Appeal Nos. EA-2020-000876-LA (formerly UKEAT/0009/21/LA)
EA-2020-000877-LA (formerly UKEAT/0010/21/LA)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 19 March 2021
Judgment handed down on 15 July 2021

Before

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

(SITTING ALONE)

EA-2020-000876-LA

MS M DRISCOLL (NÉE COBBING) APPELLANT

1) V & P GLOBAL LIMITED 2) MR F VARELA RESPONDENTS

EA-2020-000877-LA

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JUDGMENT

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APPEARANCES

For the Appellant	MR JEREMY LEWIS (of Counsel) Instructed by: Branch Austin LLP 32 St James's Street London SW1A 1HD
For the Respondents	MR MARK GREAVES (of Counsel) Instructed by: Kingsley Napley LLP Knights Quarter 14 St John's Lane Clerkenwell London EC1M 4AJ

SUMMARY

HARASSMENT

PRACTICE AND PROCEDURE

Permission to amend the notice of appeal was granted. The appeals, as amended, were allowed in part.

The EAT's earlier decision in **Timothy James Consulting Ltd v Wilton** [2015] IRLR 368 had been decided per incuriam European Directives and domestic caselaw, in the light of which it was 'manifestly wrong'. In so far as **Wilton** had decided that a constructive dismissal could not itself amount to an act of unlawful harassment within the meaning of section 26 of the Equality Act 2010, it would not be followed.

A constructive dismissal is, in principle, capable of constituting an act of harassment, within the meaning of section 26 of the Equality Act 2010. Accordingly, the Claimant's claim of harassment constituted in her alleged constructive dismissal (which had been struck out by the ET in reliance upon **Wilton** and certain obiter dicta in **Urso v Department of Work and Pensions** [2017] IRLR 304, EAT) would be reinstated, with consequential amendments made to the list of issues to be determined by the ET at the full merits hearing.

The ET ought to have permitted an amendment to the claim form, to include an additional allegation of harassment, which was based upon facts already pleaded. Permission to re-amend the particulars of claim, and to make associated amendments to the list of issues, was granted.

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

1. I refer to the parties by their respective statuses before the London Central Employment Tribunal (Employment Judge Khan, sitting alone — 'the ET'). This judgment follows the full hearing of the Claimant's appeals from, respectively:

1.1. the ET's judgment, dated 24 September 2020, by which it struck out a claim of constructive dismissal, advanced under sections 26 and 40 of the Equality Act 2010 ('the EqA'); and

1.2. its related decision, dated 25 September 2020, to refuse the Claimant's application for permission to amend the list of issues to be determined at the full hearing, set out in Schedule B to its case management summary, dated 5 August 2020 ('the List of Issues').

2. By letters dated 24 February and 17 March 2021, the Claimant applied to amend ground 3 of her notice of appeal, as set out later in this judgment. Both applications were resisted. I heard substantive argument in relation to the amended grounds, de bene esse, stating that I would give my ruling on the applications in this judgment.

3. Before me, though not below, the Claimant was represented by Mr Jeremy Lewis of counsel. The Respondents, both here and below, were represented by Mr Mark Greaves of counsel. I am grateful to them both for their helpful written and oral submissions.

Material facts and background

4. Between 2 April and 29 July 2019, the Claimant was employed by the First Respondent, a legal recruitment consultancy, as an executive assistant/operations manager. The Second Respondent is the founder and Chief Executive of the First Respondent. In these proceedings, leaving aside the claim which has been struck out, the Claimant asserts that, on various occasions in the course of her employment, the Second Respondent made comments which constituted harassment related to sex, race or disability, contrary to section 26 of the EqA; that she was victimised by the First Respondent, after her employment had ended; and that the First Respondent was in breach of its duty to provide written particulars of employment. The Respondents' case is that any alleged act which occurred prior to 6 June 2019 is statute-barred and that, in any event, all substantive claims, together with the facts alleged to underpin them, are denied. The Respondents contend that the Claimant resigned for personal reasons and that all of her claims have been advanced as an unreasonable and vexatious attempt to seek to intimidate and/or embarrass the Second Respondent and to put the Respondents to significant cost, as a direct response to the First Respondent's request that the Claimant repay overpaid holiday pay and salary. All such matters, together with remedy, if appropriate, fall to be resolved by the employment tribunal, at the full merits hearing.

The judgment and decision under appeal

5. The Claimant's constructive dismissal claim was struck out for reasons which were shortly stated. The ET held that it was bound by **Timothy James Consulting Ltd v Wilton** [2015] IRLR 368, EAT and **Urso v Department of Work and Pensions** [2017] IRLR 304, EAT to conclude that, as a matter of law, a constructive dismissal could not amount to an act of harassment contrary to section 26 of the EqA. Accordingly, it struck out the claim, under rule

37(1)(a) of the **Employment Tribunals Rules of Procedure 2013** (as amended), as having no reasonable prospect of success.

6. The Claimant's application to amend the List of Issues was to add those following:

6.1. (as new paragraph 2.1(f), under the heading 'Harassment (section 26EQA)') 'On 11 July 2019, did the Second Respondent shout in the Claimant's face, shouting that she had "put in the wrong dates" (or words to that effect)?'; and

6.2. (in substitution for existing paragraph 3.1, under the heading 'Constructive dismissal (section 26 EQA)') 'On 29 July 2019, did the Claimant resign in response to the issues referred to above, at 2.1 (a) – (e), and/or did the Claimant resign as a result of 2.1(f) being the last straw?'

7. The ET refused permission to make the latter amendment *"because the allegation of discriminatory constructive dismissal has been struck out"*. The former amendment was refused because it was held to raise a new allegation of harassment and amounted to an application to amend the claim. The ET *'noted that this new allegation is premised on the same background facts added by amendment with effect* [from] *26 March 2020, which are relied on by the claimant as amounting to the final straw in relation to the allegation of constructive dismissal that has now been struck out. The claimant has not specified how this allegation is said to relate to sex, disability or race and therefore the basis on which this allegation is brought under section 26 EQA is unclear.'*

The grounds of appeal

8. The four grounds of appeal are summarised below. Grounds 1 and 2 relate to the striking out of the claim for constructive dismissal and grounds 3 and 4 relate to the refusal of permission to make, respectively, the first and second proposed amendments to the List of Issues:

8.1. (ground 1) **Wilton** and **Urso** should not be followed and/or are inconsistent and/or do not properly implement the relevant anti-discrimination EU Directives;

8.2. (ground 2) The ET was wrong 'effectively' to strike out the consequences of the Claimant's resignation due to her allegations of harassment, given the confirmation by Singh J (as he then was), in **Wilton** [59], that a harassment resignation does not break the chain of causation;

8.3. (ground 3) No reasonable tribunal could have reached the conclusion which the ET reached in relation to the first proposed amendment. (As originally framed, three bases for this assertion were advanced. By her applications to amend her notice of appeal, the Claimant seeks to add, respectively, a fourth basis, and a further sentence to the third basis. Ground 3, including each proposed amendment, is recorded verbatim, below.):

8.3.1. (3(i)) 'The Judge was wrong to find it was a new allegation: a reference to this allegation was made in the original particulars of claim (paragraph 17), was recorded at Schedule A 2.5.4 of EJ Hodgson's record of the CMC of 27 March 2020, allowed to be added in the factual matrix of the amended particulars of claim (para 18) and accepting by the Judge on as

being a necessary particularisation of the claim at Schedule A, 8, (17) of his record of the CMC.

8.3.2. (3(ii)) The Judge was wrong to find that it did not specify how it related to sex, disability or race: how it related was referred to in the original particulars of claim (paragraph 17), that it was related to sex disability or race was recoded at Schedule A 2.5.4 of EJ Hodgson's record of the CMC of 27 March 2020 and the Claimant repeatedly in both the original particulars of claim and amended states that the shouting was because she had called out his behaviour in relation to the sexist and racist and disability related comments which the appellant found to be offensive;

8.3.3. 3(iii) The Judge was wrong to find that it amounted to an application to amend the claim for the same reasons given above. Alternatively, if an amendment was required, the judge erred in failing to treat this as in substance only a matter of relabelling of an existing pleaded allegation which should have been permitted;

8.3.4. (3(iv)) Further, and in any event, the Employment Judge erred in proceeding on the basis that the matters relied upon as the last straw were themselves required to relate to sex, disability or race. The last straw was not required to be of the same character as the other matters which cumulatively constituted a repudiatory breach; it was sufficient if it contributed something, however slight, to the conduct which cumulatively constituted a repudiatory breach of contract. Alternatively

there was no need for the last straw to be related to the protected characteristic in order to establish that the constructive dismissal was at least in part caused by the alleged unlawful acts of harassment.';

8.4. (ground 4) No reasonable tribunal could have reached the conclusion which the ET reached in relation to the second proposed amendment, which concerned whether the Claimant could claim for losses caused by her resignation (which Singh J had confirmed did not break the chain of causation: **Wilton** [59]).

The applications to amend the notice of appeal

9. The first application (relating to the amendment set out at paragraph 8.3.4 above) is said to have been identified by counsel, when he was instructed for the appeal and preparing his skeleton argument, and to be supported by **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1, CA. It is asserted that no prejudice is caused to the Respondents; the issue being one of law, and where the facts have yet to be determined. The Claimant contends that it would assist the employment tribunal and the parties for this issue to be clarified, if, for the reasons originally identified, the ET erred in refusing permission to amend the List of Issues. The second application is said to have arisen from a consideration of the skeleton arguments and to be very closely related to the existing grounds of appeal; indeed, implicit in existing grounds 3(i) and (ii). If the ET had been entitled to take the view that the relevant allegation had not been pleaded as an act of harassment, it had been obliged to take into account that the matter was merely a re-labelling exercise: **Abercrombie v Aga Rangemaster Ltd** [2014] CR 209, CA [48]. To the extent that amendment of the notice of appeal is required in order to raise the point, it should be permitted — as the issue is so closely connected to the existing grounds and the substantive hearing has yet to take place, there is no prejudice to the Respondent.

10. The Respondents resist the first application on the basis of delay and lack of substantive merit. It appeared not to have been made as soon as practicable, as required by paragraph 3.12 of the **Practice Direction (Employment Appeal Tribunal - Procedure) 2018**: counsel had been instructed on 26 January 2021, four weeks before the application had been made and there had been no explanation advanced for the delay during that period. In any event, missing the point prior to counsel's instruction was not an acceptable reason for delay, given that the Claimant had been professionally represented at all times. Further, the application lacked substantive merit. The relevant proposed amendment to the List of Issues was to add a further act of alleged harassment. Whether or not that act was also said to constitute the last straw for the purposes of a separate claim of constructive dismissal (in section 3 of the List of Issues) was immaterial. Accordingly, in order that the proposed amendment might be added to paragraph 2.1 of the List of Issues, it was necessary for the alleged act to have been related to sex, disability or race, and the Claimant had not specified how it was said to have done so. As the amended ground of appeal did not have a reasonable prospect of success, there was no prejudice to the Claimant in being refused permission to advance it. In all the circumstances, the application did not satisfy the test set out in **Khudados v Leggate and others** [2005] ICR 1013, EAT.

11. In response to the second application, the Respondents again submit that there is no acceptable explanation for the delay and that the proposed amendment does not arise from the skeleton arguments; its factual basis was clear at the time of the ET's decision. Thus, it should have been raised at the outset of the appeal, or, at the very least, at the time of the earlier application to amend. In any event, skeleton arguments had been exchanged eight days before the application was made. (An earlier written submission to the effect that the Respondents were prejudiced in being unable to address it in their skeleton argument was, sensibly, abandoned by Mr Greaves, in oral submissions.)

Discussion

12. The **Khudados** principles are well-known. The starting-point is the overriding objective of the EAT rules, to enable the EAT to deal with cases justly. The EAT has a broad and generous discretion in applying its rules and practices so as to achieve that objective. The proposed amendment set out at paragraph 8.3.4 above was identified by counsel during the week prior to the application. I am satisfied that the application was made as soon as practicable after the need for the amendment was appreciated by counsel (then recently instructed) and that I have received a full, honest and acceptable explanation for its timing. Furthermore, it was made over three weeks prior to the date of the full hearing of the appeal. Whilst the second application was made only two days prior to the hearing, following the exchange of skeleton arguments on 9 March 2021, it seeks permission for a less substantial amendment, which I consider to be implicit in (or, at the very least, very closely connected with) the first and second limbs of ground 3. It makes explicit that which is the corollary of those limbs.

13. I am also satisfied that both proposed amendments are fairly to be characterised as relating to *'a crisp point of law closely related to existing grounds of appeal'* (**Khudados** [86(c)]). Neither gave rise to any delay; the Respondents were able to deal comprehensively with both in the course of the hearing and, thus, were in no worse position than would have been the case had both proposed amendments been included within the notice of appeal, as originally drafted. No prejudice to either Respondent is identifiable. As Mr Greaves recognised, there is no prejudice in being unable to address the latter proposed amendment in the Respondents' skeleton argument; if anything, that would prejudice the Claimant, who would not have received advance notice of the Respondents' position. There has yet to be any determination of the facts in this case by the employment tribunal. Recognising that one or more of Mr Greaves' substantive arguments might,

ultimately, prevail, it is not self-evident, at the outset, that either proposed amendment raises a point of law which lacks a reasonable prospect of success.

