EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss D Richards	**v**	**Longacre Garden Centre Ltd**

Heard at: Watford Employment Tribunal **On**: 17 to 20 December 2018, 21 December 2018 (tribunal sitting in chambers)

Before: Employment Judge George
Members: Mrs A E Brown
Ms H T Edwards

Appearances

For the Claimant: in person
For the Respondent: Mr T Gillie, counsel

RESERVED JUDGMENT

1. The correct respondent is Longacre Garden Centre Ltd.

2. The claimant was unfairly dismissed by the respondent.

3. The claimant was wrongfully dismissed by the respondent.

4. The respondent subjected the claimant to sexual harassment contrary to s.26(2) of the Equality Act 2010 by the acts of the then HR Manager, on 3 September 2016.

5. The Employment Tribunal has jurisdiction to hear the claimant's complaint of sexual harassment, contrary to s.26(2) of the Equality Act 2010, in relation to the acts of the then HR Manager on 3 September 2016 notwithstanding the fact that it was presented more than three months after the acts complained of, because it is just and equitable to extend time for presentation of that complaint.

6. The claimant's complaints of sex related harassment contrary to s.26(1) of the Equality Act 2010 are not well founded and are dismissed.

7. The claimant's complaints of direct sex discrimination contrary to s.13 of the Equality Act 2010 are not well founded and are dismissed.

8. The claimant was wrongfully dismissed: her claim to be entitled to notice pay succeeds.

9. The claim for unauthorised deduction from wages is dismissed.

10. Issues relevant to remedy will be determined at a remedy hearing and case management orders for that hearing will be sent out separately.

REASONS

1. This is the unanimous decision of the tribunal on the claimant's claims of: constructive unfair dismissal, contrary to s.94 of the Employment Rights Act 1996 (hereafter referred to as the ERA); wrongful dismissal; sexual harassment, contrary to s.26(2) of the Equality Act 2010 (hereafter the EqA); harassment related to sex, contrary to s.26(1) of the EqA and unauthorised deduction from wages.

2. At the hearing the claimant gave evidence in support of her claim and was cross-examined on her witness statement. She also called the following witnesses in support: Deborah Hamshaw, formerly employed in security at the respondent; Andrea dos Santos, whose evidence was not challenged and who formerly worked as a cleaner for the respondent; Tonietta Bird, who was formerly employed by Perfect Choice – a supplier of the respondent; and Joanne French, who at the relevant time was the Bedding Manager for the respondent and also known by her married name of Dickinson. These witnesses gave evidence with reference to statements which they had prepared, which were adopted as their evidence and upon which they were cross-examined. The claimant had also served witness statements from Harry Gimblett, who still works for the respondent; and Catherine Thorpe, formerly a security guard there. The statement by Ms Thorpe took the form of an incident report form. Mr Gillie indicated to the claimant that he would have no questions for Ms Thorpe and, on that basis, the claimant did not arrange for her attendance and the statement was admitted as unchallenged evidence. On the morning of the first day of the hearing, the respondent handed in a copy handwritten document which purported to be a retraction by Mr Gimblett of the statement relied upon by the claimant. The claimant stood by the statement she had served but, recognising the difficult position that Mr Gimblett was in, did not make an application for a witness order. In those circumstances the tribunal are unable to place any weight on the statements said to be those of Mr Gimblett, given the uncertainty about whether either statement represents his evidence let alone whether that evidence is reliable.

3. The respondent called David Hemmings, the General/Finance Manager of Perfect Choice; Rick de Kerckhove, Financial Controller of the respondent; Steve Murray, Plant Buyer and formerly Plant Area Manager with the respondent; Carol Long, Director and co-owner of the respondent; Joanne Firth, HR Advisor with the respondent; Nigel Long, Managing Director and brother of Carol Long; and Robert Raynsford now Plant Area Manager for the respondent. They were all cross-examined upon witness statements which had been prepared by them or on their behalf and adopted in evidence.

