Case Number: 3346905/2016

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms Donna O'Neill **v** **1.Furniture Recycling Scheme for Hertfordshire (Fresch)**
2. Mr Michael Gadeke

Heard at: Watford **On**: 31 May and 1 to 2 June 2017

Before: Employment Judge Bedeau
Members: Mr A Scott
Mrs A Crighton
Appearances

For the Claimant: In person
For the First Respondent: Mr R Jones, Chairman
For the Second Respondent: In person

RESERVED JUDGMENT

1. The claimant's claim of harassment related to sex is not well-founded and is dismissed.

2. The claimant's claim of direct discrimination because of sex is not well-founded and is dismissed.

3. The claimant's claim of constructive dismissal is not proved and is dismissed.

4. The provisional hearing listed for remedy on 28 September 2017, is hereby vacated.

REASONS

1. By a claim from presented to the tribunal on 27 September 2016, the claimant, Ms Donna O'Neill, complained that she had been sexually

harassed and discriminated because of sex. In addition, she had not been paid her notice pay. She worked for the First Respondent as a Part-Time Co-ordinator from 5 January 2016 to 7 July 2016.In the responses all claims are denied.

2. At the preliminary hearing held on 22 December 2016, before Employment Judge Lewis, the parties clarified the claims and issues.

The issues

3. **Section 26: Harassment on grounds of sex**

3.1 Did the respondents engage in unwanted conduct by the second respondent on and after 23 May 2016 communicating with the claimant, largely but not necessarily exclusively by text, in words to the effect that he wished to continue with their relationship;

3.2 Was the conduct related to the claimant's protected characteristic?

3.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.4 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.5 In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3.6 Did the second respondent act in the course of his employment with the first respondent for the purposes of s.109 Equality Act so that the first respondent is vicariously liable for his actions?

4. Section 13: Direct discrimination because of sex/Constructive dismissal

4.1 Did the first respondent treat the claimant less favourably because of her protected characteristic of sex in:

4.1.1 Managing the claimant's grievance less favourably than it would have managed a complaint by a man?

4.1.2 Managing the claimant less favourably than it managed the second respondent?

4.1.3 The words "managing the claimant's complaint" encompasses the actions of the first respondent between 7 July and the

claimant's confirmed resignation, and includes the conduct and outcome of the consultant's inquiry into the claimant's complaint.

4.1.4 Did the claimant resign in consequence, such as to enable her to bring a claim of discrimination by constructive dismissal (it being common ground that she did not have two years' service)?

The evidence

5. The tribunal heard evidence from the claimant. On behalf of the First Respondent evidence was given by Mr Robert John Jones, Chairman. The Second Respondent, Mr Michael Gadeke, represented himself and gave evidence.

6. In addition to the oral evidence the parties adduced a joint bundle of documents with further documents being produced during the course of the hearing.

Findings of fact

7. The First Respondent, Furniture Recycling Scheme for Hertfordshire, "FRS", commonly referred to as Fresch, is a charity. It provides furniture and household goods to those on low income at 50% of the market price. Members of the public are allowed to purchase its goods but at the full price. It is staffed by a manager and at the time of the claimant's employment, two part-time co-ordinators as well as volunteers. Goods are stored in a warehouse. Volunteers would go out and collect as well as deliver goods.

8. FRS receives no regular statutory funding but is provided with free accommodation by a local business. Income earned or generated is through its charitable activities. Currently its income for this year is £52,000.

9. Mr Michael Gadeke, the Second Respondent, had been employed by the FRS for 12 years. He was promoted to Manager in 2014.

10. The claimant applied for the post of part-time Co-ordinator and was interviewed on 6 November 2015 by Mr Gadeke and a trustee of the FRS. She was successful and was offered the position on 12 November 2015. She commenced her employment on 5 January 2016, working two and a half days a week, namely Tuesday and Thursday with half day on Friday. She job-shared with another employee called Kerry.

11. She and Mr Gadeke are of similar age and were not in a relationship when she commenced her employment with FRS. This case is very much about the aftermath of a relationship that had broken down.

12. Ms Pam Young was a former trustee of FRS who worked for an organisation called GAP, a youth charity, as a Project Worker. Initially she was on friendly terms with both the claimant and Mr Gadeke but that later changed .

She inherited a bungalow in Brighton and engaged Mr Gadeke to decorate it at an agreed price of £1,000. He asked the claimant whether she would help him out with the work and she agreed.