14. In all the circumstances, I am satisfied that the overriding objective is achieved by permitting the amendments sought and I so order.

The substantive appeals, as amended

The relevant legislative provisions

15. Before turning to the parties' submissions, it is convenient to set out the domestic and EU legislation with which all parties agree that this appeal is concerned.

The EqA

16. So far as material to this appeal, section 26 of the EqA provides:

> *'(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(j) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> …
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*
>
> …'

17. Sub-sections 39(2) and 39(4) of the EqA provide that an employer (A) must not, respectively, discriminate against, or victimise, an employee (B) by (amongst other things) dismissing B or subjecting B to any other detriment. Section 39(7)(b) provides that, in each case, the reference to dismissing B includes a reference to: *'the termination of B's employment … by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.'*

18. Section 40 EqA provides, in full:

> *'(1) An employer (A) must not, in relation to employment by A, harass a person (B)*
> *(a) who is an employee of A's;*
> *(b) who has applied to A for employment.'*

19. Section 212 of the EqA provides, materially:

> *'(1) In this Act —*
>
> *…*
>
> *"detriment" does not, subject to subsection (5), include conduct which amounts to harassment.*
>
> *…*
>
> *(5) Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic.*
>
> *…'*

20. The domestic provisions proscribing harassment were introduced into the EqA's predecessor legislation, in 2005, in order to implement the obligation for which the Equal Treatment Directive (EU/2002/73 EC) had provided. In 2008, the original domestic definition of harassment was amended, having been found inadequately to have conformed with the

requirements of that Directive. The amended definition was later carried into the EqA: **Unite the Union v Nailard** [2018] IRLR 730, CA, at paragraphs 53 to 58.

The EU Directives

21. In relation to the protected characteristics on which reliance is placed by the Claimant, the relevant current EU Directives are:

21.1. the recast EU Equal Treatment Directive (No.2006/54) (a consolidating Directive, relating, so far as material to this appeal, to sex discrimination — 'the Recast Directive');

21.2. the EU Equal Treatment Framework Directive (No.2000/78) (relating, amongst other matters, to disability discrimination — 'the Framework Directive'); and

21.3. The EU Race Equality Directive (2000/43) ('the Race Equality Directive').

22. Within the Recast Directive:

22.1. Numbered recital 6 states:

'(6) Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.';

22.2. Article 2 provides (materially):

*'**Definitions***

1. For the purposes of this Directive, the following definitions shall apply:

...

(c) "harassment": where unwanted conduct relating to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

...

2. For the purposes of this Directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection or submission to such conduct; ...';

22.3. Article 14 provides (materially):

*'**Prohibition of Discrimination***

1. There shall be no direct or indirect discrimination on grounds of sex in public or private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals ...'; and

22.4. Article 26 provides:

*'**Prevention of discrimination***

Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.'

23. Within the Framework Directive:

23.1. Article 1 provides:

*'**Purpose***

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.';

23.2. so far as material, Article 2 provides:

*'**Concept of discrimination***

1 For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2 ...

3 Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

...'; and

23.3. Article 3 provides, materially:

*'**Scope***

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) ...;

(b) ...;

(c) employment and working conditions, including dismissals and pay;

A

…'.

24. In the Race Directive, so far as material:

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24.1. Article 2 provides:

*'**Concept of discrimination***

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

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2. …

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States."; and

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24.2. Article 3 provides:

*'**Scope***

1. *Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:*

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(a) …;

(b) …;

(c) employment and working conditions, including dismissals and pay;

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…'

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The parties' submissions

The Claimant

25. Grounds 1, 2 and 4 of the appeals are predicated upon the following analysis of the law, advanced by Mr Lewis, being correct.

26. Mr Lewis submitted that the definition of harassment requires a looser connection with the relevant protected characteristic(s) than does the definition of direct discrimination. Nevertheless, the Directives deem harassment to be a form of discrimination: **R (EOC) v Secretary of State for Trade** [2007] ICR 1234 (Admin), at paragraphs 16 to 17. Each Directive expressly requires that the proscription of discrimination, must extend to dismissal. The ECJ (as it then was) has emphasised that 'dismissal' is to be construed widely: **Burton v British Railways Board** [1982] 1 QB 1080, ECJ, at paragraph 9; **Meikle v Nottinghamshire County Council** [2005] ICR 1, CA, at paragraph 46 (supporting the Court's conclusion that references to 'dismissal' in the EqA's predecessor legislation included constructive dismissal). Mr Lewis observed that, in **Meikle** the Court had been concerned with provisions relating to discrimination which had referred to dismissal as an alternative to detriment, whereas the harassment provisions do not refer either to detriment or dismissal. That distinction loses its force, he submitted, when viewed in the context of the Directives which the domestic legislation was introduced to implement, which treat harassment as a form or discrimination and expressly require that the latter includes dismissals. The 'obvious' reason why the harassment provisions make no express reference to detriment or dismissal is because, if the requirements for harassment in section 26 of the EqA are satisfied that will necessarily entail a detriment, whereas the same is not necessarily the case for direct discrimination: see **Moyhing v Barts and London NHS Trust** [2006] IRLR 860, EAT, at paragraph 23. Far from indicating some narrower scope of protection, the clear underlying intention in omitting a requirement to establish further detriment is to broaden

protection and avoid surplusage, submitted Mr Lewis. The same is true of the absence of any express provision in section 40 of the EqA equivalent to that in section 39(7) of the EqA; that merely reflects the absence of any express reference to detriment or dismissal. Instead, no limit is placed on that which can amount to an act of harassment and there is no provision that it cannot include dismissal. Thus, the Claimant's case is that there is no reason to adopt a narrow definition of harassment, such that dismissal (including constructive dismissal) in response to separate acts of harassment cannot itself be regarded as part of the act of harassment. The position in relation to constructive dismissal is not conceptually different from that in **Meikle**, where the constructive dismissal was treated as the discriminatory act albeit that it had been the employee who had terminated the contract, by accepting the employer's repudiatory breach. As the Claimant's solicitors had expressed it, in their letter to the ET dated 14 August 2020 (emphasis original):

> *'…the question is "who is 'doing'" the dismissal in a constructive harassment dismissal….the answer must be that it is the employer who is still doing the dismissal…It may well be that...the employee is the one doing the "termination of the contract of employment", but it is still the employer who is doing the dismissal in a constructive harassment dismissal.'*

Furthermore, submitted Mr Lewis, if the dismissal itself cannot constitute an act of harassment, the limitation issue identified in **Meikle** could arise — time would run from the date of the last act in response to which the employee resigned, rather than from the date of resignation. Whether or not that is a live issue in any given case, the fact that it can arise at all is of significance. In this case, the Respondents advance a limitation defence in relation to the earlier acts, which would require the tribunal to consider whether there had been a continuing act.

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27. Mr Lewis submitted that the anomalous results which would arise in the event that there could not be a claim of constructive dismissal harassment were brought into sharp focus by the EqA's anti-overlap provisions. Section 212(1) of the EqA provides that unlawful harassment is excluded from the definition of 'detriment'. Further, the phrase 'any other detriment', in sections 39(2)(d) and 39(4)(d) of the EqA, make clear that the preceding matters (including dismissal) are also sub-categories of detriment. That is the clear intention because section 212(1) is focused on avoiding overlap between the provisions proscribing, respectively, harassment and direct discrimination and victimisation. The consequence is that, even where the act of harassment is on the grounds of the protected characteristic, rather than merely related to it, the claim can only be brought under the harassment provisions. Accordingly, the effect of excluding constructive dismissal as an act of harassment would be that harassment, even when constituting a form of direct race, sex or disability discrimination, or of victimisation, would be excluded, uniquely, from the ambit of the protection which would otherwise apply in relation to constructive dismissal in the event of direct discrimination and victimisation. Constructive dismissal claims could be brought if the discrimination fell short of harassment (lacking the purpose or effect stated in section 26(1)(b) of the EqA), but such claims would be barred in more serious cases which did have that purpose or effect. That, submitted Mr Lewis, cannot have been the legislative intention. Nor could it have been intended that the harassment provisions, which were designed to extend protection, would remove the pre-existing entitlement to bring a constructive dismissal claim where the harassment in question amounted to direct discrimination or victimisation.

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28. Mr Lewis contended that the above anomalies could not be avoided satisfactorily by construing the exclusion in section 212(1) of the EqA as not applying where the relevant detriment takes the form of dismissal. In relation to victimisation dismissals, that is not an option because 'detriment' forms part of the definition of victimisation, in section 27 of the EqA.

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Further, it would reintroduce the difficulties arising from the need for a comparator and to establish that the unwanted conduct was 'because of', rather than 'related to', the protected characteristic, which the separate harassment provisions were designed to avoid. It cannot have been intended to revert to the old law on harassment, which *'was constructed, somewhat uncomfortably, out of the general statutory definitions of discrimination'* (**Richmond Pharmacology v Dhaliwal** [2009] ICR 724, EAT, at paragraph 13). That would entail that the harassment legislation was deficient in relation to constructive dismissals, in the way identified in **R (EOC) v Secretary of State for Trade**, in failing to extend to conduct related to the protected characteristic. Thus, the EqA is to be construed purposively, to cover constructive dismissal consequent upon, or (at least in part) by reason of, unlawful harassment, so as to accord with the Directives. By operation of section 5(2) of the **European Union (Withdrawal) Act 2018**, the application of the principles in accordance with which a conforming interpretation of the EqA is to be applied was unaffected by Brexit. Such a construction merely required that the 'unwanted conduct' in section 26 EqA, include constructive dismissal, where the resignation is in response to repudiatory conduct which includes unlawful harassment; an approach consistent with that in **Meikle** and which would avoid the anomalous distinction between the protection afforded in cases of harassment and that afforded for other forms of discrimination, and victimisation (a distinction which was inconsistent with the Directives, which treat harassment as a form of discrimination).

29. Mr Lewis submitted that, even if constructive dismissal caused by harassment is not to be treated as itself constituting an act of harassment, that would be no reason to exclude a claim arising consequent upon dismissal, on ordinary causation principles (just as, in **Meikle**, the claim could have been framed upon the basis of earlier detriments). As set out in **Essa v Laing Ltd** [2004] ICR 746, CA, a claimant is entitled to compensation for loss which *'flows directly and*

naturally from the wrong' (per Pill LJ, at paragraphs 37 and 39), or which is causally linked to it (per Clarke LJ, at paragraphs 49 to 53). Plainly, that is the case where a resignation is, at least in part, responsive to acts of unlawful harassment. Indeed, applying those principles, if the acts of unlawful harassment were a significant influence, in causing the resignation, that would be sufficient even if it did not amount to a constructive dismissal (for example, if it were established that the contract had been affirmed): see **Roberts v Wilsons Solicitors LLP** [2018] ICR 1092, CA, at paragraphs 64 to 86. Similarly, the loss of employment would augment the level of award for injury to feelings, all presupposing that a claim in relation to the earlier acts of harassment was not time-barred.

30. By contrast, Mr Lewis submitted, to exclude such claims, flowing from dismissal (be it actual or constructive) caused by the act of harassment, would insulate employers from the consequences of unlawful harassment. It would constitute 'a flagrant failure' to implement protection from harassment in a way which complied with the requirement for an effective remedy (see **Steer v Stormsure Ltd** [2021] IRLR 172, EAT, at paragraphs 46 to 51[1]), and be inconsistent with the requirement that the compensatory rules must enable loss and damage actually sustained to be made good, in full (see, for example, **Essa v Laing**, per Clarke LJ, at paragraphs 50 and 51). In any event, a successful claimant is also entitled to seek declaratory relief, under section 124(2)(a) of the EqA.

31. In the context of the analysis summarised above, Mr Lewis submitted that the ET had placed inappropriate reliance upon the EAT's decisions in **Wilton** and **Urso**:

[1] Since the hearing of the instant appeal, **Steel v Stormsure Ltd** has been considered by the Court of Appeal; [2021] EWCA Civ 887, the judgment of which does not detract from the general principles cited by the EAT.

31.1. In **Wilton**, the employment tribunal had found that acts of harassment had caused the claimant to resign (see paragraph 59) and also that the constructive dismissal had itself been an act of harassment. In the EAT, Singh J had concluded (at paragraph 58) that constructive dismissal does not itself fall within the meaning of harassment, such that it had not been open to the tribunal to conclude to the contrary. That had not, of itself, have an impact on the remedy awarded. On the contrary, Singh J (at paragraph 59) had endorsed the employer's concession that the claimant's resignation, found to have been caused by the acts of harassment, had not broken the chain of causation in relation to the harassment claim; the compensatory award for unfair dismissal in that case had been limited to £450 of the total compensation for financial loss, being £40,394.85 (see paragraph 6). Thus, **Wilton** indicated that the ET in this case was wrong to have struck out the Claimant's claim of constructive dismissal caused by harassment. Even if it were the case that constructive dismissal could not itself constitute unlawful harassment, there would remain an issue as to whether harassment caused the resignation. If so, the Claimant would be entitled to compensation consequent upon her dismissal.