4. At the outset of the hearing the tribunal identified that there were some preliminary matters which needed to be determined before hearing the evidence: whether Mr Long should be a respondent to the claim personally or not and whether a witness order should be issued the require the attendance of Derek Barlow. Both parties agreed that it was proportionate and relevant for the tribunal to see CCTV footage of a particular incident and the respondent had made arrangements for laptops to be available so that the several clips could be viewed by the tribunal and the parties for which we are grateful.

5. It appeared from the employment judge's notes of the preliminary hearing on 14 February 2018 that the identity of the correct respondent was determined on that occasion to be the company, Longacres Garden Centre Limited, but that that had not be reflected in the title of the claim.

6. We granted the claimant's application for a witness order in respect of Mr Barlow for reasons given orally at the time. Those reasons having been given orally they are not replicated here. The witness order was issued but it was not possible to serve it and the claimant returned it to the tribunal on day 3 of the hearing. Therefore the tribunal did not hear from Mr Barlow.

7. We also had the benefit of a joint bundle of documents and page numbers in this judgment refer to that bundle.

The Issues

8. Following a period of conciliation from 7 July 2017 to 7 August 2017, the claim was presented on 21 September 2017 and the respondent defended it by a response entered on 3 November 2017. The claim was case managed by EJ Vowles on 14 February 2018 (page 49) when he ordered the claimant to provide further and better particulars. She responded with particulars which had been professionally drafted (page 53). The respondent considered that these did not sufficiently particularise the claim and applied for an unless order. On 8 May 2018 EJ Vowles directed the tribunal to write to the parties setting out the events which appeared to him to be relied upo for each head of claim (page 66).

9. It was agreed that the tribunal would, in the first instance, decide the issues relevant to liability, leaving issues relating to remedy – including those relating to contributory conduct and the likelihood of a fair dismissal talking place in any event – would be decided after the initial decision on liability.

Counsel for the respondent had, helpfully, drawn up a draft list of issues based upon EJ Vowles letter which the claimant was invited to comment on. She argued that there were three further matters which she alleged should be included as heads of sexual harassment or sex related harassment upon which the employment tribunal needed to make a determination. This application was resisted by the respondent who pointed to the attempts of the tribunal to understand how the claim was put and that this was the basis upon which the claim was prepared.

10. The tribunal made a decision about which issues should be included in the List of Issues and gave full oral reasons at the time. Written reasons not having been requested at the time, they are not set out here but, in brief, our conclusion was that the conversation on 8 October with Mr Nigel Long and that with Carol Long on 15 October ought to be added to the particulars of an allegedly unlawful sex-related harassment for the following reasons. The Claimant's account in her witness statement is that she made the complaint to Mr Nigel Long who told her that Carol Long would call her to discuss it. Ms Long then did so on the 8 October and that is a particularized complaint. It therefore made little sense for one conversation to be the subject of a complaint and the other one not since they are said to form a series of events. The alleged 15 October conversation with Carol Long would appear also to be part and parcel of the same series of transactions. Essentially, the complaint is that the conduct of the Respondent was that of failing to investigate something that ought to have been investigated, failing to act rather than conduct of being a positive act. That being the case, we think that those matters ought probably to be included in the List of Issues; they were in the original claim form; they were highlighted in the further and better particulars and relevant documents were included in the bundle. However the third matter involved an individual who was not presently expected to give evidence, and had not previously been highlighted as a possible claim. Including that would require an amendment and no application was made for that. Consequently we rejected the claimant's application to include that in the List of Issues.

11. Therefore the issues with which we were concerned were the following:

<u>Unfair Constructive Dismissal</u>

11.1. Did the respondent commit a repudiatory breach of the implied term of mutual trust and confidence in the claimant's contract of employment? The claimant relies on the following treatment as breaches cumulatively of the term of mutual trust and confidence:

a. The respondent took 4 months to call a meeting about an incident where the claimant was assaulted verbally and physically on 20 July 2015 by a member of staff from a third party company and the outcome of the meeting wa that the claimant remained working alongside the alleged assaulter.

b. The then HR Manager took no action after the claimant reported to him on 26 May 2016 that RK and LH had taken exception to the claimant's report of the assault on 20 July 2015 and had thereafter made the working environment very difficult for her.

