



Case Number: 2301202.2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs V Sanderson

and

Respondent

Childhood First (South) Limited

Held at Ashford on 13, 14, 15, 16 and, in Chambers, 23 March 2017

Representation

Claimant:

In Person

Respondent:

Mrs J Smeaton, Counsel

Members:

Mr P Adkins

Ms R Downer

Employment Judge Kurrein

JUDGMENT

The Claimant's claims are not well founded and are dismissed.

REASONS

The Claims and Issues

- 1 The Claimant started early conciliation on 18 April 2016 and it was completed on 1 June 2016. On 23 June 2016 she presented a claim to the tribunal alleging unfair constructive dismissal, sex discrimination, and public interest disclosure detriment.
- 2 On 1 August 2016 the Respondent presented a response in which it denied those claims. It asserted that her resignation had been entirely voluntary and did not amount to a dismissal.
- 3 A preliminary hearing took place on 13 August 2016. Unfortunately the order made at that hearing did not itself clarify precisely what the Claimant's claims were. It stated in the first paragraph,

"It is too early to set out the issues in the case in full."

It went on to define the issues that would arise, in a generic sense, in claims of the nature made by the Claimant and then stated,

"The issues will have to be further refined and set out more specifically once the Claimant has given further particulars of her claim as ordered below."

- 4 The employment judge then ordered the Claimant to provide further and better particulars of her claim, without limitation or regard to the content of the Claimant's claim form. That resulted in the claim expanding from a two-page document drafted by the Claimant to a fifteen page document, which appeared to have been professionally drafted. The Respondent, which had been given leave to file a response to the further and better particulars did so in detail over five closely typed pages.
- 5 Regrettably, neither the parties nor an employment judge sought at any time to list a further preliminary hearing at which the further documentation and the issues arising from it could be considered.
- 6 It was clear from our consideration of the further particulars that the Claimant had added numerous allegations that did not appear in her original claim. No consideration had been given to the decision in Selkent Bus Co Ltd v Moore [1996] ICR 836. Some of those added claims, as well as those already in the claim form, appeared to us to be potentially out of time.
- 7 We bore in mind that the Claimant was a litigant in person and concluded that in the circumstances it would be appropriate to hear all the evidence on behalf of the Claimant and the Respondent regarding all the matters set out in the Claimant's further and better particulars, and to take such decisions as we thought appropriate in respect of amendment or time at the conclusion of the hearing.
- 8 We are most grateful for the assistance of Counsel for the Respondent who drafted a List of Issues based on her understanding of what the Claimant was claiming. We accepted that in doing so the Respondent was not accepting that the claims it identified were within our jurisdiction or set out in the original claim. Following concessions by the Claimant at the start of the hearing it was as follows:-

Section 43B Employment Rights Act 1996

- 1 Did the following occur and, if so, amount to protected disclosures pursuant to s.43B ERA 1996?
- 1.1 Making an oral complaint to Mr Yexley on 16 December 2015 that the Claimant was being sexually harassed by Mr A: s43B(1)(a), (b), (d).
- 1.2 Raising a grievance to Mr Yexley and Ms Holtum by letter of 24 January 2016 complaining that she was being sexually harassed by Mr A and that she had safeguarding concerns about him being alone with children: s43B(1)(a), (b), (d).
- 1.3 Emailing Mr Blunden on 11 March 2016 reporting that Mr Yexley had failed to act in relation to her continued sexual harassment by Mr A and that she felt she was being victimised by Mr Yexley: s43B(1)(a), (b), (d), (f).
- 1.4 Emailing Mr Pearce, Mr Blunden and Ms Jennings on 23 March 2016 repeating her safeguarding concerns regarding Mr A and asking for confirmation that he would have appropriate boundaries when alone in the company of the children: s43B(1)(a), (b), (d).
- 1.5 Telephoning Kent Children's Safeguarding Board on 24 March 2016 to report her safeguarding concerns regarding Mr A and her belief that Mr Yexley was

failing in his legal obligation to protect the children from Mr A and that the health and safety of the children was likely to be endangered: s43B(1)(a), (b), (d), (f).

- 1.6 Sending a letter to Ms Jennings on 16 April 2016 alleging that her sexual harassment grievance had not been investigated properly, she had not been given any right of appeal against her grievance and that the information she had disclosed with regard to the health and safety of the children had not been investigated or addressed at all: s43B(1)(a), (b), (d), (f).
- 1.7 Telephoning Ofsted on 23rd June 2016 to report her concerns regarding safeguarding in relation to Mr A, that her previous concerns regarding his conduct had not been addressed and her further concerns regarding the health and safety of the children: s43B(1) (a), (b), (d), (f).
- 2 If so, did the Claimant reasonably believe that the making of the disclosures was in the public interest?
- 3 Did the information tend to show one or more of the matters set out in section 43B(1) ERA 1996 (as set out above at paragraph 1).
- 4 Did the Claimant suffer the following detriments?
 - 4.1 Mr Yexley warned the Claimant and Ms Wells on 17 December 2015 to “*watch what you say about Mr A as it may be regarded as discriminatory towards him*”.
 - 4.2 On the same day, Mr Yexley also told the Claimant and Ms Wells that he was banning everyone from coming to the admin building for lunch.
 - 4.3 On 9 March 2016, Ms Holtum told the Claimant that “*conversations about Martin which could be construed as bullying or harassment must stop*”. The Claimant took this to mean that she was being accused of bullying Mr A without any investigatory process being undertaken.
 - 4.4 The Claimant’s grievance was not investigated adequately, such that the sexual harassment of the Claimant was allowed to continue
 - 4.5 The Claimant was denied the right to appeal her grievance.
 - 4.6 The Claimant’s purported grievance appeal was not upheld.
 - 4.7 The Respondent failed to respond to the Claimant’s letter dated 16 April 2016.
 - 4.8 The Respondent inflicted stress and anxiety upon the Claimant
- 5 If so, was that treatment a result of the Claimant making a qualifying disclosure pursuant to s.47B ERA 1996?

Section 103A ERA 1996 - Automatic Unfair Dismissal

- 6 What was the cause of the Claimant’s resignation?
- 7 Did the Respondent breach the implied term of trust and confidence?
- 8 Was the reason or principal reason for the conduct relied upon by the Claimant as entitling her to resign without notice the fact that the Claimant had made one or more protected disclosures?

Sex Discrimination

- 9 Did the following acts occur?
 - 9.1 Mr A stared at the Claimant’s cleavage.
 - 9.2 Mr A stared inappropriately at colleagues.
 - 9.3 Mr A stared inappropriately at a 12 year old girl
 - 9.4 Mr A would squeeze past or become unnecessarily close to the Claimant and her colleagues in the galley kitchen and other spaces.
 - 9.5 Mr A denigrated women, for example he referred to his wife as “*the woman at home*” and made statements such as “*I know how to handle women*” .

9.6 The Claimant was constructively dismissed.

Sections 13 and 39 EqA 2010 – direct discrimination

10 If so, did that amount to less favourable treatment of the Claimant as compared to a hypothetical or actual male comparator pursuant to s13 and s39(2)(c) (s39(7) (b)) EqA 2010?

11 Are there facts from which the Tribunal could conclude that the treatment was because of the Claimant's sex?

12 If so, is the Respondent able to demonstrate that the reason for the Claimant's treatment was not because of her sex?

Section 26 EqA 2010 – harassment

13 Did the Respondent engage in unwanted conduct related to the Claimant's sex pursuant to s.26 EqA 2010?

14 The Claimant relies on the allegations at paragraph 9 (a) - (e) above.

15 Taking into account the Claimant's perception, the other circumstances of the case, and whether it was reasonable for the said conduct to have such an effect, did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Section 27 EqA 2010 – victimisation

16 Did the alleged treatment detailed at paragraph 4(a) – (j) occur?

17 If so, did any such treatment amount to a detriment pursuant to s.27 EqA 2010? The Claimant also claims that her dismissal amounted to such a detriment.

