Case No: 3400373/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs R McDougall	v	**LGSS Law Ltd**

Heard at: Cambridge **On:** 26, 27 and 28 February 2018

Before: Employment Judge G P Sigsworth
Members: Mrs C M Baggs and Mr R Eyre.

Appearances:
For the Claimant: Mr I McDougall, Claimant's husband.
For the Respondent: Ms S Ismail, counsel.

JUDGMENT having been sent to the parties on 16 March 2018 and Reasons having been requested in accordance with rule 62(3) of the Rules of Procedure 2013, the following Reasons are provided:

REASONS

1. The Claimant's legal claims are for direct race and/or age discrimination, indirect sex discrimination, harassment related to race/age/sex, victimisation and constructive discriminatory dismissal. For full details of the issues, and the factual allegations, please see the agree list of issues attached to this decision.

2. The Tribunal heard evidence on oath from the Claimant. Called on behalf of the Respondent were two witnesses – Ms Lynne Owen, practice manager (operations); and Ms Kim Allen, assistant practice manager (operations). There was an agreed bundle of documents of some 550 pages, to which the Tribunal was referred as was necessary and appropriate. Other documents were also produced as the hearing progressed, including the Respondent's flexible retirement policy. There was a chronology provided by the parties. At the end of the evidence, the Respondent's counsel gave written submissions and made oral submissions, and Mr McDougall made oral submissions. An oral judgment was delivered. Thereafter, the Respondent made an application for costs, which was granted.

Findings of Fact

3. The Employment Tribunal made the following relevant findings of fact:

3.1 The Claimant was employed as a legal assistant by the Respondent from 31 October 2016 until the date of her resignation with immediate effect on 15 March 2017 (her resignation was accepted on 16 March 2017). The Claimant is black and is now 40 years old (38 and 39 years old at the material time). The Respondent is a not for profit legal practice, providing legal services to the public sector. It is wholly owned by Northamptonshire County Council, Cambridgeshire County Council and Central Bedfordshire Council – a one third share each. It is regulated by the Solicitors' Regulatory Authority. It employs some 50-60 lawyers and paralegals, with legal assistants and support staff also. 80 people in total are employed by the Respondent. It has a multi-racial team on three sites, although at the Huntingdon office, where the Claimant worked, there were six legal assistants, all female, and the Claimant was the only black legal assistant. The age range was from early thirties to mid sixties. In addition to Ms Owen and Ms Allen, as the relevant managers in this case, there was Ms Michaela Sangster, principle legal assistant and the Claimant's line manager. Ms Sangster was not available to give evidence as she has emigrated to Australia.

3.2 The Claimant was interviewed with three other candidates for one of two posts for legal assistant, out of twelve applicants. The Claimant and Ms Rebecca Pryor were successful. Ms Pryor is white and in her thirties. The two unsuccessful candidates who were short listed were a white female in her fifties, and an Asian male in his twenties. Ms Pryor began her employment with the Respondent on 10 October 2016, and on 11 November 2016 submitted a flexible working request on the appropriate form. On 22 November 2016, Ms Pryor was granted flexible working on a trial basis. Ms Barbara Williams, who is a white female aged sixty, submitted a flexible retirement request on 20 November 2016, and was granted this on 25 November. This meant that she worked fewer hours, and had access to her pension. Ms Williams' flexible retirement request was granted after months of discussion with Ms Owen, before Ms Pryor's request, which was dealt with by Ms Allen. It seems that when Ms Allen granted Ms Pryor's request, she did not know about Ms Williams' flexible retirement agreement. If she had, she said, she would not have granted Ms Pryor her flexible working request. This was because of the impact on the team, as they already had one part-time legal assistant, Ms Jo Gillard. With 50-60 fee earners to support, it was not feasible to have many or the majority of legal assistants working part-time. They needed a minimum of three legal assistants in the office at any one time, and with sickness and holiday they had to balance part-time and full-time working to achieve this. Ms Pryor and the Claimant were both, of course, recruited as full timers.