c. In response to the claimant's report to Human Resources on 12 March 2017 that her working environment was difficult, the respondent called the claimant to an investigation meeting on 27 March 2017.

d. The respondent produced an investigation outcome letter on 24 April 2017 which was inconsistent and the notes provided of the meeting were inaccurate. The contents of the letter were dishonest.

e. The respondent failed to deal with a grievance which the claimant presented on 18/19 May 2017. In particular, the respondent failed to hold a grievance hearing and did not address any of her grievances.

f. On 3 July 2017 Mr Nigel Long shouted at the claimant about dead stock being on display, shouted "learn to water" at her several times, threw a box of bedding plants at the claimant and shoved 5 boxes towards her with force. The claimant reported the incident to Steve Murray but he took no action.

11.2. Did the breach consist of a one-off act or a continuing course of conduct extending over a period, culminating in the 'last straw' breach?

11.3. Did the respondent's conduct, judged objectively, have the purpose or effect of destroying or seriously damaging mutual trust and confidence?

11.4. Did the respondent have reasonable and proper cause for behaving in the way it did?

11.5. If so, did the claimant resign because of the breach? The claimant contends that she resigned because of the breach on 6 July 2017.

11.6. If so, did the claimant affirm the contract by delay?

11.7. If so, was there a potentially fair reason for dismissal within s.98 of the Employment Rights Act 1996 (hereafter the ERA)? The respondent relies on the potentially fair reasons of misconduct or poor performance.

11.8. If so, was the claimant's dismissal within the band of reasonable responses?

11.9. Did the respondent unreasonably fail to comply with the ACAS Code?

Wrongful dismissal

11.10. What sums in notice pay does the respondent owe to the claimant?

Direct sex discrimination (section 13 Equality Act 2010 – hereafter the EQA)

11.11. Did the respondent subject the clamant to the following treatment?

a. On 15 May 2017 Mr Nigel Long approached the claimant and shouted at her about wet petals on geranium plants. He shouted "get rid of it" with reference to her bottle of drinking water which denied her any right or entitlement to drink water in a hot environment.

b. On 5 June 2017 the claimant clocked off work 13 minutes early to attend a hospital appointment. Mr Nigel Long shouted aggressively at her: "what time did you start".

c. On 3 July 2017 Mr Nigel Long shouted at the claimant about dead stock being on display, shouted "learn to water" at her several times, threw a box of bedding plants at the claimant and shoved 5 boxes towards her with force. C reported the incident to Steve Murray but he took no action.

11.12. If so, was any such treatment less favourable than that which would have been done to someone who did not share the claimant's sex. The claimant relies on the following actual comparators:

a. CR in relation to paragraph 11.11.a. above;

b. MC in relation to paragraph 11.11.b. above;

c. LB in relation to paragraph 11.11.c. above.

11.13. Were the comparators at paragraph 11.12.a. to c. above in the same or materially the same circumstances as the claimant?

11.14. If so, what was the reason for any such treatment?

Sexual harassment (section 26 EQA)

11.15. Did the respondent engage in the following conduct?

a. On 3 September 2016 the then HR Manager:

   i. locked himself and the claimant in the HR office for about 1 hour and 40 minutes; and

   ii. would not let the claimant leave the room; and

   iii. referred to the claimant's breasts and said that he was attracted to older women; and

   iv. commented that the claimant's daughter was pretty and asked how old her daughter was; and

   v. told the claimant to ignore the phone ringing and anyone knocking at the door of the office; and

   vi. when she attempted to leave the office the HR Manager came up behind the claimant and pressed himself against her body in a sexual manner to such an extent that she could feel his penis through her clothing.

b. The claimant wrote to her manager Mr Steve Murray about the incident set out at paragraph 14 (a) above; Mr Murray did not respond to her email.

c. On 8 October, the claimant spoke to Nigel Long of the Respondent and reported the HR Manager's behaviour to him.