13. Mr Gadeke and the claimant began dating in March 2016 and had carried out the work on the bungalow during the bank holiday weekend, Friday 29 to Sunday 1 May 2016. However, Ms Young reduced the payment to Mr Gadeke to £400 instead of £1,000 as the work had not been completed. The following weekend he and the claimant visited the property to complete the work.

14. The claimant had booked a week's holiday in Greece from 20 May 2016. Mr Gadeke asked her whether he could go with her to which she agreed. They both stayed in one apartment but were unable to get along as they were constantly arguing. After two days, the claimant left and rented another apartment for herself. Three days later Mr Gadeke flew back home.

15. On 23 May, he sent the claimant a text asking her for her room number and describing her as "one tough cookie". The claimant responded, on the same day stating that she paid to get away from his ranting; that they should not have booked a holiday together but Mr Gadeke had assured her that he would be different to "that tyrant in Brighton". She then wrote:

> "You can't see it and just presume there is something wrong with me in your usual arrogant fashion. End of it. That's us over. I am sure. And I am sorry. It's up to you if I stay at Fresch. Make it difficult for me and I will walk. That's up to you. Sorry about the holiday but I am glad of the peace and quiet. Hope you are ok, I really do…You are not for me and I am really not for you."

16. Mr Gadeke responded stating that the claimant "lose the plot over nothing and turn it in to a drama". As regards work, he wrote:

> "That'll be completely up to you!?... I'm a good person with a good heart and I know who I am!! God's got my back, I'll cast it all on him!!"

17. On 27 May, he sent the claimant a lengthy apologetic text message in which he made repeated references to his belief in God and "I really do care about you, but big enough to accept the outcome!!". He added an emogi crying with laughter.

18. On 30 May he was told by Ms Young that she was prepared to give him an extra £200 on top of the £400 with an additional £50 to cover his expenses.

19. The relationship between the claimant and Mr Gadeke lasted six weeks. He accepted that it was at an end but was more concerned about how they were going to work together as they due to return to work from their leave on 31 May 2016. They shared an office, eight feet by eight feet with two desks. The claimant's desk which was large and heavy, was to the right of his with a computer on each. Only one telephone was working and it was on Mr Gadeke's desk.

20. There was a smaller adjoining room, referred to as the Tardis, used by staff to make tea and coffee during their breaks. There was no IT connection in that room.

21. Precisely what occurred in morning of 31 May when they returned to work is in dispute. The claimant's account is that Mr Gadeke had subjected her to a constant barrage of pressure to resume their relationship; he did not allow her to get on with her work; and he repeatedly asked her to go to the back room for five minutes and "get it all back on". She said that his words that morning kept reverberating in her mind which made her upset and angry. She wrote them down as she thought at the time that she might complain to the trustees. She said that she told Mr Gadeke that he was making her feel sick and had asked him to stop. She tried to walk away and swore at him but he kept taunting her with lurid sexual suggestions while standing only a few inches from her face. She asserted that he said, "I am going to grab you and kiss you, what are you going to do about that?" She said she felt demeaned and helpless and asked Mr Gadeke to move her desk into the other room but he refused saying that he wanted to keep looking at her all day. He sat facing her for long periods of time saying:

> "I can't stop looking at you and I won't. This is my kingdom, I rule here. I will say what I like and do what I like and there is nothing you can do about it. I only answer to God."

He then said,

> "Oh shut up and kiss me, go on, I know you want to."

Then,

> "Soften up a bit and stop fighting, it's all go. Let love in and embrace it."

22. The claimant then continued by saying that Mr Gadeke harangued her with threats:

> "Don't you ever think that you can meet anyone else whilst you're here because I will cock block him every step of the way. I won't let another man near you. I want you in my life and I'm gonna say it every day, its all good."

23. The claimant then said that Mr Gadeke refused to acknowledge her rejection of him. The stress and intimidation caused by his behaviour left her feeling unwell as she suffered chest pains resulting in her having to leave work at lunchtime.

24. She said that she had written down Mr Gadake's lurid statements in a book, referred to by her as her "last year's diary".

25. Mr Gadeke stated in his witness statement that they both returned to work on Tuesday 31 May 2016 but the atmosphere was frosty. They communicated the best they could under the circumstances. He received a message from a friend pertaining to an earlier disagreement he had had with the claimant and passed the contents of the message on to the claimant

who launched into a verbal assault on his ethics and values and the fact that he had not supported her professionally during the disagreement with the friend. At that point Mr Gadeke stated that he recognised that the personal and professional had become confused and that his position as the claimant's manager was not being respected by her. He did, however, "let it go " as things got quite tense. The claimant then left at 12.30 pm saying that she had chest pains and was seeking medical advice. She later texted him requesting the chairman of the Trust's contact number.

