

BETWEEN:

REBECCA TREVELAYNE CALDERON

Claimant

-AND-

**BUCKINGHAM PROPERTIES (GIBRALTAR) LIMITED
T/A CHESTERTONS ESTATE AGENTS**

Respondent

JUDGMENT

The Claimant's claim that she was constructively unfairly dismissed is dismissed.
The Claimant's claims for age discrimination and sex discrimination are dismissed.

Chairperson: Gabrielle O'Hagan

For the Claimant: in person

For the Respondent: Mr David Oxley, independent HR Consultant

Hearing: 25-28 November 2024

1. The Claimant was employed by the Respondent from 1 September 2017 until 10 August 2022, originally as an Assistant Property Manager and from October 2018 as a Property Manager. She resigned on 8 July 2022 giving one month's notice.
2. The Claimant filed a Claim Form with a Timeline of Events on 17 July 2022 making claims for unfair dismissal including constructive dismissal, breach of contract, age discrimination and sex discrimination and seeking compensation and arrears of sick pay, as well as notice pay, holiday pay and other payments (not particularised) plus "*a good reference*".
3. The Respondent filed a Response Form with Particulars of Response on 5 August 2022 denying all of the Claimant's Claims.
4. A Case Management Preliminary Hearing took place on 4 October 2023 and a Case Management Order was made, including that the Claimant provide Further and Better Particulars of parts of her Claim, which she did on 23 October 2023.
5. On 15 November 2023, the Claimant filed an Application to amend her Claim Form to add claims for bullying, harassment and disability (menopause) discrimination. The Respondent filed its Responses on 19 December 2023.
6. On 23 November 2023, the Respondent filed an Application under Rule 36(1)(a) of the Employment Tribunal (Constitution and Procedure) Rules 2016 (**the Tribunal Rules**) for strike out of the Claimant's claims for age discrimination and sex discrimination on the grounds that they had no reasonable prospect of success because they were time-barred

under the Equal Opportunities Act 2006 (**the EO Act**). The Claimant filed her Responses on 21 December 2023.

7. On 30 November 2023, the Respondent also filed an Application under Rule 36(1)(a) of the Tribunal Rules for strike out of the Claimant's breach of contract claims on the ground that the Tribunal did not have jurisdiction to hear the claims under Section 6 of the Employment Tribunal (Extension of Jurisdiction) Order 2016. The Claimant filed her Responses on 21 December 2023.
8. On 2 February 2024, the Claimant filed an Application for specific disclosure by the Respondent of information in relation to the termination of employment of 2 of the Respondent's ex-employees.
9. A Preliminary Hearing to consider both parties' Applications took place on 13 February 2024 (**the Preliminary Hearing**).
10. I handed down a reasoned Decision dated 9 May 2024, dismissing the Claimant's Application to amend the Claim to add claims for bullying, harassment and disability discrimination, dismissing the Respondent's Application for strike out of the Claimant's claims for age discrimination and sex discrimination, striking out the Claimant's breach of contract claims and dismissing the Claimant's Application for specific disclosure.
11. A Case Management Order was issued on 14 May 2024.
12. The Claimant filed a Witness Statement made by herself. The Respondent filed Witness Statements made by: Mr Michael Nicholls, founding Director; Mr Paul Duck, Managing Director; Ms Lisa Kilkenny, Operations Director; Ms Nicola Cox, Accounts Manager; Ms Donna Evans, Property Manager; and Mr David Oxley, HR Consultant.
13. The Main Hearing of the Claimant's claims of constructive unfair dismissal and age discrimination and sex discrimination was held on 25-28 November 2024. Only Mr Nicholls, Mr Duck, Ms Kilkenny and Mr Oxley for the Respondent gave oral evidence at the Main Hearing, as well as the Claimant. Mr Nicholls informed me at the Main Hearing that Ms Cox and Ms Evans would not be giving oral evidence because they were "*stressed*"; so they were not available for cross-examination by the Claimant. I advised the Respondent that I would be taking this into account when weighing up the written evidence of Ms Cox and Ms Evans.
14. Following the Main Hearing, the Respondent sent an email to the Tribunal requesting that references to the job title of "lettings coordinator" in the 9 May 2024 Decision and also in this Judgment be amended to "lettings negotiator" as being the correct title for the job vacancy on which many of the Claimant's claims are based, which distinction the Respondent submitted was material to the case. The Claimant objected to this, on the grounds that it was too late. As will be seen from my Judgment below, the job title is not pertinent to any of my findings and I have therefore decided to use the "lettings negotiator" title herein, as apparently the correct term.

The facts

1. In the Claimant's timeline attached to the Claim Form and her Witness Statement, the Claimant covers a large number of alleged facts and incidents going back to the commencement of her employment in 2017. I set out in this section of my Judgment only those I assess as relevant to the claims of constructive dismissal, age discrimination and sex discrimination. For the avoidance of doubt, I have considered all of the allegations made by the Claimant, both in writing and orally, and the fact that I may not refer to a specific alleged fact or incident in his Judgment should not be interpreted as an omission to do so.
2. The Claimant's Witness Statement emphasises that from the beginning of 2019, soon after she took up the role as Property Manager in October 2018, she felt overworked and unsupported. After the departure of a colleague, she alleged that the Respondent did not hire a replacement, despite her requests, and she "*shouldered the burden and began to stay late and not go on lunch breaks, but it all became too much*". Ms Kilkenny explained in her oral evidence that the Respondent had at the time reviewed resources and its business and decided to appoint a new employee in a dual role. The Claimant maintained that this had made no difference. The Respondent was a "*man down*" and it "*was all on*" her. The Claimant also alleged that she reported to Ms Kilkenny and Mr Duck that she felt that it was unfair that one of her colleagues was on the same salary as she was when she "*did 3-4 times the work and carried all the responsibility of a very demanding job*". The Claimant's Witness Statement also describes her negative feelings towards Mr Duck, whom she describes as being "*seen as unprofessional and incompetent*" by the Respondent's employees.
3. The Claimant alleges that in July 2019, Mr Duck stated at a staff meeting that the Respondent would be recruiting an additional lettings negotiator and that the Respondent was looking for "*a young man*" for the role. This was denied by the Respondent. In her Witness Statement, the Claimant adds to this allegation that Mr Duck said they were looking for "*a young man*" for the new role because Mr Nicholls' son, who had been working the role as a university summer holiday job, "*was so good*". Mr Duck agreed in his oral evidence that he could have said at the time that the Respondent was looking for a "*young Harry Nicholls*" (Mr Nicholls' son), but that this referred to the fact that Harry Nicholls had done the job so well, not the fact that he was young and male.
4. The Claimant submitted at the Main Hearing that she had trained Harry Nicholls (which was denied by Mr Nicholls in his oral evidence) and also that previously she had regularly stood in for the Head of Lettings when she was on leave, which was neither denied nor admitted by the Respondent's witnesses.
5. The Claimant did not apply for the job as lettings negotiator in 2019. In September 2019, the Respondent hired FB, who is a young man, for the role.
6. In her Witness Statement, the Claimant stated that in her review meeting in 2019, the Claimant told Mr Duck that she "*was very stressed and not paid well enough for the workload*". This was denied by the Respondent and is not reflected by an email from Mr Duck to the Claimant dated 15 October 2019 following up on the review meeting.
7. The Respondent's Staff Handbook Sickness Absence Policy, an updated version of which the Claimant had confirmed receipt on 5 June 2020, provides for the statutory sick pay

entitlement under the Employment (Sick Pay) Order: within any period of 12 months, 2 weeks' full pay and 4 weeks' half pay.

8. In her Witness Statement, the Claimant complained about not being given an office manager role, which had been given to a younger woman in July 2020. The Claimant had not applied for the role and she stated that the role had been unannounced and unadvertised. She went on to state that she completed a management course at the University in May 2021 (which the Respondent pointed up it paid for and gave her the time off to attend), and alleged "*but it was too late for the office manager role which seemed to have been created specifically for*" the aforesaid younger woman.

9. In her Witness Statement, the Claimant alleged in respect of her review meeting in November 2020:

"I raised my concerns about stress levels in my role and how I would like to move to a different department if it were ever possible. I had been raising the same concerns about workloads and stress ever since ... April 2019, also on account of stress due to the nature of the property management role. Paul Duck told me that the company had to be frugal and careful because of the pandemic and Brexit." This was denied by the Respondent and is not reflected by Mr Duck's email following up on the review meeting dated 20 November 2020.

10. In April 2021, the Claimant commented in an email to Ms Kilkenny: "*I have a heavy workload which I enjoy and can handle ...*".

11. In the Summer of 2021, the Claimant underwent a distressing hospital procedure. She was absent for sickness from 3 August 2021 until 20 September 2021 and did not receive full pay for the whole of this period of sickness absence. The Claimant was very upset by this and stated in her Witness Statement that she would have expected Ms Kilkenny or Mr Duck to have approached her: "*and provided some advice and guidance which in most companies is provided by a HR staff member. Unfortunately, Chestertons did not have any HR representative on the ground to help staff, particularly in situations such as this one when an individual is in a precarious situation.*" She went on to state that at her return to work meeting with Mr Duck, she raised the issue and that:

" ...I was very disappointed with the company's lack of empathy and support following my illness and major operation. I told Paul Duck that I should have been informed about the sick pay rules beforehand so I could have worked from home in the latter stages of my recovery if I chose to. The company was fully set up for staff working from home and I had worked from home previously during Covid and for some time afterwards.

41. I insisted to Paul Duck that I was not happy given the company had gone to great lengths before my operation to ensure I trained staff, had meetings, and prepared a lengthy handover document, yet the company did not inform me of my sick pay entitlements and the company rules. This had been an emergency situation with regards to my health and my employer should have ensured that I knew what my rights were. Since working for Chestertons I had taken hardly any sick leave and had not contracted Covid either. I was not experienced in the practices concerned around long absences due to sickness.

42. *Despite me clearly being in distress, Paul Duck said nothing could be done about the sick pay. It was in the staff handbook which I should have read and that he would entertain the matter no longer, it was closed ... I would not be entitled to any paid sick leave until the 1st January 2022 when the new calendar for leave and sick leave began again for another year. This at the time when the Covid pandemic was at its peak. I had to make doubly sure I did not get sick for the remainder of 2021 as I could not afford to lose any more income.*

12. The Respondent put into evidence a WhatsApp exchange between the Claimant and Ms Kilkenny on 31 August 2021 in which the Claimant complained about being paid *"the minimum"* sick pay. Ms Kilkenny stated that the sick pay paid by the Respondent was *"in accordance with the law and is exactly the same for everyone ... who has taken more than 10 days sick leave"*.
13. In the course of her oral evidence, I asked the Claimant whether she expected to be paid ad infinitum for sickness absence and the Claimant responded that she just expected that her sick pay entitlement would renew on 1 January every year, as Mr Duck had told her, and also that she believed that statutory sick pay was only a minimum for employers who she believed would generally increase it.
14. In September 2021, a new employee was hired, who staff were told would be *"running HR"*. The Claimant alleged in her Witness Statement that the new employee: *"had no experience nor was he qualified in HR. ... My employers knew that I was seeking a new role within the company and had completed courses and training in order to 'impress' them and yet two new roles/vacancies had arisen, well within my capabilities, but I had not been considered for either. I had just returned to work after major surgery so was reluctant to make complaints as I was only concerned with my health. It was clear that I was being discriminated against, but I had no recourse for safe complaints, and I feared that speaking out would jeopardise my job"*. The Claimant did not apply for this role and she stated in her Witness Statement that the vacancy had not been advertised or circulated internally. The Claimant did not submit any evidence that she had any HR experience or qualifications.
15. At a review meeting in December 2021, as per an email from Mr Duck dated 15 December 2021 and responded to by the Claimant without comment on its content, it was recorded: *"What is fascinating is that we have already added over 100 properties yet you say [you] feel less stressed, more in control and enjoy it more"*. This is in direct contradiction to the Claimant's statement in her Witness Statement that at the review meeting *"she again raised the issues of stress and pay"*. In his Witness Statement, Mr Nicholls stated: *"The company undertook its review process on all staff in November and December 2021. I read them all. There was nothing to suggest that the Claimant was unhappy."*
16. The Claimant's Witness Statement includes the following:-

"53. In December 2021 [FB], the lettings negotiator, told our team that he was travelling at the end of March and would be leaving the company. ...

54. I had a private conversation later with [the] head of lettings, to ask what she would think of me applying for the vacancy. She was delighted and very keen to have me as her assistant. She knew how unhappy I was in property management, and she also knew that I was familiar with the lettings role and could start immediately without training. I was already carrying out tasks that [FB] ... was employed to do. All-round it would be a very sensible move for me, for our department and for the company.

55. ... [The head of lettings] told me to wait until FB had officially handed in his notice and then ask for a meeting with Paul Duck as soon as possible. The whole team was very excited and thought it would bring positive change for all of us and for the company as there would be no need to recruit a new lettings negotiator and train them from scratch.

56. In January 2022 FB handed in his notice and his leaving date was end of March 2022. I requested a private meeting with Paul Duck. The meeting took place ... I explained to Paul Duck that I wished to apply for the vacancy of lettings negotiator and reminded him about my long-standing desire to move away from property management. I told him that I wanted to stay with Chestertons as I knew the business well, had been working for them for over 4 years and that at my age did not want to start out fresh with a new position elsewhere.

57. ... I explained how I had already discussed this with [the head of lettings] and the team, and they were happy about it and DE would be seeking to take over from me as property manager. This would mean that the company would not need to employ a new member of staff at all, just re-align existing experienced staff.

58. Paul Duck told me that if I was to move into that position I would be on a lower salary. I made it abundantly clear that I was happy to take a pay cut as I was so miserable in my current role and my mental health was suffering. ... for me it was not about money, it was about my quality of life and mental health in the workplace. I reminded him that I had been raising the same issue at recent appraisals but never pushed things as there was never a vacancy. Now that a vacancy had arisen it was my chance to change roles within the company. Paul Duck seemed receptive and positive and told me he would speak to the other Directors: Mike Nicholls, Lisa Kilkenny, and Paul Cox, and get back to me in due course."

17. The Claimant said in her oral evidence that in the meeting with Mr Duck, which took place on 19 January 2022, they had a long conversation and that she "applied for the job there and then".
18. The Respondent denies that the Claimant told Mr Duck at their meeting on 19 January 2022 that she was happy to accept the pay cut and more junior status of the lettings negotiator role because her current role was causing her significant stress and her mental health was suffering. In his grievance interview by Mr Nicholls on 13 May 2022 however, Mr Duck stated that the Claimant had told him at the meeting on 19 January 2022 that her role "was wearing her down and she wanted a fresh challenge" and, further, the Claimant "wanted to remove some/all aspects of the property manager role from her job spec". Mr Duck confirmed in his oral evidence that the Claimant and he had had a sensible discussion, that he had listened to her points and that he promised to keep her updated. He also confirmed that he was aware that the role was wearing the Claimant down, and that he was fully aware that she was unhappy in her role and wanted a change.
19. In the grievance interview of Ms Kilkenny by Mr Nicholls on 13 May 2022, Ms Kilkenny said that in February 2022, she had not been aware of the Claimant's desire to vary her role and she had made no mention of concerns with her existing role in the weekly team meetings in the previous months, or ever asked for a one-to-one meeting to discuss this. In her oral evidence, Ms Kilkenny pointed up that in her view the Claimant had not been performing her role on her own without support and that steps such as the introduction of new software and the putting into place of new systems in 2020 had changed "everything". In addition, the weekly team meetings provided a shared knowledge base for team members.
20. Mr Nicholls said in his oral evidence that Mr Duck would probably have shared with him in January 2022 the fact that the Claimant wanted the lettings negotiator role, but he was not

very sure. He also said that he wished the Claimant had spoken to him about how she was feeling at the time – she could have turned to him as they were friends; but he had had no idea.