18 If so, was such treatment because the Claimant did a protected act? The Claimant will rely on the same alleged protected disclosures at paragraph 1 as amounting to protected acts in accordance with s.27(2)(d) EqA 201

Remedy

19 If any of the Claimant's complaints are well founded, what compensation is she entitled to receive in respect of:

19.1 Financial losses; and/or

19.2 Injury to feelings; and/or

19.3 Any uplift for failure to follow the ACAS Code of Practice with regard to her grievance.

The Evidence

9 We heard the evidence of the Claimant and that of Wendy Moore and Caroline Wells, former colleagues and administrators, on behalf of the Claimant.

10 We heard the evidence of Vicky Holtum, assistant director, head of care and health; Linda Jennings, then quality and compliance director; Kelly Kirby, assistant director for statutory compliance: Gary Yexley, then director of Greenfields House; Bernadette Hankin, statutory compliance administrator; and Luis Pearce, HR manager, on behalf of the Respondent.

11 We considered the documents to which we were referred and the submissions of the parties. We make the following findings of fact.

Findings of Fact

The Claimant

- 12 The Claimant was born on 31 July 1965. She had a seventeen year career with National Westminster Bank before training in complementary healthcare, which she practised part-time while raising her family and in which field she continues to practice. She started her employment with the Respondent on 4 February 2015 as a clinical case administrator. The Claimant worked part-time, 2½ days a week, in a job share with Wendy Moore. They met weekly at about midday on Wednesdays when Mrs Moore handed over to the Claimant.
- 13 The Claimant was provided with detailed terms and conditions of employment. She also undertook the Respondent's induction programme and was given child protection training.

The Respondent

- 14 The Respondent charity was founded over 100 years ago. Its mission is,
"To create 21st-century therapeutic environments for the recovery and rehabilitation of children and young people who have suffered abuse, neglect and other trauma."
It has about 200 employees, and provides its services from five different sites. Two of these are at the location where the Claimant worked: there is a residential home in one building, and a school in a second building. The Claimant and her colleagues worked in offices in a Portakabin in the grounds of the buildings.
- 15 As would be expected, the Respondent has numerous policies. In particular its Staff Handbook has detailed provisions relating to:
- 15.1 Complaints and grievances
 - 15.2 Disciplinary procedures
 - 15.3 Personal relationships with children
 - 15.4 Harassment
 - 15.5 Whistle blowing

We refer to the specific provisions of these policies where they are relevant.

"Mr A"

- 16 The principal issues in this case first arose from the alleged conduct of one of the Claimant's colleagues, who we shall refer to as "Mr A". He started his employment on 7 December 2015. His duties, which were largely those of a tradesman but partly managerial, required him to have access to all parts of the premises in all the buildings. He was based in the maintenance shed, but was able to use a "hot desk" facility in the larger Portakabin office (to gain access to a telephone and computer) also used by Mrs Wells, and off which was a smaller office used by the Claimant and Mrs Moore. Mr A usually ate his lunch in the office.
- 17 Mr A had *keratoconus*, a condition of the eye in which the cornea become cone-shaped and more prominent. This was not disclosed to the Claimant, and then only with Mr A's express permission, until mid-March 2016. We understand he wears special glasses to assist his vision.

- 18 The Respondent dismissed Mr A at the completion of his probationary period on 6 June 2016. The matters concerning him that we deal with do not appear to have played any part in that decision.

Relevant events

- 19 On Wednesday 9 December 2015 the Claimant arrived at work to find Mr A in the larger Portakabin office sitting at a desk. She introduced herself and welcomed him. It was her perception that throughout this encounter Mr A stared at her cleavage.
- 20 It was Mrs Wells' evidence that Mr A behaved similarly to her, something she endured "almost daily". However she gave no details of any specific encounter of this nature. She was more specific about one incident, when she was putting out chairs for a meeting, and Mr A had passed so close to her he had been "brushing up against my bottom". This was in the first half of December 2015.
- 21 Later that week the Claimant was in the larger Portakabin office when she saw Mr A stand up and go to the window. He watched a young female resident performing gymnastics in the garden, in the course of which her underwear was exposed. She thought Mr A to be staring at this girl, and asserted that in such situations staff normally avert their eyes. This made the Claimant uneasy and she thought Mrs Wells also looked worried. However, Mrs Wells does not mention this incident in her statement.
- 22 On 16 December 2015 the Claimant arrived at work ready to attend the monthly Admin Group Support Meeting facilitated by Mr Yexley and Mrs Kirby. As she parked her car she told us that an ex-employee, "S" had come out of the Portakabin, approached her and said "Who is the perv?" and who when asked what she meant replied, "the new guy who can't take his eyes off my breasts".
- 23 Mrs Wells gave evidence of a similar encounter with S which appears to have taken place slightly earlier that day when S came into her office and asked her "Who's the perv", explaining she had met Mr A briefly, that he had not taken his eyes of her chest and made her feel uncomfortable.
- 24 Later that day, in the course of the Support meeting, both the Claimant and Mrs Wells raised their concerns regarding Mr A's conduct toward them, as described above, and the Claimant raised her concern regarding Mr A staring at the child doing gymnastics.
- 25 It was later alleged that at about this time Mr A had made what were thought to be unsuitable remarks concerning his wife by referring to her as "the woman at home" and making a statement "I know how to handle women".
- 26 We accepted Mr Yexley's evidence, corroborated by the typed minutes of that meeting, that he reminded everyone of the grievance policy, advised them to inform Mr A of the effect on them of his conduct and ask him to stop. He also advised those present to take notes of any further occurrences.

- 27 There was no evidence that any member of admin staff spoke to Mr A about his conduct, the Claimant being uncomfortable to do so, and no one made any contemporaneous note concerning it at any time.
- 28 On the 17 December 2015 Mr Yexley visited the Portakabin and spoke to the admin staff present. Following concerns raised by staff at the meeting the previous day about how busy the office was he told them he had taken the decision that only they should use the Portakabin for their half hour lunch break. He was concerned that it was used for this purpose not only by them but also the maintenance staff, including Mr A, and cleaning staff and thought it had become a “café”, with people providing cakes and buying fish and chips. He told them he intended to ban all staff except the admin staff from using it for lunch. We accepted his evidence that he saw this decision as a way of reducing the comings and goings in the office and of limiting Mr A’s use of the office.
- 29 We also accepted the Claimant’s evidence that Mr A continued to use the office for his lunch, contrary to Mr Yexley’s instructions, but this was never reported to Mr Yexley.
- 30 We did not accept the evidence of the Claimant and Mrs Wells that on this occasion Mr Yexley warned them that they should not discuss Mr A’s conduct in the office as it might be seen as discriminatory. Our reasons are as follows:-
- 30.1 We accepted Mr Yexley’s denial of this taking place that day. It was not disputed that he did ask that such a warning be given to the admin staff in about late February 2016, and:-
- 30.1.1 there would have been no impropriety in him giving such a warning at an earlier time;
- 30.1.2 he had no reason to deny giving such a warning at an earlier time.
- 30.2 Both the Claimant and Mrs Wells raised detailed grievances in about late January 2016 and were interviewed and questioned, but neither made any mention of Mr Yexley giving such a warning at this time.
- 30.3 It was first mentioned in the Claimant’s email of 11 March 2016 (see below).
- 31 On the 18 December 2015, while attending the Respondent’s Christmas Feast, the Claimant has told us she noticed Mr A “squeeze himself through” a crowded area “having to touch a females body with his own”. The person affected by this conduct (the Claimant’s later report of the incident was in the singular) was not identified at any time.
- 32 On 7 January 2016 the Claimant told us that she was standing in the foyer of the Portakabin, where she had to peel off a red sticker to mark her departure for the day on a chart, when “it suddenly became pitch black and I realised Mr A was violating my personal space.” She did not suggest that the lighting was switched off, or otherwise how it became “pitch black” or how he achieved “pitch blackness”, or in what way Mr A had invaded her personal space. She told us she was “terrified” and “jumped out the way” while Mr A was silent. On further reflection the Claimant’s concerns regarding Mr A escalated to the point where

she told us she was “**frightened of coming into work**” because his actions were “**unpredictable and unnerving**”.