3.3 Thus, by the time the Claimant made her flexible working request,

which she made informally by email and not on an approved form, Ms Pryor and Ms Williams had already had their requests granted, and there were three part-time legal assistants and two full time legal assistants, plus the Claimant, in the Huntingdon office. The Claimant had no statutory right to make a flexible working request, because she had not been employed for 26 weeks. That situation also applied to Ms Pryor. However, the Respondent looked at each case nevertheless on its merits, as that was their policy. The Claimant's request was to reduce from 37 hours per week to 32 hours per week, although she also proposed alternatives to this, such as job sharing and compression of hours. She gave some reasons – she has a young daughter, and substantial travel distance from home to work, and these were key elements in her request.

3.4 The Claimant's request for flexible working was refused by Ms Sangster and/or Ms Allen on or about 20 December 2016. Ms Sangster delivered the message to the Claimant. There are inconsistencies between the contemporaneous evidence of Ms Sangster and Ms Allen, which was given to Ms Owen's investigation after the Claimant's formal complaint, as to who made the decision to refuse the Claimant's request. However, what is clear is that in their written responses to Ms Owen's investigation, both Ms Sangster and Ms Allen gave reasons for refusal based on the needs of the business not being able to accommodate the request. Ms Allen said that if granted that would take the team to be four part-time workers and only two full-time workers, which would not suit the needs of the business and they would not be able to maintain sufficient cover. Ms Sangster's answer was that it would be impossible for the team to function with four part-time members and two full-time members. Although the Claimant alleges that the reason she was given for refusal was that she was still on probation and had not completed 26 weeks service that was not a reason given at the time by either Ms Allen or Ms Sangster as it does not appear in their written comments to the investigation. Ms Allen and Ms Sangster also denied any threat to terminate the Claimant's contract if she appealed. Further, immediately the Claimant put in her complaint about the refusal of her flexible working request – on 22 December 2016 – Ms Owen responded, reassuring her that the matter would be reviewed by her and that the flexible working request would not affect the Claimant's probation period or her employment with the Respondent.

3.5 The Claimant alleges there was a telephone conversation in the open office in Cambridge about the Claimant's flexible working request by Ms Allen on 20 December 2016. This conversation was not heard by the Claimant herself, because she worked in Huntingdon, but was relayed to her by a colleague. That colleague has not been called to give evidence here and has not even provided a witness statement in writing. The conversation is denied by Ms Allen, who says that although she was on the telephone quite a lot on that day, she was discussing Ms Williams' financial situation with the pension providers, which took up a lot of time

because it was complex. We find that, as is clear from the Respondent's contemporaneous records, the reason for the decision not to grant the Claimant flexible working was based on business need and a first come first served policy. This was the case, whatever may have been said by individuals to the Claimant.

3.6 The Claimant alleges that Ms Sangster told her not to appeal the decision not to grant flexible working, because Ms Allen might dismiss her. However, as conceded in the Claimant's witness statement, Ms Sangster was rushed off her feet but still found time to sit next to the Claimant in case the Claimant needed help and support, and the Claimant conceded in cross examination that Ms Sangster was a supportive line manager. In her statement to Ms Owen's investigation, Ms Sangster said that the Claimant had taken this conversation completely out of context. Ms Sangster said that she talked generally about probation periods being there for both the employer and the employee to find out whether the position was the correct fit for both parties, and either party could give notice during that time. Ms Sangster said that she advised the Claimant, because of the stress she was putting herself under, that she should consider whether all the travelling and missing out on time with her daughter made it worth staying in the job and that her family were more important. At the end of the day it may be a question of emphasis. We remind ourselves that the Claimant had accepted this job on a full-time basis, and her travel time and domestic arrangements had been discussed at interview. Thus, the Claimant chose to apply for and accept a full-time job, not a part-time one.