21. In his Witness Statement, Mr Nicholls, who in oral evidence was a consistently credible and genuine witness, also made some observations about the lack of gender and age bias within the Respondent's workforce, and that recruitment is undertaken on a merits basis, as did Ms Kilkenny in her Witness Statement.
22. On 11 February 2022, Mr Paul Cox (Finance Director), Mr Duck and Ms Kilkenny had their usual weekly management meeting. The Respondent's submission in its Response Form is that Mr Duck, Ms Kilkenny and Mr Cox considered the Claimant's request to apply for the lettings negotiator role and unanimously determined that the Claimant was unsuitable for the role as it was too junior and too subservient a role for her. Mr Cox did not give evidence and no minutes of the management meeting were put into evidence.
23. Mr Duck stated in his Witness Statement: *"I stated that the Claimant had expressed an interest in the lettings negotiator job role. I shared some comments with my fellow directors at that meeting:*
 - 3.5.1 *... our preference was for a Trainee Lettings Negotiator ... to replace the same career path as the exiting [FB].*
 - 3.5.2 *The Claimant's interest to switch role, competency level, pay grade and career path were all out of synch with the conversation I had held with the Claimant at her annual review just 7 weeks before, on 21st December 2021.*
 - 3.5.3 *The Claimant had often expressed her desire for less, not more, direct customer interaction and had never expressed a desire to pursue sales negotiations".*
 - 3.5.4 *The Claimant had attended a management course in May 2021. "It surprised me that she may now want to make a complete "U-turn.""*
24. In his oral evidence, Mr Duck clearly wanted to put on the record that in the Respondent's industry, there are two different types of employee profiles: a lists, processes, administrative personality and a more creative, *"people"*, deal-maker personality who is *"excited to make thing happen"*. The lettings negotiator role was for the latter personality type and, Mr Duck said, when the Respondent looked at the Claimant's profile, they decided that the Claimant was the former personality type. When the Claimant put to Mr Duck in cross-examination that she already dealt with clients more than anyone else, Mr Duck responded that she was not involved on the other side of business deals where the lettings negotiator role involved a lot more clients than she normally dealt with.
25. Mr Duck also later stated in his oral evidence, following his Witness Statement, that the Claimant was unsuitable for the lettings negotiator role, that the role would be a demotion in terms of status and earnings and would entail her being a junior to her colleagues, and the Claimant had previously indicated that she had an ethical issue with demanding high rents, a requirement of the role as the Respondent is engaged by landlords, not tenants. He also said that the Respondent wanted to use the Claimant's skills to enhance her career.
26. Ms Kilkenny stated in her Witness Statement that the Claimant's interest in the lettings negotiator role was a surprise to her because, inter alia:

“3.2.1” the Claimant had never raised any issues to her about her existing role or a desire to “trim or reduce” it;

“3.2.4” she “was aware of the Claimant’s interest in progressing her management career professionally” and the Respondent had paid for her to attend a University of Gibraltar management course;

“3.2.5 I was of the belief that the Claimant preferred office bound duties than out of office appointments which a lettings negotiator role encompasses”;

“3.2.6 ... I believe the Claimant struggled to remain impartial and faced moral difficulty with the continual rent increases. The Claimant often sympathised with the tenants and sided with them. This position is confirmed in the Occupational Health Report of May 2022”;

“3.2.7 ... I was surprised that the Claimant wanted a role with greater interaction with people to the one that she was in at the time.

3.3 A letting negotiator role requires someone who enjoys interacting with people, being out and about most of the day on viewings and negotiating tenancy terms. The Claimant had always expressed a preference for email correspondence over in-meetings, displayed impatience on several occasions when dealing with landlords and tenants, and expressed a desire to avoid meet and greets ..., preferring to stay in the office. In my opinion, her skill set and attitude did not align with the requirements of a lettings negotiator role. This was discussed at the 11th February 2022 management meeting and it was agreed unanimously with Paul Duck and Paul Cox ... that the Claimant wouldn’t be suitable for a lettings negotiator role. ... if she chose to apply. ... I agreed with Paul Duck that we should monitor the situation and address any concerns the Claimant had with her current role should she apply.”

27. I asked Ms Kilkenny at the Main Hearing whether all of these issues had been discussed at the 11 February 2022 management meeting, which she confirmed. In her oral evidence, Ms Kilkenny also said that she valued the Claimant as a structured, organised team member, but that she did struggle with impartiality vis-à-vis tenants.
28. On 15 February 2022, Mr Duck sent the Claimant an email stating that he had: *“made the management team aware of our conversation in which you expressed interest in [FB’s] position. As you know, he is not leaving for a few months so we are taking a little time to plan his replacement and structure but will keep you informed when we have more details on our plan.”*
29. Neither Mr Duck, nor Ms Kilkenny nor Mr Cox advised the Claimant of their decision following their 11 February 2022 meeting, nor indeed until Mr Duck told her the role had been filled, on 21 or 22 March 2022. In his oral evidence, Mr Duck admitted that *“very possibly, we should have”* told the Claimant on 11 February 2022 that it had been decided she would not be suitable for the role. When I raised this with Ms Kilkenny at the Main Hearing, she said that she thought Mr Duck would have told her.
30. On 22 and 23 February 2022, the advertisement for a lettings negotiator was published on social media and the notification of vacancy filed with the ETB. No update communication was made to the Claimant by Mr Duck. However, Mr Duck stated in his Witness Statement that after the adverts were published, 16 applications were received, but the Claimant *“did not submit her cv nor covering letter”*. First interviews were arranged by Mr Duck with 3 potentials by emails dated 10 March 2022. No update communication was made to the Claimant by Mr Duck. Mr Duck stated in his Witness Statement and repeated in his oral evidence that the Claimant did not submit her CV or cover letter and also that she did not

apply for the role (Ms Kilkenny reiterated this in her oral evidence), implying that this was why he did not interview her. But when I asked him at the Main Hearing why the Claimant was not included in the interview process, he said *“we thought we knew enough”*, implying that the Claimant was in fact being considered, but he did not feel there was any need to interview her.

31. The minutes of a staff meeting on 11 March 2022 record: *“[FB’s] replacement. Interviewing for this role.”* The Claimant alleged that at the meeting, Mr Duck was asked by Mr Nicholls if he had found a replacement for the lettings negotiator role, to which Mr Duck answered *“no”*. In the timeline attached to the Claimant’s Claim Form, the Claimant stated that she *“feels extremely embarrassed and hurt that she has been overlooked for the role without explanation”*.
32. On 21 March 2022, Mr Duck sent an email to Mr Nicholls and Ms Kilkenny in which he stated: *“I had a positive second interview with [NO] & would appreciate your thoughts on the below job offer ...I have also left a message for Rebecca to call me as I want to be the one to speak to her first out of courtesy before we tell the rest of the team.”* The Respondent put into evidence a copy of a WhatsApp message to the Claimant from Mr Duck dated 21 March 2022 asking her to give him a ring.
33. In his Witness Statement, Mr Duck alleged that on 21 March 2022, he spoke with the Claimant by telephone from his home, as he was COVID self-isolating. *“I informed the Claimant in the telephone call that the matter had been discussed at the Management Meeting and these were our collective thoughts on her expression of interest in the role, although I noted she had not applied. In any event, I informed her verbally that:*
 - 3.13.1 *It was a junior role and she was in management. The Claimant was clearly an intelligent individual, articulate, an author, and we had supported her management trajectory...*
 - 3.13.2 *The Trainee Lettings Negotiator role involved a lot of running around ... which could be perceived as a menial type function. Previously the Claimant had said quite vocally that she did not like leaving the office and indeed had issues with even going to properties ..., which had been removed previously from her job role.*
 - 3.13.3 *The role focused on calling and chasing people.... The Claimant had said that she didn’t particularly “like people” which is why she enjoys remaining in the office...”*.
34. A WhatsApp message dated 21 March 2022 from Mr Duck to, inter alia, Mr Nicholls and Ms Kilkenny was put into evidence which stated: *“Spoke to Rebecca just to say she wasn’t deemed suitable for a trainee role at less money which she understood. I have lettings meeting 9.15 a.m. tomorrow morning so would like to confirm that we job offered [NO].”* In the grievance interview of Mr Duck by Mr Nicholls on 13 May 2022, Mr Duck expanded on this and said that he had told the Claimant that the Respondent: *“did not consider her suitable for the role of lettings negotiator for a number of reasons, being: it would involve a significant pay cut, plus a structural challenge for everyone ...as the new role would involve many menial tasks which the company expected RC would not want to undertake and that other staff would be reluctant and uncomfortable treating RC (an ex senior colleague) as a new junior colleague. PD took on board that RC no longer enjoyed her role ...”*. Ms Kilkenny confirmed in her Witness Statement that she received a telephone call from Mr Duck on 21 March 2022 stating that he had spoken with the Claimant and had discussed with her why

she had not been considered suitable, and that he had told the Claimant that Ms Kilkenny would meet with her to discuss any scope for adjustments to her current role.

35. This telephone call was denied by the Claimant, which in her Witness Statement she calls "*fabricated*". She alleged in her oral evidence that when she spoke to Mr Duck following his WhatsApp message dated 21 March 2022 asking her to give him a ring they did not speak about the lettings negotiator role vacancy and the call was about something else. She also said that she would never have said that she understood that "*she wasn't deemed suitable for a trainee role at less money*". When Mr Oxley put to her that she meant that "*Paul Duck is lying*", the Claimant said "*yes*".
36. The Claimant alleged that on 22 March 2022, Mr Duck approached her in the office in front of her colleagues and told her that the Respondent's directors had spoken about the Claimant's request for the role and had decided that she was not suitable for the role as (according to the timeline attached to the Claim Form), "*We're looking for a young lad*". In the timeline, the Claimant stated that she was: "*taken aback by the abrupt and public statement in front of her colleagues and ... very upset that she has been completely overlooked*". In her Witness Statement, the Claimant expanded on this stating: "*Paul Duck then walked off without giving me any chance of reply or discussion. I was taken aback by the abrupt and public statement and immediately turned to my colleagues nearby to discuss what had just occurred and the words Paul Duck had just used. I was very upset. No interview, no discussion, and no explanation, instead I was subjected to an embarrassing put-down in an open office. Paul Duck should have been professional and arranged to speak to me in his office with the door closed and given me the right of reply.*"
37. This incident was denied by the Respondent, including that Mr Duck approached the Claimant in the office at all on 22 March 2022, because he was COVID isolating.
38. In cross-examination (with me assisting the Claimant with some of her questioning), Mr Duck appeared genuine on this issue, and denied several times that he made this comment to the Claimant, although there were areas of his evidence which were not entirely consistent: he explained that at that time he was particularly careful about isolating as his wife was clinically vulnerable; however, as highlighted by the Claimant in her cross-examination, Mr Duck's wife was not in Gibraltar at the relevant time. Further, COVID contact and self-isolation text messages dated 15 and 24 March 2022 which Mr Duck had received from the GHA were put to him in cross-examination. The 15 March 2022 contact warning stated that Mr Duck was in fact not required to isolate but was required to wear a mask and reduce social contacts until 22 March 2022, which is the day the Claimant alleged Mr Duck went to the office and spoke to her. In addition, Mr Duck stated in his own timeline that the 15 March 2022 contact warning stated that he was required to isolate, which on the face of the warning is not true (as described above). A second WhatsApp message from Mr Duck dated 21 March 2022 was also put into evidence in which he referred to having a lettings meeting the following day i.e. 22 March 2022. Mr Duck stated in his oral evidence that this meeting was held remotely. In addition, there was also put into evidence by the Respondent a signed record of a grievance appeal interview by Mr Oxley with one of the Respondent's employees (RR) dated 19 July 2022:
"Did you hear Paul Duck say to [the Claimant] in the open plan office that she was "not suitable for the role" and that "a young lad" was required? RR response "I think I recall PD standing inside the office front door and saying "we need an enthusiastic young person", but was said in an open conversation and not directed at anyone."

39. On the other hand, Mr Duck's evidence that he did not go to the office on 22 March 2022 because he was waiting to have a COVID test on 23 March 2022 is supported by a WhatsApp message from Mr Duck dated 22 March 2022 (a Tuesday) in which he stated, *"I am really hoping to come back by Thursday"*, and an email dated 24 March 2022 from Mr Duck to a client in which he stated: *"I have been off with Covid for 10 days ..."*. The records of Mr Oxley's grievance appeal interviews with Ms Cox and Ms Evans evidence that they both said that they did not hear Mr Duck saying that the Claimant was *"not suitable for the role"* and that *"a young lad"* was required. However, I do not give much weight to this evidence as these Respondent employees did not give oral evidence at the Main Hearing despite having submitted Witness Statements and were not available for cross-examination by the Claimant. Further, Mr Oxley was unconvincing when cross-examined by the Claimant on the 3 employee grievance appeal interviews (with RR, Ms Cox and Ms Evans) and unsuccessfully tried to argue that RR was referring to the *"young man"* statement allegedly made by Mr Duck in July 2019. The Claimant pointed out to him that RR was not even working for the Respondent in July 2019.
40. The Claimant stated that it was never explained to her why she was unsuitable for the lettings negotiator role in March 2022. She alleged that *"the only explanation was Paul Duck telling her that the Company was looking for a "young lad"."*
41. It is not disputed that in the conversation on 21 or 22 March 2022 (however this took place), Mr Duck advised the Claimant that it might be possible to make some changes to her current role and said that she should speak to Ms Kilkenny about this.
42. A fairly positive meeting between the Claimant and Ms Kilkenny took place on 23 March 2022, in which the Claimant alleged that she: *"told Lisa Kilkenny what Paul Duck had said about wanting a "young lad" and Lisa Kilkenny shrugged her shoulders and said, "that's them for you, you know what they're like, it was nothing to do with me, it is their decision"."* This allegation was not referred to at all in Ms Kilkenny's Witness Statement, even to deny it. When asked directly by the Claimant in cross-examination to confirm that this exchange took place, after I highlighted that if Ms Kilkenny were to deny it, either she or the Claimant must be lying, Ms Kilkenny said only that she could not *"recall that"*. This rendered her evidence on this question less credible than the rest of her evidence which for the main part I found to be credible and honest.
43. Mr Nicholls stated in his Witness Statement that he happened to pass the café where the Claimant was waiting for Ms Kilkenny on 23 March 2022 and *"wandered over for a chat which was, as it always had been, very friendly. The Claimant told me she was waiting to speak with Lisa Kilkenny. There was no hint to me of any issues."*
44. The Claimant also told Ms Kilkenny, and this is not disputed, about the great stress she was suffering which was affecting her health and her family life. In her Witness Statement, the Claimant stated: *"Everyone at Chestertons knew that I was really struggling with my role, and it was often discussed openly. ... I had more interaction with the sales department, and was told they were desperate for a new administration person as business was booming. I mentioned this to Lisa and said that would be a role I was willing to do. I said I could do accounts or even swap roles with DE and do the AML administration. I said I would take a pay cut and failing all of that could I at least work part-time or do a 4-day week. I made it very clear that I could no longer handle fault reporting and landlord tenant disputes from*

9am-6pm, five days a week. I explained how I was 'brow beaten' and full of angst and was not always able to switch off. It was affecting my health and family life, and I desperately needed a change. I told Lisa that I had already explained all this to Paul Duck in January" 2022 and at two previous appraisals.