26. In his oral evidence, he said that when the claimant arrived at or around 8.30 am, he thought, how was this going to pan out? The two desks were side-by-side in a room 8 feet by 8 feet and the atmosphere was somewhat tense. They had a discussion about Ms Young but the claimant's response exacerbated the situation. He said to her that Ms Young agreed to pay them an extra £200 to cover the work on her bungalow in Brighton but the claimant's reaction was to engage in a verbal assault upon him. She was at her desk and said "It is a load of fucking nonsense. Why are you taking money from her. You said you were going to take her to the Small Claims Court" and "Your morals are lower than a snake's belly. You say one thing and do another". At that point he decided to ask Mr Ian Saunders, volunteer and an old age pensioner, who wears hearing aids, to leave the room. He then said to the claimant:

> "Let's not get this out of all proportion. Let us keep a lid on it. Take Pam's money and put it in your back pocket. Let us move on from there. We are now in a situation that it alien to us."

27. The volunteers arrived at 9.00 am and were loading the van to be sent out on delivery. From 9.30 am there were a lot of telephone calls as well as people coming in. He denied saying the words attributed to him by the claimant as they were not in his nature. He admitted he might have said "Soften up a bit and stop fighting, its all good. Let love in an embrace it". He denied standing a few inches from her face, as she alleged. He also denied saying that it was his kingdom and if he did say "I only answer to God", it was not in the manner as described by the claimant. When he said "soften up" he was trying to put a lid on a difficult situation. He had no idea what the term "cock blocking" meant and had never used it. He then acknowledged that by the 31 May the relationship with the claimant was over as they were not compatible in Greece. He made reference to the lengthy text message he sent to the claimant on 27 May 2016 and said to the tribunal that he was trying to appease and reconcile the personal and professional.

28. We have been referred to a large number of contemporaneous texts and WhatsApp messages which, in our view, cast a flood of light on the relationship between the claimant and Mr Gadeke. The messages have assisted us in determining the nature of the relationship between them on and after 31 May 2016. We shall now refer to some of them and make findings.

29. At 16:16, 31 May, the claimant sent to Mr Gadeke a WhatsApp message stating the following:

> "I will be popping in tomorrow to collect and deliver James' mirror and I will drop off the cordless screwdriver. I would like Bob's number. Michael I am very sorry for the name calling, when you don't see my point I go further and hammer it home… There was no need for my insults towards you and I am sorry…. So angry that I have chest pains!!! This may be more than I can bear and leaving may well be my best bet."

30. Mr Gadeke's response was:

> "Please stop fighting the world!!!?... I don't care that you chuck insult, I can bear it!!... It's like looking in a mirror when I'm talking to you!... You say I rant !? I'll call the insults, like my finger pointing, we all have a threshold eh!? Drop in for the mirror and I'll give you £100 until I see Pam, that'll help with your car??... The last thing I want is for you to get poorly! Take one of your meds and chill out1?... I'll sort your shed, it may have to be Friday?? I'll have a look!... I love you Donna O'Neill, you crack me up!!"

31. He then added five crying emogies and ended by given three crosses.

32. On being questioned by the tribunal the claimant acknowledged that in one of her text messages to Mr Gadeke, she called him a "Shit bag" because she was of the view that Ms Young should not "walk all over us" as she had done the same to another employee of FRS.

33. Mr Gadeke said that the cause of the argument was the dispute with Ms Young over payment for the work done. From the claimant's email and her evidence to the tribunal, we accept Mr Gadeke's account. The claimant wanted the dispute to be dealt with in the Small Claims Court and was angry with Mr Gadeke for having accepted the additional sum from Ms Young. Of importance, is the fact that the above text from the claimant made no reference to the alleged lurid statements by Mr Gadeke and was prepared to turn up at her work place to hand in a mirror and a cordless screwdriver knowing Mr Gadeke would be present. She was also prepared to allow him to pick up her shed from her home.

34. The following day further WhatsApp messages were exchanged between them. Mr Gadeke apologised for upsetting her; she stated that it would be good if he could find time that day to collect the shed as she had one day left to return it. It had cost £55. In further messages she stated that she would sell the shed online. In her evidence, she told the tribunal that she eventually sold the shed for £50.

35. On 2 June, she sent a WhatsApp message to Mr Gadeke in which she wrote:

> "I won't jeopardise anything to do with you, your job or position… As angry as I am with your unprofessional behaviour, it's not my style. Just didn't want you to worry."