3.7 The training issue – referred to by the Claimant in her witness statement, although not in the claim form or in the list of issues. The Claimant complains of a lack of a formal induction and training programme for her. The Claimant says that this was in contrast to Ms Pryor who had such, according to the Claimant, on the basis of what the Claimant heard (hearsay again). Ms Sangster and Ms Allen gave different accounts (to the investigation), and we prefer their first hand evidence. The Claimant had the same training as Ms Pryor, they say. Ms Sangster sat next to her for three weeks and did some on the job training, which is really the only way it can be done. Ms Sangster said that she had devoted three weeks of one-to-one attention to the Claimant, sitting next to her, before she went on annual leave on 22 November 2016. Ms Allen told the Tribunal that there is no structured induction. Legal assistants are involved in the same work that Ms Allen is. They are introduced to systems and process as they go along.

3.8 On 22 December 2016, the Claimant submitted an email complaint to Ms Owen about the flexible working request refusal, also referring to the training issue and lack of induction. She had a same day response from Ms Owen, who said that Ms Donna Pinchback would conduct an office induction with her as soon as she was back in the office, and structured training would be arranged by Ms Owen. However, without waiting for this to happen,

or for Ms Owen's investigation into her complaint to complete, the Claimant put in another written complaint to Mr Quentin Baker, executive director and Ms Owen's line manager, on 27 December 2016, about the same issue. The Claimant alleged in that letter that she had been unfairly treated, harassed, humiliated, bullied and discriminated against whether directly or indirectly. Mr Baker passed this complaint on to be dealt with by Ms Owen, and the Claimant was told of this by Ms Owen on 4 January 2017. On 5 January 2017, Ms Owen moved Ms Allen out of line management responsibility for the legal assistants, including the Claimant. This was because of the Claimant's complaint about Ms Allen, and because Ms Allen was required to help on a significant IT project on a temporary basis. The line management was to transfer to Ms Owen herself. In order to investigate the Claimant's complaint, Ms Owen asked Ms Allen and Ms Sangster for their full account of what happened (see above). Once these comments were received, Ms Owen proposed to meet with the Claimant to explore the issues further. However, on 6 January 2017, the Claimant went off sick and was then absent for a month until 6 February 2017. At the date that she went off sick, Ms Owen had a response from Ms Allen, but not from Ms Sangster (received 11 January). Therefore, Ms Owen was not able to meet with the Claimant to discuss the results of her investigation until the Claimant returned to work on 8 February 2017.

3.9 The Claimant had a return to work meeting on 8 February with Ms Pinchback. Ms Owen should have attended also, but did not and could not remember why she did not. She told us that she had a very busy diary. The Claimant did not ask Ms Owen for an update on the investigation and her complaint, even though they worked in the same office. On Sunday night, 12 February 2017, the Claimant emailed Ms Owen, asking for an update or an outcome to the investigation. Less than one hour later, the Claimant made an approach to ACAS. She was then absent from work until 15 February, following a car accident. In the meantime, between 12 and 15 February 2017, Ms Owen received a communication from ACAS saying that the Claimant had started the early conciliation process. Ms Owen told ACAS that she was investigating the Claimant's complaints, and ACAS agreed with Ms Owen's wish to set up a meeting with the Claimant to discuss the issues. Then, Ms Owen emailed the Claimant on 2 March, to set up a meeting with her for 8 March. However, the Claimant emailed Ms Owen on 3 March, saying that she had lost confidence in the way the matter had been handled, and she declined a meeting request, asking instead for a written response. Ms Owen informed ACAS of the position, and they said they would speak to the Claimant.

3.10 Before anything else happened, the Claimant resigned by letter to Mr Baker dated 15 March 2017. Ms Pinchback wrote to the Claimant on 16 March 2017, presumably on Mr Baker's instructions, accepting the Claimant's resignation. In her resignation letter, the Claimant reminded Mr Baker of the formal

complaint she had made to him, and said that to date she had not had any acknowledgement, response or feedback from him or Ms Owen as to the outcome of the investigation. She alleged that she had suffered shocking and appalling treatment, that the Respondent was vicariously liable for the actions of Ms Allen and Ms Sangster who had caused her severe stress, that there had been a failure to adhere to health and safety requirements and that she had lost all confidence in the way that the Respondent had dealt with the matter, leaving her no option but to resign from her job. The Claimant alleged that the Respondent had breached the implied term of mutual trust and confidence.