- 33 The Claimant has asserted that by this time she had followed the Respondent’s grievance procedures and was reporting the events concerning Mr A verbally to her line manager. The Respondent’s grievance procedure is clear: where an employee is concerned at the conduct of a colleague the issue should first be raised with that colleague. If that is not successful, the employee should seek support to try and resolve the issue in an informal way. The harassment procedure is in very similar terms. The Claimant did not follow that guidance, whether before or after she was reminded of it by Mr Yexley on 16 December 2015.
- 34 The Claimant did not raise these issues with any manager after 16 December 2015 until 24 January 2016, in a grievance.
- 35 On 11 January 2016 Miss Hankin started her employment with the Respondent as a statutory compliance administrator. She was based in the same room as the Claimant and Mrs Moore. Miss Hankin took one desk and the Claimant and Mrs Moore shared the other. We thought Miss Hankin to be very much her own person. The events concerning these matters affected her quite badly, and she found it difficult to relive them.
- 36 The Claimant has told us that on 20 January 2016 Mr A “**darted**” into a non-existent gap adjacent to Miss Hankin and had to “squeeze past her, with his body physically touching hers”. The Claimant has told us that Miss Hankin immediately made it clear to the Claimant and Mrs Wells she was unhappy and concerned at Mr A’s conduct toward her by her facial expression and with a hand gesture. It was the Claimant’s evidence that thereafter she was “entrenched in a permanent state of apprehensive anxiety”.
- 37 Miss Hankin’s evidence did not support that account. Before this alleged event took place she had noticed that both the Claimant and Mrs Wells did not feel comfortable when Mr A was in the room, but she was not aware of the reason for this and had no issues with him herself. She had concerns that the Claimant, Mrs Wells and Mrs Moore all spoke about Mr A “an awful lot” and were “disrespectful and negative” in what they said. She was not aware that Mr A had allegedly physically brushed past her at the time it allegedly occurred.
- 38 As time went on she started to feel that the Claimant and Mrs Wells “had a vendetta” against Mr A. She was made aware that Mr A had an eye condition and wore special glasses, and had noticed that he tended to stare when entering a room, but it did not make her feel uncomfortable and she thought Mr A to be “harmless”.
- 39 Miss Hankin did not wish to become involved in what she thought of as “bitching” regarding Mr A, and felt she became an outcast as a result. She thought the things said about Mr A to be “really horrible”, and there was no reason to speak of him in that manner: it made her uncomfortable. On one occasion, when Mr A was referred to as a “pervert” she asked both Mrs Wells and the Claimant not to

speak in that way about Mr A, which she thought to be disrespectful. She thought her colleagues to be “quite off” with her following this.

- 40 It was the Claimant’s case that she had observed Mr A staring at the backs of women when they were using the photocopier in the larger Portakabin office, and had once observed him staring at Mrs Kirby when she had crouched down and exposed some of her lower back. The dates on which these alleged incidents took place were vague, as were the other particulars of them.
- 41 On 21 January 2016 Mrs Kirby held a supervision session with Mr A. She informed him that some of his conduct and some things he had said had been perceived by some female staff to be questionable and he should take care regarding his conduct in the future. We noted that there was no complaint of any specific behaviour concerning Mr A identified as taking place after this date.
- 42 On 24 January 2016 the Claimant raised a formal grievance by letter to Mr Yexley and Mrs Kirby. It extended over two closely typed pages. She referred to the definition of harassment in the Staff Handbook and raised the following issues:-
- 42.1 The occasion on which she introduced herself to Mr A on 9 December 2015
- 42.2 Her observation of Mr A at the Christmas Feast on 18 December 2015
- 42.3 The alleged incident on 7 January in the Lobby;
- 42.4 The alleged incident involving Miss Hankin on 20 January 2016;
- 42.5 Mr A staring at women when they used the photocopier etc;
- 42.6 An overheard conversation suggesting, she thought, that Mr A had lost his previous employment due to inappropriate behaviours;
- 42.7 The effect this conduct was having on her;
- 42.8 Her concern that Mr A might not adopt appropriate boundaries with children.
- 43 She concluded by stating that she accepted that Mr A’s actions, if looked at separately, could all be explained as “accidents or innocent” but she found them upsetting, menacing and inappropriate and had a duty to raise them for herself and the children.
- 44 The Claimant accepted that Mr Yexley acted entirely appropriately by immediately inviting her to a grievance meeting with Mrs Kirby and an HR Officer and advising her of her right to be accompanied.
- 45 That meeting took place the next day. It lasted one hour, and the Claimant has made no criticism of how it was conducted. The Claimant was asked to go through each of her grievances. She was asked if she could identify those who were not identified, but could not assist save in respect of Mrs Kirby herself. She repeated her concerns regarding the child gymnast.
- 46 In the course of her investigation Mrs Kirby appears to have forgotten that on 21 January 2016 she had discussed with Mr A issues regarding others’ perceptions

of his conduct. As noted above, there are no specific allegation concerning Mr A after that date.

- 47 On 1 February 2016 Mrs Kirby interviewed Mrs Wells as part of her investigation. She asked Mrs Wells not to discuss any matters outside the meeting. In the course of it Mrs Wells,
- 47.1 suggested Mr A had been “almost touching” Miss Hankin on 20 January;
- 47.2 said she had observed Mr A being within another person’s personal space, including her own, and “almost touching” her;
- 47.3 described Mr A as only looking at women and “perving” at them, which made her very uncomfortable;
- 47.4 confirmed the Claimant’s account of Mr A looking at the gymnast;
- 47.5 alleged Mr A was making the working environment unbearable
- 47.6 knew that another member of staff, DM, had heard about Mr A’s previous employment.
- 48 Later on 1 February 2016 Mrs Kirby interviewed Miss Hankin, who:-
- 48.1 recalled the incident on 20 January 2016 with Mr A because she had been told about it by the Claimant and Mrs Wells: she had not noticed it herself.
- 48.2 believed there was a “dynamic between [Mrs Wells] and Mr A and “something wasn’t right” between Mrs Wells, Mr A and [the Claimant];
- 48.3 said there was an atmosphere in the office, she could understand it could make some people uncomfortable, and it was impacting Mrs Wells and the Claimant;
- 48.4 stated Mr A had not made her feel uncomfortable.
- 49 On 2 February 2016, when they were alone, Miss Hankin confronted the Claimant: she was angry and upset, “gobsmacked”, that the Claimant had identified her to Mrs Kirby as a victim of Mr A’s improper conduct. She complained that the Claimant had not even discussed this with her, let alone forewarned her that this part of her grievance.
- 50 On 3 February 2016 Mrs Kirby interviewed DM. He said:-
- 50.1 He had heard gossip about Mr A’s capability and that female staff had complained about MrA, describing him as “creepy”;
- 50.2 He knew colleagues who thought Mr A invaded their personal space. He thought it was “just a lack of awareness of personal boundaries” and went on to say he had experience of this with Mr A and “it doesn’t concern me”.
- 51 On 4 February 2016 Mrs Kirby informed the Claimant that she had completed her investigation, but could not discuss it with the Claimant until it had been considered by Mr Yexley.

