EMPLOYMENT TRIBUNALS

26 MAY 2016

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Date 25 May 2016

Case Number: 3401249/2015

Claimant		**Respondent**
Mrs M Terraneo	**v**	**Whitbread Group Plc**
		Premier Inn

EMPLOYMENT TRIBUNAL JUDGMENT

A copy of the Employment Tribunal's judgment is enclosed. There is important information in the booklet 'The Judgment' which you should read, including about enforcing the judgment. The booklet can be found on our website at:
http://hmctsformfinder.justice.gov.uk/HMCTS/GetForms.do?court_forms_category=employment%20tribunal

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

The Judgment booklet explains that you may request the employment tribunal to reconsider a judgment or a decision. It also explains the appeal process to the Employment Appeal Tribunal. These processes are quite different, and you will need to decide whether to follow either or both. **Both are subject to strict time limits**. An application for a reconsideration must be made within 14 days of the date the decision was sent to you. An application to appeal must generally be made within 42 days of the date the decision was sent to you; but there are exceptions: see the booklet.

The booklet also explains about asking for written reasons for the judgment (if they are not included with the judgment). These will almost always be necessary if you wish to appeal. You must apply for reasons (if not included with the judgment) within 14 days of the date on which the judgment was sent. If you do so, the 42 day time limit for appeal runs from when these reasons were sent to you. Otherwise time runs from the date the judgment was sent to you or your representative.

For further information, it is important that you read the Judgment booklet. You may find further information about the EAT at **https://www.gov.uk/appeal-employment-appeal-tribunal**

An appeal form can be obtained from the Employment Appeal Tribunal at: Employment Appeal Tribunal, Second Floor, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX or in Scotland at 52 Melville Street, Edinburgh EH3 7HS.

Yours faithfully,

DEKPOFFIONG
For the Tribunal Office

RESERVED

EMPLOYMENT TRIBUNALS

Claimant: Mrs M Terraneo

Respondent: Whitbread Group Plc

HEARD AT: Bedford **ON:** 22nd March 2016
23rd March 2016
24th March 2016
19th April 2016 (Discussion)
20th April 2016 (Discussion)

BEFORE: Employment Judge Adamson

MEMBERS: Mrs K L Johnson
Mr N Cochrane

REPRESENTATION

For the Claimant: Mr G Davies, Pupil

For the Respondent: Mr A Tomlinson, Solicitor

JUDGMENT

1. The complaint of failure by the Respondent to provide a statement of employment particulars is dismissed on withdrawal.

2. The Respondent unfairly dismissed the Claimant.

3. The complaint for damages (notice pay) for breach of conduct is well founded.

4. The Respondent unlawfully discriminated and harassed the Claimant to the limited discriminated described in the reasons contrary to Sections 13, 26, 39 and 40A Equality Act 2010.

REASONS

1. By a claim presented to the Tribunal on 31st January 2015 the Claimant began these proceedings against the Respondent trading as Premier Inn. The claim as presented contains complaints of:

   (i) failure to provide a statement of employment particulars as required by section 1 Employment Rights Act 1996 (ERA);
   (ii) (constructive) unfair dismissal relying on section 95(1)(c) and contrary to section 98 ERA;
   (iii) damages for breach of contract in respect of notice pay (wrongful dismissal) relying on section 86 ERA;
   (iv) direct discrimination contrary to sections 13 and 31 Equality Act 2010 (EqA) relying on the protected characteristic of age;
   (v) harassment related to the protected characteristic of age contrary to sections 26 and 40 EqA; and
   (vi) victimisation (the protected act being one related to the protected characteristic of age) contrary to sections 27 and 39 EqA.

   During submissions at the conclusion of the hearing the Claimant withdrew her complaint of failure to provide a statement of employment particulars. That complaint is dismissed.

The Law

2.1 Unfair dismissal

2.1.1 By virtue of section 95(1)(c) ERA where an employee terminates their employment contract with or without notice in circumstances in which they are entitled to do so without notice by reason of the employer's conduct, that termination is, for the purposes of Part X ERA, a dismissal. By virtue of section 98 ERA if there is a dismissal and a complaint is brought pursuant to Part X of the Act, it is then for the employer to establish a potentially fair reason, i.e. one contained or referred to in section 98(1) ERA. If the employer does so, then on a neutral burden of proof the question then becomes whether the dismissal was fair or unfair, having regard to sub-section (4) of that provision. Guidance on this provision has been given in a number of authorities, in particular Western Excavation (ECC) Limited –v- Sharp [1978] IRLR 27 and London Borough of Waltham Forest –v- Omilaju [2005] IRLR 35.

2.1.2 In Western Excavation the court determined that:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. IF he does so, then he terminates the contract by reason of the employer's*

conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

2.1.3 In London Borough of Waltham Forest:

"14

...

The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27.

2. It is an implied term of any contract of employment that the employer shall 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: see, for example, Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, 350. The very essence of the breach of the implied term is that it is 'calculated or likely to destroy or seriously damage *the relationship' (emphasis added).*

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at p.464, 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' (emphasis added).*

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para. [480] in Harvey on Industrial Relations and Employment Law:

'[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.'

15 *The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1985] IRLR 465. Neill LJ said (p.468) that 'the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term' of trust and confidence. Glidewell LJ said at p.469:*

'(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See Woods v W M Car Services (Peterborough) Ltd [1982] IRLR 413.) This is the "last straw" situation.'

16 *Although the final straw may be relatively insignificant, it must not be utterly trivial: the principal that the law is not concerned with very small things (more elegantly expressed in the maxim 'de minimis non curat lex') is of general application.olympus."*

2.2 Wrongful Dismissal/Breach of Contract

Except in those circumstances where an employer is entitled to dismiss without notice, the employee is entitled to the notice provided for in the employment contract or section 86 Employment Rights Act 1996, whichever is the greater. Section 86(1)(c) provides that the notice required to be given by an employer to terminate the employment contract where there is twelve or more years' service, is twelve weeks.

2.3 Discrimination

2.3.1 The Equality Act 2010 provides for a number of protected characteristics, one of which is age. Section 5 EqA provides:

"5. Age

(1) In relation to the protected characteristic of age –

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.

(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."

2.3.2 Sections 13 and 39 EqA provides that if a person treats another (in the employment field) less favourably than they treat or would treat others because of a protected characteristic and that less favourable treatment is dismissal or subjecting the employee to any other detriment (amongst other matters identified in section 39 EqA) the employer directly discriminates against the employee.