3.11 By her contract of employment, the Claimant had continuity of service between her local government employment and the Respondent's employment for certain purposes only, including for the purpose of annual leave. Thus, her annual leave entitlement is based on the entirety of her local government service, and this was acknowledged to be the case by the Respondent on 4 January 2017. However, it would seem that Ms Owen had denied to the Claimant ahead of the meeting on 4 January 2017 that she had continuous service for the purposes of her holiday pay. If that is the case, then Ms Owen was wrong or mistaken about that. The issue was later resolved through ACAS in March 2017 and accrued holiday pay was paid to the Claimant with her final salary payment.

The Law

4. By s.4 of Equality Act 2010 age, race and sex are protected characteristics.

By s.13(1) of Equality Act 2010, "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."

S.19 of Equality Act 2010 states the following:

> **"19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics [include race, sex and age].

By s.23(1) of Equality Act 2010, on a comparison of cases for the purposes of sections 13 and 19 there must be no material difference between the circumstances relating to each case.

By s.26(1) of Equality Act 2010:

"**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."

S.26(4) of Equality Act 2010 provides that:

"(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."

S.27 of Equality Act 2010 provides that:

"**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.

By s.39(2) of Equality Act 2010:

"(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) …..

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

By s.39(4) of Equality Act 2010:

"(4) An employer (A) must not victimise an employee of A's (B)—

(a) …..

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

By s.39(7)(b) of Equality Act 2010, dismissal includes constructive dismissal.

By s.40(1)(a) of Equality Act 2010, an employer (A) must not, in relation to employment by A, harass a person (B) who is an employee of A's.

S.136 of Equality Act 2010 deals with the burden of proof.

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.

5. We are familiar with the two-stage process in applying the burden of proof provisions in discrimination cases, and we refer to the well-known

authorities of Igen v Wong [2005] IRLR 258, CA; and Madarassy v Nomura International Plc [2007] IRLR 246, CA. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it would not merely be legitimate but also necessary for the tribunal to conclude that the complaint should be upheld. In Madarassy, it was held that the burden of proof does not shift to the employer simply by a claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material on which the tribunal "could conclude" that on a balance of probabilities the respondent has committed an unlawful act of discrimination. Save that the tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, the tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case – see Laing v Manchester City Council [2006] IRLR 748, EAT, as approved by the Court of Appeal in Madarassy.

The basic question in a direct discrimination case is what are the grounds/reasons for treatment complained of – see Amnesty International v Ahmed [2009] IRLR 884, EAT. The EAT recognised the two different approaches in James v Eastleigh Borough Council [1990] IRLR 288, HL; and of Nagaragan v London Regional Transport [1999] IRLR 572, HL. In some cases, such as James, the grounds/reason for the treatment complained of is inherent in the act itself. In other cases, such as Nagaragan, the act complained of is not discriminatory but is rendered so by discriminatory motivation, ie by the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he/she did. The intention, in the case of both direct discrimination and victimisation, is irrelevant once unlawful discrimination is made out. We should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – see Anya v University of Oxford [2001] IRLR 377, CA.

In Shamoon v Chief Constable of the RUC [2003] IRLR 285, HL, Lord Nichols said that, when discussing the question of the relevant comparator, the tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another. In Glasgow City Council v Zafar [1998] IRLR 36, HL, it was held that it is not enough for the employee to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was the protected

characteristic relied on.

We have considered the case of Richmond Pharmacology Limited v Dhaliwal [2009] IRLR 336, EAT, for its guidance on the approach to harassment (under the old law, but still helpful). The fact is that it is not sufficient for the proscribed act merely to have the effect of violating the employee's dignity or creating an adverse environment for her. It must be reasonable for the conduct to have that effect. That is quintessentially a matter for the factual assessment of the tribunal.

In Hardys & Hansons plc v Lax [2005] IRLR 726, CA, it was held that the test of justification requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business, but it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. That "necessary" is qualified by "reasonably" reflects the applicability of the principle of proportionality and does not permit a margin of discretion or range of reasonable responses.