31.2. In **Urso**, Supperstone J had rejected a submission that a dismissal (as opposed to a constructive dismissal) could not, of itself, involve an act of harassment. He had distinguished that from a constructive dismissal, commenting that prior acts of harassment might give rise to a constructive dismissal which would not itself be an act of harassment. If that (obiter) view were correct, it provided no support for any contention that there cannot be compensation for a constructive dismissal consequent upon earlier acts of harassment.

32. Furthermore, Mr Lewis contended, in **Wilton**, Singh J had acknowledged expressly (at paragraph 56) that no argument had been developed before him by reference to EU Directives. The same applied in **Urso** (the judgment in which, so far as it concerned constructive dismissal, was obiter, in any event). In neither case had the EAT been referred to the decision in **Meikle** (which, albeit not directly on point, was clearly of relevance to the issues under consideration) that, without the need for express provision, such as now contained in section 39(7) of the EqA, dismissal includes constructive dismissal. Thus, both **Wilton** and **Urso** had been decided per incuriam. Further, having regard to the terms of the Directives and the reasoning in **Meikle**, the conclusion that constructive dismissal could not fall within section 26 of the EqA was manifestly wrong. Accordingly, the first and fourth categories of case in which the EAT may depart from its earlier decisions (per **British Gas Trading Ltd v Lock** [2016] ICR 503, EAT, at paragraph 75) applied. Further and for the same reasons, it might be said that exceptional circumstances justifying departure from those decisions (category five) exist.

33. Applying the above analysis to the judgment and decision under appeal, Mr Lewis submitted that:

33.1. in striking out the allegation of constructive dismissal and in rejecting constructive dismissal as an issue, the ET had erred, in two distinct respects:

33.1.1. Contrary to the decision in **Wilton**, constructive dismissal is itself properly to be regarded as unwanted conduct falling within section 26(1) of the EqA, and, thus, as being itself an act of harassment, where the employee resigns, in whole or in part, in response to acts of unlawful harassment; and, in any event,

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33.1.2. as a matter of remedy, irrespective of whether constructive dismissal caused by harassment is itself to be regarded as an act of harassment, the Claimant is entitled to claim compensation for the former; and

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33.2. In refusing to add the alleged 'last straw' incident to the List of Issues, the ET, wrongly, had considered it to raise a new allegation of harassment, amounting to an application to amend the claim form, whereas it had been included in both the original and amended particulars of claim; see:

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33.2.1. the original particulars of claim, at paragraph 17: *"his aggressive behaviour toward her, <u>again</u> …"* (emphasis added); and

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33.2.2. the amended particulars of claim, at paragraph 18, referring to aggressive behaviour towards the Claimant during her last day in the office (being 11 July 2019; see paragraph 23). The ET had approved that amendment as being a necessary particularisation of the claim, by paragraph 8(7) of its order made on 22 July 2020;

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33.3. The ET had erred further, in relation to the additional reason given, that the Claimant had not specified how the allegation related to sex, disability or race:

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33.3.1. The additional reason did not stand as a separate reason, independent of the ET's error in treating the allegation as being a new one, requiring an amendment. Since there had been an existing pleaded allegation as to the

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last straw incident, instead of applying the test applicable to the exercise of its discretion to permit an amendment, it had been necessary for the ET to apply the test applicable to a consideration of whether an allegation should be struck out, that is whether it had no reasonable prospect of success. In considering that latter issue, the ET ought to have taken into account the high hurdle which was applicable, in particular in a case of discrimination: see **Ahir v British Airways Plc** [2017] EWCA Civ 1392, at paragraphs 11 and 16. That was particularly so given the fact-sensitive nature of an assessment of whether the relevant conduct was related to the protected characteristic and the broad nature of that test (see **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** [2020] IRLR 495, EAT, at paragraphs 20 to 25).

33.3.2. The Claimant's pleaded case was that the reason for the Second Respondent's aggressive behaviour had been that the Claimant had 'called out' his behaviour in making sexist comments (see the amended particulars of claim, at paragraphs 12 to 14 and 18). Accordingly, the relationship with the protected characteristic of gender was apparent on the face of the pleading. The making of sexist comments was, by its nature, related to sex (see, for example, **R (EOC) v Secretary of State for Trade**, at paragraph 11). The same applied to conduct in response to the taking of issue with such comments.

33.3.3. Even if the ET had considered that the amended particulars of claim did not adequately identify how the allegation related to sex, disability or

race, once it had been recognised that the last straw incident had been pleaded already, the appropriate course would have been to require particulars of that contention, rather than to strike it out: **Twist DX Ltd and others v Armes** UKEAT/0030/20/JOJ, 23 October 2020, at paragraph 43(f);

33.3.4. In any event, in order that a constructive dismissal be, at least in part, caused by unlawful acts of harassment, there was no requirement that the last straw be related to the relevant protected characteristic; it would suffice if part of the repudiatory conduct, as a whole, entailed unlawful harassment. By its nature, the final straw was to be taken together with the other matters upon which, cumulatively, reliance was placed as amounting to the repudiatory breach. The effect of the final straw is potentially twofold: (a) it may tip the balance, such that, cumulatively, there is a repudiatory breach; and/or (b) even if conduct amounting to a repudiatory breach has already taken place, it may be required in order to defeat any affirmation argument. On either basis, the last straw forms only one element in the cumulative repudiatory conduct and need not be of the same character as the other matters, or do any more than contribute, however slightly, to the repudiatory breach: see **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 (CA), at paragraphs 39 to 55. Accordingly, the relevant issue in this case is not whether the alleged final straw alone amounted to unlawful harassment, but whether it contributed something to the conduct cumulatively relied upon as being repudiatory, which involved (or included to a material extent) acts of unlawful

harassment. Any other approach would be inconsistent with the principle that it is sufficient if discrimination is a significant (that is, more than trivial) influence and that (where the burden of proof shifts) the respondent is required to establish that the conduct was in no sense whatsoever on the prohibited ground: **Igen Ltd v Wong** [2005] ICR 931, CA, at paragraphs 35 to 37.

34. For all such reasons, Mr Lewis submitted, the appeals should be allowed and the ET's decisions to strike out the allegation of constructive dismissal and to refuse to permit the requested modifications to the List of Issues should be reversed.

The Respondents

35. Mr Greaves opened his oral submissions by accepting that the Claimant was entitled to claim damages arising from acts of harassment already pleaded and that Mr Lewis' proposition, set out at paragraph 33.1.2, above, was correct. Nevertheless, he submitted, the parties differed as to the relevance of that proposition to the Claimant's appeal. It was the Respondents' case that the Claimant had never sought to rely upon the act in question, which did not need to be pleaded. The appeal ought to be dismissed in its entirety, which would not prevent the Claimant from relying upon the alleged constructive dismissal, as a remedy issue, within section 6 of the List of Issues.

36. In summary, the Respondents' position as to each ground of appeal was as follows:

36.1. Ground 1 (**Wilton** and **Urso** were wrongly decided): Both cases had been correctly decided, because a constructive dismissal entails an act of resignation by the

employee, rather than any act of the employer, and because constructive dismissal is not explicitly brought within the scope of harassment against which section 40 of the EqA provides protection. The distinction drawn in **Urso** between 'actual' and constructive dismissal for these purposes is not impermissible on policy grounds; it simply follows from the fact that the two forms of dismissal are different;

36.2. Ground 2 (the ET had been wrong effectively to strike out the consequences of the Claimant's resignation owing to her allegations of harassment): The ET had done no more than strike out the claim which had been brought, namely that the Claimant's constructive dismissal amounted to an act of harassment under section 26 of the EqA. By this ground of appeal, the Claimant appeared to suggest that the effect of that decision was to strike out a claim that she had been constructively dismissed, contrary to section 39 of the EqA. Whilst that was a claim which the Claimant *might* have brought, it was not a claim which, in fact, she had sought to pursue, either at any preliminary hearing , or in correspondence with the ET;

36.3. Ground 3 (the ET's refusal of the application to add alleged shouting, on 11 July 2019, as an act of harassment had been perverse): The ET had been correct to find that the alleged shouting on 11 July 2019 had constituted a new allegation of harassment and, accordingly, required an application to amend the claim form (on the basis of a factual matter already pleaded). The Claimant had never clarified how the alleged shouting on 11 July 2019 was said to have been related to sex, disability or race. Her pleaded case appeared to be that the Second Respondent had shouted at her because she had challenged his behaviour and he had not liked that. As the link

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to a protected characteristic had not been inherently clear, the Claimant had been obliged to specify what it was, but had not done so; and

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36.4. Ground 4 (the ET's refusal of the application to add the Claimant's resignation, on 29 July 2019, as an act of harassment, had been perverse): The Claimant's application to include an allegation that her *resignation* had constituted an act of harassment had added little to the allegation that her *constructive dismissal* had constituted an act of harassment. Having struck out the latter claim, it had not been perverse of the ET to refuse to allow the amendment application, for the same reasons.

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37. Mr Greaves submitted that the following pertinent matters were apparent from the procedural history of the claim:

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37.1. It had not been clear, from a combined reading of the claim form and original particulars of claim (presented on 4 November 2019), whether the Claimant was bringing a claim for constructive dismissal and, if so, on what basis.

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37.2. In their original grounds of resistance, dated 6 December 2019, the Respondents had responded to a claim of constructive unfair dismissal, contrary to sections 94 and 95(1)(c) of the **Employment Rights Act 1996** ('the ERA').

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37.3. On 4 February 2020, the Claimant's solicitors had sent an e-mail to those representing the Respondents, stating that the Claimant's intention was to bring a claim for 'constructive unfair dismissal', not under sections 94 and 95 of the ERA, but under section 39(2)(c) of the EqA.

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37.4. Nevertheless, at a preliminary hearing before Employment Judge Hodgson, on 5 March 2020, the Claimant's solicitor had adopted a different position as to the relevance of her alleged constructive dismissal — the Claimant was not advancing a claim for unfair dismissal; rather, she was alleging that she had been constructively dismissed and that that dismissal constituted an act of harassment related to the protected characteristics of race, sex and disability (paragraphs 2.4 and 2.5 of Schedule A to the case management summary of that hearing refers). The judge had declined to consider any application to amend and had stated that the Claimant must make a written application (see paragraph 2.10 of the case management summary).

37.5. A formal application to amend her claims had been made by the Claimant on 26 March 2020, in which:

37.5.1. she had stated explicitly that *"the amended particulars set out no new legal claims"*;

37.5.2. within the section of the proposed amended particulars of claim headed 'BACKGROUND', she had sought to amend paragraph 18 of her grounds of complaint to include new factual allegations about her last day in the office, described as being 'the last straw'; notwithstanding which

37.5.3. she had not proposed any amendments within the section headed 'THE LAW' (in which she set out her claims). In particular, she had not sought to add a claim of harassment constituted in her alleged constructive dismissal (as had been suggested at the preliminary hearing of 5 March

2020), nor had she sought to plead a claim of discriminatory dismissal under section 39 of the EqA (as indicated in her e-mail of 4 February 2020).

37.6. On 21 July 2020, the Respondents had sent version 1 of a draft list of issues to the Claimant and the tribunal, in advance of a further preliminary hearing, scheduled to take place the following day. That version had reflected the understanding gleaned by the Respondents at the preliminary hearing of 5 March 2020. Thus, they had:

37.6.1. noted, at footnote 2, that the Claimant did not pursue a claim of unfair dismissal;

37.6.2. included the Claimant's alleged constructive dismissal as an act of harassment, contrary to section 26 of the EqA; and

37.6.3. not included a claim for discriminatory dismissal, contrary to section 39 of the EqA.

37.7. On the same date, the Claimant had amended the Respondents' draft list of issues to produce version 2. By that version, she had confirmed the Respondents' understanding of the relevance of her alleged constructive dismissal to have been correct and had agreed the Respondents' wording in relation to constructive dismissal as an act of harassment, contrary to section 26 of the EqA. She had not sought to add a claim under section 39 of the EqA.

37.8. At the preliminary hearing before Employment Judge Khan, the following day, the Claimant had further confirmed that position, as recorded at paragraph 13 of Schedule A to the case management summary, sent to the parties on 5 August 2020:

'The harassment complaint includes an allegation of constructive dismissal. This proceeds on the basis that the claimant was constructively dismissed by the first respondent because of the second respondent's alleged unwanted conduct related to sex and/or race and/or disability…and because of the second respondent's alleged aggressive behaviour towards her. The claimant contends, on this basis, that her constructive dismissal amounted to harassment under section 26 EQA.'

