assertion was made. In regard to the disciplinary hearing conducted by Mr Nielsen, it was said (among other things) in paragraph (e) on page 102C that

> "Nilesh's phone was placed in a restrictive area of the groin – the search area is a very restricted area – it is maintained that this was a deliberate act of victimisation."

47 The claimant's appeal was heard by Mr Baverstock. The notes (which the claimant said during the meeting she would refuse to sign to show that she accepted them as accurate, but which we accepted were accurate) show (at the bottom of page 111) that Mr Baverstock asked the claimant this:

> "You state that NR placed the phone in his groin area and this was harassment can you explain."

48 There was then this exchange recorded at the top of page 112:.

> "[Claimant] Yes because when the other managers do this the officers only get a slap on the wrist.
>
> [Mr Baverstock] Who has done this.
>
> [Claimant] Fabian Napier did it when Osama Fstei [i.e. Ftesi] failed the test I think it was him.
>
> [Mr Baverstock] I think that is the main point of your appeal is that correct.

[Claimant] Yes."

49 Mr Baverstock's next recorded action was that on 9 January 2018 he wrote to both Mr Napier and Mr Nielsen, asking them about what had happened when Mr Napier had carried out a mystery shopper test of the sort that Mr Rajgor had carried out. The emails were at pages 116 and 127. Mr Napier did not reply to the email to him at page 116. Mr Nielsen had to be prompted on 17 January 2018 to reply (as can be seen from the email from Mr Baverstock to him of that date at pages 126-127), and on the same day he responded (in the email at the top of page 126):

> "Tony,
>
> I [sic] full investigation was carried out after Fabien's mystery shopper visit, which included a review of all CCTV footage. The visit was then rescored, based on the footage, please see attached, which includes all relevant comments.
>
> Although there were some failings by the officers, in relation to not recording AMD checks and placing hands within bags, this was dealt with through retraining."

50 Mr Baverstock then, on the following day, 18 January 2018, wrote the letter of that date at page 136, and sent the email of 19 January 2018 at page 135, asking that the letter was sent out by post that day (19 January 2018). The letter was in these terms:

> Dear Manjit
>
> **Outcome of your appeal against formal warning**
>
> Following the appeal meeting held on 20/12/18 in response to your appeal against your warning issued to you on 30/11/17, I am writing to confirm the outcome.
>
> After careful consideration of all the circumstances of your case, I have decided to allow your appeal and overturn the original decision to issue you with a first and final written warning.
>
> I have decided that no disciplinary action will be taken in relation to your failure to follow Client search procedures. This warning will be removed from your file and will not be used for any future disciplinary.
>
> However, it was agreed by you in the appeal meeting there had been a failure in the search you carried out on 11/10/17 and therefore my

recommendation is for you to undergo some further training to ensure you are fully aware of the search requirements and standards on site.

You will be required to attend a CSO (court security officer) course on 10th March 2018 in Guildford Crown Court, Bedford Road, Guildford, Surrey, GU14PS at 0830am to 1700pm

Please contact David Nielsen to confirm your attendance on 07920 298 372

I enclose a copy of the minutes of the appeal meeting for your records.

There is no further appeal against this decision.

Yours sincerely

Tony Baverstock"

51 The documents in the bundle suggested that there was only one set of revised scores for the mystery shopper test carried out by Mr Napier: the document at page 129, the original of which was at page 118. We compared them closely and could see that the revision was objectively justified in that in the first document, the person whose performance had been assessed by Mr Napier had been scored "0" for failing to pass the "wand" over the body of a person who had walked through the scanner (of which we were given photographs at pages 180 and 181) without setting off the alarm on that scanner, which was illogical. The same was true of the "0" score for the wand not detecting the metal item that had been missed by the scanner (i.e. the machine and not the person). One other "0" score was also illogical (the one given for the detection of a metal item in a baggage search: the item had been detected, so that the score should have been "1"). In addition, if the notes on page 129 were correct, then the assessment of Mr Napier had been materially inaccurate in saying that the other searches carried out by the security officer in question (who was not, in fact, Mr Ftesi) had been insufficient.