Conclusions

6. Having regard to our findings of relevant fact, applying the appropriate law, and taking into account the submissions the parties, we have reached the following conclusions:

We refer to the list of issues.

6.1 Direct race/age discrimination.

i) A comparison of the treatment of the Claimant and her comparators, Barbara Williams and Rebecca Pryor, in the context of the flexible working request. We conclude that there is no like for like comparison here. This is because not all the applications were made at the same time. If they had been, then it would have been like for like. However, here the Claimant's application was number three out of three, and the decisions taken on the other two were taken in the belief that only one application had been made. Thus, when the Claimant made her flexible working request, the Respondent had granted two part-time working requests very recently. Therefore, a different situation applied.

ii) Further, the reason for the "less favourable treatment" was not because of race/age, but because of business need. The Respondent simply could accommodate another part-time employee, for the reasons given by Ms Allen and Ms Owen as set out in the findings of fact. If there was poor management of the process, this does not equate to unlawful discrimination. There is no Madarassy 'X' factor here. There is a difference in race/age between the Claimant and her comparators, and a difference in treatment, but that is simply

not enough. There is insufficient material from which an inference of discrimination can be drawn.

iii) Therefore, the Claimant has failed to make out a prima facie case and this claim fails. If we are wrong about that, and the burden of proof shifts to the Respondent, then we are quite satisfied that the Respondent has established a non-discriminatory reason for the treatment of the Claimant, namely business need.

6.2 Indirect sex discrimination.

i) The PCP is conceded by the Respondent. It is the application of the flexible working policy on a first come first served basis.

ii) Although no statistics have been provided, we conclude that group disadvantage is established, as it is likely that, generally, a higher number or proportion of women will wish to work part-time and have flexible working than men.

iii) Was there actual disadvantage to the Claimant? In fact, there was not here because there were no men in the legal assistants' team. However, had there been a man in the team asking before the Claimant for flexible working, then the Claimant would have been put at personal disadvantage with the policy of first come first served.

iv) However, we conclude that the Respondent is entitled to rely on the statutory justification defence. The first come first served policy was a proportionate means of achieving a legitimate aim. The legitimate aim was the necessity to restrict the number of part-time employees in the legal assistants' team, for the needs of the business – as identified in the findings of fact. The first come first served policy is as good a way for achieving this as any, and it can be readily appreciated that the employer cannot anticipate future requests, and must deal with each request on its merits as it is made. It is a sensible and proportionate way of dealing with the situation, and quite possibly the only way.

6.3 The harassment claim.

a) Even though the Claimant's flexible working request was not on the proper form, the Respondent considered it, and communicated the decision to her, even though the request was made when Ms Sangster was on holiday, as the Claimant must have known. There was a discussion on 20 December 2016 between Ms Sangster and the Claimant which we conclude was misinterpreted by the Claimant. Even if what was alleged by the Claimant was said, it has not been established that there was any link between what was said and the Claimant's race or her sex or her age. In any

case, it was not reasonable for the conduct to have that effect on the Claimant, or for her to perceive it in that way.

b) Ms Owen investigated the Claimant's complaints about the refusal of her flexible working request. The timescale was not unreasonable, until 15 February, given the Claimant's absence from the business for a period of time. There was then a period of two weeks before Ms Owen invited the Claimant to a meeting, which the Claimant declined. If the investigation was a bit sluggish through the latter part of February and into March 2017, what then prevented it from concluding properly was the Claimant's refusal to meet with Ms Owen, and the approach to ACAS. In any event, there appears to be no obvious link established between what happened and the Claimant's race/sex/age. The Claimant simply has not shown us how the delays, if any, in the investigation are related to a protected characteristic.