37.9. At the preliminary hearing on 22 July 2020, the ET had finalised the List of Issues. As noted in the introduction to Schedule B to the case management summary, it contained both the matters which had been agreed in advance between the parties and the remaining matters which had been addressed in discussion at the preliminary hearing. The List of Issues included the following:

37.9.1. five matters alleged to constitute unwanted conduct for the purposes of the harassment claim under s26 of the EqA, as set out at paragraphs 2.1(a) to (e) of Schedule B to the case management summary, in relation to each of which the tribunal would be required to determine: whether the conduct had occurred; if so, whether it had been related to a protected characteristic; and whether it had had the proscribed purpose or effect; and

37.9.2. an allegation that the Claimant had been constructively dismissed and that that dismissal had amounted to an act of harassment under section 26 of

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the EqA (see paragraph 3.1 of Schedule B to the case management summary).

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37.10. No claim for discriminatory dismissal contrary to section 39 of the EqA had been included in the List of Issues, as the Claimant had not suggested that such a claim had been brought (whether in the draft list of issues, or in the course of the preliminary hearing).

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37.11. On 28 July 2020, prior to finalising the case management summary, Employment Judge Khan had written to the parties, asking that the Claimant set out in writing the basis upon which her claim for constructive dismissal under section 26 of the EqA could proceed, in light of the EAT's decisions in **Wilton** and **Urso**, to the effect that a constructive dismissal could not amount to an act of harassment.

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37.12. On 14 August 2020, the Claimant had written to the ET, seeking both to amend the List of Issues and to set out her position as to the basis upon which the alleged constructive dismissal could amount to an act of harassment. By that letter, she had sought to add two additional alleged acts of harassment to the five matters already set out at paragraph 2.1 of the List of Issues (being those with which this appeal is concerned). Notwithstanding that, were the applications to be granted, the tribunal would need to determine whether the conduct in question had been related to a protected characteristic (as set out at paragraph 2.2 of the List of Issues), the Claimant had not set out how it was alleged that the alleged shouting, on 11 July 2019, had related to any protected characteristic.

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37.13. Whilst the reasoning set out in the Claimant's letter of 14 August had been difficult to follow, and its relevance to the applications made unclear, it had been plain that the Claimant had not been seeking to re-amend her particulars of claim; only the List of Issues, so as to reflect her pleaded claim. In particular, she had not been seeking to add to the latter a claim under section 39 of the EqA.

37.14. Regarding the basis upon which her claim for constructive dismissal under section 26 of the EqA could proceed, the Claimant had contended that **Wilton** and **Urso** were contradictory, and, in any event, had been wrongly decided because a *'constructive…dismissal…is still an act by the employer'*.

37.15. On 21 August 2020, the Respondents had set out their objections to the Claimant's application to amend the List of Issues, and their position that the Claimant was not entitled to complain that her alleged constructive dismissal was an act of harassment contrary to section 26 of the EqA. In summary:

37.15.1. the Claimant had not alleged that the alleged shouting had been related to any protected characteristic. Thus, even if proven, it could not amount to an act of harassment for the purposes of section 26; and, in any event,

37.15.2. the Claimant's resignation could not amount to unwanted conduct for the purposes of section 26, following **Wilton** and **Urso**, which were binding on the tribunal and not in conflict.

37.16. By letter dated 17 September 2020, the Claimant had provided her response to the Respondents' request for further and better particulars, clarifying that the correct date for the allegation that the Second Respondent had shouted at her on her last working day was 11 July 2019 (not 29 July 2019, as had been suggested previously) and that the date of her resignation had been 29 July 2019.

37.17. By its judgment dated 24 September 2020, the ET had struck out the allegation of constructive dismissal as an act of harassment under section 26 of the EqA, in reliance upon **Wilton** and **Urso**, which it considered to be binding (judgment, paragraph 2).

37.18. By its decision dated 25 September 2020, the ET had refused the Claimant's application to amend the List of Issues so as to:

37.18.1. include her resignation as an alleged act of harassment, because he had struck out the allegation of constructive dismissal; and

37.18.2. add the alleged shouting, on 11 July 2019, as an act of harassment. It had observed that: (1) the latter constituted a new allegation of harassment and, as such, amounted to an application to amend her claim; and (2) the Claimant had not specified how the allegation was said to relate to sex, disability or race, such that the basis upon which it had been brought under section 26 of the EqA was unclear.

The grounds of appeal

38. In response to ground 1 of the notice of appeal, Mr Greaves submitted that **Wilton** and **Urso** had been correctly decided, for the reasons respectively set out at paragraph 58 of the former and paragraphs 68 to 69 of the latter. In short, there had been no expansion of the statutory definition of harassment which would bring constructive dismissal within its scope; and, unlike an 'actual' dismissal, a constructive dismissal was not an act of the employer at all. It was Mr Greaves' position that, had it been intended to bring constructive dismissal within the scope of section 26 of the EqA, explicit wording to that effect would have been incorporated in section 40 (as it had been in section 39). No difficulty was thereby created — a claim could be brought under section 39; it was merely the employee's act of resignation which could not constitute harassment by the employer.

39. The EU Directives did not undermine those submissions, contended Mr Greaves. Within the Recast Directive, he relied upon the language of article 14(1), submitting that, as article 2 separately defined direct discrimination; indirect discrimination; and harassment, the reference to 'direct or indirect discrimination' in article 14(1) would be superfluous, if discrimination had been intended to incorporate harassment; the intention must have been to limit that article to discrimination distinct from harassment. The use of the word 'deemed', within article 2(3) of the Race Directive and article 2(3) of the Framework Directive, was also significant, as had been recognised by Burton J (in relation to a different Directive which had adopted the same wording), in **R (EOC) v Secretary of State for Trade**, at paragraph 16: *'…it means…that harassment, however itself defined, is here to be deemed to be discrimination and hence prohibited, but that the provision does not thereby assimilate the two different definitions'* (emphasis original). Thus, Mr Greaves contended, contrary to the Claimant's submissions the Directives did not expressly require that the prohibition on discrimination, including harassment, must cover dismissals; in

fact, they excluded them. It followed that they provided no barrier to the **Wilton** approach. **Meikle** had been concerned with a very different situation and with provisions which were not encompassed by the harassment provisions; it was distinguishable. In that case, the Court of Appeal had been attempting to reconcile different provisions relating to constructive dismissal, according to whether the protected characteristic in question had been race or disability, on the one hand, or sex, on the other. Plainly, it was hard to discern a principled basis for any such distinction. By contrast, on the Claimant's case in this appeal, the issue was whether the position for harassment must be the same as for direct discrimination, which the Respondents submitted need not be the case. There had been no failure to implement the requirements of the Directives, because the Claimant could obtain a remedy, including declaratory relief, by bringing a claim under section 39 of the EqA. The only declaration which she could not achieve by that means was to the effect that her act of resignation was itself an act of harassment.

40. Mr Greaves further submitted that the Claimant's contention that the obvious reason why the harassment provisions did not refer expressly either to detriment or dismissal was that the requirements for harassment, if established, would necessarily entail a detriment, and that the clear underlying intention in omitting a requirement to establish further detriment was to broaden protection and avoid surplusage, was not correct. To constitute an act of harassment, conduct must have the proscribed purpose or effect. So, a hypersensitive employee can succeed if she can prove the proscribed purpose, even absent the effect. Equally, an act which does not amount to detriment may amount to harassment, taking into account the requirements imposed by section 26(4) of the EqA. Thus, the absence of a reference to dismissal is significant, if only in relation to 'purpose'. Whilst, commonly, there would be a detriment, that would not necessarily be the case. Accordingly, the inclusion of an express reference to detriment and dismissal within the harassment provisions would not, automatically, have entailed surplusage. The Claimant's

construction of section 40 of the EqA would be more powerful if that section were to be read in isolation. Read with section 39, as it should be, her construction is shown to be incorrect; as a matter of construction, rather than principle, had it been intended to adopt the same approach to harassment, section 40 would have been otiose, because there would have been no need for harassment to be hived off, submitted Mr Greaves. Furthermore, the acts of discrimination identified within the Directives and sections 39(2) and (4) of the EqA are required because, adopting ordinary language, the act of resignation is not that of the employer. When considering remedy, it is from the acts which trigger the resignation, not the resignation itself, that an award for injury to feelings flows. Financial losses can then be sought for a separate claim of unfair and/or discriminatory dismissal. The distinction was rightly recognised in **Urso**.

41. As to the Claimant's submissions regarding the anti-overlap provisions of the EqA, if **Wilton** is correct a claim can be brought under section 39 of the EqA. The Claimant's construction of section 212 of the EqA is simply wrong, unduly narrow and advanced in order to justify the Claimant's purposive reading of section 40, submitted Mr Greaves. Whilst acknowledging that the issue could arise with any combination of claims, Mr Greaves submitted that, properly understood, section 212 seeks simply to avoid the mischief of double recovery; it does not deprive a claimant of a remedy, where he or she mislabels a harassment claim. If a female employee were to present a claim for direct sex discrimination, on the basis that her manager had undermined her and thereby subjected her to a detriment, the ET could find that there had been a detriment and, thereby, less favourable treatment for the purposes of section 13 of the EqA, even if, on the same facts, the employee would have succeeded in establishing a claim of harassment. Yet, on the Claimant's construction of section 212 of the EqA, the employee's claim of direct discrimination should fail. Whilst there was no authority on the point, it could not have been Parliament's intention that a tribunal should reject otherwise valid claims,

if they had not been correctly labelled, submitted Mr Greaves; section 212 simply precluded a claimant from succeeding on the same set of facts in claims of detriment and harassment. Nevertheless, a claim of constructive dismissal could succeed, even when a claimant had put up with prior acts of harassment over a lengthy period (see, for example, **Munchkins Restaurant Ltd and another v Karmazyn and ors** UKEAT/0359/09/LA; UKEAT/0481/09/LA, in which the EAT had held that it had not been perverse of the tribunal so to have found). Nor would any successful defence of affirmation in such circumstances necessarily deprive the claimant of a remedy, for which purposes the relevant question was whether the constructive dismissal had operated to break the chain of causation (see **Roberts v Wilsons Solicitors LLP**, at paragraph 86); a fact-sensitive question to be considered whether the claim was advanced under section 39 or section 40 of the EqA.

42. As to the Claimant's concerns regarding limitation, there were two options; either a claim could be brought under section 39 of the EqA (which itself would avoid any limitation issue), or the conduct in question could be viewed as forming part of a course of conduct; in which situation it was obvious that an extension of time would be granted. Such a course of conduct would be made out if there were a collateral finding that there had been a constructive dismissal. Whilst each claim would be fact-sensitive, a claim could be advanced by either route. The Claimant in this case would have been placed at no disadvantage (whether for limitation or remedy purposes) by bringing a claim under section 39. The wording of section 26(4) meant that there was no need to ask whether an employee has been subjected to detriment, but the substantive outcome would always be the same.

43. As to ground 2 of the Claimant's appeal, Mr Greaves submitted that it was the function of an employment tribunal to determine the claims actually brought (see **Land Rover v Short**

(2011) UKEAT/0496/10/RN, at paragraphs 32 to 33, quoted in **Scicluna v Zippy Stitch Ltd** [2018] EWCA Civ 1320, at paragraph 17). In this case, the ET had not '*effectively*' struck out the consequences of the Claimant's resignation owing to alleged harassment; it had struck out the only claim in relation to constructive dismissal which the Claimant had stated (at the July preliminary hearing) her intention to bring and which had been included in the draft list of issues prepared by her solicitors — that her constructive dismissal itself had amounted to an act of harassment, contrary to section 26 of the EqA. The ET had not struck out the remedy issue, which was different. The location of each allegation in the List of Issues was significant and indicated the context in which it had been made. Indeed, it might be sensible for the relevant issue to be recorded in section 6 of the List of Issues, for that reason, submitted Mr Greaves. Properly understood, ground two of the appeal appeared to suggest that the ET had been wrong '*effectively'* to strike out a claim of constructive dismissal contrary to section 39 of the EqA, yet the ET had made no decision to that effect, as no such claim had been brought. Professionally represented at all times and being aware of the possibility of such a claim, the Claimant had not indicated her intention to bring it, whether at the preliminary hearing on 5 March 2020; in her application to amend her claim, on 26 March 2020; in the draft list of issues prepared on 21 July 2020; at the preliminary hearing on 22 July 2020; or in her application to amend the (finalised) List of Issues, on 14 August 2020.

44. Whilst the Respondents accepted that: (1) it might have been open to the Claimant to allege constructive dismissal contrary to section 39, as a result of prior acts of harassment; and (2) a dismissal contrary to section 39 (or which was otherwise unfair) did not break the chain of causation in respect of losses flowing from prior acts of harassment, any claim to be advanced under section 39, albeit on the factual basis already pleaded, would need to be the subject of an

application to amend, to be considered in accordance with the principles in **Selkent Bus Co Ltd v Moore** [1996] ICR 836, EAT.