45. Ms Kilkenny stated in her Witness Statement that the Claimant had never previously expressed to her *"any stress issues"* at the Respondent's weekly property management meetings, nor requested any time with Ms Kilkenny to discuss any difficulties, or expressed to her a desire to make changes to her role. Ms Kilkenny also stated that she explained to the Claimant that a dual role was not possible, as both the Claimant's own role and the lettings negotiator role were full time positions. Surprisingly, she did not tell the Claimant that a candidate for the lettings negotiator role had already been selected. Ms Kilkenny stated that when she suggested the possibility of splitting the Claimant's Property Manager role, the Claimant rejected the idea, *"saying it was all or nothing"*. Ms Kilkenny also said in her oral evidence that she could not recall that the Claimant told her at their 23 March 2022 meeting that the Claimant wanted a *"quiet admin role"* even if it meant a pay cut.
46. Ms Kilkenny said that she would put forward and discuss with the management team at their next meeting the Claimant's request for a 4-day week or removing fault management from her role. She stated in her Witness Statement that she did indeed speak to the management team, on 1 April 2022, *"and we all agreed that neither suggestion was in the best interest of the business"*.
47. Ms Kilkenny sent the Claimant an email dated 5 April 2022 stating that: *"... the management team have considered and discussed your feelings about your current role and your desire to move away from fault management or have a reduced working week. ... Whilst we are happy to review the property manager job role as our property portfolio increases, removing fault management from this role is not possible and not in the best interests of the business. ... Reducing your working week would not be possible as the property manager is a vital role in our business and as you are aware, faults can occur on any given day/time. We are therefore unable to adopt the changes you are requesting at this time."* She went on to add: *"However, we do understand your situation and can appreciate that after 4 years in the role you are ready for new challenges. Unfortunately, there are currently no vacancies or potential vacancies within Chestertons. Should any arise in the future we would certainly give you consideration. In the wider scope of our business contacts if you would want us to liaise with you on anything that may be of interest, please let us know what your ideal job would be and we would do our best to assist you. As a valued member of the team, we have no desire to lose you. However, your happiness and job satisfaction are important to us and we will do our best to assist you in any way we can."*
48. The Claimant was deeply upset by this email. She stated in her Witness Statement: *"The state of my mental health and my reports of stress were completely overlooked and ignored. ... My cries for help were ignored and I was told that I had to stay in my role exactly as it was with no modifications or leave if I did not like it."* In her oral evidence, the Claimant emphasised her feelings of distress caused by Ms Kilkenny's email. She said: *"How do you think it made me feel, being told to go to work 9 to 6 every day, 5 days a week?"; and "All I wanted was to not work one day a week and that had been ignored"*. She stated in her

cross-examination of Ms Kilkenny that the offer to assist her to find an “ideal job” was the reason she had a breakdown. Ms Kilkenny replied that the Respondent had just wanted to help the Claimant, however it could, but the Claimant did not accept this and responded that the Respondent’s responsibility was to help her to find a job within the company.

49. In Mr Nicholls’ Witness Statement, he stated that on 5 April 2022, he was aware that Ms Kilkenny was writing to the Claimant to state that the Respondent: *“could not accommodate that any property manager could undertake a 4 day week or working from home, as the role was not suitable for those adjustments. I knew the Claimant as a friend as much as I knew her as an employee, if not more so. ... I was also aware that she had stated she was going home angry. I didn’t want my friend to suffer. So I suggested to [Ms Kilkenny] that if the Claimant had had enough, I would help her in my personal capacity, as a friend, as in my position I could possibly introduce her to other opportunities elsewhere. ... I think it is very sad that this offer of support has been misconstrued.”*
50. On 6 April 2022, the Claimant was reprimanded by Mr Duck openly in front of the team due to a complaint being received from one of the Respondent’s landlord clients that the Claimant was not acting in their best interests, but rather in the interests of a pregnant tenant. The Claimant stated in her Witness Statement: *“He was not interested in the facts and instead chose to scold me openly in front of the whole team. Paul Duck’s interference was ill-conceived, unreasonable, and rude. The proper place to discuss my working practices would have been in private. Another case of humiliation and put-down delivered to me by Paul Duck who would have been fully aware of the email I had received from Lisa Kilkenny the previous evening. I had to hold back the tears and was at breaking point. The attitude by my employer triggered a series of negative mental health events and I suffered an immediate breakdown. I made an appointment to see a doctor the next day on 7th April. I wrote a reply to the email sent by Lisa Kilkenny, then I tied up all loose ends and silently left the office.”*
51. In her email response to Ms Kilkenny dated 6 April 2022, the Claimant stated: *“I reported my issues and concerns to Paul Duck back in January 2022. I made it very clear back then that I was unhappy with some aspects of my job and my mental health was suffering. My role is very demanding and most emails are from angry people complaining. Not one aspect of my role is positive, and it was weighing down on me and causing me extreme distress. I waited for an opportunity to arrive whereby I could change roles and I offered solutions to Paul Duck back then. The solutions were all attainable but unfortunately, they have been ignored.
I have re-read your email this morning and the contents are very upsetting. Not one of my requests has been granted and I was not asking for much. I feel I have been totally let down and my welfare has been disregarded. I need time to get over the shock of all of this so am going to see a doctor for advice as I am extremely unhappy at the moment, It seems I am not valued whatsoever and I find that unacceptable.”*
52. In oral evidence, Mr Nicholls said the Claimant’s requests were not ignored, but were considered.
53. The Claimant submitted a sick note for stress at work covering the period 7-23 April 2022.
54. On 20 April 2022, Ms Kilkenny emailed the Claimant, inter alia, to advise her that the Respondent had contacted an Occupational Health (OH) specialist who could: *“assist us with stress levels at work. Keen to discuss with you what they suggest when you have a moment*

to call me. Think it should help". The Claimant stated in her Witness Statement that she was offended that the Respondent: *"wanted a second opinion as to my medical condition. It was clear that they did not trust me"*. In her oral evidence, she said that she thought the Respondent's proposal of an OH appointment meant that the Respondent *"had a lack of trust"* in her sick notes.

55. On 20 April 2022, the Claimant responded to Ms Kilkenny by email that she wished to make a formal complaint about, amongst other things, the fact that she had not been considered for the role of lettings negotiator against the background that she had explained clearly to Mr Duck that she: *"needed to be moved away from my current role due to extreme stress which was affecting my mental health and my life in general ... my situation was becoming unbearable."* In this email, the Claimant continued: *"There is a long history in which I have been overlooked despite my raising concerns each year at my appraisals. ... There have been a few incidents where issues concerning my employee welfare have not been handled correctly or professionally and all those have taken their toll on me over the years. I have been a hardworking and loyal employee ... who has greatly enjoyed being part of the Chestertons family Despite my unwavering commitment to this company my pleas for consideration for my well-being have been ignored. I feel utterly undervalued and there seems to be a culture in the company where people who are unhappy with their situation either have to put up with it or leave."*
56. In response to this email from the Claimant, Mr Nicholls initiated a grievance procedure by email to the Claimant dated 26 April 2022.
57. In her Further and Better Particulars, the Claimant alleged that after she was absent for sickness in April 2022, the Respondent created, and employed a young girl in, a new role of "administrative assistant", which the Claimant alleged was exactly the sort of role she had been asking for; and in addition the Respondent then employed a second Property Manager, *"something which had been promised to the Claimant since 2019"*.
58. In April 2022, the Claimant's pay decreased as a result of the operation of the statutory sick pay rules and as in the Summer of 2021, she was very upset when she began to be paid less. The Claimant alleged in her Witness Statement that she *"was never aware of this system in [her] entire working life"* and believed that she had been mis-informed by Mr Duck in the Summer of 2021 and by the Respondent's payroll manager (JC) in 2022 about the rolling nature of the entitlement. She went on to allege: *"It was clear to me that the company was refusing to pay me sick leave and each time I produced a valid medical certificate the dates of the leave period changed in order that they avoided paying the sick leave. This was putting stress upon the existing stress of an employee who had been signed off due to stress in the workplace and who had suffered a breakdown."* In an email from the Claimant to JC dated 28 April 2022, the Claimant complained: *"Just another example of how this company doesn't look after its staff. ... Everyone else I speak to says that in their places of work people are supported when they are unwell and those Gibraltar laws are just guidelines ..."*.
59. The Claimant asked Ms Kilkenny in cross-examination why she had not explained the Respondent's sick pay system to her in the Summer of 2021 when the Claimant was scheduled to be absent for 6 weeks, Ms Kilkenny said that this was because it was in the Staff Handbook and /or the Claimant could have contacted payroll. When I put it to the Claimant at the Main Hearing that the statutory sick pay regime is familiar to most Gibraltar

employees bearing in mind that she had been working in Gibraltar for many years, the Claimant denied that she was aware of the regime.

60. The Claimant had annual leave booked from 25 April 2022 to 3 May 2022. She submitted a second sick note for “stress at work” covering the period 3-31 May 2022.
61. In respect of the grievance procedure, Mr Nicholls sent a follow-up email to the Claimant dated 5 May 2022 and the Claimant sent her summary of complaints to Mr Nicholls by email on 6 May 2022. She opened her email by stating: *“I am still employed by Chestertons and under contract”*.
62. The Claimant’s grievance complaints focussed on what she saw as the Respondent ignoring her repeated requests to change the aspects of her role which were causing her issues and/or to change roles, despite, she said, the Respondent having been notified (for 3 years at her appraisals with Mr Duck) of her desire to do so because of the negative effects of her role on her mental health and wellbeing. She stated: *“As soon as a vacancy arose I applied. I was willing to take a pay cut ... just so I could be taken off the aspects of my job which were causing me so much distress, yet I have been completely ignored. I provided a whole range of solutions to my stress and mental health concerns but none were taken on board. Instead I was told that I had to do my usual role for the exact same hours or find another job elsewhere. This was absolutely shocking to me and was the ‘last straw’ in an extremely tense working environment.”* She went on: *“... no effort has been made to find a solution for me ... No effort has been made to accommodate me as a long-standing loyal staff member so I doubt that I would be able to return to work having the knowledge that I am not valued. The situation is untenable”*.
63. In her grievance complaints email (dated 6 May 2022), the Claimant also complained about the way the Respondent, through Mr Duck, had handled her application for the role of lettings negotiator. She stated: *“I applied for a job and he promised to keep me updated, which he did not. In fact I found out via social media ... and when he told me I was “unsuitable for the role” it was in a passing comment and in front of colleagues. I should have been formally interviewed for that job and then told why I was not suitable for it.”*
64. The Claimant additionally complained about not being paid sick pay to which she believed she was entitled and the fact that she considered that the Respondent should have had an employee trained in HR to whom she could turn for support, help and advice.
65. Whilst the Claimant was on sick leave, on 20 May 2022, the Respondent advertised a vacancy for a “Property Administrator”, on 23 May 2022 advertised a vacancy for an “Office Administrator” and on 14 June 2022 advertised a vacancy for an “Operations Administrator”. The Claimant felt that these were all roles which she would have liked instead of her role and for which she felt she was suitable. She was aggrieved that she had not been contacted by the Respondent in this regard. In oral examination, Mr Duck said that he thought that at that time the Claimant was in conversations with Mr Nicholls and Ms Kilkeny about exiting the business. Ms Kilkeny said that at that time, the Claimant had been signed off for sickness and in any event she was not involved in the advertising for the vacancies.

66. The Claimant attended the OH appointment arranged for her by the Respondent on 24 May 2022. She said in her oral evidence that by that stage she had had time to think about it and wanted to go *“to try to resolve something”*.
67. The OH doctor’s Case Report dated 25 May 2022 (**the OH Report**) included an opinion that the Claimant was fit to work and made *“recommendations on adjustments”* (with the caveat that *“it is for the employer to decide on those which may reasonably practicably be achieved”*):
- *“Reduction in exposure to stress-inducing activities.*
 - *Enhanced support and mentoring.*
 - *Consideration of homeworking.*
 - *Discussion with Line Management/Directors about the ‘rent raising issue’.*“
68. The OH Report also recorded that the Claimant had stated to the OH doctor: *“that she is ‘tired’ and ‘burnt out’ from the conflict resolution and mediation aspect of her role. Unfortunately, she feels that she has not been listened to when she has aired these concerns”* and she is *“tired of the aspects of her job that require ‘making endless apologies’ and finds it increasingly difficult to put herself in the position to engage in confrontation. ... she reports a period recently when ...she was obliged, against her judgment, to suggest and enforce rental price increases which she felt were not necessarily wanted or needed ... she felt herself party to inflicting great distress on tenants.*
Ms Calderon feels ... that she is supported by peers and immediate line management. She feels that there have been occasions where she has not been given the support that she deserves from the directors.
Recent email exchanges and a refusal, or inability to adjust her working routines have left Ms Calderon feeling under-appreciated and ‘let down’. Additionally, Ms Calderon reports being left humiliated after she was informed in front of a full office that she had failed in her application for a new internal job application. She also feels that she was discriminated against ... as she was later told that Chestertons was ‘after a young lad’ for the role.”
69. In respect of the Claimant’s “Functional Capacity”, the OH Report stated: *“Whilst Ms Calderon remains capable of doing the role she is employed to do, it appears that it is at increasing risk to her mental health. If it is not possible to reduce or eliminate the exposure to the harmful aspects of her role (e.g. by limiting hours dealing with clients or reassignments) then it is likely that ill-health will persist. In this instance I have discussed the potential for a change in career direction with Ms Calderon”*. The OH Report recommended a reduction in the Claimant’s client-facing hours and a change of assignment as being likely to have a positive impact on the Claimant’s health, but also noted that these adjustments had already been discussed between the Claimant and the Respondent and had not been possible.
70. The Respondent had asked in its referral to the OH doctor: *“She wanted to apply for the lettings negotiator role some weeks back – a more junior role and with very different skillsets – a sign she doesn’t want her existing job any more. We are not a big enough employer to just create a role ... – is the stress symptomatic of her desire to leave?”* The doctor’s response was: *“...the work she is engaged in is now damaging her health. If Chestertons is unable to make adjustments to reduce the damage she is sustaining then I have advised her to consider changing employment.”*

71. The Claimant's grievance was rejected by letter from Mr Nicholls dated 27 May 2022 as follows:

"1. Allegation that Chestertons did not deal with your request to amend your existing role to move away from fault management: not upheld. An assessment did take place to review your role and remove fault management and reduce your working week from 5 days to 4 days. This was carefully considered by the management team but it was found that the Property Management role requires a full time position. This allows for the service levels offered ... to clients ...

2. Allegation that Chestertons did not consider you for the lettings negotiator role: not upheld. An assessment did take place and a call was held between yourself and Paul Duck where Paul explained the reasons for not supporting an application. This role was more junior than the role currently matching your skillset.