36. As can be seen from the above message, the claimant on 31 May, asked for "Bob's number" that is the Chairman, Mr Robert Jones' contact details as she wanted him to mediate between them. Mr Gadeke said in evidence that he did not give Mr Jones' details to the claimant as he wanted her to return to the office to have a conversation with him about why she wanted to escalate the matter to Trustees/Chairman level. She did meet with Mr Gadeke later on that day but alleged that he switched off her computer while they were in the office. She did not make reference to this in her witness statement which was denied by Mr Gadeke in evidence. Having regard to our concerns about the claimant's credibility and the fact that this allegation was singularly absent from her witness statement, we do not find that Mr Gadeke had switched off her computer. We do, however, find that they tried to discuss a way forward in their relationship without involving the Trustees or Mr Jones, after which the claimant was content to return to the premises the following day with a mirror belonging to someone by the name of Jane and a cordless screwdriver.

37. The claimant returned to work on Thursday 2 June as this was her scheduled work day but was late as she said her vehicle had been clamped. She only worked for a couple of hours before leaving following a telephone call with her doctor and went on sick leave.

38. On 6 June Mr Gadeke WhatsApped her stating that "all was fair in love and war" and was offering her "an olive branch and not a rant". He said that she was very precious and that he did not like to think of her being upset. It was never his intention to cause what had happened in their relationship and was sorry.

39. We are of the view that Mr Gadeke's message sent in the evening of 5 June, was responded to by the claimant on 6 June at 09:36 in which she wrote the following:

> "You are right… I don't know how we got here. I for one will conduct myself peacefully and without sentiment.. I also know I have to leave, we can't possibly work through this. I'm sorry for my part that it got so shit. I'm back at the doctors on Thursday and he wants to sign me off again for another week. I won't drag it out, just gotta find out what I'm supposed to do. Conflict of interest might cover it as long as details not needed. Anyways I've just rang the office. Ian will reserve the fridge freezer for me, my little red one has broken down, repair man recons thermostat and that's burnt out the motor. Can you put me down for delivery as soon as there is a gap please. Thank you Michael."

40. She then sent a further message at 09:48 stating,

> "Ment to add can I pay on delivery. I dint really want to come in.".

41. Two hours later she sent a further message;

> "Feel bad that you're so short staffed Michael, I can come back on Tuesday if I'm needed? I don't know what to do? What's your view?"

42. These messages do demonstrate to us that the claimant was prepared to engage in day-to-day conversations with Mr Gadeke in relation to replacing her fridge freezer and asking him whether or not she could pay on delivery. She was also concerned about him being short staffed and asked for his advice on what she should do. Although it is possible given the myriad nature of human relationships that a victim can work with the perpetrator of the harassment without either expressly or impliedly condoning his or her behaviour, in our view it seems unlikely that the claimant would engage with Mr Gadeke in the way she has been doing whilst alleging that he was sexually harassing and discriminating against her because of her sex.

43. The following day they engaged in further exchanges in relation to the costs of the one week holiday in Greece and the extent of their respective financial contributions. There was the absence of any rancour or concern about Mr Gadeke's alleged behaviour towards the claimant being sexually discriminatory or sexually harassing. He stated that he wanted the claimant to return to work as she was an asset to the First Respondent.

44. The claimant replied on 9 June stating that she was concerned about her daughter who had not been able to return to work until she saw her doctor. She thanked Mr Gadeke for the fridge freezer as it meant a lot. He replied that she was welcome but he was sorry that she did not think it was wise to return to work.

45. In her WhatsApp message on 15 June to him she made reference to job applications:

> "I will resign officially once something lands on my lap. I won't drag it out. I feel bad enough already really, it is after all a charity."

46. The exchanges in relation to Lily were in connection with her being out of surgery. The claimant had informed Mr Gadeke about he and his response was to send his best wishes. The claimant later wrote on 16 June:

> "I'm sorry. Never meant to hurt you Michael, I just didn't know how difficult it was going to be"

47. Mr Gadeke replied the same day stating that he was missing her.

48. The following day she informed him that she was in London waiting for an interview. His response was to wish her good luck.

49. Up to and including 17 June 2016, they both communicated via WhatsApp messages, thereafter, by texts. We find that the WhatsApp messages were about day-to-day and work related matters. Both parties were willing to engage in correspondence of a personal nature. Matters continued in a similar vein up until 30 June.

50. On 24 June Mr Gadeke thanked the claimant for agreeing to hand in her sick note he requested to cover her absence on 23 June which she stated

she was in possession of and would drop it off later in the day. On 28 June, he wrote to her stating that he had not received the sick note.