45. In relation to ground three, Mr Greaves acknowledged that the allegation that the Second Respondent had shouted at the Claimant on 11 July 2019 had not constituted a new allegation of fact, raised for the first time in the Claimant's letter of 14 August 2020 (as reference to it had been permitted by way of amendment to paragraph 18 of the original particulars of claim at the July preliminary hearing — see paragraph 8(7) of the case management summary of that hearing). The ET had been alive to the re-labelling issue (hence the ET's statement that *'the allegation is premised on the same background facts added by amendment …on 26 March 2020'*). However, the ET had been correct to hold that it had constituted a '*new allegation of harassment*' and, thus, had amounted to '*an application to amend the claim*', out of time; not merely the List of Issues:

45.1. The Claimant's application to amend her claim had sought merely to add detail concerning the shouting on 11 July 2019, expressly as part of the '*Background'* to her claim. When setting out her claims, at paragraphs 20 to 22 of her amended particulars of claim, the Claimant had not sought to suggest that the matter had amounted to an additional act of harassment;

45.2. The Claimant had not included the allegation as an alleged act of harassment in the draft list of issues submitted on 21 July 2020; and

45.3. During the preliminary hearing on 22 July 2020, the Claimant had not suggested that the shouting had been an act of harassment, as was clear from the case management summary and the final List of Issues, set out at Schedule B.

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46. Furthermore, the Claimant's application, on 14 August 2020, had not specified the relationship between the alleged shouting on 11 July 2019 and any protected characteristic; a matter which had not been addressed at an earlier stage. Whilst the Claimant asserted that the relationship had been specified at paragraph 17 of the original particulars of claim (ground 3(ii)), the relevant allegation had not been included anywhere in that paragraph. Similarly, contrary to the Claimant's contention that the relationship between the act and the relevant protected characteristic had been recorded at paragraph 2.5.4 of Schedule A to Employment Judge Hodgson's case management summary (ground 3(ii)), that paragraph had related to the alleged constructive dismissal, rather than to the alleged shouting which, as before, had not been set out at that stage. The amended particulars of claim had not themselves set out the alleged relationship; paragraph 18 had stated merely that the reason for the shouting had been '*again…because she had called out* [the Second Respondent's] *behaviour*'. The Respondents' presumption had been that the inclusion of the word '*again'* had been a reference to paragraph 17 of the same document, in which the Claimant had made a separate allegation that the Second Respondent had been aggressive '*because she* [had] *challenged him…and he did not like his behaviour questioned'*. It followed that it had not been perverse of the ET to have concluded that the Claimant had not set out how it was that the alleged shouting on 11 July 2019 was said to have been related to sex, disability or race. On its face, paragraph 18 of the amended particulars of claim appeared to allege that the relevant shouting had related to the Claimant's conduct in challenging the Second Respondent's behaviour and his dislike of being challenged; the nature of the behaviour in question being incidental. As a matter of principle, submitted Mr Greaves, the Second Respondent's alleged reaction to the Claimant's challenge to his behaviour would constitute conduct related to conduct related to sex; a step too far. As was clear from paragraph 20 of **Aslam**, whilst broad in nature, the 'related to' test does have its own limits. Of each alleged act of harassment the same three questions must be asked: what was the unwanted act; was it

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related to a relevant protected characteristic; and did it have the proscribed purpose or effect? An act which is not itself harassment might serve as a last straw for the purposes of a claim of constructive dismissal, but that will not entitle a claimant to advance it as a separate act of harassment. Accordingly, it had been necessary for the Claimant to specify how the shouting was said to be related to sex, disability and/or race, and fell to be viewed as part and parcel of earlier behaviour, which was not inherently clear. She had not done so, such that it had been reasonably open to the ET to refuse her application to amend, on that basis. The earlier alleged acts of harassment had not required further explanation, because, if established, they intrinsically constituted conduct related to the specified protected characteristic. Whilst it would have been open to the ET to seek further particulars of the alleged relationship, it had not been obliged to do so.

47. The point of law advanced by ground 3(iv) was not disputed, in so far as it related to constructive dismissal, but did not undermine the need to satisfy the test applicable to a separate claim of harassment in relation to the act in question, submitted Mr Greaves. Thus, if ground one of the appeal were to succeed, ground 3(iv) would be unnecessary and, if ground one were to fail, ground 3(iv) would not avail the Claimant. In practical terms, there were only two live issues in the appeal, being whether **Wilton** and **Urso** had been decided correctly and whether the ET had erred in refusing the Claimant's application to add the alleged shouting on 11 July 2019 as an act of alleged harassment. That was, in part, because the Respondents accepted that, were the pleaded claims of harassment to be established, the Claimant could seek compensation which included losses flowing from any constructive dismissal caused by that unlawful harassment.

48. Pragmatically, Mr Greaves and Mr Lewis were agreed that, were I to allow ground 3(iii) of the appeal, it would be appropriate for me to determine the Claimant's application to amend, rather than remit the matter to the ET for that purpose.

49. In relation to ground 4, the Claimant's application had been simply to add her resignation as an act of harassment under section 26 of the EqA, initially at paragraph 2.1(g), and, later, within paragraph 3.1, of the List of Issues. It had added nothing substantive to her complaint that her constructive dismissal had been an act of harassment under section 26; a matter which, at that time, had been set out at paragraph 3.1 of the List of Issues. By her notice of appeal, the Claimant had asserted that her intention had not been to seek an injury to feelings award for the act of resignation, but the financial losses caused by the latter. Nevertheless, the ET could only determine the application actually made; not the one which the Claimant had intended to make, or thought that she was making. The ET had not acted perversely by refusing the Claimant's application to rely upon her resignation as an act of harassment, for the same reasons upon which it had relied in striking out her claim that her constructive dismissal itself had been an act of harassment. In short, the ET had been bound to follow **Wilton** and **Urso** and to find that the Claimant's resignation could not amount to an act of harassment contrary to section 26 of the EqA, since it had not been an act of the First Respondent at all.

50. For all such reasons, Mr Greaves submitted, the appeal should be dismissed. If, contrary to that position, the appeal were to be allowed and it were held that the matter did not need to be remitted to the ET, no claim in relation to constructive dismissal should be included in the List of Issues, unless affirmation were also included as an issue. In particular, he said, the Respondents would wish to assert affirmation owing to delay, as a defence to any claim in which it was alleged that the Claimant had been constructively dismissed (the Claimant's solicitors having clarified,

in their letter of 17 September 2020, that the alleged 'last straw' had occurred on 11 July 2019, though her resignation had not taken place until 29 July 2019).

The Claimant in reply

51. Mr Lewis made clear that the inclusion of affirmation as an issue within the List of Issues would not be resisted. He submitted that the consequence of Mr Greaves' opening concession (recorded at paragraph 35, above) was that the Claimant's appeal must be allowed; the Respondents' submissions to the ET, together with the latter's decision, had not reflected that concession.

52. In relation to ground 1, Mr Lewis submitted that the Respondents' construction of the Directives could not be correct. Numbered recital 6 to the Recast Directive fed into article 14 of the latter. The only other reference to harassment in that directive appeared in Article 26. In the Framework Directive, article 2(3) defined harassment and article 3 was the equivalent of article 14 of the Recast Directive. No separate provision, equivalent to article 26 of the latter, was made in relation to harassment. Articles 2 and 3 of the Race Directive contained provisions equivalent to articles 2 and 3 of the Framework Directive, using near identical language. Given that the reference to dismissals in the Race and Framework Directives must extend to harassment, the submission that article 14 of the Recast Directive somehow excluded harassment was unarguable and inconsistent with paragraph 16 of **R (EOC) v Secretary of State for Trade**, which confirmed that harassment is deemed to be discrimination. The issue concerned the scope of protection conferred, not the definition of the term. The Respondents' submissions as to the relevance of **Meikle** piggy-backed on their erroneous interpretation of the Directives. As Mr Lewis engagingly put it, were his own submissions regarding their proper construction to be rejected, he would have lost his star striker but would not have lost the match; section 212 of the EqA should itself lead

A to the conclusions which he urged. The fundamental flaw in the Respondents' submissions was that section 39 of the EqA can apply only to claims of direct discrimination, or victimisation. Harassment is said to be wider, which is why sections 26 and 40 had been enacted.

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53. Mr Lewis acknowledged that the Claimant would need to make an application to amend her claim form, in order to advance a claim under section 39 of the EqA. Nevertheless, he submitted, the relationship between the acts upon which she relied and her challenge to such C behaviour was clear from her pleaded case. The use of the word 'again', at paragraph 18 of the amended particulars of claim, was a clear reference to the Second Respondent's alleged use of the term 'sassy minx', pleaded at paragraphs 12 to 17 of the same document. The acts of D harassment relied upon were not hermetically sealed from one another. It would be for the tribunal to determine, as a question of fact, whether, taken together, they were sufficiently related to the relevant protected characteristics. The pleading was one presented in an employment tribunal and its wording should not be subjected to anxious scrutiny. Spelled out, the existing pleaded case E was, plainly, that the Claimant had been treated aggressively because she had called out the Second Respondent's behaviour, including his alleged sexist comments, referring to sassy minxes. Whether that would suffice to establish her claim would be a matter for the tribunal. A F requirement that the Claimant Identify the relationship between the relevant acts and protected characteristic (sex) would result in simple repetition of that case.

G 54. The ET's approach in relation to the alleged last straw had been perverse and had taken account of irrelevant matters and ignored those which were relevant. Discrimination claims ought not to be excluded at case management stage. Further, there was no indication that the Tribunal H had taken into account that the issue was one of relabelling. If it had done so, it had not explained its reasoning.

55. If the Claimant's application to rely upon her alleged constructive dismissal as a further act of harassment was properly viewed as being one to amend her claim (as distinct from the List of Issues), there was only one right answer, upon the application of **Selkent** principles: the matter was one of relabelling; the particulars were very clear; delay afforded no reason to refuse the application; and the balance of prejudice only pointed in one direction. Irrespective of the headings used in the List of Issues, it had been very clear, from the Claimant's solicitors' letter to the ET, dated 22 September 2020, that she was relying on the alleged shouting by the Second Respondent both as an act of harassment in its own right and as the last straw giving rise to her constructive dismissal.

Discussion and conclusions

Ground 1

56. I begin by analysing the ratio and genesis of existing domestic caselaw. In **Wilton**, the EAT held that, although three incidents of harassment related to sex had led the claimant to resign, the application of harassment as prohibited conduct in the context of employment, in section 40 of the EqA, did not include a resignation amounting to constructive dismissal; and that, accordingly, it had not been open to the tribunal, as a matter of law, to find that the constructive dismissal had been, in itself, an unlawful act of harassment, contrary to section 26 of the EqA. Ground 3 of the appeal in **Wilton** had related to the relevant finding and was addressed at paragraph 48ff of the EAT's judgment. At paragraph 56, Singh J (as he then was) observed,

> *'56 At the hearing before me there was also briefly flagged the possibility that the claimant would submit that the construction of the legislation advanced by the employer would result in a breach of the United Kingdom's obligations under European Union law and therefore should not be adopted. However, this line of argument was not developed at the hearing before me.'*

None of the EU Directives upon which the Claimant in this appeal relies (nor any other) was cited to the EAT.

57. The EAT's decision on ground 3 was shortly stated and is recited below:

> *'53 The employer submits that it is notable that section 40 does not expand on the definition of harassment in section 26 so as to include constructive dismissal within its scope.*
>
> *…*
>
> *58 …In my judgment, the employer is correct to submit that the act of constructive dismissal does not in itself fall within the meaning of harassment as defined by the Equality Act 2010. It was therefore not open to the tribunal as a matter of law to find that the constructive dismissal in this case was in itself an unlawful act of harassment.*
>
> *59 At the hearing before me the employer made it clear for the record that, although it wished to pursue this ground of appeal as a matter of principle, it does not contend that the claimant's resignation following on from the acts of harassment which the tribunal found occurred in this case broke the chain of causation. It is accepted that the tribunal found as a matter of fact that those acts of harassment caused the claimant to resign. I endorse that concession and observe that there is no appeal before me against that finding of fact.*
>
> *60 Nevertheless, the employer's appeal against the liability judgment will be allowed to the extent that the employment tribunal erred as a matter of law in finding (at para 39 of the liability judgment) that the act of constructive dismissal in this case in itself amounted to an unlawful act of harassment. There will be substituted a finding that the act of constructive dismissal did not amount to an unlawful act of harassment.'*

58. In **Urso**, the employment tribunal had relied upon **Wilton** for its conclusion that an 'actual' dismissal was no more capable of amounting to harassment than was a constructive dismissal. That finding was the subject of ground 5 of the claimant's appeal to the EAT. At paragraphs 68 to 70, Supperstone J held:

> *'68* [The appellant] *submits that Wilton was wrongly decided. I do not agree. What Singh J decided in Wilton is that 'the act of constructive dismissal does not in itself fall within the meaning of harassment as defined by the Equality Act [emphasis added]' (paragraph 58). That is correct. A constructive dismissal comes about where the employee terminates the contract of employment with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct (Employment Rights Act 1996 ss.95(1)(c), 136(1)(c)). Where these conditions are fulfilled, the employee's resignation is treated as a constructive dismissal by the employer, provided that the employer's conduct is the main operative cause of the resignation (Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27). Prior acts of harassment may give rise to a constructive dismissal, but the constructive dismissal itself is not an act of harassment: it may occur as a result of an act taken by the employee in response to acts of harassment.*
>
> *69 A constructive dismissal is different from an 'actual' dismissal, and as such the case of Wilton can, in my judgment, be distinguished from the present case. There is, in my view, no good reason for excluding an actual dismissal from the harassment jurisdiction. Section 40 prohibits harassment 'in relation to employment' which includes a person 'who is an employee'. Further, as noted, harassment is prevented by ss.40 and 108 at every stage of employment (before, during and after employment). I reject* [the respondent's] *submission (and the ET's finding) that a dismissal may not be* [an] *affront to an employee's dignity (see paragraph 66 above).*
>
> *70 Accordingly I consider that the ET erred in rejecting the claimant's harassment claim on the basis that her dismissal is not capable of amounting to harassment.'*

59. Section 108 of the EqA, to which Supperstone J referred, provides (in material part):

> *'**108 Relationships that have ended***
>
> *(1) A person (A) must not discriminate against another (B) if—*
>
> *(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and*
>
> *(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.*
>
> *(2) A person (A) must not harass another (B) if—*
>
> *(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and*
>
> *(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.*
>
> *...*
>
> *(6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.*
>
> *(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A.'*

His conclusion that *'section 40 prohibits harassment 'in relation to employment' which includes a person 'who is an employee'. Further, as noted, harassment is prevented by ss.40 and 108 at every stage of employment (before, during and after employment)'* is a useful reminder of the reach of section 40.