In determining whether there has been discrimination the Tribunal must, as always, consider the burden of proof. Section 136(2) and (3) EqA provides:

"……..

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

……."

2.3.3 Guidance on the application of this provision has been given in a number of places; we quote from Wong –v- Igen Limited & Others [2005] 3 AER 812 which provides, in the Annex, as follows:

"ANNEX

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

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

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the

discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

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

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

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

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

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

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

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

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

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

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

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

2.3.4 While it is by no means compulsory, parties frequently refer to comparators when determining whether there has been less favourable treatment. Section 23(2) EqA requires that in a comparison of cases for the purposes of section 13 (and also 14 or 19), there must be no material difference between the circumstances relating to each case.

2.3.5 We were referred to the Judgment of the EAT in Eagle Place Services Limited –v- Rudd EAT/0497/08 handed down on 25th September 2009, and the proposition that a Respondent cannot make reasonable adjustments in respect of disability and complain about the financial implications. In this case the Claimant had a cancer scare for which the Respondent made adjustments to in its business.

2.4 Harassment

The definition of harassment in section 26 EqA is as follows, so far as relevant to these proceedings:

"26 Harassment

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

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

.....

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

2.5 Victimisation

Section 27 EqA provides that a person victimises another if they subject that other to a detriment because they have done a protected act or the person carrying out the victimisation believes that the other has done or may do a protected act within the meaning of section 27.

2.6 Time Limits

2.6.1 In respect of Equality Act 2010 complaints, section 123 of that Act provides that the complaint must be brought within the period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable, conducting extending over a period to be treated as done at the end of that period and failure to do something to be treated as occurring when the person in question decided on it (and in the absence of evidence to the contrary the person is taken to decide or a failure to do something when they do an act inconsistent with the doing of it or expiry of the period which a person might reasonable have expected to do it).

2.6.2 When a claim is presented beyond the normal three month time the burden of proof is on the Claimant to establish jurisdiction (see Robertson –v- Bexley Community Centre [2003] IRLR 434. We refer ourselves to the guidance in British Coal Corporation –v- Keeble [1997] IRLR 336 where the following guidance was given:

> *"…the [employment] tribunal should adopt as a checklist the factors mentioned in s.33 of the Limitation Act 1980. That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –*
>
> *(a) the length of and reasons for the delay;*
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
> *(c) the extent to which the party sued had cooperated with any requests for information;*
> *(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
> *(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."*

We were also referred to the recent Judgment in Rathakrishnan –v- Pizza Express (Restaurants) Ltd [2016] ICR 283 where a number of authorities were referred to, including *British Coal Corporation* and *Robertson*.

3. Remedy

3. We heard some relevant evidence on the question of remedy, but not on quantum. Relevant to our consideration at this stage is section 207A Trade Union and Labour Relations (Consolidation) Act 1992 which applies to complaints within the jurisdictions listed in Schedule A2 of that Act. Section 207A provides that if it appears to the Tribunal that the complaint relates to one which concerns a matter to which a relevant Code of Practice applies and a party has failed to comply with the Code in relation to that matter and that failure is unreasonable the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase or reduce the award it makes by up to 25%.

4.1 The issues in these proceedings, as agreed by the parties, were:

4.2 Constructive Unfair Dismissal

(1) Whether:

(a) the Claimant was repeatedly bullied by a Manager, and was told that she was 'too old now' and 'forgetful';
(b) the Claimant was told to retire by the Respondent;
(c) the Claimant was told by Ms Holmes, Operations Manager, that she felt the Claimant was slowing down and that she should think about her age and retire;
(d) the Claimant was treated differently (i.e. less favourably) by Cristina Bongiovani, Food and Beverage Manager, by:
  (i) reporting the Claimant for smoking on the terrace on 28th November 2014;
  (ii) plotting with others to push the Claimant out of her employment; and
  (iii) demoting the Claimant and cutting her hours without consultation.
(e) the Claimant's job title, role and working hours were changed without her agreement;
(f) the Claimant was treated less favourably in comparison to younger employees; and
(g) the Claimant was shouted at by the Respondent in front of other employees and guests.

(2) In the event that the Tribunal determines any, or all, of the acts in paragraph 1 did happen, whether these amounted to a breach of the implied term of mutual trust and confidence.

(3) As this claim involves a series of events resulting in the Claimant's resignation, does the final straw principle apply? (London Borough of Waltham Forest –v- Omilaju [2005] IRLR)

(4) Whether the Claimant resigned in response to the acts alleged in paragraph 1.

(5) There is no suggestion that the Claimant had affirmed a breach nor that any dismissal was fair within the meaning of section 98(4) EqA, if there had been a dismissal.

4.3 Wrongful Dismissal

(1) Whether the Respondent breached the Claimant's contract of employment by failing to pay notice pay.

4.4 Direct Age Discrimination

(1) The comparator relied on is Valentina Giovanilli.

(2) Whether the Claimant suffered constructive dismissal, or other detriments (as in 3. below) as a result of her age.

(3) In bringing the above claim, the Claimant relies on the following acts or omissions of the Respondent:

(a) The Claimant's original dismissal in January 2015;
(b) the alleged disparity in treatment for disciplinary procedures; and
(c) The alleged failure by the Respondent to investigate the Claimant's grievance complaints.

(4) In each case, the Tribunal is to consider whether the act or omission occurred and, if so, whether the Claimant suffered a detriment in each case.

4.5 Harassment

(1) Whether the Respondent has subjected the Claimant to unwanted conduct which had the purpose or effect of violating the Claimant's dignity or creating an offensive, intimidating or hostile environment, by the acts in paragraph 2.

(2) Specifically, under this head of claim the Claimant is relying on the following acts or omissions of the Respondent:

(a) The disciplinary allegations made against her;
(b) The disciplinary sanctions made against her;
(c) That her grievance dated 18th February 2015 was not considered;
(d) That she was shouted at and berated in front of guests; and
(e) That she was asked to leave the organisations because of her age.

(3) In each case above, therefore, the Tribunal must determine whether or not the act or omission occurred and, if so, whether it constituted harassment as per the definition above.

4.6 Victimisation

(1) It is accepted that by the Respondent that the Claimant's grievance dated 18th February 2015 constituted a protected act for the purposes of this claim.