c) The alleged conversation on 20 December 2016 on the telephone by Ms Allen. There was no direct evidence that this took place – ie that Ms Allen was on the telephone discussing the Claimant's flexible working request. Even if she was, it is difficult to see how that is harassment. It is perhaps ill advised to discuss such a matter in the open office, but it was, no doubt, if it occurred, a legitimate discussion about the pro and cons of such a request. In any event, the Claimant was in Huntingdon, and Ms Allen in Cambridge, having a discussion in a managerial context and had no idea that it would be overheard or reported back to the Claimant. We conclude that there was no harassment made out here, as defined. Again, we find it difficult to make any link with this incident and the protected characteristics relied on.

d) The alleged warning by Ms Sangster not to appeal the flexible working request or the Claimant's contract might be terminated. If that conversation took place, and a warning was given, the context is likely to have been this; that it was pointless in the Claimant appealing, because the decision would not change, given the business need requirement. It would have been a suggestion by Ms Sangster to the Claimant not to put herself through such a stressful process unnecessarily. We do not find that harassment as defined has been made out, as there is no link as far as we can see to a protected characteristic.

6.4 Victimisation.

The protected act is the complaint to Mr Baker of 27 December 2016.

a) The conversation on 4 January 2017 concerning the Claimant's annual leave entitlement with Ms Owen. We

have very little evidence about this conversation, and Ms Owen was not cross examined on it. It was originally not pleaded in the claim form. We conclude that we have insufficient evidence to discern motivation. It is likely to have been a misunderstanding by Ms Owen, and it was put right when the Claimant left.

b) Refusal of the flexible working request on 20 December 2016. This clearly cannot be as a result of a protected act, because the protected act was later, namely the complaint to Mr Baker on 27 December 2016.

c) The investigation by Ms Owen into the flexible working refusal complaint. We have dealt with this above in the context of harassment. We simply find that the allegation is not made out on the facts, and the two key players (Ms Sangster and Ms Allen) made statements to the investigation and the investigation was as thorough as it could be.

d) Although not identified in the list of issues, nevertheless, at this hearing, we identified with counsel and with Mr McDougall that there was a constructive discriminatory dismissal complaint for us to resolve. However, as no discrimination has been made out, then the Claimant's resignation was not cause by or tainted by discrimination. Thus, that claim also fails. The Claimant does not, of course, have sufficient service for a constructive unfair dismissal claim.

The Respondent's costs application

7. The Respondent has made a costs application in respect of counsel's fees, but not in relation to the costs of preparation generally of the defence to the claim, and for some expenses. The Respondent's case here is based on unreasonable conduct of the proceedings after the constructive unfair dismissal complaint was stuck out on the basis of insufficient service, and on the basis that the remaining complaints of unlawful discrimination had no reasonable prospect of success. We refer to rule 76(1) of the Employment Tribunals Rules of Procedure 2013. Our judgment has concluded that there is no link between the protected characteristics relied on and the conduct of the Respondent. The Respondent says that the eight discrimination complaints have not been pursued with any vigour, and there has been very little criticism of the Respondent's actions. Ms Owen has not charged for her time, and VAT is not being sought. The costs relate to the time after the witness statements were exchanged on 12 February 2018, including preparation of the bundle as well and also Ms Owen's parking and mileage. Ms Owen is no longer an employee of the Respondent. The Respondent wrote to the Claimant on 19 February 2018 with a costs warning letter. £1,500 was offered in full final settlement, but was rejected by the Claimant.

8. The Tribunal determines that the conduct of the proceedings by the

Claimant in the way outlined by the Respondent since the strike out of the constructive dismissal complaint and the costs warning letter has been unreasonable. The Claimant's continuity of service point was decided against her, and the Claimant should have reconsidered the prospect of success of the discrimination complaints because, in reality, they had no such reasonable prospect. Further, we conclude that the Respondent has sensibly limited the amount of costs being sought and, on the basis of what we were told about means, we believe that the Claimant has sufficient disposable income and/or savings to meet that relatively modest claim. We do not order the full amount claimed. Counsel's fees for a three day hearing are awarded, plus half the copying costs of the bundle and Ms Owen's witness expenses. Thus, we order the Claimant to pay to the Respondent costs in the total sum of £2,823.50.

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Employment Judge G P Sigsworth

Date: 30 April 2018

Judgment sent to the parties on

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For the Tribunal office