- 52 On 5 February 2016 Mrs Kirby told the Claimant, in confidence, that Mr A would be subject to disciplinary proceedings for potential gross misconduct on the grounds of sexual harassment.
- 53 The Respondent does not appear to have considered whether, in light of the nature of the allegations made against Mr A it should have considered suspending Mr A pending the outcome of the process.
- 54 On 8 February 2016 Mrs Kirby reassured the Claimant that her identity would not be disclosed to Mr A.
- 55 Mrs Kirby completed her investigation report and delivered it to Mr Yexley. It was not signed or dated. She set out the Claimant's grievance in summary and the evidence of the witnesses who corroborated it. She accepted in hindsight she should have included the evidence of DM, because it was potentially exculpatory. She concluded:-
- 55.1 there was sufficient evidence to bring disciplinary proceedings against Mr A for potential gross misconduct on the grounds of sexual harassment and
- 55.2 there were no grounds giving rise to any safeguarding concerns in respect of the children.
- 56 Mrs Kirby had been concerned to learn from her interview of Miss Hankin of the nature and extent of the references to Mr A that were allegedly being made in the admin office. She relayed this to Mr Yexley. He had grave concerns regarding this, particularly because of his position in charge of the disciplinary procedure. He asked Miss Holtum to raise this in her supervision sessions with the admin staff as being unacceptable.
- 57 Mr Yexley conducted Mr A's disciplinary hearing on 26 February 2016. Mr A denied knowingly acting as was alleged and stated that he would have preferred it if those who had made the complaint had spoken to him first. In dealing with his alleged staring Mr A informed Mr Yexley of his condition of *keratoconus* and produced a recent letter from the Ophthalmology Department of the local NHS trust that confirmed his condition. He thought peoples' perceptions of personal space varied considerably and cited Miss Hankin's lack of awareness of any invasion in support of this. He stated that he had always moved quietly. A colleague had drawn his attention to the girl doing gymnastics, and he did not think he had watched her "at length". At the conclusion of the meeting Mr A asserted he had never before been the subject of complaint, and had previously represented female members as a TU Equality and Diversity Officer.
- 58 The Claimant accepted that from early March she noted a marked change in Mr A's conduct: on at least two occasions he carefully stepped to one side or away from her so as to ensure he did not invade her personal space. We have no doubt this change was as a consequence of Mr A being made aware by both his supervision with Mrs Kirby and the commencement of the disciplinary proceedings against him of the nature of his conduct that was of concern to some members of staff.

59 On 8 March 2016 Miss Holtum, as she had with all the other staff in the admin block previously, held a supervision meeting with the Claimant. In the course of it she informed the Claimant that the Respondent had received an allegation that inappropriate comments regarding Mr A had been made in the admin offices and that this must stop.

60 On 9 March 2016, a handover day for the Claimant, Miss Hankin was upset that when she arrived for work and greeted Mrs Wells “she just grunted at me”. They had a row, each alleging that the other had an attitude toward them. Mrs Wells, by email that day at 09:05 to Mr Yexley, in which she complained about the conduct of Miss Hankin resigned from her position. Mrs Wells has subsequently compromised any potential claim in the Employment Tribunal against the Respondent for a modest sum.

61 Subsequently that day, when the Claimant arrived for her handover with Mrs Moore, Miss Hankin, who was in the toilet, overheard them in the kitchen discussing the earlier incident between Miss Hankin and Mrs Wells. She complained to the Claimant about being discussed “behind her back” when neither the Claimant nor Mrs Moore had been present. The Claimant denied that this had been the case and, in the words of Miss Hankin, the Claimant “lost it, she went ballistic, she shouted and got in my face”. Miss Hankin repeated her complaint, and the Claimant left the office.

62 We accepted the contemporaneous note made by Ms Hankin concerning those events as accurate.

63 On 9 March 2016 the Claimant wrote to Mr Yexley to express her surprise and dismay at having been requested in her supervision not to talk about Mr A in the admin block. She was outraged that as a victim of [alleged] harassment she was being accused of harassing conduct. It is clear that her attitude to this remains the same. She vehemently denied that any improper comments about Mr A had taken place. She has sought to maintain that position before us, but we did not accept it was true. In particular,

63.1 Both Mrs Moore and Mrs Wells accepted in cross examination that there were such conversations;

63.2 Miss Hankin’s evidence of such conversation taking place was clear and unequivocal;

63.3 When cross examined on this point the Claimant went to great lengths, over several minutes, to avoid answering the questions put to her. She sought to deflect the questions by using semantics, such as how “a conversation” should be defined, or sought to elide the question by stating that anything that was said was in the context of seeking or offering support.

We find as a fact that the Claimant and Mrs Wells regularly discussed Mr A in inappropriate terms in the presence of both Mrs Moore and Miss Hankin.

64 Mr Yexley wrote to Mr A on 9 March 2016 to advise him that he had been exonerated of the charges made against him in the disciplinary proceedings. He advised Mr A to have more regard for others’ personal space, something Mr A

appears to have anticipated earlier. He also offered Mr A the benefit of any additional training, resources or support.

65 On the same date Mr Yexley also wrote to the Claimant to advise her of the outcome of her grievance. He informed her that:-

65.1 her concerns had been listened to and taken seriously.

65.2 a full investigation had taken place.

65.3 appropriate action had been taken.

The letter concluded by advising the Claimant of her right to progress to the next stage by referring her grievance to Mr Pearce within 7 days, when a further hearing would take place.

66 At 08:36 on 10 March 2016 the Claimant emailed Mr Yexley and others to express her shock at having been under "attack" by Ms Hankin and being accused of inappropriate conversations in supervision. She was signed off by her GP later that day, with an URTI as the specified reason, and was subsequently signed off for that and other reasons such that she never returned to work before she resigned.

67 On 11 March 2016 at 08:29 the Claimant emailed the Respondent's CEO, Mr Blunden, with a copy to Mr Pearce. She raised all the issues she had raised in her grievance concerning Mr A. She also complained about the conduct of the investigation of her grievance and its outcome, the failures she perceived in the process and alleged that she had been libelled and slandered in supervision.

68 Mr Blunden responded the same day to thank the Claimant for raising her concerns and to inform her that Mr Pearce would contact her to manage the matter to ensure appropriate procedures were followed and a satisfactory outcome achieved.

69 Later that day Mr Pearce contacted the Claimant to confirm that he would be dealing with the matter and to offer her the assistance of a confidential support line.

70 On 14 March 2016 Mr Yexley sent the Claimant a copy of the notes of her grievance hearing, which had been omitted in error from his outcome letter. She responded by email to state she had expected to receive the notes of Mr A's disciplinary hearing and thought she had the right to know what the outcome of that hearing had been.

71 Later that day the Claimant wrote to Mr Pearce to tell him she was struggling with the thought of returning to work the next day. She went on to,

71.1 repeat her (false) assertion that no comments had been made concerning Mr A and to express her disappointment regarding that "accusation";

71.2 allege she had been unsupported through "2½ months of sexual harassment";

71.3 inform him that recent events of 9 March 2016 had exacerbated her concerns.

71.4 seek an assurance that:-

- 71.4.1 she would be told who had made the accusations regarding Mr A being discussed in inappropriate terms;
- 71.4.2 she would be told of the basis on which those accusations had been accepted;
- 71.4.3 she would be told where she would be working in light of the continued employment of Mr A and Miss Hankin;
- 71.4.4 appropriate support systems would be in place “to prevent either of the above members of staff having access to verbally, physically or emotionally assaulting me again”.

She concluded by informing Mr Pearce that she would be seeing her GP for symptoms she attributed to stress.

- 72 At this time Mrs Jennings was conducting an investigation into the events of 9 March 2016. She interviewed Mrs Moore on 14 March 2016 for that purpose.
- 73 By this time Mr Pearce had taken legal advice concerning the Respondent's relationship with the Claimant. It felt to him that the Claimant was raising complaints “every day” and he decided to ask Mrs Jennings to deal with all the issues raised by the Claimant.
- 74 Mrs Jennings agreed to do so and tried to arrange a meeting with the Claimant to discuss any issues she wished to raise. It took place in the public café at the Weald of Kent Golf Club near Headcorn. Mrs Jennings was accompanied by a colleague, Ms King: the Claimant was unaccompanied. Mrs Jennings also treated this meeting as part of her investigation into the events of 9 March 2016 and two sets of minutes were produced:-
 - 74.1 A copy setting out everything that took place, which was subsequently titled as a “Grievance Appeal Meeting” and
 - 74.2 An amended copy dealing solely with the events leading up to and the aftermath of the 9 March 2016 incident headed, “Grievance Investigation Meeting”.
- 75 On an unknown date Mr Pearce sought and received legal advice. He concluded, probably later than mid-March, that in light of the far ranging investigations being carried out by Mrs Jennings, which went far beyond what usually took place on a grievance appeal (because it would not normally involve a re-investigation), that that process should be treated as being the Claimant's Grievance Appeal.
- 76 The Claimant has very rightly complained that she was not aware that this was a grievance appeal meeting at the time. Indeed, she could not have been because she did not raise her grievance appeal until the following day. As a consequence she was not advised of her right to be accompanied or given that opportunity.
- 77 Nevertheless, in the course of that meeting (which lasted almost 2 hours) the Claimant was asked to deal with all the events she had raised in her grievance, and agreed to do so because “it was all linked” and she was comfortable to do