51. On 30 June, the claimant sent a text message to him stating,

> "Is it true you are back working for Pam after everything she did?"

52. The issue of Ms Young allegedly being in contact with Mr Gadeke caused the claimant some concern. The following are the exchanges between her and Mr Gadeke. It is unclear when the last one was sent by Mr Gadeke:

> "MG No Donna I'm not!!! Why do you ask? XX
>
> DO She is attempting to give me grief. I'm making a statement to the police today. She sounds like she's doing it for you.
>
> MG I've heard she wants paint back from Wood Common??.. Just drop it here and forget about it? Why all the agro?? Stop fighting the bloody world!! Xx
>
> DO So I'm being discussed! Just because you folded and allow people to treat you like that doesn't mean we all do.!
>
> MG I don't have any paint. It's in the landing cupboard at Wood Common... You know that job I worked an extra day and you benefitted.
>
> DO Pam will end up being the nails in your coffin because I'm not taking her insults and constant texts. I refused to be harassed by her. We both know she is carrying your banner. You shouldn't have allowed her to treat your employees this way. Trustees will know, then they will have to know the whole sordid story, and no, I'm not answering my phone to you so don't ring me.
>
> MG Donna, tell Pam where the paint is.. There's only one person putting nails in my coffin if this continues!!!.. When did the jobs we did her a personal favour not professional!? As for your job, come back, no one is stopping you!? Please chill out!? Xx
>
> DO I don't want you passing messages to Pam from me !! She can fuck off. And don't preach to me about personal and professional !!! Your not able to differentiate! You said I can't work with you, go off sick with a bad back and milk it to you find something! Hypocritical tosser.
>
> MG The first week, I had trouble differentiating!!.. Not now!! We've had numerous conversations since!! I said take some time off yes! Milk it!!! No!!! The job is still yours, you are making matters worse with all this!? As far as I'm aware, you are currently sick until Monday!! I'll make further contact Tuesday to see where you're at!?.. The Pam thing is completely separate!!.. Please try to use good judgement!!
>
> DO You have made it impossible for me to come back.
> The first week you found it difficult!! Week !!! Utter shit! You have kept it up and kept me out!

MG Nothing's impossible!!.. We need to have a chat, that's all!?.. This is blowing out of all proportion!!.. It can be put right? I'm not keeping you out!! No more over text please, drop in or agree to meet me for a conversation please!! X

DO No. Stop making contact. Third party is required now.

MG The question is? Do you want to come back!? If so, I will sort it out!?

DO Your attitude will never be sorted. Women just aren't welcome at Fresch. You have made sure of that, and now in the past… Your way or the hi way seems to be the case. Stop messaging me."

MG Morning Donna, I have to officially ask again if you could come in for a chat about your current situation!?... This week will be four weeks on sick, after which, sick pay scale alters!!.. We need to discuss this, whether you intend to come back!?... Could you please let me know whether you could come in and chat please, failing that, we'll need to outline in writing, where we are!!... Take this the right way please… The painting situation is now resolved, you won't hear from Pam again, this now needs to be separated from work!! Hope to hear back! x"

53. The claimant did not reply to Mr Gadeke's request. He, therefore, sent her a letter dated 7 July 2016, in which he wrote:

"Dear Donna, I hope you're feeling better. You have recently been unwell, and providing sick note for your absence. If this is still the case could you, please supply an up to date one as soon as possible.

As on Tuesday 5 July you were due to return to work, I have tried to contact you by phone and messaged about this, but have not been able to reach you. Could you please call the office to discuss the current situation?

With the period of illness now extending to four weeks, I need to remind you Fresch policy states:

> "In any given leave year (1 April to 31 March) Fresch staff will receive full pay for up to the first 20 days of absence through sickness or incapacity. For up to 20 further days of absence through sickness or incapacity, staff will receive half pay.
>
> After a maximum of 40 days in any given year, Fresch staff will be entitled only to statutory sick pay and will not accrue normal leave entitlement during their absence on sick leave.
>
> This will be actioned pro rata for staff whose employment begins halfway through a year or for any staff on part-time contracts.
>
> The policy also states that staff should inform their line manager of their inability to work by no later than 9.30 am on the morning that they are due to attend work."

> Could we please arrange a possible meeting or have a discussion regarding matters as soon as you receive this letter? I hope all is well with you and I look forward to hearing from you soon."