3. Allegation that pay has not increased since October 2018: not upheld...

As a result of these findings, I do not uphold your complaint and I propose to take the following actions in order to resolve this complaint ...:

- 1. ... There are adjustments outlined in the [OH Report] which will now be discussed ... to align on how we move forward. The report confirms that you are fit for work and so we will work with you to support you in transitioning back into work ...*
 - 2. Due process to discuss the role – since raising issues, you have since been off sick or on holiday since 7 April 2022 – we have, therefore, not had a chance to address your concerns other than advising that a 4 day week does not work for the business and that removing fault management from your role does not work for the business. A "Return to Work" meeting is to be scheduled to understand how we move forward giving [sic] the concerning comments that you feel the relationship is 'untenable'."*
72. In her oral evidence, the Claimant said that she did not like the grievance outcome decision, and that she did not think this was what a friend or a CEO would decide. The same day, 27 May 2022, the Claimant sent a lengthy response by email setting out her reasons for not agreeing with the grievance decision, including in respect of Mr Duck's alleged *"shocking comment ... both sexist and ageist in nature. How can the company condone such language and discriminative behaviour from none other than the MD?"*; and also resisting her return to work on mental health grounds, referring to the OH Report advice that if adjustments were not made to the Claimant's role, the risk to her mental health was likely to be ongoing. The Claimant concluded by stating: *"You leave me with no option now but to instruct a solicitor and seek legal advice."*
73. Following an acknowledgement email from the Respondent, the Claimant wrote again to the Respondent on 30 May 2022: *"... Following some initial consideration with my solicitor, who, having read all the correspondence and documentation relating to this matter, has advised"* that the Claimant should not return to work. The Claimant then set out a number of allegations and claims, purportedly written by her solicitor, culminating with a claim for a settlement payment. At the Preliminary Hearing and in her Witness Statement, the Claimant said that in fact she had not been formally advised by a solicitor, but that she had had a brief chat with a former solicitor who was not an employment law expert, but who had given her some basic general advice. She confirmed in her oral evidence that the statement *"Following some initial consideration with my solicitor..."* was therefore not true. Although the Claimant generally presented as an honest and genuine witness in these proceedings, this admission

inevitably raised questions for me about the extent to which she may have misrepresented other issues to the Respondent in 2022.

74. The Claimant did not return to work on 31 May 2022 and in response to a follow-up email from Mr Nicholls dated 1 June 2022, the Claimant sent an email dated 1 June 2022 re-iterating the contents of her 30 May 2022 email. In her Witness Statement, the Claimant stated that as she had not received any pay since 31 March 2022, she had been put under a lot of stress, strain and financial pressure at this point. She also stated: *"It was now clear that I could no longer work for Chestertons, owing to the unfair and biased investigation I knew that I could not trust them. This meant I was effectively being pushed out of employment through no fault of my own or forced to return to an unsafe environment."* Conversely, in her oral evidence, the Claimant said that she *"wanted to stay"* and *"wanted to work"*.
75. On 8 June 2022, Mr Nicholls emailed the Claimant referring to the Claimant's continued absence from work and stating: *"I was surprised to learn from your email response [dated 1 June 2022] that you are not unwell and instead are effectively refusing to attend work. This leaves the Company in a rather difficult position as your absence is unauthorised. On this basis I must reserve the Company's right to make salary deductions in respect of the days you will not work."* Mr Nicholls went on to invite the Claimant to a meeting to discuss the OH Report which he said: *"reports that you are fit to undertake your current role but does make a number of recommendations for the Company to consider if it is reasonably able ... I am motivated to find a way to try to make some of the adjustments suggested by the doctor. I will however need your commitment to return to work so that we can work with you to assess the adjustments proposed."*
... The Company has no reason to consider a financial settlement of the type you set out in your email and is instead focussed on your return to work and we hope that you are too."
76. The Claimant responded to Mr Nicholls by email on the same day and expressed her feelings that the Respondent was ignoring her concerns about Mr Duck's *"misleading and dishonourable comments, as well as his bullying behaviour ... and instead you insist for me to return to work. ... A medical professional of your choosing has told you that I cannot go back to work for Chestertons yet you insist that I return..."*. She also said that the OH Report was a medical certificate which the Respondent was choosing to ignore. She concluded: *"My solicitor has read the history and timeline and sees no other option but for Chestertons to release me with a fair financial settlement"*.
77. On 9 June 2022, the Claimant put in a third sick note for stress covering the period 6 June 2022 to 1 July 2022.
78. The Respondent disagreed that the OH Report was a medical certificate and Mr Nicholls conveyed this to the Claimant by email dated 10 June 2022 and requested the hard copy sick note, together with some other information. Mr Nicholls also arranged for a meeting between him and the Claimant to take place to discuss the OH Report recommendations. He also said that he would arrange for a third party HR professional to attend to act as a witness and to provide guidance.
79. The Claimant replied to Mr Nicholls by email on 10 June 2022, including in respect of the OH Report: *"... Dr [W] makes it clear that my ill-health will persist if I return to my current role, therefore a 'return to work' meeting is not viable ... until an alternative and agreeable solution is provided. ... Chestertons have not reached out to me or offered me an alternative other than"*

my existing role. Chestertons' position has not changed; there is no care, kindness or consideration despite the deterioration of my mental health. Instead, you have become more aggressive with each email and I find myself being bullied into submission. Please note you have a duty of care to your employees and this has been found wanting, ... under a management who doesn't care about my welfare ...".

80. Mr Oxley, an HR consultant, was engaged by the Respondent on 14 June 2022: *"to assist with mediating in a meeting between [the Claimant] and Mike Nicholls the following day ... The reason for the scheduled meeting was that [the Respondent] had received an occupational health report and wished to explore the possible routes back to employment with [the Claimant] as she was currently off sick."* At the meeting on 15 June 2022, the Claimant was not happy about the nature of Mr Oxley's involvement. She appears to have thought that Mr Oxley would be acting as an independent mediator *"for conciliatory mediation discussions"*, whereas, as Mr Nicholls had already advised the Claimant, his purpose of the meeting was to discuss the OH Report recommendations with the help of Mr Oxley as an HR expert.
81. The meeting notes taken by Mr Oxley recorded that the Claimant: *"cited ongoing grievances with Chestertons with some details. DO stated that this should be dealt with via the Grievance procedure ...
RC Did not feel that she could return to work even if all the adjustments recommended in the report were made ...
RC and MN were happy to discuss potential for a Compromise Agreement ...
RC was happy to postpone the appeal in case a compromise agreement could be sought."*
82. After the meeting, Mr Nicholls recorded in an email: *"The outcome is 99% certain Rebecca and I will meet next week in a Without Prejudice meeting to see if we can agree departure terms ... in a compromise agreement. The grievance appeal process is put on hold."*
83. The Claimant's consistent position was that at the meeting on 15 June 2022, the Respondent unconditionally agreed that it would offer her a settlement payment and she would not have to go back to work.
84. Without prejudice communications between the parties then took place (which were put into evidence), including an email from the Claimant to Mr Nicholls dated 19 June 2022 in which she stated: *"The reason I cannot return to the Chestertons office is because of Paul Duck and not because I refuse to work. Paul Duck is the cause of all this anguish, had he listened to my appeal during my appraisals and had he cared about my welfare all this could have been solved long ago."*
85. On 25 June 2022, Mr Nicholls wrote a letter to the Claimant expressing: *"disappointment that, as yet, we have been unable to reach satisfactory negotiation on this. We reject your counter-proposal for a settlement and would like to address the outstanding matters identified by you regarding your employment with Chestertons"*. Mr Nicholls then went on to advise that the Claimant's grievance appeal, to be managed by Mr Oxley, would be recommenced; Mr Nicholls would be writing to follow up on the recommendations for return to work adjustments made in the OH Report, notwithstanding that the Claimant had *"mentioned you do not feel there was any way you would return to work even if all adjustments were considered"*; and concluded that the Respondent hoped the Claimant *"will be able to return to work following your current absence as scheduled on 30th June 2022"*.

86. The Claimant responded by email dated 26 June 2022: *"... you continue to disrespect me with these aggressive and bullying tactics. My last email is my final offer to conclude this sorry mess. You agreed to a financial settlement ... If you don't want to pay that amount then we'll go to an industrial tribunal..."*.
87. Mr Nicholls replied by letter dated 30 June 2022: *"I was disappointed to see your current position ... It appears from your response that you do not wish to co-operate further in attempting to resolve matters ... Notwithstanding your position on this we would like to draw a line under these matters, and have a duty to do this so that we can move forward in a way that allows you gainful employment with Chestertons. We would like to offer the following solutions and hope you will engage with us to resolve matters to your satisfaction."*
Mr Nicholls then set out a proposed new date for the grievance appeal meeting with Mr Oxley and listed various adjustments to the Claimant's role recommended by the OH Report that the Respondent offered to make / stated that it would not be able to make (*"despite your assertion you did not wish to consider any adjustments detailed in the" OH Report*).
88. The Claimant responded by email dated 30 June 2022, including that at the 15 June 2022 meeting between the Claimant, Mr Nicholls and Mr Oxley, it was: *"agreed that I could not return to the office and work under the MD Paul Duck after the way he has behaved"*; and that *"it was agreed that the only option suitable for me and Chestertons was to be released from my contract, given a decent reference and a fair financial settlement"*.
89. The Respondent replied by emailed letter from Mr Nicholls dated 4 July 2022 emphatically denying this, stating that rather there had been an agreement to explore settlement as an option. Mr Nicholls also re-iterated the Respondent's commitment to remedying the issues around the Claimant's employment and sickness absence and offered to arrange another OH appointment for the Claimant as she had stated the first appointment was *"irrelevant"*. Mr Nicholls concluded with a without prejudice settlement offer, which was disclosed into evidence.
90. In his Witness Statement, Mr Nicholls recalled: *"I was saddened that the Claimant would not discuss with us the recommendations from the expert [OH Report] and how we could adapt her role, as the Claimant fulfilled an important role for the company and despite everything she was a friend and a valued employee."*
91. The Claimant did not return to work on 4 July 2022 and sent an email to Mr Nicholls dated 4 July 2022 stating that she would be taking 2 weeks' holiday. Mr Nicholls responded by email dated 5 July 2022 stating, inter alia, that the Claimant did not have sufficient holiday days. Further email correspondence ensued, including in respect of re-scheduling the grievance appeal meeting. In her Witness Statement, the Claimant stated: *"Mike Nicholls was insisting I return to an unsafe workplace where I would be forced to work alongside and be under the orders of Paul Duck. This was the final straw in a long line of negative issues. I broke down and resigned..."*.
92. In her oral evidence, the Claimant stated that she was being *"forced to return to the office when I felt scared there"*. When I advised the Claimant that this quite serious allegation could affect her credibility given she had not raised it previously, the Claimant said that she supposed a better description would be *"not comfortable to be with someone who had told a lie about" her*.

93. In her cross-examination of Ms Kilkenny, the Claimant asked her whether she thought that the Claimant wanted to resign, rather than she was forced to resign. Ms Kilkenny said "yes".
94. In his Witness Statement, Mr Nicholls comments: *"I was sad that the Claimant resigned ... as we were never afforded the opportunity to discuss how we might change her role following her about turn in career progression just weeks earlier. ... I do not believe that the attack on Paul Duck is merited or supportable with any facts."*
95. The Claimant's emailed resignation letter dated 8 July 2022 gave one month's notice and stated that her final day would be 10 August 2022. She stated: *"Due to the reasons listed below I believe that the employment relationship has irrevocably broken down and my position in the company has become untenable after a fundamental breach of contract by Chestertons:*
- *Discrimination on the basis of sexism and ageism*
 - *Unprofessionalism*
 - *Bullying*
 - *Failure to pay sick leave ...*
 - *Total lack of duty of care to an employee undergoing stress and mental health issues in the workplace."*
96. Mr Nicholls wrote an email to the Claimant dated 11 July 2022 stating: *"you would ordinarily be expected to attend the office for work until your finish date. Please could you update me on your current status and your intentions regarding work attendance during your notice period?"*
97. The Claimant never returned to work because, she said, she did not feel that she could be in the Respondent's office environment.
98. The Claimant's grievance appeal was heard by Mr Oxley on 12 July 2022. The minutes record, inter alia: the Claimant *"said that large aspects of the appeal were the fact her mental health had not been considered and that she felt the company did not want her there anymore"*.
99. In her 8 July 2022 resignation letter, the Claimant stated that she had filed an Employment Tribunal Claim. The Claim Form was actually presented 9 days later, on 17 July 2022.
100. The grievance appeal outcome – that the Claimant's substantive points of appeal had not been upheld – was conveyed to the Claimant by letter on 25 July 2022.

Applicable Law

The Employment Act (the Act)

1. Section 59 of the Act provides that every employee with sufficient qualifying service shall have the right not to be unfairly dismissed by their employer.
2. Section 64(2) provides that “an employee shall be taken to be dismissed by his employer if ... (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct”.
3. Section 65 of the Act provides:

“(1) In determining ...whether the dismissal of an employee was fair or unfair, it shall be for the employer to show–

- (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal; and
- (b) that it was a reason falling within the next following subsection, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

...(6) ... the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case.”

Constructive Unfair Dismissal: Principles and Authorities

- (A) The employer was guilty of repudiatory conduct which is a significant breach going to the root of the contract of employment, which is “*so intolerable that it amounts to a repudiation of the contract*” (*British Aircraft Corporation v Austin* [1978] IRLR) or which shows that the employer intends to abandon and altogether refuse to perform the contract (*Western Excavating (ECC) Limited v Sharpe* [1978] IRLR 27 (CA)) or no longer intends to be bound by one or more of the essential terms of the contract (such as where the employer arbitrarily changes the employee’s working conditions, or demotes the employee to a lower rank or a poorer paid position).
1. It is clearly established that contracts of employment include an implied contractual term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (*Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] AC 20). Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract.
 2. To amount to a breach of this implied term, the employer’s conduct must be so serious that looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the putative innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. It is not necessary to show that the employer intended any repudiation of the contract: the motives of the employer

are not determinative or even relevant. The Tribunal's function is to look objectively at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it (Malik –v- BCCI [1997] IRLR 462 (HL) and Woods –v- WM Car Services (Peterborough) Limited [1981] IRLR 347 (EAT)).

3. The question whether a repudiatory breach of contract has occurred must be judged objectively (Buckland-v-Bournemouth University Higher Education Corporation [2010] ICR 908). This requires the Tribunal to assess whether a breach of contract has occurred on the evidence before it: Tullett Prebon PLC & Others -v- BCG Brokers LP & Others [2011] IRLR 420 (CA): “The question whether or not there has been a repudiatory breach of the duty of trust and confidence is “a question of fact for the tribunal”: Woods ... per Lord Denning MR, who added: ‘The circumstances ... are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not’ (*ibid*)”.
4. It follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held: if, on an objective approach, there has been no breach, then the employee's claim will fail (Omilaju-v-Waltham Forest London Borough Council [2005] EWCA Civ 1493).
5. It is not possible for the employer unilaterally to "cure" a repudiatory breach of contract by attempting to make amends or undo what has been done. Unless the employee has waived the breach or affirmed the contract, they have an ongoing right to choose whether to treat the breach as terminal (Flatman-v-Essex County Council UKEAT/0097/20).

(B) Under the "last straw" doctrine, an employee can resign in response to the last in a series of breaches of contract or a series of acts or incidents or a course of conduct by their employer which, taken cumulatively, amount to a repudiatory breach of the implied term of trust and confidence. As per Woods: “The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.”