- so. The Claimant detailed her concerns with Mr A and Miss Hankin, and the way the matter had been dealt with by Mrs Kirby and Mr Yexley and, on his behalf, by Miss Holtum. She also acknowledged that Mr A's behaviour had changed in early March. Towards the end of the meeting she was asked how she would prefer the issues to be resolved and responded with similar concerns to those in her letter to Mr Pearce of 14 March 2016. Mediation and counselling services were discussed with her and she was asked to let Mrs Jennings know if any other issues arose or occurred to her.
- 78 On the 16 March 2016, in an attempt to assist the Claimant understand the situation, Mr Yexley sought Mr A's consent to his eye condition being disclosed to those who had raised their concerns regarding his conduct. Mr A gave that consent almost immediately and it was relayed to Mr Pearce who, in turn, told the Claimant of it.
- 79 The Claimant responded the same day to discount the information she had been given, equating it to people who, like her husband, have to look over their glasses. She went on to say she wished to set an appeal in motion, in accordance with the deadline in the outcome letter, because she did not understand how Mr A's eye condition was relevant. She wanted an expert to explain why this condition had resulted in her perception that Mr A had stared at her cleavage, to know the outcome of the disciplinary proceedings and to receive an explanation for Mr A's other conduct.
- 80 It was apparent from the manner in which she presented her case at the hearing that the Claimant was quite unable to accept that the Respondent had a duty of confidentiality to Mr A, or that she was not entitled to know all the details of the disciplinary process he was subject to.
- 81 On 17 March 2016 Mrs Jennings interviewed Mrs Wells regarding the Claimant's and her own grievances concerning Mr A and the incidents of the 9 March 2016.
- 82 On 21 March 2016 the Claimant provided a further MED3 and asked Mr Pearce what other steps were required of her for the appeal process. She again raised the issue of what systems would be in place for her security.
- 83 Mr Pearce replied the following day. He confirmed a further investigation was being conducted by Mrs Jennings and that the Claimant would receive discretionary sick pay. He reiterated that he could not disclose details concerning Mr A, but reassured the Claimant that her grievance was being handled by an "independent panel" with no prior involvement. He told her that desks had been and would be reorganised for her and that he would keep her up to date.
- 84 On 23 March 2016 the Claimant emailed Mr Pearce to assert that her safeguarding concerns in her grievance of 24 January 2016 had not been dealt with appropriately. In that email the Claimant acknowledged she had been told the appeal process was underway, but then asked Mr Pearce to confirm to her what he felt regarding the safeguarding of children from Mr A's conduct. Mr Pearce responded the same day to state that these issues would be dealt with as

part of the appeal process, the outcome of which she would be informed of by letter.

- 85 On 24 March 2016 the Claimant emailed Mr Pearce and Mr Whelan, the Deputy Chief Executive, to again request confirmation of the Respondent's attitude to her concerns regarding Mr A's threat to children and the Respondent's response to it, giving an ultimatum that if she did not receive an appropriate response within 2 hours she would have to consider what other options were available.
- 86 Following the expiry of that ultimatum the Claimant contacted Kent Safeguarding Children Board to inform them of her concerns regarding Mr A and the Respondent's response to them.
- 87 On 30 March 2016 the Claimant emailed Mr Pearce to thank him for re-arranging the seating in the admin block, to inform him she remained signed off by her GP and to request an update of the investigation and appeal. Mr Pearce immediately responded to inform her that he anticipated an outcome no later than 12 April 2016 and to repeat his position that she was not entitled to confidential information regarding Mr A.
- 88 On 31 March 2016 Mrs Jennings, who had been on pre-booked leave, interviewed Mr Yexley and, subsequently, Mrs Kirby, as part of her investigations into the Claimant's grievances and the events of 9 March 2016.
- 89 On 1 April 2016 Mrs Jennings made a Safeguarding Statement about the concerns raised by the Claimant regarding Mr A. She concluded that the evidence raised no safeguarding concerns, no further action should be taken other than for Mr Yexley to monitor the situation and raise any concerns in accordance with the appropriate policies.
- 90 On 4 April 2016 Mrs Jennings held a telephone interview with Miss Holtum.
- 91 On 7 April 2016 Mrs Jennings finalised her Investigation Report concerning the Claimant's grievance. She created a brief chronology and dealt with matters in an Introduction, Methodology, Summary of Allegations, Evidence, Witnesses and Conclusions.
- 92 She found no evidence to support the Claimant's grievances relating to:-
- 92.1 her being victimised by Mr Yexley;
 - 92.2 sexual harassment;
 - 92.3 harassment;
 - 92.4 slander and libel
- 93 She thought there to be some evidence that Mr Yexley had not provided as much support to the Claimant as he might have done, because he did not check with her regularly to enquire about her well-being, but that such support had been given by Miss Holtum and Mrs Kirby.
- 94 On 12 April 2016 Mr Pearce informed the Claimant that the investigation had concluded, but the outcome of her appeal was still awaited, for which he

apologised. Later that day the Claimant enquired what work she should perform when she returned the next day and Mr Pearce told her she could remain at home on full pay until her appeal was finalised.

95 We thought it notable that by this time the Claimant had not only acknowledged that the appeal process was underway, but was clearly aware that a decision was imminent.

96 On 13 April 2016 Mrs Jennings sent the Claimant a detailed letter headed "Grievance Appeal Outcome". She confirmed that she had carried out a detailed investigation and then set out each of the matters of which the Claimant had complained. She then set out her conclusions in respect of each of these nine matters. She went on to inform the Claimant that:-

96.1 for a reasonable period of time Mr A would not work from the admin block;

96.2 mediation would be appropriate if all parties agreed;

96.3 she would be given access to the Respondent's therapist;

96.4 discussions would take place to introduce dynamic practice;

and concluded by stating that the decision was final and there was no further right of appeal.

97 On the 18 April 2016 the Claimant wrote to Mrs Jennings, at considerable length, to take issue with the outcome letter. The vast majority of the letter sought to challenge the factual findings and conclusions that had been reached. We thought those findings and conclusions to be entirely reasonable.

98 However, the letter commenced by alleging that because Mrs Jennings had also dealt with the concerns the Claimant raised with Mr Blunden, which the Claimant thought should have been dealt with separately, and she had not appealed until 16 March 2016, she had not taken part in a "Grievance Appeal" on 15 March 2016.

99 The Claimant's letter concluded by rejecting the proposed solutions, in particular because:-

99.1 she had been the subject of false and anonymous allegations and would be in "an extremely vulnerable position" because further false allegation might be made; and

99.2 the issue of why Miss Hankin had "verbally attacked me" and Mrs Wells had not been answered.

100 She accepted she had no further right of appeal regarding her allegations concerning Mr A, but went on to assert that the finality of the decision was "intimidating and erroneous" insofar as it related to her letter to Mr Blunden and the conduct of Mr Yexley, which had led to "a complete breakdown in trust and confidence" in him.