52 What had happened in the search assessed by Mr Napier and scored by him in the document at page 118 was that the scanner (called an AMD by the respondent) had not picked up a metal item as a result of it having been "set very low due to electrical sub station". We heard no evidence about the responsibility for that setting, i.e. who was responsible for that setting, but in any event, the claimant's first and final written warning was given for failing to carry out an effective personal search, not for failing to ensure that the AMD was set up properly.

53 The claimant resigned in an email of 29 January 2018 (page 137), which was brief and stated no substantive reason for her resignation other than that she was "resigning by way of constructive dismissal". She gave 4 weeks' notice, but in the event, her last day of employment was 23 February 2018.

54 In fact, on 19 December 2017, the claimant had applied for a new job. She was interviewed for it on 8 January 2018, and was appointed to the post to work on an "as and when" basis, with minimum guaranteed hours, as from 13 January 2018. The claimant started working under that contract on 24 February 2018.

55 In paragraph 29 of her witness statement, the claimant described the reason for her resignation after receiving Mr Baverstock's letter at page 136 which we have set out in paragraph 50 above. What the claimant said in paragraph 29 (apart from the final two sentences, the second of which is set out in paragraph 36 above) was this:

> "As said, my appeal was successful to the extent that the disciplinary sanction was removed from my record, and I confirm that the notes of the meeting on 20/12/2017 are broadly correct (pages 108). However, it also confirmed that I had been singled out for this treatment because I was a female, and nothing was going to be done about that. I have said that no relevant training or monitoring had been provided to anyone to my knowledge, and that was not going to change. Although somewhat bizarrely therefore, it was the successful outcome that amounted to the 'last straw'. and I felt I had no choice but to resign. The fact that a man was not subjected to the whole process confirmed my feeling that I was the victim of harassment, which made me feel really bad."

56 In fact, Mr Baverstock was plainly keen to retain the claimant as an employee of the respondent, as he wrote to the claimant in the letter dated 29 January 2018 at page 142:

> "Dear Manjit
>
> Further to your email on 29/1/18 in which you stated you wished to tender your resignation with MITIE, I am somewhat concerned that you may be acting in haste.
>
> I am also keen [to] resolve any issues, either perceived or real that you may have surrounding your resignation and as such I would like to meet with you to discuss them in greater detail. Please contact me on 07979 701215 to make the necessary arrangements."

<u>The law</u>

Section 136(2) of the EqA 2010

57 Section 136(2) of the EqA 2010 provides that if there are facts from which a court could decide, in the absence of any other explanation, that a person contravened any provision of that Act, then the court must decide that that contravention

occurred unless that person "shows" that he/she/it did not contravene that provision.

58 There is much case law concerning the application of that provision, and we record here only that we bore that case law in mind. We also bore it in mind that (as the House of Lords said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337) in some cases the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 or victimisation within the meaning of section 27 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

Time limit for claiming discrimination contrary to section 39 of the EqA 2010

59 The primary time limit for making a claim of discrimination contrary to sections 13 and/or 26 and 39 of the EqA 2010 is three months, but time may be extended if it is just and equitable to do so. In determining the latter question, the principles in the relevant case law (most notably *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 237) must be applied.

60 If, however, a claim of constructive dismissal (i.e. dismissal within the meaning of section 95(1)(c) of the ERA 1996 and 39(7)(b) of the EqA 2010) is made and the tribunal concludes that (1) there was an accumulation of conduct that constituted a breach of the implied term of trust and confidence and (2) that accumulation included conduct which was contrary to the EqA 2010, then the three-month time limit runs from the date when the dismissal took effect. That is the result of paragraphs 49-53 of the judgment of Keene LJ in *Meikle v Nottinghamshire County Council* [2005] ICR 1, with which Bennett J and Thorpe LJ agreed.

Constructive dismissal

61 Concerning the implied term of trust and confidence, Mr Pourghazi's written closing submissions referred to and set out the key passage of the judgment of Dyson LJ (as he then was) in *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481 and the principles to be derived from the further decision of the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1.

62 Mr Pourghazi also referred to the judgment of Lord Denning MR in *Western Excavating v Sharp* [1978] ICR 221 concerning affirmation of the contract of employment after its repudiation.