54. The claimant told the tribunal that she signed on at her local Job Centre and visited Stevenage Citizen's Advice Bureau on 5 July 2016, as she wanted Mr Jones' contact details. The CAB provided her with the information as they accessed the Charity Commission's website. She drafted her letter of resignation dated 7 July 2016, stating:

> "To Bob Jones and the Trustees of Fresch,
>
> It is with great regret that I resign my position at Fresch as Scheme Co-ordinator. I have been experiencing repeated unwanted sexual harassment from my Manager, Michael Gadeke this caused me to be signed off work with stress for the past five weeks. He has also refused me my rights as I have been asking for a third party to mediate the situation. This is a fundamental breach of contract and I am resigning in response to this.
>
> Yours regretfully,
>
> Ms Donna O'Neill
>
> P.S I have started proceedings with Acas as of this day 12 July. I have had little choice in this as I was denied by Michael, any contact details of yourselves. I have proof of my request also proof of Michael's denials for these contact details dated 31 May 2016."

55. The "P.S" part of the letter was written after she handed in her resignation letter to Mr Jones at Mr Jones' home. Mr Jones refused to accept it and advised that she could lodge a grievance after which she could reconsider her position.

56. Her resignation letter was again submitted on 12 July 2016.

57. On 11 July 2016, she lodged a grievance citing Mr Gadeke's conduct towards her on 31 May 2016 and alleged that he had said to her that he wanted her to stay in the office so he could look at her all day and for her to change her mind. This was when she had requested that she wanted to leave to go to an Argos store. She alleged sexual harassment. She also made reference to Mr Gadeke not providing her with Mr Jones' contact details and not allowing her to move her desk to the Tardis.

58. Mr Jones decided to engage the services of someone who, in his view, was completely independent of the First and Second respondents. He enlisted the services of Ms Caro Hart of Franklin Hart Consultancy CIC, to investigated the claimant's grievance.

59. As part of her investigation, Ms Hart interviewed the claimant, Mr Gadeke and Mr Saunders.

60. The claimant said that Ms Hart did not consider the 60 messages sent by her to Mr Gadeke and from him to her. Mr Jones disagreed with this and produced during the course of the hearing, the email exchanges between the claimant and Ms Hart, as evidence in rebuttal. After reading them it was clear to us that Ms Hart did receive the text messages as she had downloaded them from Mr Jones' computer while at his home. We were also satisfied having read Ms Hart's report that she did read and consider those messages. She found that there was no case to answer and recommended that the claimant be supported in her return to work.

61. On 23 July 2016, the claimant informed Ms Hart that she did not accept her conclusion and would be issuing proceedings against the respondents. She was of the view that Ms Hart was not sufficiently qualified in terms of her experience and understanding of employment law, to make a judgement on her grievance. She stated that the messages quoted in her report had removed the kisses and emojies. She was of the view that the conclusion was perverse and effectively a white-wash. The Trustees could have done more to investigate her complaint instead of contracting out the process to Ms Hart. She did not believe that she was given a fair hearing.

62. We were satisfied, having heard the evidence given by Mr Jones that all Ms Hart was doing was to make a recommendation but the ultimate decision was for the Trustees, namely whether to accept or reject the report and if to accept the report, whether to implement her recommendation.

63. The claimant in her oral evidence to us said that she entered in her diary the various incidents relied upon in support of her claims against the respondents. When she produced her diary and upon reading the contents, we were of the view that it was a notebook covering matters such as shopping lists and her summary of events recorded in the past tense. We were not satisfied that this document could be described as a diary documenting incidents contemporaneously. In it she wrote that the advice she received from the Job Centre was to the effect that if she "quit" her job it would affect her Job Seekers Allowance. It is not without significance that she resigned when she was due to go on half pay while on sick leave.

Submissions

64. We heard submissions form the claimant and from Mr Jones on behalf of the First Respondent and from Mr Gadeke, the Second Respondent. We have taken their submissions in to account but do not propose to refer to them herein having regard to Rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

65. Section 95(1)c Employment Rights Act 1996, provides,

> "(1) For the purposes of this Part an employee is dismissed by his employer if …..

> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

66. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

67. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

68. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the "last straw" doctrine that,

> "…the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?", Glidewell LJ.

69. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be…. .
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no

need to examine the earlier history to see whether the alleged final straw does in fact have that effect.", pages 37 - 38.