- 101 On 20 April 2016 the Claimant sought an update on a response to that letter. Mr Pearce replied the next day to state that she would receive a response “in due course.”
- 102 On 6 May 2016 the Claimant sent Mr Pearce a further chasing letter and sought clarification of her sick pay position as she believed it would expire on 25 May 2016. Mr Pearce confirmed his acceptance of her position.
- 103 On 5 June 2016 the Claimant wrote to Mr Blunden, in what she described as an attempt at reconciliation, giving a brief outline of the principal events that had taken place to that date.
- 104 On 7 June 2016 Mrs Kirby informed Mr A that he had not been successful in completing his probationary period and gave him one month’s notice.
- 105 On 7 June 2016 Mr Pearce wrote to the Claimant to inform her that he had been requested to respond to her letter to Mr Blunden. He confirmed to her the Respondent’s position that the grievance procedure had concluded and to state it would welcome the opportunity of a meeting with the Claimant to discuss her return to work.
- 106 On 15 June 2016 the Claimant emailed Mr Pearce to inform him she was seeking legal advice.
- 107 On 22 June 2016 Miss Holtum wrote to the Claimant to ask her to attend a sickness absence meeting, which she proposed should take place on 30 June 2016, and to request her consent to a medical report
- 108 On 23 June 2016 the Claimant emailed Mr Pearce a letter of resignation alleging fundamental breach of contract and a “final straw” in being denied an appeal.
- 109 Later that day the Claimant contacted OFSTED to complain about the Respondent, in particular its administrative staffing resources and her concerns regarding Mr A.
- 110 It is right to record that on 13 July 2016 OFSTED confirmed to the Claimant that they had no concerns regarding the Respondent breaching regulations. On the same date it confirmed that position to the Respondent and stated that no further action would be taken regarding the complaint.

Submissions

- 111 We hear oral submissions on behalf of each of the parties. It is neither necessary nor proportionate to set them out here.

The Law

- 112 We have had particular regard to the following provisions of the Employment Rights Act 1996:-

43B Disclosures qualifying for protection

- (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
 - (d) that the health or safety of any individual has been, is being or is likely to be endangered,
 - (e) that the environment has been, is being or is likely to be damaged, or
 - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
- (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
- (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
- (4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
- (5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person

- (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure—
- (a) to his employer, or
 - (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
 - (i) the conduct of a person other than his employer, or
 - (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
- (2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

43F Disclosure to prescribed person

- (1) A qualifying disclosure is made in accordance with this section if the worker—
- (a) makes the disclosure ... to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
 - (b) reasonably believes—
 - (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
 - (ii) that the information disclosed, and any allegation contained in it, are substantially true.
- (2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters

in respect of which each person, or persons of each descriptions, is or are prescribed.

43G Disclosure in other cases

- (1) A qualifying disclosure is made in accordance with this section if—
 - (b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
 - (c) he does not make the disclosure for purposes of personal gain,
 - (d) any of the conditions in subsection (2) is met, and
 - (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
- (2) The conditions referred to in subsection (1)(d) are—
 - (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
 - (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
 - (c) that the worker has previously made a disclosure of substantially the same information—
 - (i) to his employer, or
 - (ii) in accordance with section 43F.
- (3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—
 - (a) the identity of the person to whom the disclosure is made,
 - (b) the seriousness of the relevant failure,
 - (c) whether the relevant failure is continuing or is likely to occur in the future,
 - (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
 - (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
 - (f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.
- (4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.]

47B Protected disclosures

- (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
- (1A) A worker ('W') has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

- (a) by another worker of W's employer in the course of that other worker's employment, or
- (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
- (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
- (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
- (1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
 - (a) from doing that thing, or
 - (b) from doing anything of that description.
- (1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—
 - (a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
 - (b) it is reasonable for the worker or agent to rely on the statement.But this does not prevent the employer from being liable by reason of subsection (1B).
- (2) ... this section does not apply where—
 - (a) the worker is an employee, and
 - (b) the detriment in question amounts to dismissal (within the meaning of Part X).
- (3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, 'worker', 'worker's contract', 'employment' and 'employer' have the extended meaning given by section 43K.

48 Complaints to employment tribunals

- (1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44, 45, 46, 47 47A, 47C(1), 47E , 47F or 47G.
- (1ZA) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 45A.
- (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
- (1AA) An agency worker may present a complaint to an employment tribunal that the agency worker has been subjected to a detriment in contravention of section 47C(5) by the temporary work agency or the hirer.
- (1B) A person may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47D.
- (2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

113 We have had particular regard to the following provisions of the Equality Act 2010

13 Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
- (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
- (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
- (6) If the protected characteristic is sex—
 - (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
 - (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
- (7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
- (8) This section is subject to sections 17(6) and 18(7).

26 Harassment

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
 - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (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.
- (5) The relevant protected characteristics are—
 - age;
 - disability;
 - gender reassignment;

race;
religion or belief;
sex;
sexual orientation.

27 Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
- (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

123 Time limits

- (1) Proceedings on a complaint within section 120 may not be brought after the end of—
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
- (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section—
- (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
- (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to—
 - (a) an employment tribunal;
 - (b) the Asylum and Immigration Tribunal;
 - (c) the Special Immigration Appeals Commission;
 - (d) the First-tier Tribunal;
 - (e) the Special Educational Needs Tribunal for Wales;
 - (f) an Additional Support Needs Tribunal for Scotland.

Further Findings and Conclusions

- 114 Our principal findings of fact are set out above and there is no need to repeat them.
- 115 Before dealing with each of the Claimant's claims individually, albeit we have had regard to all the evidence in considering each of them, we make the following more general findings.

Mr A staring - 9 December 2015

- 116 We thought it unfortunate that the Claimant was so imprecise in describing this incident. She gave no detail of what was actually said or how long the encounter lasted. It appears Mr A was seated, so would have been looking up toward the Claimant when they first met, but there was no evidence whether he remained seated or stood up, or whether she sat down. There was no evidence of how close they were to each other, or whether they shook hands. From the office plan it seems likely the Claimant had her back to the office door and/or window, but this is not clear. We thought it surprising that in respect of this and all other occasions when the Claimant perceives Mr A is staring at her or someone else there is no mention at all of the fact he wears glasses, apparently of a special nature.
- 117 In the absence of any more specific evidence, whilst we find that the Claimant held an honest perception that Mr A had stared at her inappropriately, she has failed to establish, on the balance of probabilities, that this incident was anything other than innocent.

Girl Gymnast

- 118 The Claimant's evidence on this issue was limited. There was no evidence about who was present other than Mrs Wells. The Claimant's assertion that in similar circumstances staff avert their eyes was wholly uncorroborated. The incident was looked at by two senior members of staff, both with wide knowledge of safeguarding issues, and both concluded there was no cause for further investigation or action. That course was approved by OFSTED.

119 We concluded that Mr A's conduct on this occasion was entirely innocent and there was no basis for a belief on the part of the Claimant that it gave rise to a safeguarding concern.

Ex Colleague "S", 18 December 2016

120 We were concerned at the apparent duplication by S of her question to two different members of staff within a short period. If S made the enquiry of Mrs Wells while she was in the Portakabin she would have been in close proximity to Mr A at the time. In addition, although Mrs Wells gave no evidence as to how she had replied to S's enquiry as to who "the perv" was, we thought it highly likely she would have told S who Mr A was. If that is right, and we think it more likely than not, it is highly unlikely that S would have very shortly afterwards made the same enquiry in identical terms to the Claimant.

121 In the absence of any direct evidence from S as to what took place to lead her to make this alleged comment, and to make it twice, we are quite unable to draw any relevant inference from this alleged incident.

Lobby incident – 7 January 2016

122 We were again concerned at the lack of detail provided by the Claimant in respect of this incident. Although she expanded on it in her grievance meeting, she gave us no evidence as to her and Mr A's respective positions, whether before, during or after the alleged incident. It was not clear to us if the incident took place in the corridor near the Portakabin entrance door, or the waiting room/lobby shown on the plan. We could not understand the Claimant's assertion that "he managed to get pitch blackness". There is no suggestion he touched her, simply that he invaded her personal space, but without specificity.

Others' Perception

123 It is right to note that Mrs Moore, who as the Claimant's job share we believe would have had just as much contact with Mr A as the Claimant, was not subject to, and did not herself witness, any conduct by Mr A that was of concern to her.

124 That is also the case with Miss Hankin, a full time member of staff, whose evidence was clear: she had no concerns regarding Mr A and was aware of his tendency to stare.

The Claimant

125 At the start of the hearing the Claimant, as a litigant in person, was advised of the principles of the overriding objection and that she should not hesitate to seek clarification of anything she did not understand. The law and procedure were explained to her in summary.