63 We saw no need to set those passages out in this already long judgment. Mr Ward did not take issue with what Mr Pourghazi said in his submissions about that case law, and we (having ourselves referred in our initial discussions with the parties to *Omilaju* and the principles in *Lewis v Motorworld Garages Ltd* [1986] ICR 157, which were confirmed in *Kaur*) accepted what Mr Pourghazi said about the applicable case law.

<u>Our conclusions</u>

64 In arriving at our conclusions on all of the claims, as described below, we looked at the acts and omissions relied on by the claimant both individually and cumulatively. We also accepted Mr Pourghazi's submission that the claim of harassment within the meaning of section 26 of the EqA 2010 added nothing to the claim of direct discrimination within the meaning of section 13 of that Act.

65 Turning, then to the factual elements of the claim, our conclusions were as follows.

65.1 We accepted that the manner in which Mr Nielsen dealt with the claimant's grievances stated in 2016 was faulty in that he did not in terms ever address the claimant's claim that she was being discriminated against by Mr Saidykhan because of her sex, and in that there was a delay (1) in (see paragraph 23 above) responding to the claimant's email of 18 July 2016 and (2) in (see paragraph 27 above) sending the claimant the letter of 6 September 2016 at page 60, which we have set out in paragraphs 17 and 27 above. That failure to address that claim in terms, taken together with that delay, was not in itself a breach of the implied term of trust and confidence. However, it was in our view conduct which could contribute to an accumulation of conduct which taken together amounted to a breach of the implied term of trust and confidence. When considering Mr Nielsen's mind set at the time, we concluded that his sole focus was on getting the situation at the claimant's workplace to be harmonious again, both because he wanted the claimant to remain an employee of the respondent and because what was of greatest importance to him was ensuring that the respondent fulfilled its contractual obligations to HMCTS. The fact that he had got on well with the claimant in the five years before 2016 suggested strongly that he was not likely to have discriminated against the claimant because of her sex. Whether he had done so was something which we considered after coming to conclusions on the other factual elements of the claimant's claims.

65.2 We concluded that Mr Rajgor's refusal of the claimant's request to take three weeks' continuous leave on the basis that if she were permitted to do so then all parents with children of school age would be entitled to point to that as a precedent in asking for more than two weeks' holiday during school holidays could not be said to be in itself a breach of the implied term of trust and confidence. We came to that conclusion even though the claimant had previously been given permission to take three continuous weeks of holiday in August 2013 and August 2015 and the fact that Mr Uddin had regularly taken three or slightly more continuous weeks of holiday in October and/or November of 2016, 2017, 2018 and 2019. Mr Rajgor's decision was, however, conduct which could contribute to an

accumulation of conduct which taken together amounted to a breach of the implied term of trust and confidence.

65.3 We were unconvinced by Mr Rajgor's assertion that because he did not know whether or not the claimant was female, he could not have discriminated against her because of her sex. That is because the claimant's email of 29 March 2017 which we have set out in paragraph 29 above was more likely to have been written by a woman than a man. However, we were satisfied by Mr Rajgor's evidence that he had not taken into account the fact that the writer of that email was likely to be a woman to any extent when refusing that writer's request to take three weeks' continuous holiday in August.

65.4 Mr Rajgor in no way singled out the claimant as a woman in his mystery shopper test of 11 October 2017. The claimant happened to be the security officer who was conducting the personal searches, as Mr Ftesi was (as recorded by Mr Rajgor in his email of that day, which we have set out in paragraph 34 above) "too occupied with paperwork for prohibited items" to assist with the searching at that time. We also concluded that Mr Rajgor in no other way targeted the claimant for a mystery shopper test because she was a woman: i.e. he did not in advance think to himself that he would go to Reading County Court and hope that she rather than a male security guard would be the subject of his test.

65.5 The claimant's suspension was, in the circumstances described by Mr Rajgor in his email of 11 October 2017 set out in paragraph 34 above, plainly for reasonable and proper cause. That is because the claimant had plainly failed to do her job, in the circumstance that she knew what to do but had not done it on at least seven occasions when Mr Rajgor was observing. In coming to that conclusion, we took into account Mr Rajgor's evidence about what he had seen on that occasion and the fact that the claimant accepted that the CCTV footage showed that she had spent 3-4 seconds passing the search wand over the front of the persons she was searching, that that was inadequate, and that she had passed the wand over the back of each person searched for only one second. We concluded that the email set out in paragraph 34 above was an accurate and fair description of what had happened when Mr Rajgor was conducting his mystery shopper test at Reading County Court on 11 October 2017.