(2) Therefore, the Tribunal is firstly to consider:

(a) Whether the Claimant's working hours and role changed on or around 4th March 2015;

(b) Whether the Claimant was 'ignored' by her co-workers following her return to work on 4th March 2015; and

(c) The Claimant's suspension on 4th March 2015.

(3) The Tribunal is then to consider whether some or all of the above acts constitute a detriment for the purposes of this claim and, if so, whether the Claimant suffered the above detriments as a result of the protected act.

4.7 Jurisdiction

(1) Whether any of the complaints above are out of time, in that they are based on facts that occurred more than three months prior to the submission of the Claim form.

(2) In considering this point, the Tribunal is to consider whether any or all of these alleged acts of discrimination form a course of conduct.

(3) Should any complaints be deemed to be out of time as above, the Tribunal is to consider whether it would be just and equitable to extend time in all the circumstances.

4.8 ACAS Uplift

(1) Did the Respondent unreasonably breach the ACAS Code for Disciplinary and Grievance Procedures? (The Respondent concedes there were some.)

(2) If so, is it just and equitable to increase any award to the Claimant under s 207A Trade Union and Labour Relations (Consolidation) Act 1992?

(3) If so, by what percentage should the Claimant's award be increased?

5. The Tribunal heard evidence on oath from:

(i) The Claimant;

(ii) Dennis MacNulty, Branch Secretary for the Camden Area of the GMB;
(iii) Edward Pyke, employed by the Respondent as a Cluster General Manager;
(iv) Alexandra Brunner, employed by the Respondent as a Cluster General Manager;
(v) Karin Holmes, employed by the Respondent as an Operations Manager; and
(vi) Cristina Bongiovani.

All the witnesses had prepared written statements, and all those statements were taken as read. We had regard to all the documents within the bundle to which we were referred. We had the benefit of a cast list and chronology and used the same in our deliberations but referred to the documentation and oral evidence when making our findings of fact. We had the benefit of written submissions supplemented orally from the Claimant's representative and oral submissions from the Respondent's representative.

6. We remind ourselves that the claim we determined is that presented to the Tribunal, there having been no applications to amend. The claim was presented to the Tribunal on 31st July 2015 following completion of the statutory early conciliation procedure, the relevant A and B dates being 2nd June and 2nd July 2015 respectively.

7.1 The exact start date of the Claimant's continuous employment with the Respondent (including its predecessor organisations) was in dispute. We are satisfied that the Claimant had been continuously employed by the Respondent from at least 1st August 1996. The Claimant became employed by the Respondent in 2012 following a takeover of the business, there having been many such takeovers during the Claimant's employment. The Claimant was employed on a salaried contract to work 42 hours per week, albeit in reality she was paid on an hourly basis. We did not hear any evidence as to how this came about. The remainder of the Respondent's staff employed in the restaurant as Team Members were hourly paid with no guaranteed bonus.

7.2 Although some of the Respondent's witnesses gave different titles for the Claimant's job, the Respondent's pleaded case is that she was employed by it as a breakfast supervisor. Breakfast supervisor is the job title provided to the Respondent in a statement of employment particulars by Six Continents Hotels to the Claimant on 1st October 2002, which document also recites that the Claimant's employment with that company began on 22nd March that year. The title 'breakfast supervisor' was a job title and expressly stated not to be a job description.

7.3 For a considerable period before her resignation the Claimant had not been required to wear an apron; only managers and team leaders were not so required. Although within the Respondent's current organisation there was no title of 'breakfast supervisor' (and in its hierarchy was

shown as a 'Team Member') it confirmed to the Claimant by letter dated 28th January 2014 that the Claimant was employed as 'a shift leader in breakfast' when she was 'expected to run the shift according to the [Respondent's] standards. This was in line with the statements made by Leana Pecanac (a beverage manager with responsibility for the Claimant) in the presence of Karin Holmes on 24th January 2014 that what Ms Pecanac required from the Claimant was leadership and that the Claimant was a shift leader.

7.4 In June 2014 Ms Bongiovani, an assistant operations manager with the Respondent, confirmed to the Tribunal that the Claimant was required to provide instructions to other shift members in her absence.

7.5 There was a dispute as to the extent of the Claimant's operational duties. We are satisfied that the Claimant's role, while at all times remaining a shift leader, was wider than simply hosting and included waiting on tables, restocking the buffet and collecting money.

7.6 We heard considerable evidence by the Respondent of warnings given by it to the Claimant about smoking and other matters (many of which are not accepted by her as being actually given) but no evidence of any warnings to her about not wearing an apron. The fact that the Claimant was not required to wear an apron before she returned to work on 4th March 2015, and also could have been provided with a jacket to wear (which only Team Leaders and above wore) supports a finding, which we do so find, that the Claimant was more than ordinary team member.

8. During early January 2015, while the Claimant was absent from work through suspension, the Respondent discussed with its staff changes to their duties to make them more flexible so that dining room staff could be trained to work on reception and vice versa, and that aprons were to be introduced in the dining room for staff serving on tables. We find that the Claimant, being absent at the time, was never so informed.

9. The Claimant was born on 21st January 1946 and thus at the date she resigned (on 5th March 2015) was aged 69. No structured evidence was provided to the Tribunal by either party about the ages of its employees who worked at the place where the Claimant worked, namely the Respondent's Premier Inn at 215 Haverstock Hill, Hampstead, London. Having regard to the evidence we heard, in particular that of Ms Bongiovani, we find that, apart from the Claimant, all the 'team members' in the dining room, which for this purpose includes the Claimant, were with the exception of the Claimant were in their 30s or younger. The reception staff included two employees in their 60s, one of around 45 and two in their 20s. Within the kitchen were employed Fernando Orego who was 60 and another person who was 40, another at around 35 and one aged 20. We heard of another person who had been recruited by Ms Bongiovani who was aged 60 and who worked for two months in the Respondent's hotel at what was described as Archway, Hampstead. We are satisfied that the vast majority of the Respondent's employees

employed on the same or similar tasks to the Claimant were in their 20s or 30s. Mr Orego was nicknamed 'Papa'. We were invited by the Claimant's representative to infer from this epithet that this was evidence of an age discriminatory culture. We heard evidence from a number of witnesses however that Mr Orego invited people to call him by that epithet. We do not draw the inference we were invited to, rather we find it was a friendly nickname Mr Orego generated for himself.