126 The Employment Judge repeatedly explained basic principles and the relevant issues to her. He also assisted her in re-framing some of her questions of witnesses, and put some questions on her behalf. At one point Counsel for the Respondent, perfectly properly, suggested the Judge had gone quite as far as was reasonable in this regard.

- 127 Despite this assistance the Claimant failed to accept guidance from the Tribunal as to the relevant issues or on general principles of law. She became upset on several occasions and was given time to compose herself.
- 128 We regret to say that we found the Claimant to be an unsatisfactory witness. She failed to answer some questions, in particular as set out above. In addition we were concerned that when asked as to the issues she would have wanted to raise at a grievance appeal was quite unable to give any answer.
- 129 As a consequence of the above we concluded that where there was any dispute of fact we preferred the evidence given on behalf of the Respondent to that given by the Claimant.

Mr Yexley

- 130 Me thought Mr Yexley, who was promoted since these event, to have been a capable and considerate senior manager. His evidence was clear and he gave direct relevant answers to the points raised with him.
- 131 We concluded that the Claimant had failed to establish, on the balance of probabilities, that Mr Yexley had at any time acted in any way improperly in the course of these events. In particular:-
- 131.1 He advised the Claimant appropriately on 16 December 2016.
- 131.2 He dealt with her grievance promptly and professionally;
- 131.3 He protected the confidentiality of the proceedings involving Mr A appropriately;
- 131.4 His advice that staff should not discuss Mr A in the office, given *via* Miss Holtum, was entirely reasonable.
- 131.5 He did not fail in any alleged “duty of care” to the Claimant: he was not her line manager, and Miss Holtum and Mrs Kirby did provide the Claimant with support.
- 132 The only criticism that might have been made of Mr Yexley is that he did not consider whether or not to suspend Mr A on receipt of Mrs Kirby’s report. We are unanimous in finding that a reasonable employer who had considered that issue might have gone either way.

Mr Pearce

- 133 Whilst we acknowledge that Mr Pearce was on occasions acting on legal advice we were surprised at the extent to which he did not recall matters and had made mistakes, in particular the decision to treat the meeting on 15 March 2016 as a Grievance Appeal Meeting.

Public Interest Disclosures

- 134 These were alleged to be

1 Did the following occur and, if so, amount to protected disclosures pursuant to s.43B ERA 1996?

1.1 Making an oral complaint to Mr Yexley on 16 December 2015 that the Claimant was being sexually harassed by Mr A: s43B(1) (a), (b), (d).

1.2 Raising a grievance to Mr Yexley and Ms Holtum by letter of 24 January 2016 complaining that she was being sexually harassed by Mr A and that she had safeguarding concerns about him being alone with children: s43B(1) (a), (b), (d).

1.3 Emailing Mr Blunden on 11 March 2016 reporting that Mr Yexley had failed to act in relation to her continued sexual harassment by Mr A and that she felt she was being victimised by Mr Yexley: s43B(1) (a), (b), (d), (f).

1.4 Emailing Mr Pearce, Mr Blunden and Ms Jennings on 23 March 2016 repeating her safeguarding concerns regarding Mr A and asking for confirmation that he would have appropriate boundaries when alone in the company of the children: s43B(1) (a), (b), (d).

1.5 Telephoning Kent Children's Safeguarding Board on 24 March 2016 to report her safeguarding concerns regarding Mr A and her belief that Mr Yexley was failing in his legal obligation to protect the children from Mr A and that the health and safety of the children was likely to be endangered: s43B(1) (a), (b), (d), (f).

1.6 Sending a letter to Ms Jennings on 16 April 2016 alleging that her sexual harassment grievance had not been investigated properly, she had not been given any right of appeal against her grievance and that the information she had disclosed with regard to the health and safety of the children had not been investigated or addressed at all: s43B(1) (a), (b), (d), (f).

1.7 Telephoning Ofsted on 23rd June 2016 to report her concerns regarding safeguarding in relation to Mr A, that her previous concerns regarding his conduct had not been addressed and her further concerns regarding the health and safety of the children: s43B(1) (a), (b), (d), (f).

135 We accepted that events of the nature set out above occurred, but not that they were precisely as there set out. For instance:-

135.1 The first alleged PID relates to the incident when the Claimant introduced herself to Mr A on 9 December 2015. The complaint appears to have been that she felt uncomfortable in his presence, rather than it being a specific allegation of sexual harassment.

135.2 The second alleged PID was the Claimant's letter of grievance of 24 January 2016. It is vague as to the alleged incidents in which she was not personally involved, and very subjective in what it describes. We deal further with this below. She does not explicitly refer to sexual harassment, although she does refer to the S.26 EA 2010 definition of harassment.

135.3 In respect of the third PID, the Claimant has failed to establish that there was any act of sexual harassment, far less one of a continuing nature, from which Mr Yexley should have protected her. The last specific incident she pleaded was on 7 January 2016, on which we have made the above findings.

136 Again, whilst we accepted that what the Claimant said or wrote did provide some information to the recipient concerning the issues she raised we have concluded, in light of all our above findings, that the Claimant has failed to establish on the balance of probabilities that she had a reasonable belief that the communications were in the public interest. In particular, she gave no direct evidence of the basis on which she alleged the public interest was invoked. In other cases, where it

might be implied by reason of an alleged safeguarding concern being raised, there was no basis for a reasonable belief that such an issue existed.

- 137 We are of a like mind in respect of the Claimant holding a reasonable belief that the events she recounted tended to show any of the matters in S.43B(1). She has failed to establish on the balance of probabilities that what she had perceived as taking place was a belief that was reasonably held.
- 138 In light of all the above findings of fact we are unanimous in concluding that the Claimant has failed to show on the balance of probabilities that she made any qualifying disclosures.
- 139 We accept that the disclosures alleged at 1.1, 1.2, 1.3, 1.4 and 1.6 were made to her employer.
- 140 The Claimant has failed to establish that the disclosure at 1.5 to KCSB was made to an appropriate person within S.43G ERA 1996.
- 141 The alleged disclosure at 1.7, whilst made to a prescribed person, is of no direct relevance because it was made after the Claimant's resignation and there is no alleged detriment that took place after the alleged disclosure.
- 142 We are therefore unanimous in finding that the Claimant has failed to establish on the balance of probabilities that she made any protected disclosures.

Detriments

- 143 These are alleged to be as follows:-

4.1 Mr Yexley warned the Claimant and Ms Wells on 17 December 2015 to "watch what you say about Mr A as it may be regarded as discriminatory towards him".

4.2 On the same day, Mr Yexley also told the Claimant and Ms Wells that he was banning everyone from coming to the admin building for lunch.

4.3 On 9 March 2016, Ms Holtum told the Claimant that "conversations about Martin which could be construed as bullying or harassment must stop". The Claimant took this to mean that she was being accused of bullying Mr A without any investigatory process being undertaken.

4.4 The Claimant's grievance was not investigated adequately or at all, such that the sexual harassment of the Claimant was allowed to continue

4.5 The Claimant was denied the right to appeal her grievance.

4.6 The Claimant's purported grievance appeal was not upheld.

4.7 The Respondent failed to respond to the Claimant's letter dated 16 April 2016.

4.8 The Respondent inflicted stress and anxiety upon the Claimant

- 144 We refer to our above findings, and deal with each of these in turn. We also deal with the causation issue because the onus was on the Respondent to establish on the balance of probabilities the reason for any detriment the Claimant established.

144.1 This did not take place.

144.2 This did take place. This was a detriment, because the Claimant would have preferred communal lunches to continue. Mr Yexley thought this instruction to be in everyone's interests in light of the issues raised regarding how busy the office was at the previous day's meeting. He also thought it would reduce

contact between Mr A and the Claimant, although no one later informed him that Mr A continued to use the room for lunch.