60. As **Urso** was concerned with a so-called 'actual' dismissal, Supperstone J's comments in relation to constructive dismissals were obiter and, in any event, themselves expressed without the benefit of any potentially relevant EU law, or related submissions. Nevertheless, his analysis of the nature of a constructive dismissal identified the requirements of the latter, being (1) the employee's termination of the contract of employment, in circumstances in which (2) that

A employee is entitled to terminate it without notice, by reason of the employer's conduct. It is the co-existence of both elements (and the causal link between the two) which converts that which would otherwise be a simple resignation into a dismissal, properly so-called. Necessarily, therefore, there can be no dismissal in the absence of conduct of the requisite nature on the part B of the employer. As Keene LJ held in **Meikle**, at paragraph 48:

> *'48… the courts should avoid attaching too much significance to form instead of* C *substance. Whether there is a dismissal cannot depend on whether an employer says to an employee "get out" or alternatively drives him out. In the Derby case [2001] ICR 833*[2]*, after dealing with the arguments based on the history of the various statutes, the* D *appeal tribunal said, at p840:*
>
> *"16...Whether the employer deliberately dismisses the employee on racial grounds or* E *he so acts as to repudiate the contract by racially discriminatory conduct, which repudiation the employee accepts, the end result is the same, namely the loss of employment by the employee. Why should Parliament be taken to have distinguished between these two situations?"'*

F

61. In **Meikle**, the relevant question (for current purposes) was whether a constructive dismissal amounted to a 'dismissal' within the meaning of section 4(2)(d) of the Disability G Discrimination Act 1995 ('the DDA'), the equivalent of which is now to be found in section 39(2) of the EqA. The Court of Appeal held (at paragraph 53) that the EAT had been right to regard the constructive dismissal of Mrs Meikle as being, in itself, a discriminatory act under the DDA.

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[2] **Derby Specialist Fabrication Ltd v Burton** [2001] ICR 833, EAT

Meikle was not concerned, expressly, with harassment (which, in the DDA, had been defined by section 3B and rendered unlawful in relation to employment by section 4(3)). Nevertheless, it is clear, from paragraph 48, that Keene LJ saw no principled basis for distinguishing between the different types of dismissal when considering a claim of discrimination. Furthermore, at paragraph 49, he went on to hold that:

> *'49 ... There are relatively short limitation periods operating in discrimination law, normally three months from the act complained of, and on the face of it there could be great significance attaching to whether the act is the dismissal, with time running from the termination of employment by resignation, or the employer's earlier discriminatory act.*

62. I accept Mr Lewis' submission that both such considerations would have been of relevance to the issue with which Singh J was concerned, in **Wilton**. They would also have been of significance to Supperstone J's conclusions in **Urso**, to the effect that **Wilton** had been correctly decided, but that there was a principled distinction to be drawn between constructive and 'actual' dismissal. Nevertheless, neither constitution of the EAT was referred to **Meikle**, such that both decisions were made per incuriam that authority.

The EU Directives

63. I, therefore, turn to consider the Directives to which I have been referred and their relevance, if any, to the issues arising in this appeal and the caselaw on which the parties rely.

64. The Recast Directive:

64.1. by recital 6, states that harassment and sexual harassment constitute discrimination on grounds of sex for the purposes of that Directive;

64.2. by article 2(2), defines discrimination to include harassment and sexual harassment;

64.3. by article 14, provides that there shall be no direct or indirect discrimination on grounds of sex in relation to employment and working conditions, including dismissals.

65. The Framework Directive:

65.1. by article 2(3), deems harassment to be a form of direct or indirect discrimination based on any of the grounds referred to in article 1 (being religion or belief, disability, age or sexual orientation); and

65.2. by article 3(1)(c), applies in relation to employment and working conditions, including dismissals.

66. The Race Directive:

66.1. by article 2(3) deems harassment to be a form of direct or indirect discrimination based on ethnic origin; and

66.2. by article 3(1)(c), applies in relation to employment and working conditions, including dismissals..

67. Thus, each Directive:

67.1. expressly encompasses harassment within its definition of discrimination. In the Recast Directive, discrimination '*includes'* harassment and sexual harassment. In the Framework and Race Directives harassment *'shall be deemed to be'* a form of direct or indirect discrimination; and

67.2. applies in relation to dismissals.

68. The conclusion reached by Burton J, in **R (EOC) v Secretary of State for Trade**, at paragraph 16, *'...that harassment, however itself defined, is here to be deemed to be discrimination and hence prohibited, but that the provision does not thereby assimilate the two different definitions'*, leaves unaffected the express application of each Directive to dismissals and, in any event, there is no 'deeming' provision in the Recast Directive. In my judgment, article 14 of the latter does not avail the Respondents either, because:

68.1. as recital 6 to the Recast Directive makes clear, harassment and sexual harassment *'constitute discrimination on grounds of sex for the purposes of this Directive'* (emphasis added) and the proscription of *'direct or indirect discrimination on grounds of sex'* (emphasis added) imposed by article 14(1) is to be read in that context; and

68.2. in the Framework and Race Directives, harassment is expressly deemed to be a form of direct or indirect discrimination on the relevant specified grounds. Were I to have

harboured any lingering doubt over the proper construction of article 14 of the Recast Directive, it would have been resolved having regard to the provision made by the Framework and Race Directives; I accept Mr Lewis' submission that there is no principled basis upon which a different approach should apply according to the nature of the protected characteristic.

69. In the above circumstances, I am satisfied that each of the Directives to which I have been referred proscribes harassment on the grounds to which it refers, including in relation to dismissals. I accept Mr Lewis' submission that the CJEU/ECJ has long held that the term 'dismissal' is to be 'widely construed'. Thus, in **Burton**, it was held to include termination of employment as part of a voluntary redundancy scheme; and, in **Marshall v Southampton and South-west Hampshire Area Health Authority (Teaching)** [1986] ICR 335, ECJ (to which reference was made in **Meikle**, at paragraph 46), it was held to include an age limit for the compulsory dismissal of workers, pursuant to an employer's general policy concerning retirement. Consistent with such an approach, in my judgment there is no principled basis upon which, in the Directives with which I am concerned, the word dismissal should be taken to exclude constructive dismissal.

The EqA

70. As I have noted earlier in this judgment, the domestic provisions which define and proscribe harassment, now to be found in the EqA, reflect the obligation first imposed by the Equal Treatment Directive: **Unite the Union v Nailard**. They are to be construed purposively, so as to conform with all relevant Directives. As the parties agree, by operation of section 5(2) of the **European Union (Withdrawal) Act 2018**, that position is unaffected by Brexit.

71. That being so, in order to conform with the obligations which I have concluded to be imposed by the Directives, the EqA must be construed so as to proscribe harassment in the form of dismissal, including constructive dismissal. I reject Mr Greaves' submission that a claim arising from constructive dismissal could instead be brought under section 39 of the EqA; such a claim would not be one of harassment and would, at least potentially, engage the need to consider issues which would not arise in a claim of harassment, such as the appropriate comparator. Furthermore, it would abrogate the broader test applicable to a claim of harassment, whereby the conduct impugned need only be 'related to' the relevant protected characteristic(s). If the claim were established, the available remedies would not include a declaration that the constructive dismissal itself constituted an act of harassment (as Mr Greaves acknowledged). A claimant who can rely upon only those acts of harassment which give rise to a constructive dismissal is potentially exposed to a limitation defence which would not be available to the respondent employer if the dismissal itself could be advanced as an act of harassment (by parity of reasoning with **Meikle**, at paragraphs 49 to 53). The fact that, in some cases, such a defence would not succeed by virtue of a continuing act is no answer; that will not be so in every case and, in any event, it presents a further hurdle for a claimant to surmount. In this case, the Respondents plead a limitation defence in relation to any alleged act which took place before 6 July 2019. The Claimant resigned on 29 July 2019. Finally, adopting either side's construction of section 26 of the EqA, the provisions contained in section 40 of the Act could, instead, have been incorporated within section 39; a drafting matter which I regard as being of no import.

72. A conforming interpretation of the EqA can be achieved by applying conventional domestic principles of purposive construction. There is no difficulty in construing section 26 of the EqA so as to encompass constructive dismissal; it provides for no express limitation of the type of 'unwanted conduct' which can and cannot constitute an act of harassment, as long as that

conduct is related to a relevant protected characteristic and has the purpose or effect stipulated by section 26(1)(b). So it is that a non-constructive dismissal can fall within the ambit of section 26, notwithstanding the absence of express wording to that effect (see **Urso**). It follows that the **Marleasing**[3] principle does not arise for consideration.

73. Accordingly, in my judgment, having regard to the requirements imposed by the relevant Directives, and the injunction set out at paragraph 48 of **Meikle**, **Wilton** was not correctly decided, in so far as it determined that a constructive dismissal cannot itself amount to an act of unlawful harassment. As it was decided per incuriam those Directives and **Meikle**, in light of which I consider it to be manifestly wrong, I am satisfied that it is appropriate for this appeal tribunal, exceptionally, to depart from that earlier decision. In my judgment, as a matter of law, where an employee (as defined by the EqA) resigns in response to repudiatory conduct which constitutes or includes unlawful harassment, his or her constructive dismissal is itself capable of constituting 'unwanted conduct' and, hence, an act of harassment, contrary to sections 26 and 40 of the EqA. Whether or not it does so in the particular case will be a matter for the tribunal to determine.

74. For the sake of completeness, I do not accept Mr Lewis' submissions in relation to sub-sections 212(1) and 212(5) of the EqA. Some insight into the purpose of the latter sub-section may be gained from the Explanatory Notes to it (at paragraph 661):

> '*Subsection (5), which expands the meaning of "detriment" in subsection (1), makes clear that although the express prohibition of sexual orientation harassment does not*

[3] **Marleasing SA v La Comercial Internacional de Alimentación SA** (Case C-106/89)

apply for example to schools, a pupil who is bullied by a school employee as a result of his or her sexual orientation may nevertheless bring a claim of direct discrimination if the bullying caused the pupil to suffer a "detriment".'

Unpacking that example, sub-section 85(3), within Part 6, of the EqA provides that *'The responsible body of* [a school to which section 85 applies] *must not harass— (a) a pupil; (b) a person who has applied for admission as a pupil.'* Sub-section 85(10) provides that *'In the application of section 26 for the purposes of subsection (3), none of the following is a relevant protected characteristic— (a) gender reassignment; (b) religion or belief; (c) sexual orientation.'* (Similar exclusionary provisions are to be found in, for example, section 29, Part 3 of the EqA, relating to the provision of services and the exercise of a public function which is not the provision of a service. Sub-section 29(8) provides, '*In the application of section 26 for the purposes of subsection (3) and subsection (6) as it relates to harassment, neither of the following is a relevant protected characteristic— (a) religion or belief; (b) sexual orientation.'* The Explanatory Notes to that section include the following paragraph (113):

'This section replaces the provisions in previous legislation and extends protection so that it is generally uniform across all the protected characteristics covered by this Part. However, as under previous law, there is no express protection for harassment related to religion or belief or sexual orientation in either the provision of services or the exercise of public functions. Conduct that would otherwise have fallen within the definition of harassment may still amount to direct discrimination, as section 212(5) makes clear.')