10. Within her claim, the Claimant asserts that Ms Holmes made a number of comments about the Claimant's age and attributed some of the Claimant's actions to her age; and that the Claimant should consider retiring. Having regard to the entirety of both the Claimant's and Ms Holmes' evidence we are satisfied that conversations did take place between the two of them in the autumn of 2014 regarding the Claimant's work. At that time the Claimant had suffered a serious health scare and we accept Ms Holmes' evidence that the discussion revolved around the suggestion that the Claimant work five days (but not reduce her hours), thus giving the Claimant two full days away from work. We do not accept that Ms Holmes suggested to the Claimant that the Claimant should retire.

11. We were referred to documents which indicated that a number of managers with the Respondent had previously found the Claimant difficult to manage, as indeed was Ms Bongiovani's position.

12. Within the Tribunal file we were referred to a note dated 14th September 2007 allegedly prepared by a Craig Teasdale, a general manager, who records that on that date arrived at the Respondent's premises to train members of "Premier Travel Inn" and the Claimant behaved aggressively. The Claimant's evidence was that this was before she ever worked for Premier Inn and denied the event occurred. The evidence to the Tribunal was that the Claimant transferred to Premier Inn in 2012 and thus we do not accept the integrity of that note.

13.1 The Claimant did not accept that all the warnings the Respondent asserted had been given to her.

13.2 We are satisfied that on the 20th July 2011 the Claimant was warned for smoking on the terrace in front of the restaurant. We further accept that the Claimant received a disciplinary warning described as a first written warning for breach of health and safety rules on 19th July 2012, albeit it was not made clear what that breach was.

13.3 In the Tribunal file were two warning letters, both dated 11th November 2012; one for breach of company food safety rules and one for both breach of health and safety rules and breach of house rule number 20, i.e. not to drink, chew or eat in public areas or anywhere in front of customers, for which, the documents inform, the Claimant was given a verbal and first written warning respectively. The Claimant denied every having received those two warnings and it was not clear what the breach

of company food safety rule or health and safety rules were. There was no explanation as to why the Respondent gave two separate warnings on the same day when the same could be included in one letter. While the Respondent may have issued the Claimant with those warnings, we cannot and do not so find.

13.4 We accept that on 29th April the Claimant was given a verbal warning for unsatisfactory performance, failure or refusal to carry out legitimate and reasonable instructions, and rude or abusive behaviour towards guests, employees or suppliers, albeit the details were not described.

13.5 These warnings, insofar as they are established, indicate a persistent low-level of unsatisfactory conduct for which minor disciplinary action was taken. Despite these warnings on 29th January 2014 the Claimant was of course confirmed, as we have referred to before, to be a shift leader in breakfast.

14. Ms Bongiovani suspended the Claimant around 22nd September, following an allegation that the Claimant had pushed two other workers, namely Miriam and Rachel. Ms Bongiovani interviewed the Claimant who denied the allegation. The Claimant informed Ms Bongiovani that she had been telephoned and been told that she had been sacked, albeit she did not recognise the voice. Following Ms Bongiovani's interview with the Claimant the matter was transferred to another manager employed by the Respondent at other premises and ultimately the Claimant returned to work. There was no evidence referred to the Tribunal that the Claimant had been disciplined (we accept that in this situation suspension was indeed a neutral act); there was no evidence of disciplinary proceedings and we thus accept the Claimant's evidence that there was none. The matter appears to have petered out.

15. In a note dated 2nd September 2012 the Claimant reported to the Respondent's management that she was being bullied and harassed by Ms Pecanac. Within the note the Claimant alleges that Ms Pecanac: spoke down to her and belittled her because of her age and said that "oh you are too old now Marisa and you are forgetful now". The Claimant further reported that on 1st September that year (i.e. the day before the note was written) there had been another incident when Ms Pecanac had given the Claimant a hard time following which a member of staff had enquired of Ms Pecanac what had happened to the Claimant, to which Ms Pecanac had stated that she had great pleasure in doing what she had done and hoped [the Claimant] had cried. There being no evidence to the contrary, we accept the Claimant's evidence that her complaint was never addressed. We also accept that the Claimant believed the truth of what she had written. We accept that the incidents described by the Claimant in her note took place as she described.

16. An investigation was conducted by a manager Ewa Szareak with a report by Ms Bongiovani that on the 28th November 2014 the Claimant had been seen smoking in a prohibited area. During the meeting the

Claimant confirmed that she had smoked on the terrace outside the restaurant (being a place which was not a designated smoking area for staff). The outcome was an investigation report, the allegations being described as:

"1. Smoking in the workplace
2. Breaching the company Health, safety and security procedures
3. Behaviour likely to seriously damage the relationship between guests and the Company, and /or bring the company into disrepute"

Ms Szareak recited that she had interviewed not only the Claimant and Ms Bongiovani but also a Marco Cetta, an agency worker. The findings and conclusions were:

"The incident happened on early morning on 28th November at 6:00-6:40am. Marissa was working early on breakfast on 28th November 2014, starting at 6:00. Marco, agency employee who has been covering the site on that day was helping out setting the buffet for breakfast.

Marissa has stated in her investigation that after 6:00 she went to have a cigarette while she was on duty. She said she took a quick cigarette and coffee break at the terrace (by the restaurant entrance). She stated that she has only lit the cigarette but due to bad taste in her mouth she has not finished it. Both witnesses Cristina Bongiovanni and Marco Cetta confirm the fact that Marissa has been smoking in her uniform on at the terrace by the restaurant entrance at 6:30ish.

Furthermore CCTV footage from that day shows Marissa stood by the entrance of the restaurant having a cigarette.
Marissa has admitted to smoking on the terrace on the day of 28/11/14, she admitted in her investigation that she is aware of the smoking policy and aware that the only place that the PI employees can smoke [is] in the designated smoking area. She is aware of the location of the designated smoking area."

17. On the 2nd January 2014 James Geary, a food and beverage team leader, reported that he had witnessed the Claimant and Valentina Gieovannilli (a breakfast team member) smoking outside the back door of the kitchen (also a non-designated smoking area) and that when he spoke to them about the matter they both went to the designated smoking area.