- 144.3 This did take place. It was not a detriment because employees are not at liberty to make scurrilous comments about a colleague in the workplace. In all the circumstances it was an entirely reasonable management instruction.
- 144.4 This is incorrect. Our findings are that the Mrs Kelly's investigation was thorough. Mrs Jennings' investigations were even more thorough, and her conclusions were reasonable.
- 144.5 The Claimant was not given the opportunity to be accompanied to and attend a formal Grievance Appeal Hearing, and was not aware the meeting was of that nature at the time. That was a detriment. We have given careful consideration to the Respondent's evidence of the reason for it, being the frequency of the Claimant's complaints. We have concluded that the true reason for this detriment was not that the Claimant had possibly made one or more public interest disclosures, i.e the content of the various communication, but because of the volume of complaints which largely raised the same issues.
- 144.6 This is correct. It was a detriment. However, we were satisfied that on all the evidence available it was an entirely reasonable finding wholly unconnected to the raising of possible public interest disclosures.
- 144.7 This is correct. It was a detriment. We accepted the evidence of Mr Pearce that he considered the appeal process to have concluded and acted on legal advice. He thought if he did not draw a line the correspondence would never end. That was the reason for this detriment. It was not because of the content of the Claimant's complaints, but because of their volume.
- 144.8 We accept that the Claimant did have stress and anxiety. It is our universal experience that employees who raise grievances, regardless of whether or not they are also alleged public interest disclosures, tend to suffer from stress and anxiety. The Claimant has failed to identify any specific act of the Respondent as causative of her stress and anxiety for which the Respondent can give an explanation. We are unable to attribute the cause to any specific action or inaction of the Respondent. However, we are unanimous in finding that there is evidence from which we can find that the Respondent caused such stress and anxiety because of the Claimant's alleged disclosures.
- 145 Having regard to all the evidence we have heard we are unanimous in concluding that the Respondent has explained the reasons for the detriments the Claimant has established as not being the result of any disclosure made by the Claimant, alternatively that there is no evidence of the necessary causal connection.

Sex Discrimination

- 146 We consider it appropriate to deal with these claims before those relating to the claim for unfair constructive dismissal.

The Acts

- 9.1 Mr A stared at the Claimant's cleavage.
 - 9.2 Mr A stared inappropriately at colleagues.
 - 9.3 Mr A stared inappropriately at a 12 year old girl
 - 9.4 Mr A would squeeze past or become unnecessarily close to the Claimant and her colleagues in the galley kitchen and other spaces.
 - 9.5 Mr A denigrated women, for example he referred to his wife as "the woman at home" and made statements such as "I know how to handle women" .
 - 9.6 The Claimant was constructively dismissed.
- 147 Once again, our principal findings of fact are set out above. We make the following further findings of fact.
- 147.1 This was the Claimant's perception.
 - 147.2 This was the perception of the Claimant and Mrs Wells: other staff did not perceive this.
 - 147.3 This was the perception of the Claimant and Mrs Wells.
 - 147.4 This was the perception of the Claimant and Mrs Wells, other staff did not report similar incidents.
 - 147.5 These statements were reported to have been made by Mr A, but there was no evidence of when this was done, and it was not in the hearing of the Claimant.
 - 147.6 We deal with this below.

Direct Discrimination

- 148 The onus is on the Claimant to establish on the balance of probabilities:-
- 148.1 she was treated less favourably than a suitable comparator;
 - 148.2 evidence from we could infer, absent an explanation from the Respondent, that treatment could have been because of sex.
- 149 The Claimant did not identify any actual comparators. We have adopted a hypothetical comparator, being a man with all the same attributes as the Claimant.
- 150 We refer to our findings of fact in respect of issues 9.1 to 9.4. These acts were entirely innocent: they did not relate to sex. DM's evidence concerning Mr A's lack of awareness of personal space was clear and unequivocal. In respect of those matters we are unanimous in finding that the Claimant has failed to establish that a suitable comparator would have been treated differently.
- 151 Issue 9.5 did not take place in the presence of the Claimant, did not refer to her and cannot be direct discrimination against her.

Harassment

- 152 We repeat our above findings in respect of these alleged acts.

- 153 We accept that it was the Claimant's perception that all these matters related to sex and/or were of a sexual nature.
- 154 However, we are unanimous in our view that on an objective consideration of these matters, having regard to all the circumstances of the case, it was not reasonable for these matters to have that effect.
- 155 We take the view that there is some support for that view in the fact that:-
- 155.1 neither Mrs Moore nor Miss Hankin had similar perceptions;
- 155.2 none of the experts involved shared the Claimant's view of Mr A's conduct presenting safeguarding concerns.
- 156 Having regard to all the circumstances of the case, including the Claimant's perception, we cannot accept that it was reasonable for the Claimant to perceive the conduct of Mr A as having the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Victimisation

- 157 We have already made our findings on whether these were detriments and on the Respondent's explanations for them.
- 158 We accept that one or more of the alleged PIDs, in particular those at 1.2, 1.3, 1.4 and 1.5 were protected acts.
- 159 In this context, however, the onus is on the Claimant to establish, on the balance of probabilities, evidence from which we could infer that the detriments she has established could have been because she performed protected acts.
- 160 It is our unanimous conclusion that she has failed to do so. Our reasons are the same as those set out above. There was no evidence of there being a causative connection between the protected acts and the detriments she complains of.

Unfair Dismissal

- 161 We are unanimous in our view that the Claimant was perfectly entitled to feel aggrieved at not being invited to a formal Grievance Appeal Meeting and in not being given a substantive explanation for that failure despite numerous requests.
- 162 Whilst we have accepted the explanations for those omissions were not a consequence of a public interest disclosure or protected act, that is very far from saying that the Respondent is not blameworthy.
- 163 That conduct, in a different context, might well have amounted to a breach of the implied term relating to the conduct of grievances and that relating to trust and confidence.
- 164 In this context, however, the Claimant does not have the two years service necessary to claim ordinary constructive unfair dismissal.
- 165 In light of all our above findings we are quite unable to find that the Claimant has established any breach of contract, far less a fundamental breach, caused by her alleged protected disclosures or acts. This aspect of her claim must fail.

“Amendment” and Time Points

166 In light of all our above findings we do not consider it necessary or proportionate to deal with these at length.

Amendment

167 We accepted that the Claimant was frustrated by the very limited character count allowed when completing an ET1 on-line. It is extremely short and should, in our view, be several times longer than it is.

168 We thought it unfortunate that the Claimant did not heed the clear alternative to that limit, set out immediately below it, of uploading a longer document in .rtf format.

169 It was not disputed that at the PH, at least in part because of that issue, the Claimant was ordered to provide full particulars without being limited to what was in her claim form.

170 We concluded, particularly as the Respondent had taken no objection at the time, that it was not appropriate to reject any of the “amended” claims in the Further Particulars provided by the Claimant.

Time

171 The Claimant’s claims that took place before 19 January 2016, to the extent that they were not “conduct extending over a period”, are out of time.

172 Those claims are concerned with Mr A’s conduct on 9 December 2015 and 7 December 2016 and Mr Yexley’s alleged conduct on 17 December 2015.

173 Under S.123 Equality Act 2010 we have the power to extend time if, in all the circumstances of the case it is just and equitable to do so. The onus is on the Claimant to establish, on a balance of probabilities that that is the case.

174 We have had regard to the factors identified in British Coal Corpn v Keeble [1997] IRLR 336:-

174.1 the length of and reasons for the delay;

174.2 the extent to which the cogency of the evidence is likely to be affected by the delay;

174.3 the extent to which the party sued had cooperated with any requests for information;

174.4 the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and

174.5 the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

175 We have also considered the decision in Robertson v Bexley Community Centre [2003] IRLR 434 and accept that that the granting of an extension of time is the exception rather than the rule.

176 We have concluded that the Claimant has established on the balance of probabilities that it would in all the circumstances of the case be just and equitable to extend time in her favour in respect of these matters. In particular:-

176.1 The delay is relatively short and the Claimant had raised a detailed grievance which the Respondent as investigating and considering;

176.2 There was no adverse effect on the cogency of the evidence. There was no suggestion that Mr A might, but for the delay, have been available as a witness, for instance.

176.3 There was little prejudice to the Respondent.

176.4 There was potentially substantial prejudice to the Claimant: the out of time matters were, to a great extent, the foundation (albeit insecure, as we have found) on which her case rested.

Employment Judge Kurrein

28 March 2017