1. In Omilaju, the Court of Appeal provided useful guidance on the last straw doctrine:

19. “... A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase “an act in a series” in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as “unreasonable” or “blameworthy” conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a

series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.*

22. *Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective ... “.*

(C) The repudiatory breach by the employer caused the employee to resign – the employee must be able to show that they resigned in response to the relevant breach of contract by the employer. Once a repudiatory breach of contract has been established an employee can claim constructive dismissal as long as the breach "played a part" in their leaving (Abbycars (West Horndon) Ltd v Ford UKEAT/0472/07) and Nottinghamshire County Council–v–Meikle [2004] IRLR 703 (CA)).

(D) Affirmation: the employee resigned without unreasonable delay. Otherwise, they will be treated as having elected to affirm the contract and will lose the right to treat themselves as discharged and therefore will lose the right to claim constructive dismissal.

1. Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has chosen to affirm the contract and continue to perform it or has accepted the repudiation by treating the contract of employment as at an end and resigning. The employee must at some stage elect between those two possible courses of action.

2. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation, but if it is prolonged, if the innocent party calls on the guilty party for continued performance of the contract, such conduct is only consistent with the continued existence of the contractual obligations and so may be evidence of an implied affirmation (WE Cox Toner (International) Limited–v–Crook [1981] IRLR 443 (EAT)). As per Dr Paul Leaney-v-Loughborough University ([2023] EAT 155): “*the ongoing and dynamic nature of the employment relationship means that a prolonged or significant delay may give rise to an implied affirmation, because of what occurred during that period*”.

3. Colomar Mari v Reuters Limited [2015] 1W:UK 712 summarised the position with regard to

affirmation as follows: “The essential principles are that:

(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed ...

(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay ...

(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation (Fereday v Staffs NHS Primary Care Trust UKEAT/0513/ZT [2011])...

(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive ...”.

4. Continued working and the receipt of wages strongly point towards affirmation. However, if the employee further performs the contract to a limited extent but at the same time makes it clear that they are only continuing so as to allow the employer to remedy a repudiatory breach, such further performance does not prejudice their right subsequently to accept the repudiation. But: “That does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends” (Buckland).

5. As per Dr Paul Leaney: “... a tribunal is not bound to assume in every case that there cannot be any affirmation during a period of sickness absence; Nevertheless, it was something that, in our judgment, needed to be considered in the overall context of the issue of whether the claimant had, at some point in the relevant time window, affirmed.

51. We also consider that the tribunal gave insufficient attention to the potential significance of the fact that there were negotiations taking place during much of the period prior to the claimant going off sick, and its own finding that he did so following the end of those negotiations. While there is no challenge before us to the conclusion that the negotiations could not be relied upon as a last straw, the question of the significance of this aspect for the issue of affirmation was a distinct matter. ... we do not think it was correct to treat the fact that there was a period of negotiations as, therefore, irrelevant to the distinct issue of affirmation.

52. The tribunal properly noted that there was no evidence that the claimant had specifically indicated that he was reserving his position pending the outcome of the negotiations ... Nevertheless, it was clear that his position was that the point of the negotiations was that they might provide some resolution to his concerns, whatever that might be; and that it was the negotiations coming to an end without any resolution which triggered his going off sick and then resigning.

53. ... where an employee postpones resigning in order to pursue a contractual grievance procedure which might lead to a resolution of their concern, that will generally not amount to an affirmation. Rather, the employee should be treated as continuing to work and draw

pay for a limited time while giving the employer the opportunity to put matters right. So, in the present case, some consideration needed to be given to whether, although he did not say in terms that he was working under protest, the claimant could be said to have been working on while he allowed the respondent some opportunity to try to address his concerns in some way through these negotiations, before deciding whether to resign."

The Equal Opportunities Act 2006 (the EO Act)

"Meaning of discrimination on the ground of sex.

6.(1) A person discriminates against a woman if on the ground of sex he treats her less favourably than he treats or would treat another person.

...(3) A comparison of the case of persons of different sex under subsection (1) or (2) must be such that the relevant circumstances in the one case are comparable to the other."

"Meaning of discrimination on the ground of age.

11.(1) A person ("A") discriminates against another person ("B") if on the ground of B's age, A treats B less favourably than A treats or would treat other persons and A cannot show that the treatment is an appropriate and necessary means of achieving a legitimate aim.

... (3) A comparison of the case of B with that of another person under subsection (1) or (2) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

Applicants and employees.

"15. ...(2) It is unlawful for an employer, in the case of a person employed by him, to discriminate against that person on any equal opportunities ground—

- (a) in the terms of employment which he affords him;
- (b) in the opportunities which he affords him for promotion, transfer or training, or to any other benefits, or by refusing or deliberately not affording him any such opportunity; or
- (c) by dismissing him, or subjecting him to any other detriment."

"Burden of proof: Employment Tribunal.

74. ...(2) Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent— (a) has committed against the complainant an act [of discrimination], the Tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act."

Authorities

1. There are two elements in direct discrimination, as explained in *Glasgow City Council v Zafar* [1998] IRLR 36: the less favourable treatment and the reason for that treatment. The protected characteristic must be the ground for the less favourable treatment i.e. it must be a significant influence or an effective cause. Motive or intention is not required.
2. Treatment will be deemed to be on the ground of a protected characteristic if either it is inherently discriminatory or if the protected characteristic influenced the "mental processes" of the alleged discriminator, whether consciously or unconsciously, to any significant extent (*Naqarajan v London Regional Transport* [2000] 1 AC 501). If so, it will be necessary to identify the person who made the decision.

3. Unreasonable conduct or poor management does not of itself point to discrimination. In *Glasgow City Council v Zafar* 1998 ICR 120, HL, it was held that: “*the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant less favourably.*” And in *Chief Constable of Kent Constabulary v Bowler* EAT 0214/16: “*Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic*”. Further, an unjustified sense of grievance on the part of an employee does not point to less favourable treatment (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337, HL). However, a failure by the employer to explain unreasonable conduct can support an inference of discrimination since it may be inferred that the explanation offered is not the true or full explanation (*Rice v McEvoy* 2011 NICA 9 NICA).

4. *South Western Ambulance NHS Foundation Trust v King* [2020] IRLR 168 held that reliance cannot be placed on some alleged floating or overarching discriminatory state of affairs without that state of affairs being anchored by identified specific acts of discrimination occurring over time. A relevant but not conclusive factor is whether the same or different individuals were involved in the incidents.

5. As per *Cowie v Vesuvius plc and others* (2202735/2021):

“246. ... (1) ... 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 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.

... (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.

... (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 ...

(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."

6. The presence of discrimination is almost always a matter of inference rather than direct proof (even after the Section 74(2) shift in the burden of proof). It is still for a claimant to establish matters from which the presence of discrimination can be inferred, before any burden passes to the respondent. Talbot v Costain Oil, Gas and Process Limited and Others 2017 ICR D11 summarises the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

- it is very unusual to find direct evidence of discrimination;
- normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;
- it is essential that the tribunal makes findings about any primary facts that are in issue so that it can take them into account as part of the relevant circumstances;
- the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;
- assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities.

7. The two-stage test was also discussed in Lainj and Manchester City Council and Others, 2006 IRLR 748:

"No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case.... The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (or other) discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race.'"

8. And in Madarassy v Nomura International Plc 2007 IRLR 246: *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."* The something "more" need not be substantial – it may be derived from the factual context including inconsistent or dishonest evidence. In this case, Mummery LJ pointed out that the employer should be able to adduce at stage one evidence to show: *"that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant."*

Findings

Constructive unfair dismissal

1. The Claimant's claim for constructive unfair dismissal is based on the Claimant's allegations that she resigned in response to a series of events amounting to a repudiatory breach by the Respondent of the implied contractual term of trust and confidence culminating in a 'last straw'.
2. In her resignation letter dated 8 July 2022, the Claimant stated: *"Due to the reasons listed below I believe that the employment relationship has irrevocably broken down and my position in the company has become untenable after a fundamental breach of contract by Chestertons:*
 - *Discrimination on the basis of sexism and ageism*
 - *Unprofessionalism*
 - *Bullying*
 - *Failure to pay sick leave ...*
 - *Total lack of duty of care to an employee undergoing stress and mental health issues in the workplace".*
3. In the Claimant's Further and Better Particulars, in addition to these reasons stated at the time of her resignation, she provided 4 pages of particulars of alleged breach(es) of contract by the Respondent on which she relied in respect of her claim for constructive unfair dismissal.
4. I consider hereunder the identifiable alleged breach(es) of contract and identifiable alleged acts which on their own or cumulatively might amount to a breach of the implied term of trust and confidence by the Respondent, set out in the resignation letter and the Further and Better Particulars.

"Discrimination on the basis of sexism and ageism"
5. I consider the Claimant's claims of age and sex discrimination in this Judgment below.

"Unprofessionalism"
"Failure to provide HR services"
The way the original Property Manager ... was badly treated and the knock-on effects it had to the Claimant caused stress in the work place..."
6. The Claimant did not provide any particulars in her resignation letter of *"unprofessionalism"* and I am unable to make any finding in this regard.
7. In respect of the Claimant's complaint in the Further and Better Particulars of a failure by the Respondent to provide HR services, as I found in my Decision dated 9 May 2024: *"...Nor is there any requirement for an employer to have a human resources expert in place.... There is no legal duty on an employer to have in post an HR representative."* Objectively, I find that this complaint has no bearing the Claimant's repudiatory breach of contract claim.

8. Turning to the complaint in the Further and Better Particulars about the original Property Manager, my understanding of the evidence is that this related to alleged events in 2017-2018, but the Claimant did not submit any evidence in this regard nor indeed provide any particulars save that the Respondent did not give her any information about the employee's departure. Even if the Claimant is alleging that stress had been caused to her personally as a result of these events, on an objective assessment, I do not accept that this could still have been affecting her in 2022 or formed part of chain of objectionable acts contributing to her resignation in 2022. It is also clear from the Claimant's email dated 6 April 2022 to Ms Kilkenny that the Claimant first notified the Respondent of her stress with her role in January 2022: *"I reported my issues and concerns to Paul Duck back in January 2022"*.

"Nepotism in the workplace. The Claimant and other members of staff reported [Mr Duck] for unfair treatment" multiple times.

Mr Duck was "the perpetrator of nepotism, bad practice, sexism and ageism yet he was the only person the Claimant could report these issues to ... this caused frustration and anxiety"; and that Mr Nicholls and Ms Kilkenny agreed but took no action.

9. I consider the Claimant's claims of age and sex discrimination in this Judgment below. I have already dealt with the Claimant's allegations concerning other employees in my Decision dated 9 May 2024.

10. The Claimant clearly held onto lingering resentments about various historic issues at work such as her alleged perception of the sexist culture at the Respondent, the alleged negative morale amongst the Respondent's employees, alleged preferential treatment of other employees by Mr Duck and her alleged dislike of the Respondent's office premises. However, the Claimant did not submit any evidence in support of any of these allegations and I find that she has not proven them.

11. In any event, I find that such alleged acts by the Respondent, most of them from 2 or 3 years previously, did not constitute and could not have significantly contributed to the Claimant's resignation in July 2022.

The Claimant continually asked for a replacement Assistant Property Manager, but her requests were ignored despite increasing workloads.

"When the Claimant complained of sexist comments in the workplace she was laughed at" "Others in the workplace were given promotions and sent on courses".

12. The Claimant did not submit any evidence which supports any of these allegations made in the Further and Better Particulars and I find that she has not proven them. The evidence before me shows that in her review meetings with Mr Duck in 2018, 2019, 2020 and even December 2021, no such complaints were raised by the Claimant and, following her review meeting on 10 December 2021, the Claimant said that despite a greater workload, she felt less stressed, more in control and enjoyed it more. When she requested, she was also sent on a management course at the University of Gibraltar in May 2021.

The Respondent did not pay sick leave and the Claimant was not informed of the Respondent's rules on sick pay and lost out financially as a result.

When the Claimant complained, Mr Duck and Ms Kilkenny told her she should have read the Staff Handbook.

The Claimant was not given the opportunity to work from home.

13. In respect of this complaint, I find that Mr Duck did mis-inform the Claimant on 20 September 2021 that statutory sick pay entitlement renews on 1 January of each calendar year, since statutory sick pay (as operated by the Respondent) is rolling. However, I find that this was an honest mistake; there is no evidence that Mr Duck had any ulterior motive for this, and I find that this error cannot objectively be viewed as constituting or contributing to action by the Respondent indicating an intention no longer to be bound by the contract (a repudiatory breach), bearing in mind that in the ordinary way even where a business or department is run by an employer with gross incompetence, this would not be sufficient on its own to amount to a breach of the implied term.
14. In addition, in April and May 2022, the Claimant corresponded by email frequently with JC on the subject of her sick pay and there was nothing from JC in that correspondence which was incorrect. The Claimant appeared simply not to understand how the rolling nature of the entitlement operates (so that the relevant calculation period is the previous 12 months from the current date), however many times JC attempted to explain this to her. The Claimant is clearly a highly intelligent woman and has been in Gibraltar for a long time. She was already aware that there was a maximum statutory sick pay entitlement from the events of the Summer of 2021 and had at that time been directed to the Staff Handbook Sickness Absence Policy, which correctly sets out the entitlement. Even if she was not thereby aware of the statutory sick pay entitlement, it would only have taken her a matter of seconds to research this or she could have looked at the Staff Handbook Sickness Absence Policy, to which Ms Kilkenny had referred her on 31 August 2021 and Mr Duck had referred her on 20 September 2021.
15. Further, the evidence establishes that the Claimant was in fact paid all of her statutory sick pay. Although I accept, as the Claimant said in her oral evidence, that the Respondent not paying her in excess of statutory sick pay, which she alleged was normal practice for many Gibraltar employers (without any evidence, I am unable to assess this allegation), and not informing her about the entitlement (which was not the case at least in 2022, as I have found above), *“didn’t make [her] feel looked after”*, I certainly do not find this to be *“cruel, heartless and totally unprofessional”* behaviour by the Respondent, as alleged by the Claimant.
16. I therefore do not consider the Claimant’s complaints about alleged unpaid sick pay and the Respondent allowing her to rely on incorrect information to be established by the facts. I also find that there was no duty on the Respondent (and no implied contractual term) to explain the statutory sick pay regime to an employee, nor to agree to an employee working from home. I therefore find that these complaints did not constitute or contribute to a repudiatory breach of contract by the Respondent.

The Respondent did not consider the Claimant’s requests to move to a less stressful role and/or to reduce her working hours, ignoring the state of her mental health and her reports of stress.

17. In respect of this complaint, it is clear from the Claimant’s email dated 6 April 2022 to Ms Kilkenny that the Claimant first notified the Respondent of her stress and unhappiness with her role in January 2022, not, as she alleged several times, in her annual reviews with Mr Duck for 3 years prior to March 2022. As she said in her email to Ms Kilkenny dated 6 April 2022: *“I reported my issues and concerns to Paul Duck back in **January 2022**. I made it very clear*

back then that I was unhappy with some aspects of my job and my mental health was suffering. ... I waited for an opportunity to arrive whereby I could change roles and I offered solutions to Paul Duck back then” (emphasis added).