18.1 On 5th January 2014 the Claimant was summoned to attend a disciplinary hearing on the 8th of that month to discuss the allegations described by Ms Szareak in her report. The Claimant was informed that disciplinary action may be taken against her, which could include dismissal. The Claimant attended the meeting, conducted by Mr Ryan Silvera, who was employed by the Respondent as an operations

manager. The Claimant had previously been provided with a copy of the investigation report. The invitation letter also stated that the Claimant had been provided with interview notes from the three people interviewed by Ms Szareak but at the subsequent appeal, about which more below, the Claimant denied having received those documents, which denial Ms Bruner (who conducted the appeal) accepted. We too accept that the Claimant had not received the investigation notes.

18.2 At the meeting the Claimant informed that she understood that she was there to discuss smoking on the terrace which is a non-smoking area. The Claimant readily accepted that she: had lit a cigarette; was in a non-smoking area; and had thrown the cigarette away. During the hearing the second occasion that the Claimant had been caught smoking, albeit not included in the notification for the meeting, was also raised. The Claimant disputed that she had been smoking by the back door. Mr Silvera considered that the Claimant had not learned from the initial incident in November, albeit she was not smoking in an area where she was on public view as she had been on the terrace, and concluded that the Claimant was guilty of gross misconduct and that the appropriate penalty was summary dismissal, which decision he informed her of orally at the conclusion of that meeting.

18.3 Mr Silvera, in his confirmatory letter of the same date, confirmed that his decision to dismiss the Claimant summarily was for gross misconduct was in respect of both the incidents on the 24th November 2014 (mistakenly described as December) and 2nd January 2015. The Claimant was reminded of her right of appeal.

19.1 The Claimant exercised her right of appeal by letter dated 14th January, her appeal being on a number of grounds, namely: outside the Respondent's policies and procedures; the evidence was insufficient and unsubstantiated to warrant the penalty; the decision was fabricated and falsified by the Respondent and was prejudged; the allegations had been instigated to support trumped-up charges; Ms Szareak's report was a fabrication; the Respondent used CCTV footage but did not allow the Claimant to see the same; the Claimant did not give her permission for the Respondent to use its CCTV footage; the suspension was conducted over the telephone by Mr James Geary who had no formal input into the investigation and also made a second allegation, which was both unsubstantiated and formed part of the disciplinary proceedings (i.e. the 2nd January 2015 incident).

19.2 The appeal hearing took place on 4th February and was conducted by Ms Brunner. At the appeal meeting the Claimant was able to say all that she wished and, as referred to before, Ms Brunner accepted that the Claimant had not received the investigation interviews, albeit she had received the investigation report. Ms Brunner did not consider the allegation regarding 2nd January and thus effectively discounted that reported incident for the purpose of the appeal. Ms Brunner considered that the penalty imposed on the Claimant, who had expressed

repentance, was too harsh and the Respondent had inappropriately taken into account the second allegation. Ms Brunner substituted a final written warning limiting the warning to the incident on 28th November (described as 24th December); the decision being confirmed to the Claimant in writing by letter dated 11th February.

19.3 A return to work meeting was fixed for 23rd February.

20.1 On 23rd February the Claimant's return to work meeting took place. The Claimant informed Ms Brunner that: she felt stressed about returning to work; that customers had informed her that they knew she had been dismissed and also asked her whether she had retired; that she had been penalised in the past for age discrimination by Ms Pecanac and that two months before, Ms Holmes had suggested she reduce her hours, the reason being because of her ill-health due to her age. The Claimant referred to other matters. When Ms Brunner asked the Claimant whether she would consider working at another site the Claimant was adamant that she would not. When Ms Brunner expressed an opinion that the Claimant was being extremely negative about the Respondent's team and site where she worked, the Claimant responded that they had said she had retired but was ready to come back to work.

20.2 Towards the end of the meeting the Claimant handed to Ms Brunner a grievance document dated 18th of that month. Ms Brunner informed the Claimant that an official grievance meeting would need to take place but that the processed would be managed by Ms Holmes.

20.3 The grievance (accepted by the Respondent as a protected act) was in respect of "bullying in the workplace, Undermining, Unsupportive, Discrimination, Vexatious, Theft, Towards certain members of staff ....." The details provided were:

(i) For the previous two years certain members of staff had been telephoning the Claimant asking her to retire;

(ii) A number of false allegations had been made about the Claimant in relation to an assault she believes had been instigated and planned with a view to forcing the Claimant to leave, the allegations being investigated by the same person who, the Claimant believed, instigated the attack on her;

(iii) Disciplinary procedures had been used vexatiously to justify disciplinary action without credible evidence, there then following a disciplinary action with a sanction being a verbal warning delivered over the telephone without any paperwork to support that sanction;

(iv) There had been, by the time of her grievance, a second deliberate attempt to try and dismiss the Claimant regarding smoking in a non-designated area for which CCTV evidence was used, however the

Claimant was outside the building and thus within the law of the land;

(v) There was no policy to support the Respondent's disciplinary action in respect of the Claimant's smoking, the evidence used being again by the same members of staff as before, further the smoking incident had happened in November yet she was not questioned until Christmas Eve, being a deliberate vindictive action which was designed and succeeded in ruining her Christmas.

Towards the end of her grievance the Claimant opined that she had been unsupported and bullied at work due to her age. Within the grievance the Claimant also sought a quashing of the final written warning given by Ms Brunner and the people involved taken to task.

21. Ms Brunner's response to the allegations that the Respondent had told some of its customers that the Claimant had been dismissed was that the company would never tell that to customers; its standard practice in response to requests for information by guests about an employee's lack of presence being to inform that they were on annual leave.

22. On 4th March the Claimant returned to work attending as normal at 6am. When the Claimant arrived she discovered that her shift had been altered to begin an hour later. The Respondent had not informed the Claimant of the change. Further, it transpired that the Claimant's hours had been reduced (when applying the information on the rota) to 28.5 hours, which would result in a significant reduction in the Claimant's wages. Ms Bongiovani's oral evidence to the Tribunal was that irrespective of the number of hours on the rota, work could be found for the Respondent's employees over and above the hours allocated. Ms Bongiovani did not provide any details of this assertion. We take into account that English was clearly not Ms Bongiovani's first language, but even so allowing, she was inconsistent about a considerable number of matters. We find that the Claimant's hours were in fact cut from the contractual 42 to 28.5 and there was no guarantee of any additional hours, let alone any information about what role or tasks the Claimant would have been asked to do during those hours which may not have been on the Claimant's contracted duties.