75. Thus, the intention behind sub-section 212(5) was to expand the definition of 'detriment' in sub-section 212(1), so as to encompass conduct which would satisfy the definition of harassment in sub-section 26(1), in all respects other than the 'relevant protected characteristic', as defined by sub-section 26(5). By sub-section 26(5), the characteristics protected for the purposes of a harassment claim are themselves narrower than those for which section 4 of the EqA provides; omitting marriage and civil partnership; and pregnancy and maternity. Nevertheless, in all such circumstances, the conduct in question could be the subject of a claim of discrimination, were it to constitute a detriment for the purposes of (as the case may be) sub-section 85(2); sub-section 29(2) or 29(6); or, for current purposes, sub-section 39(2) of the EqA. It is for that reason that the focus of sub-section 212(5) is, throughout, on the relationship between the putative act of harassment and the protected characteristic upon which reliance is placed, hence the wording which I emphasise below:

> *'212*
>
> *...*
>
> *(5) Where this Act disapplies a prohibition on harassment* ***in relation to a specified protected characteristic****, the disapplication does not prevent conduct* ***relating to that characteristic*** *from amounting to a detriment for the purposes of discrimination within section 13* ***because of that characteristic****.'*

76. It follows that a combined reading of sub-sections 212(1) and 212(5) of the EqA advances Mr Lewis' argument no further; were I to have concluded that a constructive dismissal itself could not fall within the definition of harassment for which section 26 of the EqA provides, subsection 212(1) would not have precluded the bringing of a claim for discrimination under sub-section 39(2). That is because such a dismissal would not have constituted 'conduct which amounts to harassment'. In any event, sub-section 212(5) would not have been engaged. In any given case,

if there is doubt as to whether the alleged constructive dismissal itself amounts to harassment, the claim can be pleaded as one for harassment and discrimination, in the alternative.

77. I allow ground 1 of the Claimant's appeal. In so doing, I make no criticism of the ET for seeking to apply **Wilton**, by which it was bound.

Grounds 2 to 4

Matters of relevance to all three grounds of appeal

78. Before turning to consider grounds 2 to 4 of the Claimant's appeal, in turn, it is necessary to analyse, first, that which had been pleaded by the Claimant and, then, that which had been struck out, or for which permission to amend had been refused, by the Tribunal.

The Claimant's pleaded case

79. The Claimant presented her claims on 4 November 2019. In her original particulars of claim, at paragraphs:

79.1. 4(a) to (c), she stated (so far as material) that she brought claims of: *'(a) Race Harassment and Sex Harassment; (b) Associate Race Harassment/ Associative Sex Harassment/Associative disability Harassment; (c) Constructive Dismissal caused by harassment…'* (sic);

79.2. 17, she pleaded:

'The Claimant resigned on 29 July because of the offensive environment which the 2nd Respondent's behaviour had created and because of his aggressive behaviour

towards her, again, which the claimant avers was because she had called out his behaviour.'; and

79.3. 19 to 22, she advanced claims of harassment, alternatively 'associative harassment' relating to sex, race and disability. The acts of harassment said to be related to sex were the Second Respondent's alleged use of the term *'sassy minxes'*, when referring to female candidates (paragraphs 19(a) and 20). The alleged references themselves had been pleaded at paragraphs 12 and 13.

80. In a section headed 'The Law', no separate claim of constructive dismissal, whether or not as an instance of harassment or discrimination, was expressly advanced. Amongst the relief claimed in the prayer, the Claimant identified 'Discriminatory/Harassment CUD' (paragraph 27, with emphasis added).

81. In their original grounds of resistance, the Respondents summarised the Claimant's pleaded claims as including a claim for constructive dismissal, contrary to sections 94 and 95 of the ERA (see paragraph 6.5). In fact, to the extent that a claim for constructive dismissal was being advanced at all, the pleaded case was at least as consistent with its having been advanced as an instance of discrimination or harassment. The Respondents' response to the claim which they had identified was pleaded at paragraphs 70 to 75 of their grounds of resistance, including the following paragraph (74):

'In response to paragraph 17 of the P of C, the Claimant has failed to properly particularise the alleged "offensive environment" or "aggressive behaviour" on which she seeks to rely. For the avoidance of doubt, it is denied that the Claimant was subjected to any negative treatment/course of conduct that would have either individually or

cumulatively damaged the relationship of trust and confidence between the Claimant and the Respondents.'

82. On 5 March 2020, the preliminary hearing before EJ Hodgson took place, the case management summary of which was sent to the parties on 27 March 2020. Schedule A to that document stated, at paragraph 2.3, that it was accepted that no claim of direct discrimination was contained in the claim form and that, *'if any of the allegations of harassment or victimisation are to be advanced as allegations of direct discrimination, it will be necessary for the claimant to amend the claim form.*' So far as material, paragraphs 2.4 and 2.5 recorded:

'2.4 The claimant alleges she was constructively dismissed. She does not pursue a claim of unfair dismissal.

2.5 The claims of harassment are as follows:

...

2.5.4 Allegation 4: by constructively dismissing the claimant. The claimant relies on the protected characteristics of race, sex and disability.'

83. On 26 March 2020, the Claimant applied to amend her particulars of claim. Neither the claims advanced nor the prayer were affected. The amendments sought included those set out below, made to former paragraph 17 (now numbered 18):

'The Claimant resigned on 29 July <u>2019</u> because of the offensive environment (<u>the offensive environment caused by the 2nd Respondent's racist and sexist comments referred to above)</u> ~~which the 2nd Respondent's behaviour had created~~ and because of his aggressive behaviour towards her, again, which the Claimant avers was because she had called out his behaviour. <u>On the Claimant's last working day in the office, towards the end of the day, the 2nd Respondent was in the meeting room. The Claimant sent an email to the 2nd Respondent with details of a handover for the new starters, who were</u>

due to start whilst she was on annual leave. The 2nd Respondent came out of the meeting room and was shouting in the Claimant's face, shouting that she had "put in the wrong dates" (or words to that effect) because the 2nd Respondent said that the date that she had put on the handover notes was a week before the new starters were due to start. The Claimant avers that the 2nd Respondent shouted at her on this date because she had called out his behaviour. The Claimant avers this was the last straw for her and she therefore resigned.'

84. At the preliminary hearing on 22 July 2020, that amendment (amongst others) was allowed (see paragraph 8(7) of Schedule A to the case management summary, sent to the parties on 5 August 2020). Paragraphs 13 and 14 of Schedule A were in the following terms:

*'**Post-script — The allegation of constructive dismissal brought under section 26 EQA***

13. The harassment complaint includes an allegation of constructive dismissal. This proceeds on the basis that the claimant was constructively dismissed by the first respondent because of the second respondents alleged unwonted conduct related to sex and/or race and/or disability (as set out below in Schedule B) and because of the second respondent's alleged aggressive behaviour towards her. The claimant contends, on this basis, that her constructive dismissal amounted to harassment under section 26 EQA.

14. During the hearing I queried whether a constructive dismissal claim could be brought under section 26 EQA 2010. There was much to get through in the time available so this issue was not given the time it required. I therefore wrote to the parties after this hearing and ordered the claimant to explain, in light of [**Wilton**] *and* [***Urso***], *the basis on which this complaint proceeded under section 26 EQA. The claimant must provide this information by no later than 14 August 2020.'*

85. Within the list of issues, at Schedule B:

85.1. paragraph 2.1 identified the following issue, *'Did the following conduct occur?'* going on to list the conduct (other than constructive dismissal) which was said to constitute harassment, at sub-paragraphs (a) to (e).

85.2. paragraph 3 was in the following terms:

> *'**3. <u>Constructive dismissal (section 26 EQA)</u>***
>
> *3.1 The claimant also complains that she was constructively dismissed on 29 July 2019 because of the second respondent's alleged unwanted conduct related to sex and/or race and/or disability (as alleged above) and because of the second respondent's aggressive behaviour towards her. She contends, on this basis, that her constructive dismissal amounted to harassment under section 26 EQA. The claimant has been ordered to set out the basis on which she may proceed with this complaint.'*

86. In their letter of 14 August 2020, the Claimant's solicitors explained her position, as had been required by the ET. They also applied to amend paragraph 2.1 of the List of Issues, to add paragraphs (f) and (g), in the terms set out at paragraph 6 above (save that the date for the first such issue was, in error, stated to be 29 (rather than 11) July 2019, a matter later corrected in their letter dated 22 September 2020). In the 22 September letter, they proposed that the list of issues be amended as follows (sic):

> *'2.1*
>
> *'f' On 11 July 2019 did the 2nd Respondent shout in the Claimant's face, shouting that she had "put in the wrong dates" (or words to that effect)*
>
> *Constructive Dismissal*

3.1 On 29 July 2019 did the Claimant resign in response to the issues referred to above 2.1 (a) to (e) and/or did the Claimant resign as a result of 2.1 'f' being a last straw?''

87. By its judgment dated 24 September 2020, the allegation of constructive dismissal brought under section 26 of the EqA was struck out as having no reasonable prospect of success *'because of the decisions in Wilton and Urso which are binding on this tribunal.'*

88. As noted at paragraph 7 above, by letter dated 25 September 2020, the second proposed amendment to the list of issues was refused *'because the allegation of constructive dismissal has been struck out'* and the first amendment was said to raise a new allegation of harassment, amounting to an application to amend the claim, *'premised on the same background facts added by amendment with effect* [from] *26 March 2020, which are relied on by the claimant as amounting to the final straw in relation to the allegation of constructive dismissal that has now been struck out. The claimant has not specified how this allegation is said to relate to sex, disability or race and therefore the basis on which this allegation is brought under section 26 EQA is unclear'*.

89. By their amended grounds of resistance, dated 27 October 2020, the Respondents deleted former paragraph 6.5. At paragraphs 23 and 68, they denied the allegations made by paragraph 18 of the amended particulars of claim, together with the relevance of such matters, *'as the allegation of constructive dismissal under s26 EA has been struck out'*, an assertion repeated at paragraph 73. Paragraph 23 advanced a positive case, contrary to that advanced by the Claimant, regarding the events of 11 July, by reference to the Second Respondent's asserted professional and personal commitments on that day.

90. From the above, the following matters are clear:

90.1. The alleged causal link between (1) the Claimant's resignation and (2) the offensive environment and aggressive behaviour for which the Second Respondent was alleged to have been responsible had been pleaded from the outset, at paragraph 17 of the original particulars of claim, as had the allegation of constructive dismissal caused by harassment. Since March 2020 (by amendment, the Claimant had made clear (were clarity required) that her reference to an 'offensive environment' was to '*the offensive environment caused by the 2nd Respondent's alleged racist and sexist comments referred to above'*;

90.2. Thus, the issues recorded in Schedule A to the March 2020 case management summary included, at paragraph 2.5.4, a claim of harassment in the form of constructive dismissal; an issue repeated at paragraph 13 of Schedule A and paragraph 3.1 of Schedule B to the August 2020 case management summary (reflecting the orders made on 22 July 2020);

90.3. The shouting which was the subject of proposed issue 2.1(f) was at all times pleaded to have taken place *'because* [the Claimant] *had called out* [the Second Respondent's] *behaviour.'* In paragraph 17 of the original particulars of claim, the use of the word 'again', immediately following the allusion to the Second Respondent's allegedly aggressive behaviour, was a clear reference to his earlier alleged acts of aggression towards the Claimant. Those had been pleaded in the immediately foregoing paragraph, which had concluded with the words, *'The Claimant avers that this behaviour towards her was because she challenged him (in*

relation to the sassy minx comment set out above) and he did not like his behaviour questioned.' The relevant wording was left undisturbed in the amended particulars of claim;

90.4. By paragraph 18 of her amended particulars of claim, the Claimant alleged that the Second Respondent's shouting had constituted '*the last straw for her and she therefore resigned'*;

90.5. The sole reason why:

90.5.1. the claim of harassment in the form of constructive dismissal was struck out was because the Tribunal considered itself bound by **Wilton** and **Urso**; and

90.5.2. the second of the two proposed amendments to the List of Issues was refused was that the above claim had itself been struck out.

91. Against that background, I now shall consider grounds 2 to 4, in turn.

Ground 2

92. As is clear from the above, at the latest by March 2020 the Claimant had made clear her intention to bring a claim for harassment in the form of constructive dismissal. She was not then and is not now seeking to advance a claim of discrimination under section 39 of the EqA. Having found that it is appropriate to depart from the decision in **Wilton**, I am satisfied that the Claimant is entitled to advance such a claim, which, therefore, ought to be reinstated as an issue for determination by the tribunal at the full merits hearing.

93. The Respondents accept that the Claimant is entitled to claim damages arising from acts of harassment already pleaded and that, as a matter of remedy (and irrespective of whether constructive dismissal caused by harassment is itself to be regarded as an act of harassment), the Claimant is entitled to claim compensation for such a dismissal. That is consistent with the position adopted by the employer in **Wilton**, endorsed by Singh J at paragraph 59, and with Singh LJ's analysis in **Roberts v Wilsons Solicitors LLP** (at paragraphs 64 to 91).