18. In addition, the emails sent by Mr Duck to the Claimant following up on her review meetings in 2018, 2019, 2020 and even December 2021 do not refer to any complaints being raised by the Claimant. Ms Kilkenny gave evidence that the Claimant had never previously raised concerns with her, in their weekly team meetings or individually. None of this was disputed by the Claimant.
19. I also find on the same evidence that the Claimant did not inform the Respondent prior to January 2022 that she would like to move to a different department.
20. Further, the Claimant’s allegations that she was unfairly and discriminatorily passed over for a lettings negotiator role in 2019, an office manager role in 2020 and an HR role in 2021, all of which she would have preferred and I have no doubt she would have been more than capable of performing, are not reasonable. Although I accept that none of these vacancies were advertised or circulated internally, the Respondent had no idea at the time that the Claimant, then very competently performing her own role as Property Manager, without apparent complaint, would have liked any of these roles.
21. In my finding, when, in February/March 2022, the Claimant did start to push for a less stressful role and/or reduced hours, it was the Respondent’s rejection of this, as conveyed by Ms Kilkenny’s email to the Claimant dated 5 April 2022, which appears to have been a pivotal moment for the Claimant: *“Not one of my requests has been granted and I was not asking for much. I feel I have been totally let down and my welfare has been disregarded. I need time to get over the shock of all of this ... It seems I am not valued whatsoever and I find that unacceptable”* (the Claimant’s 6 April 2022 email to Ms Kilkenny). As the Claimant said at the grievance appeal meeting on 12 July 2022, *“large aspects of the appeal were the fact her mental health had not been considered and that she felt the company did not want her there anymore”*.
22. I accept that in early 2022 the Claimant’s job had become increasingly difficult for her, due to, inter alia, the increase in the volume of business she was responsible for and the Claimant’s growing dislike of parts of the job, in particular, the requirement to convey negative communications to tenants. As recorded in the OH Report, she stated to the OH doctor (on 24 May 2022): *“that she is tired of the aspects of her job that require ‘making endless apologies’ and finds it increasingly difficult to put herself in the position to engage in confrontation. ... she reports a period recently when ...she was obliged, against her judgment, to suggest and enforce rental price increases which she felt were not necessarily wanted or needed ... she felt herself party to inflicting great distress on tenants. ... Recent email exchanges and a refusal, or inability to adjust her working routines have left Ms Calderon feeling under-appreciated and ‘let down’. Additionally, Ms Calderon reports being left humiliated after she was informed in front of a full office that she had failed in her application for a new internal job application. She also feels that she was discriminated against ... as she was later told that Chestertons was ‘after a young lad’ for the role.”*
23. So it is clear that the events of March and April 2022 had without doubt left the Claimant, already unhappy at work, feeling that the Respondent did not support her or value her and would have been happy to see her resign. She came to blame Mr Duck in particular for her

feelings: *“Paul Duck is the cause of all this anguish, had he listened to my appeal during my appraisals and had he cared about my welfare all this could have been solved long ago”* (the Claimant’s email to Mr Nicholls dated 19 June 2022). This email clearly indicates what I find to be the Claimant’s belief that all of her issues at work would have been solved by Mr Duck responding to her reports of stress and unhappiness - by changing her role or giving her a new role. The Claimant’s reprimand by Mr Duck openly in front of the team on 6 April 2022, when the Claimant believed Mr Duck would have been aware of the email to the Claimant from Ms Kilkenny dated 5 April 2022, by which she was already upset, poured oil on the flames.

24. The Claimant also chose to read Ms Kilkenny’s offer in her email to the Claimant dated 5 April 2022 - to liaise with the Claimant if she wanted in respect of alternative *“ideal”* jobs - as the Respondent saying that her only option was to leave if she did not want to continue in her role and she stated in her cross-examination of Ms Kilkenny that the offer was the reason she had a breakdown. But I find on an objective reading of the email that the offer was simply that, an offer to help the Claimant to find a positive outcome to her predicament. On an objective assessment, I do not find the Claimant’s reactions reasonable (although I accept them to be entirely genuine) particularly given Ms Kilkenny’s firm assurances in her email that the Claimant was: *“a valued member of the team, we have no desire to lose you. However, your happiness and job satisfaction are important to us and we will do our best to assist you in any way we can.”*
25. Similarly, the Claimant viewed the Respondent’s referral of her to the OH doctor (arranged and paid for by the Respondent) as an indication that the Respondent mistrusted her. However, the Claimant did not provide any explanation for or evidence in support of this allegation. Each of Ms Kilkenny’s and Mr Nicholls’ communications of 20 April 2022 and 5 May 2022 evidence that the purpose of the OH appointment was to: *“assist us with stress levels at work. Keen to discuss with you what they suggest when you have a moment”*; and *“appraise your current condition and see what adjustments would be required in order to assist your return to work”*. Ironically, in the end, the Claimant relied upon the OH Report recommendations as justification for refusing to return to work in the months which followed.
26. Against the above background, including by the Claimant’s own account, I find that by the beginning of 2022 the Claimant had become deeply unhappy doing the job she had been employed to do and felt strongly that there was some kind of duty on the Respondent to solve this, including by giving her a different job or varying her existing role, which duty the Respondent did not meet. In this regard, she repeatedly relied upon the OH Report dated 25 May 2022, for example: *“If Chestertons is unable to make adjustments to reduce the damage [the Claimant] is sustaining then I have advised her to consider changing employment.”* The Claimant chose to read this opinion as imposing a duty on the Respondent, which it deliberately ignored, to vary the Claimant’s role; otherwise her mental health would be damaged.
27. I also find that she genuinely felt that the fact that she was unhappy and stressed in her role was ignored by the Respondent’s directors and that they did not give her the support that she felt she deserved. I think that this is clearly reflected in the Claimant’s email to Ms Kilkenny dated 6 April 2022. She does not apportion any blame or culpability on the Respondent for her increased antipathy towards her role, but rather expresses frustration and resentment that the Respondent had rejected (in the Claimant’s view, deliberately ignored) her entreaties to change the aspects of her job which were causing her distress, and in March 2022 to give her the lettings negotiator role to achieve this outcome.

28. In the Claimant's oral evidence, it was put to her several times that the Respondent did in fact try to discuss with her adjustments to her role in order to facilitate her return to work. The Claimant insisted that this was too little too late as this did not occur until 30 June 2022 when the settlement discussions were underway. In fact, the Respondent first referred to discussing the proposed adjustments in the OH Report *"to support you in transitioning back into work"* in its grievance outcome letter dated 27 May 2022. Further, the Respondent's initially stated objective in making the OH referral for the Claimant was to assess potential adjustments, to *"appraise your current condition and see what adjustments would be required in order to assist your return to work"* (Mr Nicholls' communication of 5 May 2022).
29. In any event, given that the OH Report had confirmed that the Claimant was not suffering from a disability for the purposes of the EO Act, so that the statutory duty on the Respondent to make reasonable adjustments to remove or reduce a disadvantage related to disability was not activated, the Respondent was not under a statutory duty to make any adjustments.
30. As an overall finding on this allegation that the Respondent did not consider the Claimant's requests to vary her role to ameliorate the parts of it which were causing her stress, I hold that the Respondent cannot be held responsible for the Claimant's reactions or feelings in relation to her role in circumstances which I find were not caused by any act or omission of the Respondent and so were not a result of any breach of the duty of trust and confidence owed by the Respondent. I also find that the duty cannot impose upon an employer an obligation to agree to give an employee a different role or change the nature of an employee's job to eliminate parts of it which the employee does not like, through no fault of the employer, especially when it is not practicable or would negatively affect the employer's business. In this case, the Respondent also needed the Claimant to come back to work after the end of her sick leave and do the job she was employed to do.
31. Objectively judged on the whole of the evidence, the Respondent's decisions as regards denying the Claimant's requests to vary her role, including to move away from fault management and reduce her working week, and requesting her to return to work, were ultimately necessary commercial ones taken after due consideration: the Claimant's Property Manager role required full time hours to provide the necessary service levels to clients and an integral part of the role was fault management (as per the grievance outcome letter dated 27 May 2022). In my finding, these decisions therefore were not and did not contribute to a repudiatory breach of the implied contractual duty of trust and confidence owed by the Respondent to the Claimant, particularly since, in my finding, the duty cannot impose upon an employer an obligation to make decisions which are adverse to its business, however compelling an employee's reasons may be.
32. The fact that the Claimant refused to accept this and even at the grievance appeal meeting on 12 July 2022, maintained, *"when they realised she was suffering due to stress from the job they should have invited her back on 4 days per week and instead requested that she return to work"*, does not create a breach simply because the Claimant subjectively felt that such a breach had occurred, no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail (*Omilaju*).
33. In addition, by the Claimant's own admission, in the time leading up to the Claimant's resignation on 8 July 2022, the Claimant's demands for a change to her role, which she previously premised on the 25 May 2022 OH Report recommendations for adjustments, had

fallen away, replaced by a refusal by the Claimant to come back to work, even if the OH Report recommendations for adjustments were made, on the new ground that allegedly the workplace was unsafe for her due to Mr Duck's presence. She stated in her email to Mr Nicholls dated 19 June 2022: *"The reason I cannot return to the Chestertons office is because of Paul Duck"*; and in an email to Mr Nicholls dated 30 June 2022: *"I could not return to the office and work under the MD Paul Duck after the way he has behaved"*; and *"it was agreed that the only option suitable for me and Chestertons was to be released from my contract, given a decent reference and a fair financial settlement"*.

34. In her oral evidence, the Claimant confirmed that the OH Report recommendations for adjustments had been very relevant, but by 30 June 2022, the situation had moved far away from that due to Mr Duck's *"dishonest and unprofessional behaviour"*, making the OH Report *"irrelevant"*. Thus, by 30 June 2022, the Respondent's refusal of the Claimant's requests for the Respondent to vary her role or give her a new job to reduce her stress at work was, on her own admission, not the cause of, and could not have contributed to, her resignation, as this was *"irrelevant"* to her by then.
35. On the other hand, turning to Ms Kilkenny's offer in her 5 April 2022 email to assist the Claimant with alternative roles (albeit resented by the Claimant at the time), I appreciate the Claimant's bitterness that the Respondent did not contact the Claimant in respect of the roles it advertised on 20 May 2022 for a Property Administrator, on 23 May 2022 for an Office Administrator and on 14 June 2022 for an Operations Administrator. The Claimant felt that these were all roles which she would have liked instead of her role and for which she felt she was suitable. Given Ms Kilkenny's assurances in her 5 April 2022 email, I find that the Respondent's failures to contact the Claimant about these vacancies, when it knew how much the Claimant wanted to change roles, objectively would breach the implied contractual duty of trust and confidence owed to the Claimant. Ms Kilkenny's submission that she did not contact the Claimant in this regard during this period because the Claimant was on sick leave is not in my finding sufficient justification for these omissions.
36. However, my understanding of the evidence was that the Claimant did not find out about these advertised vacancies until after she had resigned and in any event she made no mention of them in her resignation letter dated 8 July 2022, so they could have had no effect on her decision. I therefore find that the Claimant did not resign in response to this repudiatory breach of contract by the Respondent which I have found to be established.

The Respondent did not consider the Claimant for the role of lettings negotiator in March 2022

37. During the Main Hearing, the Claimant raised again and again with the Respondent's witnesses the belief that she could have easily and expertly performed the lettings negotiator role and she asked repeatedly *"why wasn't I considered?"* I accept that this belief may well have been justified (after all, the role was more junior and one of the reasons the Claimant wanted it was because it would have been easier for her). I also accept that the Claimant therefore genuinely felt that it was deeply unfair of the Respondent not to offer her the role because of this and because she believed that this would have resolved her situation, and accordingly that this was a breach of an alleged *"duty of care"* she alleged that the Respondent owed to her.

38. In respect of the management meeting on 11 February 2022 at which the Claimant's request to apply for the lettings negotiator role was allegedly discussed between Mr Duck, Ms Kilkenny and Mr Cox, no minutes were disclosed of the meeting and Mr Cox, the third attendee, did not give evidence at the Main Hearing. Ms Kilkenny stated in her Witness Statement that at the meeting, she, Mr Cox and Mr Duck discussed some of the Claimant's work and communications style preferences which she says they agreed unanimously meant that the Claimant would not be suitable for the lettings negotiator role "*if she chose to apply*". Given that no mention of the Claimant's "preferences" was made in any of the contemporaneous evidence, I am not inclined to believe that any such discussions took place at the management meeting on 11 February 2022. I think it more likely than not that Mr Duck raised the Claimant's request to apply for the lettings negotiator role, but the request was not in fact discussed in any significant detail, with Mr Duck's decision on the request being presented by him and accepted by Ms Kilkenny and Mr Cox.
39. The Respondent's pleadings and the evidence given by the Respondent's witnesses show that Mr Duck, in my finding above, alone, took the decision not to consider the Claimant for the lettings negotiator role for the reason, as stated ab initio in the Response Form, that the role would carry a significant pay cut and would involve the Claimant taking on a new junior role (which would be uncomfortable for the Claimant and her colleagues). These reasons were repeated in Mr Duck's WhatsApp message dated 21 March 2022 which stated: "*Spoke to Rebecca just to say she wasn't deemed suitable for a trainee role at less money which she understood*" and in his grievance interview by Mr Nicholls on 13 May 2022 when he said that he had told the Claimant that the Respondent: "*did not consider her suitable for the role of lettings negotiator for a number of reasons, being: it would involve a significant pay cut, plus a structural challenge for everyone ...as the new role would involve many menial tasks which the company expected RC would not want to undertake and that other staff would be reluctant and uncomfortable treating RC (an ex senior colleague) as a new junior colleague.*" In the Respondent's referral to the OH doctor in April/May 2022, the Respondent also stated that the "*lettings negotiator role ... [is] a more junior role and with very different skillsets We are not a big enough employer to just create a role...*".
40. Given the inconsistencies with the Response Form, Mr Duck's WhatsApp message dated 21 March 2022 and what he said in his grievance interview on 13 May 2022 as set out above, I do not believe much of Mr Duck's quite differing account in his Witness Statement of what was discussed in his alleged telephone call with the Claimant on 21 March 2022:
"I informed the Claimant ... verbally that:
3.13.1 *...The Claimant was clearly an intelligent individual, articulate, an author, and we had supported her management trajectory...*
3.13.2 *... Previously the Claimant had said quite vocally that she did not like leaving the office and indeed had issues with even going to properties ..., which had been removed previously from her job role.*
3.13.3 *The role focused on calling and chasing people.... The Claimant had said that she didn't particularly "like people" which is why she enjoys remaining in the office...*".
41. In this regard, for the same reasons, I also do not believe the evidence given by Mr Duck at the Main Hearing, which appeared rehearsed and was therefore unconvincing, that when considering the Claimant's application for the role, he assessed the Claimant's "*profile*" as a lists, processes, administrative "*personality type*", which he decided was not a match for a lettings negotiator role. The Main Hearing was the first time that this subject of 'personality type' had been raised in the proceedings. None of the Response Form, Mr Duck's Witness

Statement nor any of the other evidence made any mention of it. I therefore found this new evidence by Mr Duck implausible in relation to his actual thought processes in February 2022.