23.1 There was a dispute as to what happened during the shift. The Claimant's position is that she greeted her colleagues and carried on work as normal; the Respondent's that the Claimant had spoken inappropriately to two members of staff, namely Ms Valentina Giovannilli and Ms Luz Diaz. In her written statement to Ms Bongiovani to Ms Giovannilli states that the Claimant had been rude to her and was trying to boss her around. During oral evidence to this Tribunal there was no dispute that the Claimant was entitled to give instructions to the two team members or that the instructions were, on their face, reasonable. It further appears that Ms Giovannilli did not wish to perform one of the

Claimant's instructions. There was no investigation into Ms Giovannilli's alleged refusal to follow an apparently proper instruction.

23.2 Ms Diaz had also complained about the way the Claimant had spoken to her and an instruction she had given, the instruction itself again being within the Claimant's authority.

23.3 During that shift Ms Bongiovani handed the Claimant an apron which the Claimant considered to be dirty and for that reason, and also because the Claimant did not wear an apron as part of her uniform, did not accept. We remind ourselves that the Claimant had not been told about the change of uniform which had been implemented during the first week of January that year. Ms Bongiovani provided the Claimant with a clean uniform which the Claimant then wore. The Claimant was not offered a jacket.

24. There is a dispute regarding the other incidents which occurred during that morning shift, about which more below. At the end of the Claimant's shift Ms Bongiovani called the Claimant into her office where Mr Silvera, an operations manager at another hotel, was present. There is dispute as to what happened at that meeting. There is no dispute that the Claimant was handed a letter suspending her pending an investigation. Within the Tribunal bundle is a copy of that letter. There is also a copy of another almost identical letter dated 3rd March 2015. Ms Bongiovani's initial position in evidence was that she had drafted the letter from scratch but later accepted that she had completed a template. The version of the letter dated 3rd March confirms that the Claimant had been suspended from work on full pay on 3rd March 2015, whereas the other version is dated 4th March and states that the Claimant was suspended on 4th March 2015. It may be that the letter, being a standard template, generates a date when it is printed, but there is no evidence either way that that is the case. Whether that is the case or not, the font on the letter dated 4th March is different from that dated 3rd March. Ms Bongiovani in her witness statement, which she had of course confirmed was accurate, had stated that the letter was written and sent to the Claimant after she had gone home on 4th March; the reference to the date of 3rd March being a 'typo'. In oral evidence there was no dispute that the letter was handed to the Claimant at work on 4th March.

25.1 There are discrepancies in the Respondent's evidence as to what happened on the 4th March. The Respondent conducted an investigation. Ms Bongiovani's position being that she had to suspend the Claimant because of what happened. Ms Bongiovani's position was that as Ms Giovannilli had been crying, the Claimant must have acted in some inappropriate manner (this was despite the fact that, to this Tribunal, there was no dispute that the Claimant had been entitled to speak to Ms Giovannilli and give her instructions of the type she had, similarly in respect of Ms Diaz).

25.2 The investigation was conducted by Mark Tyler. Mr Tyler conducted a number of interviews, speaking with: Ms Bongiovani; Ms Giovannilli; Ms Ramtohul; Ms Diaz and Messrs Giuseppe Maisto and Fernando Orego. The report makes further reference to an interview with 'Ryan', understood to be Mr Silvera; but for reasons which were not explained Mr Tyler stated in his report that his statement could not be used.

25.3 We have concerns about the integrity of the investigation and not simply because of the unexplained non-use of Mr Silvera's statement. One person, a receptionist, Lucy, who had reportedly heard shouting in the office during the meeting between the Claimant and Mr Silvera and Ms Bongiovani was recorded as "no statement". Further, while Mr Orego, after informing that he had not heard about the matters regarding the Claimant's alleged inappropriate behaviour, was warned by Mr Tyler that refusing to help an investigation could be seen as misconduct. Mr Orego had maintained his position. Upon reviewing the statements upon which Mr Tyler based his report, particularly after Ms Bongiovani's oral evidence to the Tribunal about the instructions being reasonable and within the Claimant's authority, there is little (albeit some) evidence to support the allegations made by the Respondent against the Claimant. Similarly there was conflicting evidence regarding the Claimant's attitude to greeting her colleagues, some saying that she had and others that she had not.

26. Within the Claimant's claim and within her witness statement she asserts that at the meeting on 4th March Mr Silvera said to her "there is no room for you in this establishment, get out, get out". Mr Silvera did not give evidence to the Tribunal. We accept and find that statement was made. After the meeting on 4th March the Respondent did send the Claimant a further letter regarding her suspension. We find that the Claimant was provided with a letter dated 3rd March on the 4th, and was subsequently sent one with the correct date later. Having regard to our concerns about the Respondent's investigation, in particular the lack of any statement from Lucy; the lack of any explanation why Ryan's statement could not be used; and the warning to Mr Orego, we do not accept that Mr Tyler's investigation report can be relied on as an accurate reflection of what occurred. Having regard to all these matters and Ms Bongiovani's inconsistent evidence regarding the meeting we find that the letter dated 3rd March had been written prior to the Claimant's return to work. Further, in the absence of any specific evidence, even if the letter when first written was auto-dated (which would be the day before the Claimant returned to work and the meeting) the first line of the letter refers to the meeting having already taken place on the same date, that date being identified. Further any change of font would have been extremely unlikely to have been made by accident because of the steps necessary to change fonts on template documents there being no explanation for the change of font.

27. By letter dated 5th February 2015 (there is no dispute in respect of this document that the date is a clerical error, the date actually being 5th

March 2015) the Claimant wrote to the Respondent, handing in the letter on 5th March 2015, resigning from her employment with immediate effect. The stated reasons were: underhand and vexatious disciplinary treatment of the previous two years; the events of 4th March 2015; being the target of systematic bullying; three separate deliberate attempts of disciplinary action using false and vindictive accusations; an assertion that the Claimant had not adhered to the Respondent's smoking policy (despite the Claimant being dismissed and reinstated and subsequently issued with a final warning) that being evidence of a bullying campaign; being ignored by Ms Brunner and Ms Emma Cluett (the latter being another senior manager); being demoted; and, that the cumulative effect of the above is that she had lost trust and confidence in the Respondent's staff at Hampstead, together with the cluster manager of the Respondent. The Claimant finished her resignation letter with an assertion that the above was age discrimination. The following day Ms Cluett, a cluster general manager, wrote to the Claimant asking her to reconsider her decision to resign and informing that if she did not by 13th of that month, her resignation would be actioned. The Claimant did not reconsider.