70. The test of whether the employee's trust and confidence has been undermined is an objective one, Omilaju.

71. In the case of Tullett Prebon plc v BGC [2011] IRLR 420, on the issue of whether the first instance judge had applied a subjective test rather than an objective one to the actions of the alleged contract breaker, the Court of Appeal held, reading from the headnote,

> "The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a 'question of fact for the tribunal of fact'. It [is] a highly specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract-breaker has clearly shown an intention to abandon and altogether refused to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract breaker towards the employees is of paramount importance.
>
> In the present case, the judge had approached the issue correctly. He had not applied a subjective approach. He had objectively assessed the true intention of Tullett and had reached the conclusions that their intention was not to attack but to strengthen the employment relationship. That was a permissible and correct finding, reached after a careful consideration of all the circumstances which had to be taken into account in so far as they bore on an objective assessment of the intention of the alleged contract breaker."

72. Under section 13, Equality Act 2010, direct discrimination is defined:

> "(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."

73. Section 23, EqA provides for a comparison by reference to circumstances in relation to a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

74. Section 136 EqA is the burden of proof provision. It provides:

> "(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 of any other explanation, that a person (A) contravened the provisions 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."

75. The statutory burden of proof applies in cases of direct and indirect discrimination, victimisation and harassment. It also applies to breaches of an equality clause in an equal pay case.

76. Guidance in applying the statutory burden of proof was given under the old law in the case of Barton v Investec Henderson Crossthwaite Securities Ltd [2003] IRLR 332, EAT. This was approved by the Court of Appeal in the case of Igen Ltd v Wong [2005] IRLR 258. It is applicable to other forms of discrimination where the new burden of proof applies. The Court amended the dicta in Barton. It held, Peter Gibson LJ giving the leading judgment., that:

> "1. Pursuant to Section 63A of the SDA, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful by virtue of Part II or which by virtue of Section 41 or 42 of the SDA is to be treated as having been committed against the Claimant. These are referred to as "such facts".
>
> 2. If the Claimant does not prove such facts he or she will fail.
>
> 3. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> 4. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.
>
> 5. It is important to note the word "could" in s 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> 6. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is adequate explanation for those facts.
>
> 7. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)b of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
>
> 8. Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take into account in determining, such facts pursuant to s.56(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> 9. Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the Respondent.
>
> 10. It is then for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

> 11. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
>
> 12. That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> 13. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

77. We have also considered the cases of: Laing v Manchester City Council [2005] IRLR 748, EAT; and Madarassy v Nomura International plc [2007IRLR 246, CA. The Court of Appeal in Madarassy approved the dicta in Igen.

78. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal was entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

79. As already stated, in direct discrimination cases involving less favourable treatment, the claimant will need to show that he or she was treated differently when compared with an actual or hypothetical person, the comparator. There must be no material differences in the circumstances of the claimant and the comparator.

80. In the House of Lords case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, it was held that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as he or she was and postponing the less favourable treatment issue until they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground was less favourable.

81. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after

passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

82. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not without more , sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

83. The Court then went on to give this helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

84. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

85. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic,

for example, race, sex, religion or belief, sexual orientation, pregnancy and gender reassignment.

86. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal which accepted her argument that the tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent.

87. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of, B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not to lead to the legal conclusion that the dismissal occurred because she was a woman.

88. The tribunal could bypass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it is not necessary to consider whether the claimant has established a prima facie case particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This approached was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal

Ulster Constabulary [2003] ICR 337, judgment of the House of Lords and by Mr Justice Elias in Laing-v-Manchester City Council [2006] ICR 1519, EAT.

89. In relation to harassment related to disability, section 26 provides:

> **"**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 and intimidating, hostile, degrading, humiliating or offensive environment for B"

90. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race relations Act 1976. The EAT held that the claimant had to show that,

> (1) the respondent had engaged in unwanted conduct;
>
> (2)the conduct had the purpose or effect of violating the claimant's dignity or of creating an adverse environment;
>
> (3) the conduct was on one of the prohibited grounds;
>
> (4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the that the factors that respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and
>
> (5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity have been violated, or an adverse environment created.

Conclusions

91. We have taken in to account the issues as set out by Employment Judge Lewis at the preliminary hearing held on 22 December 2016. We bear in

mind the law in relation to harassment on grounds of sex, direct discrimination as well as constructive dismissal.