42. In addition, both Ms Kilkenny and Mr Duck set out in their Witness Statements further alleged alternative reasons for the Claimant's deemed unsuitability for the role, other than as articulated by Mr Duck in his oral evidence (which I have found above I do not believe) and as stated in the Response Form, Mr Duck's WhatsApp message dated 21 March 2022 and in his grievance interview on 13 May 2022 as set out above, including (in both cases) the fact that the Claimant preferred to be office bound and that she had previously indicated that she had an ethical issue with demanding high rents, a requirement of the role as the Respondent is engaged by landlords, not tenants. However, save for their very similar evidence on this as set out in their Witness Statements, there is no evidence of these alleged reasons having been considered by Mr Duck, Ms Kilkenny or Mr Cox at the time the decision was taken on 11 February 2022 or of these alleged reasons having been explained by Mr Duck or Ms Kilkenny to the Claimant, in March 2022 or at any time until the Main Hearing. I find these reasons to be conceived by Mr Duck and Ms Kilkenny with the benefit of hindsight, taking into account the statements made by the Claimant in relation to her dislike of imposing rent increases on tenants as described in the OH Report dated 25 May 2022, which Ms Kilkenny even referred to in her Witness Statement as evidence of this supposed reason for the management meeting decision taken on 11 February 2022. This raised questions for me as to the veracity of Ms Kilkenny's and Mr Duck's evidence on this subject.
43. However, the fact that the Claimant strongly believed (and still believes) that she was capable of and suitable for the lettings negotiator job, that she had informed the Respondent that she did not mind the demotion and less pay and that she felt that the Respondent somehow owed her the role in order to provide a solution to her predicament, does not negate the Respondent's right to make its own assessment and to take its business requirements into account when taking a decision about giving someone a job, even if objectively the decision seems unreasonable.
44. Although I empathise with the Claimant's deeply held feelings of unfairness about the Respondent's decision not to give her the lettings negotiator job (which I find to be for the reason established by the evidence - that the role would carry a significant pay cut and would involve the Claimant taking on a new junior role which would be uncomfortable for the Claimant and her colleagues), which would have been a solution to all of her perceived problems, on an objective approach, I find that on the facts the decision did not constitute or contribute to a breach of the implied contractual duty of trust and confidence owed by the Respondent to the Claimant, since the duty cannot, in my finding, impose upon an employer an obligation to offer a vacancy to an existing employee simply because they want it, however compelling the employee's reasons may be, and however unreasonable the employer's reasons appear to be (so long as those reasons are otherwise not unlawful).
45. Further, at law, an employer-employee "duty of care", as frequently referred to by the Claimant in the proceedings, only applies (usually in the personal injury or health and safety arenas) to impose an obligation on employers to protect employees from harm, including to their physical and mental health, not (unfortunately for employees) to ensure job satisfaction or happiness at work. In any event, employers are not even obliged to do everything possible to prevent injury to employees' health; only to take reasonable precautionary steps (Dutton & Clark Ltd-v-Daly [1985] ICR 780).

The Respondent informed the Claimant that she had not been given the role of lettings negotiator in March 2022 in a public and demeaning manner

46. Turning first to the question of whether or not, as alleged by the Claimant, on 22 March 2022 Mr Duck approached the Claimant in the office in front of her colleagues and told her that the Respondent's directors had spoken about the Claimant's request for the lettings negotiator role and had decided that she was not suitable for the role as, he allegedly said, "*We're looking for a young lad*". This incident was denied by the Respondent, including that Mr Duck approached the Claimant in the office at all on 22 March 2022, because he was COVID isolating.
47. In cross-examination, Mr Duck appeared genuine on this issue, although there were areas of his evidence which were not entirely consistent. He explained that at that time he was particularly careful about isolating as his wife was clinically vulnerable and so: "*the idea of going to work when COVID was around was not on my family radar*". However, as highlighted by the Claimant in cross-examining Mr Duck, his wife was not in Gibraltar at the relevant time. Further, COVID contact and self-isolation text messages dated 15 and 24 March 2022 which Mr Duck had received from the GHA were put to him in cross-examination. The 15 March 2022 contact warning stated that Mr Duck was in fact not required to isolate but was required to wear a mask and reduce social contacts until 22 March 2022, which is the day the Claimant alleged Mr Duck went to the office and spoke to her. Mr Duck had stated in his timeline that the 15 March 2022 contact warning said that he was required to isolate, which on the face of the warning is not true (as described above). A second WhatsApp message from Mr Duck dated 21 March 2022 was also put into evidence in which he referred to having a lettings meeting the following day. Mr Duck stated in his oral evidence that this meeting was held remotely. In addition, the record of Mr Oxley's grievance appeal interview dated 19 July 2022 with RR recorded: "*Did you hear Paul Duck say to [the Claimant] in the open plan office that she was "not suitable for the role" and that "a young lad" was required? RR response "I think I recall PD standing inside the office front door and saying "we need an enthusiastic young person", but was said in an open conversation and not directed at anyone"*".
48. On the other hand, Mr Duck's evidence that he did not go to the office on 22 March 2022 pending taking a COVID test on 23 March 2022 is supported by a WhatsApp message from Mr Duck dated 22 March 2022 (a Tuesday) in which he stated: "*I am really hoping to come back by Thursday*" and an email dated 24 March 2022 from Mr Duck to a client in which he stated: "*I have been off with Covid for 10 days ...*".
49. The Respondent also submitted that the Claimant had seized on the comment made by Mr Duck in 2019 that the Respondent was looking for "*a young man*" like Mr Nicholls' son for a lettings negotiator opening, which she appeared not to have forgotten, and then weaponised it to include it in the comments made to her by Mr Duck on 21/22 March 2022 when he advised her that she had not been successful in her application for the lettings negotiator role at that time.
50. In addition, the records of Mr Oxley's interviews with Ms Cox and Ms Evans evidence that they both said that they did not hear Mr Duck saying that the Claimant was "*not suitable for the role*" or that "*a young lad*" was required. However, I do not give much weight to this evidence as, despite having submitted Witness Statements, these Respondent employees did not give oral evidence at the Main Hearing and were not available for cross-examination by the Claimant.

51. Taking all these considerations into account, both the Claimant and Mr Duck were equally credible (and not credible) in relation to when, where and in what terms the Claimant was told by Mr Duck on 21 or 22 March 2022 that she had not been given the job as lettings negotiator, and there was additional credible evidence (as set out above) in support of both their accounts. The evidence was so equally weighted that I find myself unable to make a finding, even on the balance of probabilities, as to which version of this event is true.

Failure to keep the Claimant updated on her application for the lettings negotiator role

52. In my finding, the evidence is clear that Mr Duck failed to keep the Claimant updated on what was clearly an application by her on 19 January 2022 for the role of lettings negotiator, despite having promised to do so on 19 January 2022 and 15 February 2022, including when, on 22 and 23 February 2022, the advertisement for the role was published on social media and the notification of vacancy filed with the ETB, and when he commenced interviewing applicants in March 2022. I agree with the Claimant's statement in oral evidence that she "*applied for the job there and then*", at her meeting with Mr Duck on 19 January 2022. But Mr Duck stated in his Witness Statement and repeated in his oral evidence that the Claimant did not apply for the role and did not submit her CV or cover letter, implying that this was why he did not interview her. However, when I asked him at the Main Hearing why the Claimant was not included in the interview process, he said instead, "*we thought we knew enough*", implying that either the Claimant's application had already been rejected or that she was being considered, but he did not feel there was any need to interview her. These disingenuous comments led me to doubt the integrity of Mr Duck's evidence on this issue, particularly as the Claimant could not have been expected to apply formally (put in her CV and cover letter) until she was made aware that the application process was live, which information she would have expected to have received from Mr Duck, given his assurances on 19 January 2022 and 15 February 2022 that he would keep her updated.

53. Equally damning, even if the Claimant had submitted her CV and cover letter, I find that Mr Duck had already decided, well before the application/interview process commenced, that the Claimant would not be given the job, as per the decision made at the management meeting on 11 February 2022.

54. There is no relevant information in Ms Kilkenny's Witness Statement covering the period between 11 February 2022 and 19 March 2022 when Ms Kilkenny stated that she was aware Mr Duck had a preferred candidate for the position. She did not enquire of Mr Duck whether the Claimant had applied and made no mention of discussing with the Claimant the reasons why the management team deemed the Claimant unsuitable for the role following the 11 February 2022 management meeting, including on 23 March 2022 when she met with the Claimant after the Claimant had been informed by Mr Duck that she was not to be given the role.

55. Thus, none of Mr Duck, Ms Kilkenny or Mr Cox advised the Claimant of the decision not to give the Claimant the lettings negotiator job following their 11 February 2022 meeting, or indeed until Mr Duck told her the role had been filled, on 21 or 22 March 2022. In his oral evidence, Mr Duck admitted that "*very possibly, we should have*" told the Claimant that it had been decided she would not be suitable for the role. In this regard, Mr Duck's email to the Claimant dated 15 February 2022, 4 days after the decision had been taken, is lamentable. He told the Claimant that he had: "*made the management team aware of our conversation in*

which you expressed interest in [FB's] position. As you know, he is not leaving for a few months so we are taking a little time to plan his replacement and structure but will keep you informed when we have more details on our plan." It is unfathomable why he did not tell the Claimant in this email that she would not be considered for the role.

56. As set out above, Mr Duck failed to advise the Claimant that her request to be considered for the role of lettings negotiator had been rejected, failed to invite the Claimant to submit her CV and cover letter, failed to ensure that the Claimant was pre-advised of the fact that other individuals were being interviewed and failed to invite her to interview for the role (or alternatively to explain why she was not being considered for interview), all of which she was legitimately entitled to expect from her employer, even without Mr Duck's promises on 19 January 2022 and 15 February 2022. I therefore uphold the Claimant's allegations in this regard as set out in her grievance email to Mr Nicholls dated 6 May 2022: *"I applied for a job and he promised to keep me updated, which he did not. In fact I found out via social media ... I should have been formally interviewed for that job and then told why I was not suitable for it."* In my finding, these failures by the Respondent (Mr Duck) amounted to much more than very poor employee management (which in itself is surprising given Mr Duck's self-professed HR expertise and experience) and constituted a fundamental breach of the implied duty of trust and confidence the Respondent owed to the Claimant.

57. However, two months later, in her resignation letter dated 8 July 2022, the Claimant omitted all mention of these failures on the part of Mr Duck in January to March 2022 and stated: *"Due to the reasons listed below I believe that the employment relationship has irrevocably broken down and my position in the company has become untenable after a fundamental breach of contract by Chestertons:*

- *Discrimination on the basis of sexism and ageism*
- *Unprofessionalism*
- *Bullying*
- *Failure to pay sick leave ...*
- *Total lack of duty of care to an employee undergoing stress and mental health issues in the workplace."*

On the face of this letter, by 8 July 2022, Mr Duck's failures in January to March 2022 had lost their significance for the Claimant vis-à-vis these reasons stated in the resignation letter. I therefore find that the Claimant did not resign in response to this repudiatory breach of contract by the Respondent which I have found to be established.

The Respondent did not conduct the Claimant's grievance procedure fairly

58. In her Witness Statement, the Claimant's grounds for alleging that the grievance procedure was unfair were based mainly on her belief that Mr Nicholls had preferred Mr Duck's account of how he had notified the Claimant that she had not been successful in her application for the lettings negotiator role on 21 or 22 March 2022, over her account. She saw this as the Respondent supporting Mr Duck's alleged lies and refusing to accept that the Claimant did not feel she could work in the same environment as Mr Duck. The Claimant was also displeased and disappointed at Mr Nicholls' grievance outcome decision, and did not think that this was what a friend or a CEO would have done.

59. In my finding, there was no evidence of Mr Nicholls making a decision which he knew or suspected to be based on an untruth by Mr Duck or that his management of the grievance procedure was unfair or biased. Relevant witnesses were interviewed, statements taken and assessed and a decision taken. I find that Mr Nicholls' evidence consistently showed him, even today, to be sympathetic and benevolent towards the Claimant, and to have conducted the grievance procedure as best he could.
60. In her oral evidence, the Claimant pursued an alternative argument that her grievance consisted of 16 complaints, but Mr Nicholls only dealt with 3 of them in the grievance outcome letter. Mr Oxley put to the Claimant in cross-examination that the grievance appeal procedure did deal with all 16 complaints and the Claimant agreed with this, but then said that Mr Oxley should have been independent of the Respondent and that she was not happy with the grievance appeal decisions on the complaints. That may be, but, given that it is normal for grievance procedures to be run by employees of the employer and given that the alleged defect in the grievance procedure of which the Claimant complained was then remedied by the grievance appeal procedure, which was in fact still ongoing at the date of the Claimant's resignation, I find that, even if the grievance procedure had not been conducted fairly, which I have found not to be the case, this did not constitute or contribute towards a repudiatory breach of contract by the Respondent.

The Respondent repeatedly tried to force the Claimant back to work in an unsafe workplace alongside Mr Duck and that this amounted to bullying and the Respondent had not shown the Claimant any care, kindness or consideration and was aggressive.

61. I held in my 9 May 2024 Decision as follows:

No "inference can be drawn that the Respondent's requests that the Claimant return to work had the purpose or effect of causing the Claimant to be alarmed, distressed, humiliated or intimidated, nor that the requests could reasonably be viewed as offensive, intimidating, abusive, malicious or insulting, despite the Claimant's assertions therein that the Respondent had not shown her any "care, kindness or consideration" and was "aggressive" and bullying her "into submission" (email from the Claimant to the Respondent dated 10 June 2023). In fact, the correspondence from the Respondent which includes references to the Claimant returning to work which is before me is polite and professional and does not include any negative language. If I am wrong on this point, then I would find that the requests were reasonable action taken by an employer relating to the management and direction of the employee or the employee's employment (for the purposes of Section 4(3) of the Bullying at Work Act), given that I do not believe there to be anything objectionable about an employer requiring an employee to attend work, when not on certified sick leave or holiday.

5. The allegation that the Respondent allegedly bullied the Claimant into going back to the office after sick leave is, each time it is mentioned by the Claimant, unparticularised and without reference to any of the required cause or effect components of the meaning of bullying for the purposes of Section 4 of the Bullying at Work Act. As per Foxtons, a one sentence assertion of a complaint, is not enough to sustain a claim. ... the Claimant has not to date identified what conduct of the Respondent in requiring her to go back to work (for the purposes of the Bullying at Work Act) was offensive, intimidating, abusive, malicious or insulting, nor that that conduct had the purpose or effect of causing her to be alarmed, distressed, humiliated or intimidated."