28. Following the Respondent's acceptance of the Claimant's resignation, as Ms Cluett had informed in her letter of 6th March, the Claimant's concerns as reported by the Claimant in her resignation letter and her outstanding grievance were referred to the Respondent's regional operations director, Nic Brown, who in turn handed the matter to Mr Pyke to deal with it. Mr Pyke was provided with a copy of the Claimant's resignation letter and her grievance document dated 18th February. There was no suggestion that Mr Pyke had the notes of Ms Brunner's return to work meeting with the Claimant. Mr Pyke sought to discuss the matter again with the Claimant, with a view to identifying the subject of the grievance so that it could be investigated and dealt with by someone else. This is not hearing the grievance as Mr Pyke informs in his written statement that he was tasked to do. Neither was it dealing with stage one of the grievance procedure as Mr Pyke stated in oral evidence. Mr Pyke reported the results of his meeting with the Claimant to a Rob Kinsman for an investigation, who produced a report in which he did not uphold the Claimant's allegations. The investigation did not address any of the allegations of age discrimination or bullying or any attempts by the Respondent to engineer the termination of the Claimant's employment. It would appear that Mr Kinsman investigated complaints of maintenance to a door and air conditioning; that a particular member of staff had stolen; that a particular member of staff had not charged customers and stolen company money; and whether a particular member of staff had taken the Respondent's property home for personal use. Unsurprisingly the people the subject of these allegations denied the allegations and in the absence of any evidence to support the allegation they were not upheld. Mr Kinsman commented in his short report:

"Reading the grievance letter, it is clear that Marisa has questions over the manner in which the disciplinary procedure that has taken place and seems very resentful over the process.

Questioning the team, they seem to believe these allegations have been made in retribution to statements or evidence provided, during recent disciplinary cases involving Marisa.

I hope that this is not the case and Marisa needs to be reminded of the consequences of making false allegations within the workplace. I would suggest that further clarity is gained on the reasons for her making these allegations and what she would like to see as a result."

29. The Claimant appealed against that decision but we did not hear of any outcome

Conclusions

30.1 We have found that derogatory statements were made by Ms Pecanac regarding the Claimant's age and forgetfulness but not those the Claimant attributes to Ms Holmes. We have thus found that the events alleged at paragraph 4.2 (i)(a) to have been established, but not those at paragraphs 4.2 (1)(b) and (c).

30.2 In respect of the smoking incidents involving the Claimant on 28th November, we find that Ms Bongiovani did report the Claimant but there was nothing untoward with her so doing, indeed it would have been in accordance with her duties as a manager. Having regard to the Claimant's record of smoking in authorised locations and the Respondent's prohibition of staff so doing we are not persuaded that the Claimant was treated differently or less favourably by being reported. Ms Giovannelli who was caught smoking with the Claimant in January 2015 did not have a history of such contravention of the Respondent's policy.

30.3 Having regard to our findings regarding the events of 4th March 2015, in particular Mr Silvera's statements and the determined actions of Ms Bongiovani involving two subordinate staff, we are satisfied that the Respondent, through Ms Bongiovani, act in a manner that would put in jeopardy the Claimant's continued employment. We similarly find that Ms Bongiovani did cut the Claimant's hours without consultation in contravention of the Claimant's employment contract. We further find that when the Claimant returned to work on 4th March 2015 the Respondent had changed the Claimant's duties; further when the Claimant returned to work on 4th March she was required to wear an apron when she had not been so required before. Managers and team leaders wore jackets; this was not offered to the Claimant, despite Ms Bongiovani's evidence being to the effect that the Claimant could have worn one. We do not accept Ms Bongiovani's evidence that there was

any intention to allow the Claimant to wear a jacket; had there been she could have provided one to the Claimant or at least mentioned it. We find that the Respondent did intend to effectively demote the Claimant. We are fortified in that finding by the inconsistent evidence of the Respondent where, in the notes of discussions and in writing, as referred to before, the Respondent confirmed that the Claimant had a leadership role, was a shift supervisor and was expected to run the breakfast shift, and other duties required of the Claimant as identified in Ms Holmes letter of 28th January 2014 referred to before, and the Respondent's position at this Tribunal was effectively that the Claimant had the same duties as any other "team member". This was not the case; the Claimant's duties had never been so changed, albeit within the Claimant's administration she may well have been referred to as a Team Member in its organisation but that is not the same as changing her contractual terms or job duties. We find that the Claimant's job role and working hours were changed without consultation or agreement.

31. We find that the Claimant was shouted at by Mr Silvera in front of Ms Bongiovani on 4th March as described before. That meeting became heated and thus the Respondent's customers may well have heard. We find that customers did. The meeting took place in an office out of public sight but while we refer specifically to Lucy, other members of staff could also have heard. In respect of the smoking incident on 2nd January, which was some months after the Respondent had issued its smoking policy the previous April, we did not hear whether it had been in issue before that date, both the Claimant and Ms Giovannilli were observed to be smoking but only the Claimant was disciplined. Ms Bongiovani's evidence about the matter was inconsistent and wholly unreliable as to whether any disciplinary action was taken against Ms Giovannilli: we are not persuaded that it was. This also being a discrimination claim the Respondent, being a very large company and represented by solicitors, has had ample opportunity to provide evidence if she had been. We make that statement recognising the lack of documentation in many areas in the presentation of the Respondent's case. Ms Bongiovani being Ms Giovannilli's direct manager, would surely have known whether any disciplinary action was taken and the outcome of it. Further we note that on 4th March when, as Ms Bongiovani stated to the Tribunal, the Claimant had given a reasonable instruction, spoken with authority, the Claimant was suspended but no action was taken against Ms Gieovannilli who had disobeyed what was by all accounts a reasonable and proper instruction.