Credibility

92. In relation to credibility, the claimant invited the tribunal to accept that the various lurid statements made by Mr Gadeke were made on 31 May 2016. The difficulty was that these statements were not repeated by her in the messages sent to him. Her exchanges with him do demonstrate, in the tribunal's view, that she was quite content to engage in further communication with Mr Gadeke notwithstanding her allegations that he was the perpetrator of discriminatory behaviour and sexually harassed her. She was content to have him collect her shed prior to the expiry date when it was due to be returned. She agreed to return a mirror belonging to Jane and cordless screwdriver. She attended work on Thursday 2 June 2016 knowing that Mr Gadeke would be on duty. She did not say in her text messages to him that he had made these lurid statements to her and would not be communicating with him at any point in time prior to 30 June 2016. She sought his advice on whether she should return to work. She told the tribunal that she had a diary documenting, contemporaneously, these various incidents in support of her claims. When the so called diary was read it could not be described as such but a notebook. It did not record contemporaneous events. It was really a book with a number of matters including shopping lists and narratives of past incidents but without giving any dates. She also said to the tribunal that Ms Hart did not consider the 60 text messages that she had sent to her. From the email chain, it is clear to the tribunal that Ms Hart did download and read the text messages. They formed important part of her report and conclusions. We, therefore, were unable to rely on the claimant's evidence and preferred the evidence of Mr Jones and Mr Gadeke where their evidence came into conflict with the claimant's account.

65. Mr Gadeke was still her line manger and had to communicate with her in relation to work related matters, such as sick notes, sick pay, FRS's property and sick leave. It was a very difficult situation for both of them which the claimant recognise as she was looking for work elsewhere.

66. As the claimant did not call any witnesses and having regard to our finding on credibility, her claims are not well-founded.

Harassment related to sex

67. We have not made findings of fact in support of what the claimant alleged Mr Gadeke had said to her on 31 May 2016. She did not make references to such statements in subsequent messages to him or indeed to anyone else. She told the tribunal that she did not feel the need to refer to those alleged statements during her meeting with Ms Hart. She alleged that Ms Hart did not read the 60 messages but the tribunal having considered them were satisfied that Ms Hart spent some time downloading the messages while at Mr Jones' home and were also referred to in her report.

68. The claimant did not say to Mr Gadeke that he should stop harassing her and was not afraid of using insulting words in her messages to him notwithstanding the fact that he was her line manager. He wanted her to put aside what had gone on in their brief relationship and return to work. In the absence of findings in support of the alleged statements made by Mr Gadeke on after 31 May 2016, we are unable to conclude that he had engaged in unwanted conduct related to the claimant's sex. Even if they so related, it was not the purpose to create an intimidating, hostile, degrading, humiliating or offensive environment and the effect on the claimant was negligible as she continued to communicate with Mr Gadeke, used unpleasant language and sought his help and advice. Accordingly, this claim is not well-founded and is dismissed.

Direct discrimination because of sex

69. We were satisfied that had it been a man who lodged a grievance in relation to a female manager with whom he had a relationship, Mr Jones would have engaged the services of an outside agency completely independent of FRS and of the manager in order to provide fair and impartial grievance invesitgation. In that respect the claimant had not been treated less favourably when compared with a hypothetical male part-time Co-ordinator.

70. In relation to managing the claimant less favourably because of her sex, we have not made any findings in support of Mr Gadeke's alleged less favourable treatment of her, particularly in regard to what the claimant alleged occurred on 31 May 2016. It was Mr Gadeke's intention to resolve personal issues between them independently of the Trustees and/or the Chairman. As her line manager, the first step was to resolve matters informally. Where that fails then to invoke the formal process. This would have been the approach which would have applied to the hypothetical comparator. Not giving her Mr Jones' contact details was not because of the claimant's sex or because of sex but that it was Mr Gadeke's sincerely held belief that matters could be resolved amicably and they were. The following day the claimant agreed to deliver two items of property to the warehouse. She wanted Mr Gadeke to help her with her shed. She apologised for her behaviour and sought his advice on whether she should return to work. We are satisfied that issues between them were resolved at the meeting on 31 May 2016 and this was demonstrated by reference to the WhatsApp and text messages up to 30 June 2016. This claim is not well-founded.

71. Although Mr Gadeke was, at all material times, acting in the course of his employment, the respondent is not vicariously liable as this direct discrimination claim is not well-founded.

Constructive dismissal

72. We have come to the conclusion that the reason why the claimant resigned was that if she had left voluntarily it would have affected her state benefits

and she was about to go on half pay following her four weeks' sickness absence. If she claimed constructive dismissal it was unlikely to affect her benefits. Income support would have been more than what she would have earned had she remained on sick leave on half pay. It is not without significance the four weeks came to an end at the same time as she decided to tender her resignation.

73. In any event having regard to our findings, there was no fundamental breach of her contract of employment by either respondent. This claim has not been proved and is dismissed.

74. As all of the claimant's claims are dismissed, the provisional remedy hearing listed on 28 September 2017, is hereby vacated.

_____
Employment Judge Bedeau

Date: ……21 August 2017……..

Sent to the parties on: .25 August 2017..

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For the Tribunal Office