d. On 8 October 2016 Ms Carol Long said to the claimant that she had reported the incident of 3 September 2016 to the police but in fact had not done so.

e. On 15 October 2016 the claimant had a conversation with Carol Long in which she was assured that the allegations had been reported to the police.

f. On 15 May 2017 Mr Nigel Long approached the claimant and shouted at her about wet petals on geranium plants. He shouted "get rid of it" with reference to her bottle of drinking water which denied her any right or entitlement to drink water in a hot environment.

g. On 5 June 2017 the claimant clocked off work 13 minutes early to attend a hospital appointment. Mr Nigel Long shouted aggressively at her: "what time did you start".

h. Mr Rob Ryansford told the claimant's colleague Harry Gimblett not to speak to, or work with, the claimant; in so doing the respondent isolated the claimant from work colleagues.

g. Was any such conduct a course of conduct?

h. Was such conduct unwanted?

i. Did the conduct have the proscribed purpose or effect?

Unlawful deduction from wages

j. Did the respondent deduct one weeks' wages from the claimant?

k. If so, was any such deduction authorised by statute or did the claimant give her consent for any such deductions to be made?

Time

l. Any acts or omissions by the respondent that occurred before 8 April 2017 are potentially out of time.

m. Are any of the claimant's discrimination complaints out of time such that the tribunal does not have jurisdiction to hear them?

n. If so, do any such complaints form an act of continuing discrimination such that they are in time?

o. If not, would it be just and equitable to extend time such that those complaints can be heard?

p. Are any of the claimant's claims under the ERA out of time? If so, was it reasonably practicable for the claimant to have made her claims in time such that the limitation period should not be extended?

Findings of Fact

2. The standard of proof that we apply when making our findings of fact is that of the balance of probabilities. We took into account all of the evidence presented to us, both documentary and oral. We do not record all of the evidence in these reasons but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the

consistency of accounts given on different occasions compared with contemporaneous documents, where they exist.

3. The claimant started work with the respondent as a part-time plant/compound assistant on 18 July 2014. The respondent operates a garden centre and some of their plants were supplied by a third party supplied called RC Kemp & Son which trades under the style of Perfect Choice (hereafter referred to as PC). Employees and representatives of PC work alongside employees of the respondent from time to time and it seems to us that there was the potential for tension between the two groups. The respondent's employees were responsible for watering the plants so that they would be presented in the best possible way for sale. PC's employees had a legitimate interest in the plants being cared for because, as we understand it, they were placed in the respondent's business on sale or return. However Perfect Choice employees had no management role in relation to the respondent's employees.

4. The claimant makes an overall complaint against the respondent that she made complaints during the course of her employment which were not taken seriously. She refers to some historical matters to illustrate that. She alleges that a Merchandising Assistant with PC swore at her in May 2015 and that on 20 July 2015 there was an altercation when she was "physically and verbally assaulted again" by the Merchandising Assistant (as described in her statement paragraph 2). She did not originally describe this as a physical assault. Her complaint at the time (page 126) was that the PC Merchandising Assistant

> "proceeded to have a shouting tantrum at myself and [TA] whilst we were in the compound area. She got very agitated and and her manager […] had told her to calm down, but to no avail. She proceeded to verbally attack me swearing and shouting at the me that I was a F--- B---. Her manager […] had to restrain her and pull her back as she was crying and screaming at me."

5. The claimant explained that a police officer, whom she had spoken to later (see paragraph 81), had advised her of the legal definition of common assault. When challenged that her description of the 20 July 2015 incident had changed in order to make it appear more serious she denied that: she did not regard herself as having said alleged that there was actual contact by the statement that there had been a physical assault. We accept that explanation. Given that explanation, she has been broadly consistent in her description of the incident.

6. There is no evidence that the claimant complained about the PC Merchandising Assistant prior to her 20 July 2015 to the respondent's then HR adviser, DF, (see page 126). In order to investigate an incident between the respondent's employee (the claimant) and the PC employee, the respondent's HR adviser arranged for an investigation to be carried out by Mr Murray (see his paragraph 9). He spoke to the claimant and also to one of the respondent's plant assistant's, TA, whom the claimant said had also been shouted at by the PC Merchandising Assistant.