62. The Claimant did not for the Main Hearing submit any additional grounds or evidence in respect of this complaint. In her oral evidence, she moderated her allegation that she would be “scared” to return to the office to feeling “*not comfortable to be with someone who had told a lie about*” her. The OH Report dated 25 May 2022 had concluded that the Claimant was fit to return and the Claimant’s second sick note expired on 31 May 2022. It was only when the Respondent requested the Claimant to return to work or produce a new sick note that the Claimant submitted a third sick note covering the period 6 June 2022 to 3 July 2022. In addition, the Claimant did not accept the Respondent’s invitations to meet to discuss the situation. As per my Decision dated 9 May 2024 (quoted above), the correspondence from the Respondent from May 2022 onwards which includes references to the Claimant returning to work is polite and professional and does not include any negative language. Moreover, I do not believe there to be anything objectionable about an employer requiring an employee to attend work, when not on certified sick leave or holiday. Indeed, I consider this to be justifiable and reasonable.
63. Although I appreciate that the Claimant was concerned about having to work in the same office as Mr Duck, the subject of her grievance and to whom she had evidently developed an intense antipathy: “*Paul Duck is the cause of all this anguish, had he listened to my appeal during my appraisals and had he cared about my welfare all this could have been solved long ago*” (the Claimant’s email to Mr Nicholls dated 19 June 2022), the Respondent did not consider that any risk to the Claimant arose therefrom and I agree. There is no evidence to support the allegation that Mr Duck’s presence in the office created an unsafe workplace and in my finding the Claimant has failed to prove this.
64. In respect of this complaint, the Claimant has not presented any alleged facts or evidence from which any inference can be drawn that the Respondent’s requests that the Claimant return to work amounted to anything other than the Respondent taking reasonable action to return the Claimant to her employment, and certainly does not constitute nor contribute to a breach of the implied contractual term of trust and confidence.
65. The Claimant’s position that at the 15 June 2022 meeting it was unconditionally agreed that she was released from her employment contract, she did not have to return to work and return to what she alleged to be an unsafe workplace where she would be forced to work alongside Mr Duck, and the Respondent would pay her what she deemed to be a fair financial settlement, is not grounded in reality. No employer would unconditionally agree to entering into a settlement agreement and no settlement can be agreed without the amount of the settlement payment being agreed. It is clear from the minutes of the meeting on 15 June 2022 and the correspondence which followed that the parties entered into negotiations on the settlement payment, but the offer was not accepted by the Claimant. Without a negotiated departure, the Claimant was required to return to work.

Last straw doctrine

66. In her 6 May 2022 grievance email, the Claimant referred to Ms Kilkenny’s email to the Claimant dated 5 April 2022 conveying that the Respondent was not able to offer her an alternative role as the ‘last straw’. The Claimant was then absent for sickness from 7 April 2022 and she never returned to work. I find from this that as from 5 April 2022 it is more than probable that the Claimant viewed her employment as at an end.

67. Apparently ignoring this, and bearing in mind her resignation date of 8 July 2022, the Claimant also referred to Mr Nicholls' requests in early July 2022 just prior to her resignation that she return, according to her, *"to an unsafe workplace where I would be forced to work alongside and be under the orders of Paul Duck ... [as] the final straw in a long line of negative issues. I broke down and resigned..."*.
68. Following Omilaju, to constitute a 'last straw' for the Claimant's constructive dismissal claim, it must be established that Mr Nicholls' requests, although: *"not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. ... Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant."* However, in this case, as set out above, I do not uphold the Claimant's allegations in relation to the Respondent's requests that she return to work. For the avoidance of doubt, I find that the requests were if not *"entirely innocuous"* then justifiable and lawful and certainly *"... insufficient to activate earlier acts which may have been, or may have contributed, to a repudiatory breach"* (Omilaju).
69. In respect of the settlement negotiations in June 2022, it should go without saying that an employer not making a settlement offer to an employee in the amount the employee demands, or indeed not making an offer at all, cannot be or contribute to an employer repudiatory breach of contract or a last straw (Dr Paul Leaney). In this regard, in my finding, it is more likely than not that the breakdown of the settlement negotiations was in fact the cause of the Claimant's eventual decision to resign - 4 days after receiving the Respondent's final unacceptable settlement offer (on 4 July 2022) and when she became aware that the Respondent was not going to accede to her increased settlement payment demand and that her employment would continue.
70. Moreover, with the exceptions of: (i) Mr Duck's failings to keep the Claimant informed on her application for the lettings negotiator job in January to March 2022 as set out above; and (ii) the Respondent's omissions to contact the Claimant in respect of the roles it advertised in May and June 2022 as set out above, I have also found above that objectively there were no other acts or a course of conduct on the part of the Respondent which alone or taken together might amount to a breach of the implied term of trust and confidence. Rather, I have found that, with those two exceptions, all of the Claimant's other complaints concerned reasonable and justifiable acts of the Respondent which the Claimant genuinely (I have no doubt), but in my finding, wrongly when viewed objectively, found upsetting and injurious and chose to interpret as destructive of her relationship of trust and confidence with the Respondent.
71. Taking the above considerations into account, I find that the last straw doctrine does not arise on the facts of this case.

Affirmation

72. In respect of: (i) Mr Duck's failings to keep the Claimant informed on her application for the lettings negotiator job in January to March 2022 as set out above; and (ii) the Respondent's omissions to contact the Claimant in respect of the roles it advertised in May and June 2022 as set out above, which also as set out above are the only breaches of the implied contractual duty of trust of confidence I have found to be established, as I have also found above, the

Claimant did not resign in response to either of these breaches, either on or shortly after 22/23 March 2022 when she became aware of Mr Duck's failings (i), or in response to the job vacancies advertisements (ii), as she did not find out about these advertised vacancies until after she had resigned. She made no mention of either of these breaches in her resignation letter dated 8 July 2022. Thus, even if the Claimant had resigned in response to these upheld breaches (which I have found above she did not), the Claimant would be deemed to have affirmed them by remaining in employment until her resignation.

73. In any event, even if the Claimant had made out her pleaded case that any other acts or conduct of the Respondent constituted (or was the last straw in a chain of incidents together constituting) a repudiatory breach of the implied contractual term of trust and confidence entitling her to resign, it was incumbent on the Claimant at some point to elect between termination and continuing with her contract of employment. The Claimant expressly described Ms Kilkenny's email to her dated 5 April 2022 conveying that the Respondent was not able to offer her an alternative role as the 'last straw'. She later stated in her grievance email to Mr Nicholls of 6 May 2022: *"I doubt that I would be able to return to work having the knowledge that I am not valued. The situation is untenable"*. She also stated in her Witness Statement that as of 1 June 2022, *"It was now clear that I could no longer work for Chestertons"*. Thus, as early as 5 April 2022, it is more than probable that the Claimant viewed her employment as at an end, but she did not resign in response, nor did she resign on or shortly after 6 May 2022 or 1 June 2022. Instead, she decided to remain in employment (and emphasised this in her grievance email to Mr Nicholls dated 6 May 2022 which she opened with: *"I am still employed by Chestertons and under contract"*) for 4 more months. In this regard, I did not believe the Claimant's oral evidence that she *"wanted to stay"* and *"wanted to work"* and that she thought that Mr Duck might apologise or she might be moved to an admin. job, given the preponderance of evidence to the contrary.
74. On the facts of this case, I therefore find that the Claimant's election not to resign at any point in the period from 5 April 2022 until 8 July 2022 to constitute an election by her to continue with her contract of employment. In my finding, she thereby affirmed any alleged repudiatory breach(es) of contract by the Respondent.
75. I recognise that for all of the period from 7 April 2022 to 10 August 2022, the Claimant was absent from work, on sick leave, holiday or unauthorised absence. She was also corresponding with the Respondent in relation to her grievance appeal and settlement negotiations. For the avoidance of doubt, I do not find that either of these factors negate my finding of affirmation. I therefore part ways on this issue with *Dr Paul Leaney-v-Loughborough University* ([2023] EAT 155) in which the EAT held that in that case it was the fact of settlement negotiations coming to an end and an ongoing grievance procedure which did not provide any resolution of the claimant's concerns which triggered the claimant's resignation and negated any finding of affirmation until that point. By contrast, in the instant case, the Claimant in my finding had no intention of returning to work, whatever the outcome of the grievance appeal and even if the settlement negotiations did not give her the result she was hoping for, at the latest on 6 May 2022 when she stated in her grievance email to Mr Nicholls that she *"would not be able to return to work having the knowledge that I am not valued. The situation is untenable..."*. Thus, this case is not on all fours with *Dr Leaney*.

In conclusion

76. I find that judged objectively the Claimant has established on the facts 2 repudiatory breaches by the Respondent of the implied contractual term of trust and confidence:
- (i) Mr Duck's failings in January to March 2022 in respect of what was clearly an application by the Claimant for the role of lettings negotiator in failing to invite her to submit her CV and cover letter, failing to ensure that the Claimant was pre-advised of the fact that other individuals were being interviewed and failing to invite her to interview for the role (or alternatively to explain why she was not being considered for interview), all of which she was legitimately entitled to expect from her employer, even without Mr Duck's promise that he would do so; and
 - (ii) the Respondent's omissions to contact the Claimant in respect of the roles it advertised on 20 May 2022 for a Property Administrator, on 23 May 2022 for an Office Administrator and on 14 June 2022 for an Operations Administrator, against the background of Ms Kilkenny's offer in her 5 April 2022 email to assist the Claimant with alternative roles.
77. However, the Claimant made no mention of either of these breaches in her resignation letter dated 8 July 2022, from which I can only conclude that they did not play a part in her decision to resign: she did not resign in response to either of the repudiatory breaches of contract by the Respondent which I have found to be established. I therefore find that the Claimant has not succeeded in establishing that a repudiatory breach by the Respondent of the implied contractual term of trust and confidence caused the Claimant to resign or played any part in her decision to resign and her constructive unfair dismissal claim therefore fails.

Age discrimination and sex discrimination

1. As set out in my 9 May 2024 Decision: *"As I explained to both parties at the Preliminary Hearing, in my view, the alleged act of less favourable treatment of the Claimant by the Respondent for the purposes of the Claimant's claims of age and sex discrimination under Sections 6(1) and 11(1) of the EO Act cannot be the alleged statement made by Mr Duck on 22 March 2022, that the Respondent was looking for a young man for the job of lettings [negotiator], since such a statement of general intention on its own has no relevance to the Respondent's treatment of the Claimant. The only alleged act of less favourable treatment, which I have identified on the materials before me, is the Respondent's decision not to give the Claimant the job of lettings [negotiator] and instead to give it to a younger male person, with Mr Duck's alleged statement (if established) providing supporting evidence of the grounds on which this decision was made by the Respondent. This decision was conveyed to the Claimant on 22 March 2022.*

3. At the Preliminary Hearing, I also explained to the Claimant that to succeed in any claim for discrimination, she must prove facts from which the Tribunal can conclude that the Respondent committed an act of discrimination against her personally i.e. that the Respondent treated her less favourably in some way than it would treat a real or hypothetical comparator. Broad unparticularised allegations that the Respondent as a company had a culture of ageism and sexism are not relevant in this regard.

4. Thus, the Claimant's allegations in the Further and Better Particulars regarding the

employment and suitability for employment of other staff members, Ms RR and Mr PC, do not, so far as I can see, have any bearing on the Claimant's own employment or her claims that the Respondent discriminated against her. The same is true of the Claimant's allegation that in April 2022, the Respondent created, and employed a young girl, into a new role of "administrative assistant", which the Claimant alleged was exactly the sort of role she had been asking for; and in addition the Respondent then employed a second property manager, "something which had been promised to the Claimant since 2019", since, in both cases, the Claimant has not pleaded or submitted any evidence that she applied for either of these roles, nor has she made any claim that there was unfavourable treatment of her personally by the Respondent with regard to these roles.

5. For the same reasons, I do not consider as relevant the Respondent's submission that the Respondent does not have a policy of not promoting women or older persons, since this has no bearing on the alleged discriminatory decision in relation to the specific post of lettings [negotiator], for which particular job Mr Duck allegedly said that a "young man" was sought by the Respondent.

...7. I find the Claimant has a reasonable prospect of success in proving (although I also find that, at least at this stage, she has not proved facts which would confer upon her the burden of proof benefits of Section 74 of the EO Act), namely, the decision made by the Respondent and conveyed to the Claimant on 22 March 2022 to reject her application for the job of lettings [negotiator] and to employ a young man in the role, against the background of Mr Duck's alleged comment (whenever made) that the Respondent was looking for a "young lad" for the same job of lettings [negotiator]."

2. I have considered in some detail above the issue of whether or not Mr Duck made the alleged comment that the Respondent was looking for a "young lad" for the role of lettings negotiator in 2022.
3. In their evidence at the Main Hearing, both Ms Kilkenny and Mr Nicholls made some observations about the lack of gender or age bias within the Respondent's workforce and that recruitment is undertaken on a merits basis. In this regard, I repeat paragraph 5. of my 9 May 2024 Decision (above).
4. I do not accept that the Claimant genuinely believed that the Respondent had a sexist or ageist culture. There was no evidence to support this allegation; indeed, the Respondent's employee details put into evidence show the opposite. In addition, the Claimant made no complaints in this regard until March 2022.
5. Notwithstanding the inconsistencies in parts of the Respondent's (Mr Duck's and Ms Kilkenny's) evidence on the reasons for the decision to give the Claimant the job as lettings negotiator as set out above, given the Response Form details and the contemporaneous evidence from the relevant time (the WhatsApp message from Mr Duck dated 21 March 2022 and the grievance interview of Mr Duck by Mr Nicholls on 13 May 2022) and the evidence given to the Main Hearing, I find that the Claimant has not succeeded in proving that Mr Duck's decision not to offer the lettings negotiator role to the Claimant was reached because the Claimant is a woman or because of her age or because Mr Duck wanted a young man for the role.
6. As I have held above, I find that in February 2022, Mr Duck believed, rightly or wrongly, that

the Claimant was not suitable for the role, taking into account that the role would carry a significant pay cut and would involve the Claimant taking on a new junior role which would be uncomfortable for the Claimant and her colleagues because of her existing more senior role. Despite my doubts as articulated above about the credibility of parts of Mr Duck's evidence, I found him convincing on these points at least and the Claimant did not present any evidence which proved otherwise, save for the alleged "young lad" comment, which I have considered above. I find that the evidence submitted by the Respondent, including the Respondent's witnesses who gave live evidence (albeit that I have found above that their accounts were modified over time), establishes these non-discriminatory reasons for the decision made by Mr Duck. Thus, even if it were the case that Mr Duck's decision was unreasonable or unfair (which I have not found to be the case), on the facts, I do not find that the Respondent's decision not to give the Claimant the lettings negotiator role was motivated by either conscious or unconscious age or sex discrimination.

7. In addition, the Claimant has not on the balance of probabilities proved that the Respondent would not have reached the same decision as regards an application for the role of lettings negotiator by a hypothetical existing young female or young or old male employee already employed by the Respondent as a Property Manager with the Claimant's experience and expertise and who had been successfully performing their role for a number of years.
8. Accordingly, I find that the Claimant has not, in my finding, succeeded in proving or establishing facts from which I could conclude, in the absence of an adequate explanation, that the Respondent's decision to reject her application for the job of lettings negotiator constituted an act of less favourable treatment on the ground that she is a woman or on the ground of her age. She has therefore not in my finding raised a prima facie case of discrimination such as to cause the burden of proof to shift to the Respondent to explain the decision. Following *Madarassy*, the Claimant has established only the "*bare facts of a difference in status and a difference in treatment*" between her and the successful applicant, indicating a possibility of discrimination, but from which, without more, I do not conclude that, on the balance of probabilities, the Respondent's decision was an unlawful act of age or sex discrimination.
9. I therefore find that the Respondent did not subject the Claimant to any acts of age discrimination or sex discrimination under the EO Act. These claims are therefore dismissed.

Finally, I would like to record the fact that the Claimant was a litigant in person. She is to be commended for the way she handled the proceedings: she had clearly devoted an enormous amount of time and intellectual rigour to preparing her case and produced comprehensive and accomplished documentation, as well as expertly representing herself.

Gabrielle O'Hagan

Gabrielle O'Hagan, Chairperson
28 March 2025