94. It follows that, when assessing the remedy (if any) to which the Claimant is entitled, the tribunal will need to determine the losses which flow from those of the pleaded acts of harassment (including constructive dismissal) which it finds to be established. Even if the alleged constructive dismissal is itself found not to have constituted an act of harassment, the tribunal will need to consider whether it operated to break the chain of causation for losses flowing from any earlier acts of harassment which it finds to be established. I consider both such issues to be encompassed within the broad remedy issue already identified at paragraph 6.1 of the List of Issues: *'If the claimant is successful in any of her claims, to what compensation (if any) is she entitled.'*

95. The above notwithstanding, strictly analysed I do not consider that the ET struck out 'the consequences' of the Claimant's resignation; it struck out the claim for harassment constituted in an alleged constructive dismissal. For that reason, I dismiss ground 2 of the appeal, whilst making clear that the latter claim has been pleaded and should be reinstated as an issue for determination by the tribunal.

Ground 3

96. In relation to the first proposed amendment to the List of Issues:

96.1. As the Respondents acknowledge, the relevant allegation of fact had been pleaded, at paragraph 18 of the amended particulars of claim, as the ET noted, in its letter of 25 September 2020. Contrary to ground 3(i), the issue had not been recorded at paragraph 2.5.4 of Schedule A to the case management summary of EJ Hodgson, nor in paragraph 8(7) of Schedule A to the case management summary of EJ Khan, each of which related to the claim of harassment in the form of constructive dismissal.

96.2. The ET was correct to consider that the alleged conduct (i.e. the Second Respondent's shouting) had not previously been said to constitute an act of harassment in its own right and the fact that it had been identified as the last straw does not itself establish to the contrary. Indeed, it is Mr Lewis' position that, as a matter of law, the last straw need not itself be an act of harassment. In identifying a claim of harassment in the form of constructive dismissal, paragraph 11 of the draft list of issues, as revised by the Claimant on 21 July 2020, had left undisturbed the Respondents' formulation, which had expressly distinguished between *'the Second Respondent's alleged unwanted conduct related to race and sex (as alleged above) and* ...[his]*...aggressive behaviour towards her'*. I reject Mr Lewis' submission that the Tribunal ought to have asked itself whether it was appropriate to strike out the relevant allegation, rather than whether it should permit an amendment; the issue was not whether the alleged act could serve as an alleged last straw, but whether it constituted an independent act of harassment, hitherto unpleaded as such.

96.3. Thus, in substance, the Claimant's application had been to amend not simply the List of Issues but the claim form itself. The principles applicable when considering

amendments were recently revisited in **Vaughan v Modality Partnership** [2021] IRLR 97, EAT, in which HHJ Tayler observed, at paragraph 13:

'No consideration of an application for amendment is complete without a reference to Selkent. It is so familiar that it is especially easy to quote it without reflecting on the core principle it elucidates. The key passage is at Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661, 664, [1996] ICR 836, 843D:
"Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."'

Emphasising '*the practical approach* [which] *should underlie the entire balancing exercise*'[4], HHJ Tayler also referred to **Abercrombie and others v Aga Rangemaster Ltd** [2014] ICR 209, CA, in which Underhill LJ held, at paragraphs 48 and 50:

'48 ... the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted: see the discussion in Harvey on Industrial Relations and Employment Law, para 312.01–03. We were referred by way of example to my decision in Transport and General Workers' Union v Safeway Stores Ltd (unreported), 6 June 2007, in which the claimants were permitted to add a claim by a trade union for breach of the collective consultation obligations under section 189 of the Trade Union and Labour

[4] at paragraph 21

Relations (Consolidation) Act 1992 to what had been pleaded only as a claim for unfair dismissal by individual employees. (That case in fact probably went beyond "mere re-labelling"—as do others which are indeed more authoritative examples, such as British Newspaper Printing Corpn (North) Ltd v Kelly [1989] IRLR 222, where this court permitted an amendment to substitute a claim for unfair dismissal for a claim initially pleaded as a claim for redundancy payments.)

49….

50. it is true that fresh proceedings under section 34 of the 1996 Act would have been out of time. Mummery J says in his guidance in Selkent Bus Co Ltd v Moore [1996] ICR 836 that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded—and a fortiori in a re-labelling case—justice does not require the same approach: NB that in High Court proceedings amendments to introduce "new claims" out of time are permissible where "the new cause of action arises out of the same facts or substantially the same facts as are already in issue" (Limitation Act 1980, section 35(5)). In the circumstances of the present case the fact that the claim under section 34 would have been out of time if brought in fresh proceedings seems to me to be a factor of no real weight. There is, as I have already said, no question of any specific prejudice to the respondent from the claim being reformulated after the expiry of the time limit.'

96.4. In this case, whilst characterising the application as being one to amend the claim, the ET did not go on to analyse it in accordance with the principles set out in **Selkent** and other relevant authority. (**Vaughan** had not been decided in September 2020, but

Abercrombie and the caselaw to which it referred had long since been decided.) Yet, the ET did no more than identify that the relevant allegation was premised on the same background facts which had been added by amendment. Whether or not those alleged facts had related to a claim of constructive dismissal which had since been struck out, they remained to be determined, even if only when considering whether the alleged constructive dismissal operated to break the chain of causation for losses claimed in respect of any established earlier acts of harassment. In my judgment, the Tribunal did not consider the Claimant's application in accordance with the applicable caselaw.

96.5. Having so concluded, I accept the parties' joint invitation to determine the application to amend. Having regard to the non-exhaustive **Selkent** factors (being the nature of the amendment; the applicability of time limits; and the timing and manner of the application) and to the wider legal principles set out above, I am satisfied that the nature of the amendment for which permission is sought is the addition of another label to facts already pleaded. The factual issue is unchanged (and has already been pleaded to, in detail, in the amended grounds of resistance). In light of my conclusions on grounds 1 and 2 of this appeal, the legal issues arising in the constructive dismissal harassment claim will encompass whether the last straw was itself an act of harassment. In any event, the tribunal will be considering prior alleged acts of harassment, with which the newly alleged act of harassment is very closely connected. In such circumstances, as in **Abercrombie**, I consider the fact that the new allegation would have been out of time, if made in fresh proceedings, to be a factor of no real weight in this case. Similarly, there is no issue arising from the timing of the application, made long before the substantive hearing, shortly after the

preliminary hearing at which the list of issues had been addressed but had yet to be finalised. Sensibly, Mr Greaves did not contend that the Respondents had been prejudiced by that timing.

96.6. Stepping back and balancing the injustice and hardship of allowing the amendment sought against the injustice and hardship of refusing it, I am satisfied that it ought to be permitted. True it is that the Respondents will have to face a complaint which would have been out of time had it been brought as a new claim. However, in circumstances in which all factual and legal issues arising will need to be canvassed in any event and the Claimant would otherwise be deprived of a potentially valid claim, it is clear that the injustice and hardship of refusing the amendment would outweigh the injustice and hardship of allowing it.

96.7. In so finding, I have not lost sight of the Tribunal's additional stated objection, to the effect that the relationship between the relevant allegation and the relevant protected characteristic(s) has not been specified. I have sympathy with Mr Greaves' submission that 'conduct related to conduct related to' a relevant protected characteristic is a bridge too far, even allowing for the broad nature of the 'related to' concept recognised in **Aslam**, itself expressly said to have its own (albeit unspecified) limits. However, I have concluded that Mr Lewis is right to emphasise the following dictum of HHJ Auerbach, at paragraph 21 of **Aslam**:

'...whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case

that the complainant considers that the conduct related to that characteristic is not determinative.'

As intimated (though not made clear) in the amended particulars of claim, and consistent with the submissions made by Mr Lewis, the relevant protected characteristic upon which reliance is placed is sex. Accepting that the making of sexist comments ('sassy minx') is intrinsically related to sex, it is less clear that the same applies to conduct in response to the taking of issue with such comments and Mr Lewis has provided no authority supportive of his submission to that effect. Nevertheless, that is the asserted relationship between the relevant protected characteristic and the alleged act of harassment and whether or not that assertion is made good will be *'a matter for the appreciation of the Tribunal'*, having heard all relevant evidence. I do not consider it to be unarguable so as to defeat the amendment application itself.

97. Thus, ground 3(i) of the appeal fails; ground 3(ii) succeeds, in so far as the alleged act of harassment (shouting) is said to relate to the protected characteristic of sex only; and the alternative basis on which ground 3(iii) of the appeal is advanced succeeds. Accordingly, permission is granted, with immediate effect:

97.1. to re-amend the particulars of claim as follows:

97.1.1. to add the following sentence, at the end of paragraph 18: *'The Claimant further avers that the Second Respondent's shouting was itself an act of harassment related to sex, by the First and Second Respondents.'*; and

A

97.1.2. to add the following wording, at the end of paragraph 20(a): *'…and, on 11 July 2019, shouting in the Claimant's face that she had "put in the wrong dates" (or words to that effect).'*;

B

97.2. in consequence, to amend the List of Issues as follows:

C

97.2.1. to insert the first proposed amendment as paragraph 2.1(f); and

97.2.2. at paragraph 2.2, *'If such conduct did occur, was it related to sex (allegations* (a)~~,~~ ~~and~~ (b) and (f))…?'.

D

98. Ground 3(iv) of the appeal fails. The issues which it raises are not material to the first proposed amendment, as a free-standing act of harassment. In order to be established as such, the act in question must satisfy the requirements of section 26(1) of the EqA, including that it be related to a relevant protected characteristic.

E

F

Ground 4

99. As the Tribunal was bound to follow **Wilton**, its conclusion as to the second proposed amendment (properly viewed as being to the List of Issues only) cannot be said to have been perverse. The proposed amendment reflected the Claimant's case that her alleged constructive dismissal was itself an act of harassment. Accordingly, ground 4 of the appeal fails. Nevertheless, my conclusions in relation to grounds 1 and 2 mean that the claim of harassment in the form of constructive dismissal can proceed, such that it should be added to the List of Issues, if only as a consequence of those conclusions.

G

H

Summary of conclusions and disposal

100. In summary:

100.1. Permission to amend ground 3 of the notice of appeal is granted.

100.2. Ground 1 of the appeal is allowed; in so far as it determined that a constructive dismissal cannot itself amount to an act of unlawful harassment within the meaning of section 26 of the EqA, **Wilton** should not be followed. Where an employee (as defined by the EqA) resigns in response to repudiatory conduct which includes unlawful harassment, his or her constructive dismissal is itself capable of constituting 'unwanted conduct' and, hence, an act of harassment, contrary to sections 26 and 40 of the EqA. Accordingly, the Claimant's claim of harassment in the form of constructive dismissal should be reinstated and determined by the tribunal at the full merits hearing.

100.3. Ground 2 of the appeal is dismissed. Paragraph 6.1 of the List of Issues adequately encompasses the following issue, which is agreed between the parties:

'If the alleged constructive dismissal is established, but is found not to constitute an act of harassment in its own right, did it operate to break the chain of causation for losses flowing from any earlier acts of harassment which the tribunal finds to be established?'

100.4. As to ground 3 of the appeal:

100.4.1. ground 3(i) is dismissed;

100.4.2. ground 3(ii) is allowed, in so far as the alleged act of harassment (shouting) is said to relate to the protected characteristic of sex only;

100.4.3. ground 3(iii) is allowed, in so far as it contends that the relevant proposed amendment (to the claim form) amounted to a relabelling of an existing pleaded allegation which ought to have been permitted. Consequential upon that finding, permission is granted for the amendments to the claim form and the List of Issues identified at paragraph 97 above to be made, with immediate effect; and

100.4.4. ground 3(iv) is dismissed.

100.5. Ground 4 of the appeal is dismissed.

100.6. Consequential upon my conclusions in relation to grounds 1 and 2, the List of Issues shall be amended to include the following related issue, at new paragraph 3.2[5]:

'3.2.1 Did the Claimant affirm the contract following the most recent act which she alleges to have caused, or triggered, her resignation (set out at paragraph 2.1(f) above), by failing to raise any complaint, or to react to any such conduct, until after the Respondents had requested that she re-pay overpaid holiday pay and salary?[6]'?

3.2.2 If not, was that act by itself a repudiatory breach of contract?

[5] Per **Kaur**, at paragraph 55.
[6] The alleged acts of affirmation are drawn from paragraph 75 of the Respondents' original grounds of resistance.

3.2.3 *If not, was it, nevertheless, a part of a course of conduct comprising several acts of harassment (as set out at paragraphs 2.1(a) to (e), above) which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence —*

3.2.3.1 *<u>if it was not</u>, did the Claimant, at an earlier stage, affirm the contract by failing to raise any complaint, or to react to any such conduct, until after the Respondents had requested that she re-pay overpaid holiday pay and salary?*

3.2.3.2 *<u>if it was</u>, did the Claimant resign in response (or partly in response) to that breach?'*

100.7. The remedy issue identified at paragraph 6.1 of the List of Issues encompasses the following issue:

'If the alleged constructive dismissal is established, but is found not to constitute an act of harassment in its own right, did it operate to break the chain of causation for losses flowing from any earlier acts of harassment which the tribunal finds to be established?'