32. While we have not found that all the matters the Claimant complained of occurred, in respect of the sum of those which did as found in our findings of fact we find that the Respondent did act in a manner which was always likely (and in respect of the meeting on 4th March 2015 was calculated) to destroy and seriously damage the relationship of trust and confidence between employer and employee. We do not find the Respondent had reasonable and proper cause for its actions. We find the Respondent broke the implied contractual term of mutual trust and

confidence and the Claimant resigned, we accept, in response to the series of above acts: thus there was a dismissal. There being no potentially fair reason and there being no procedure adopted by the Respondent we find that the Respondent's dismissal of the Claimant was unfair.

Wrongful Dismissal

33. The Respondent did not pay the Claimant any notice pay. The Respondent having dismissed the Claimant in a situation which does not permit it to do so without paying notice pay we find that the Claimant is entitled to damages for that dismissal in respect of that breach. The complaint of wrongful dismissal succeeds.

Direct Age Discrimination

Original Dismissal in January 2015

34. The Claimant has a history of smoking in non smoking areas. We did not hear that Mrs Giovannilli did. It was Mr Geary who witnessed the Claimant and Mrs Giovannilli smoking and reported them. There was no evidence that Mr Geary had any involvement which in any plan to end the Claimant's employment or any animosity towards either the Claimant or Mrs Giovannilli. While the Respondent did go from issuing written warnings to summary dismissal without any intervening disciplinary penalty in respect of the Claimant, it had, comparatively recently, re issued its smoking policy and the Claimant had shown by her actions in November and also while awaiting the disciplinary meeting smoking in a prohibited place on the 2nd January 2015 that she would continue to break that smoking policy. Mr. Silvera subsequently made blunt statements to the Claimant when she returned to work, we are not persuaded that there are any facts from which we could conclude that in January 2015 age was a reason for the Respondents dismissal of the Claimant. In respect of the smoking incident on the 2nd January 2015, the Respondent did not institute disciplinary proceedings against the Claimant, but rather took into account the Claimant's actions in then current proceedings for the same offence. We have found that Mrs Giovannilli was not subject to disciplinary proceedings. We do not regard the Claimant and Mrs Giovannilli sets of circumstances the same rather do consider that there are material differences. We remind ourselves of the different employment history of the Claimant and Mrs Giovannilli. We are not persuaded that there are any facts from which we could conclude that the disparity of treatment was because of age.

35. We refer to our findings in respect of before. Mrs Giovannilli was not the subject of any disciplinary process for failure to carry out a reasonable management instruction issued by the Claimant. Mrs Giovannilli was, we can find, part of a concerted effort by the Respondent to secure the termination of the Claimant's employment, albeit we do not suggest that Mrs Giovannilli played a leading role merely that she was involved in it.

36. We refer back and note the substantial differences of age between the Claimant and her colleagues. We refer back and also note that no action was apparently taken in respect of Mrs Pecanac's comments regarding the Claimant's age and abilities in 2012. When the Claimant presented a grievance to Mrs Brunner at the return to work meeting, which contained complaints of age discrimination and despite the meeting taking place and Mr Pyke meeting with the Claimant that part of the Claimant's grievance which related to age discrimination was not investigated. We can only conclude that the Respondent sought to and did avoid investigating the Claimant's grievance in respect of age discrimination. We find that part of the Claimant's appeal was never concluded. There was no explanation for the lack of any conclusion. For those reasons we find, and having regard to Mr McNulty's evidence that there was a culture of age discrimination within the Respondent at the premises where the Claimant worked, which we accept, we find that part of the Claimant's complaint of failure by the Respondent to investigate the Claimant's grievance complaint succeeds complaint of direct age discrimination.

37. To the extent that the Respondents actions on the 4th March 2015 where motivated by age, and we find that part of the Respondents complaint succeeds.

Harassment

38. In so far as some matters are complained of as either direct discrimination or harassment. In respect of those matters which we have found to be direct discrimination, we do not consider them as potential acts of harassment due to those findings and Section 212(1)(5)EQA.

39. We have addressed the issue of disciplinary allegations against the Claimant in March 2015 and found an element of direct discrimination. Insofar as the allegations in respect of smoking we do not find any facts from which we could conclude that they relate to the Claimant's age.

40. Our findings in respect of disciplinary section against the Claimant in respect of unfair dismissal is as above, we have not found any facts which we could conclude that that related to age.

41. We have found that a reason the Respondent did not address her grievance stated 18th February was direct discrimination and we do not consider it further.

42. There was evidence and we find that the Claimant was shouted at such that on the 4th March that guests could hear. We find that was part of the effort to bring the Claimant's employment to an end, and insofar as it does not fall within the complaint our findings of direct discrimination we do find that it related to the Claimant's age plus that complaint of harassment succeeds.

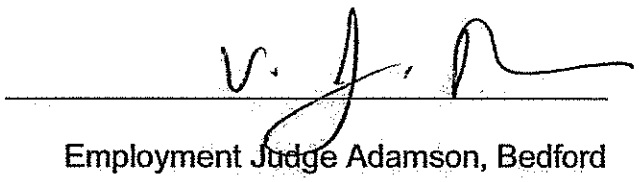
43. We have not found that the Respondent asked the Claimant to leave its organisation, the comments of Mrs Pecanac are out of time. That complaint does not succeed.

Victimisation

44. It has been accepted that the Claimant's written grievance stated the 18th February 2015, constitutes a protected act. We found the Respondent did seek to change the Claimant's working hours and role on 4th March, albeit there was nothing to suggest, that those who did so had any knowledge of the Claimant's grievance or that there was any connection. There were allegations and counter allegations about who, if anyone, had ignored who on the 4th March 2015 there were claims and counterclaims. We do not find it established that the Claimant was ignored by some of her co-workers when returned to work that day. Insofar as the Claimant was suspended on 4th March 2015 we have found this was the result of the Respondent's actions. We have not found anything to link the Respondents actions to the protected act. We find that there are no facts from which we could conclude that the Respondent has victimised the Claimant.

Remedy

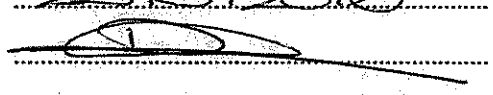
44. We did not determine the issue of remedy. There will be a separate hearing to determine that issue, notification of which will be sent by the Tribunal administration to the parties separately. Should the parties settle that part of the claim they should notify the Tribunal promptly.



Employment Judge Adamson, Bedford

JUDGMENT SENT TO THE PARTIES ON

25/9/2016



FOR THE SECRETARY TO THE TRIBUNALS