65.6 That meant that the instigation of a disciplinary investigation into the claimant's conduct on that day was wholly merited. She was in our view correctly thought by the respondent to have failed to do her job to such an extent that she could have been summarily dismissed as a result, but whether that dismissal would in the circumstances have been fair (i.e. fair within the meaning of section 98(4) of the ERA 1996) was another matter. That factor may have been in the mind of Mr Nielsen when he concluded

that the claimant should be given a first and final written warning for her failure to do her job properly on 11 October 2017.

65.7 In our view there was nothing in the fact that the claimant was given that first and final written warning in the circumstances as we found them to be (including the circumstances of the male comparator to which we refer in paragraphs 49, 51 and 52 above) from which we could draw the inference that she had been discriminated against because of her sex by being given that warning. If there had been, then we would have concluded that, taken in isolation, Mr Nielsen's decision that the claimant should be given that warning had not been to any extent affected by the fact that she was a woman. Alternatively, the apparent reason why she was given that first and final written warning was that she had plainly failed to do her job properly when she knew full well how to do it.

65.8 As for the allowing by Mr Baverstock of the claimant's appeal against her first and final written warning so that she received no disciplinary warning at all, that was in itself wholly positive. It could not reasonably be taken as proof (or an implicit admission) that the claimant had been discriminated against as a woman by being subjected to a first and final written warning, not least because the allowing of the appeal could have been done purely with a view to retaining the claimant as an employee of the respondent. In fact, the possibility that that was the reason for allowing the appeal was borne out by the letter which Mr Baverstock immediately wrote on receipt of the claimant's resignation email (the first part of which we have set out in paragraph 56 above), which we concluded, having heard and seen him give evidence, was genuine.

66 Having made those findings individually, we stood back and asked ourselves whether, looking at the matter objectively, there had been a breach of the implied term of trust and confidence (assuming that there was no discriminatory conduct in the circumstances) and, if there had been such a breach, whether the claimant had affirmed her contract of employment. We concluded that the only culpable things done by the respondent related to the claimant's grievance of 2016 and the refusal of her request to take three continuous weeks of holiday in August 2017. As a result, in our view, whether or not those culpable things amounted to a breach of the implied term of trust and confidence, the claimant had affirmed her contract of employment after 24 April 2017 and long before she resigned on 29 January 2018. Also as a result, we concluded that the claimant's claimed "last straw" in the form of allowing her appeal against her final written warning was not wrongful and, as Mr Pourghazi submitted, paragraph 21 of the judgment of Dyson LJ in *Omilaju* meant that the claim to have been dismissed constructively could not succeed unless the giving to the claimant of a final written warning was to any extent discrimination against the claimant because of her sex.

67 We then reconsidered the claim of sex discrimination in regard to the manner in which Mr Nielsen dealt with the claimant's grievances of 2016. Having found (as

stated in paragraph 65.7 above) nothing in the circumstances from which we could infer that the giving by Mr Nielsen of a final written warning was tainted to any extent by the claimant's sex, we looked again at the manner in which Mr Nielsen had dealt with the claimant's grievance and reconsidered both of those aspects of his conduct together. Having done so, we concluded that he had satisfied us that his conduct was in neither respect tainted by discrimination because of the claimant's sex.

68 As we had concluded that there was no discrimination against the claimant because of her sex, given our conclusions stated in paragraph 66 above, the claimant's claim of constructive dismissal had to fail. Thus, the claimant was not dismissed unfairly. Nor was she discriminated against because of her sex. Since the claim of harassment within the meaning of section 26 of the EqA 2010 added nothing to the claim of discrimination because of sex, that claim also had to fail.

69 For all of the above reasons, none of the claimant's claims succeeded.

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Employment Judge Hyams
Date: 24 February 2020

Judgment sent to the parties on

25/02/2020

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For the Tribunal Office