7. Mr Murray's conclusion was that there had been a breakdown in the relationship between the claimant and the PC Merchandising Assistant. He recommended a mediation meeting. One was arranged (see page 131 for evidence of attempts to arrange one in September 2015) and it did take place. The only real difference between the claimant's account of this meeting and that of Mr Hemmings is that on his account it took 30 minutes and on the claimant's, merely 10 minutes. There are no notes of the meeting.

8. Our conclusion on this is that it was agreed between the respective employers that they should arrange a meeting between the two employees. The PC Merchandising Assistant apologised. The claimant accepted the apology in the meeting and, so far as the respondent was concerned, that was the end of it. The meeting was not expressly called a mediation meeting but that is what it was, in effect (see the title of the email at page 131). It would have been preferable for the meting to be documented but, notwithstanding that, we conclude that it happened.

9. The claimant complained about a different PC employee, the Merchandising Manager, on 26 May 2016 (see page 132). In her complaint, the claimant describes the Merchandising Manager as being a "very rude person" and says that she is being harassed by unspecified persons because of the claimant's previous complaint against the PC Merchandising Assistant. The complaint went to the respondent's then HR Manager, who had been appointed to replace DF.

10. It is important to record some facts about this HR Manager who, as we say, had not long been in post when the claimant's complaint about the PC Merchandising Manager was brought to his attention. Ultimately, he resigned his employment with the respondent after six months on 10 October 2016 when irregularities were discovered during his paternity leave (see Mr de Kerckhove's statement at paragraphs 5 to 7). It appears that the respondent began to suspect that the HR Manager had supplied his own reference, did not have the qualifications he professed to have and had used aliases. When they confronted him with their suspicions in a phone call, he resigned.

11. There is no evidence that the HR Manager did anything with Ms Richard's email of complaint about the HR Merchandising Manager (page 132) in which she says "I hope this will be addressed, if not already done so." It was suggested in cross-examination that the claimant had not asked for particular action by this email and the claimant agreed. However, it is clear that the claimant was asking for the situation which she detailed in the email to be addressed. This included that she wants the respondent to address the situation that PC employees set the bedding area up wrongly, as she saw it, and the respondent's employees were blamed for it: "I do not feel it should be allowed to be carried on".

12. The respondent has a grievance policy which is referred to in the claimant's contract (page 104). The policy (which we set out in full as it appears in the handbook) reads (page 122),

"**Grievance Procedure**

If you have any questions or grievances relating to your employment, you may seek redress orally or in writing in the following manner;

In the first instance you should raise the matter either orally or in writing with your **[supervisor/Personnel Administrator in the Company]** and the matter will be discussed informally with him or her;
If the grievance is not thereby resolved or if you consider that you have not been fairly treated, you may apply to **a Director** within 7 days."

13. The policy does not require an employee to put their grievance in in writing. It does not require the complaint to take any particular form or to state what the desired outcome is. The claimant did not specifically say that her complaint at page 132 was a grievance but it fits the form of the respondent's policy in that it sets out her ongoing concerns and was directed towards the person who held the position of the Personnel Administrator.

3 September 2016

14. We had a number of witness accounts of the events of 3 September 2016 which we set out before making out findings about it. The HR Manager, who resigned from the respondent's employment on 10 October 2016, was not a witness. In our view, care needs to be taken when deciding what weight to place on the claimant's evidence. This is because she sometimes jumps to conclusions that are not objectively justifiable and this leads her to state confidently as facts conclusions which are not supported by evidence. This was particularly so with her alleged comparators who, on investigation, we concluded were not in a comparable situation to her. For that reason we have looked to the evidence of her supporting witnesses and corroborative documents and did not simply accept her account of key incidents. However, in our view, she was not a deliberately dishonest witness: it was rather that, on occasions, her perspective caused her to view events in a particular light and she used heightened language.

15. The claimant's account of the events of 3 September 2016 (as set out in her witness statement) is that the HR Manager asked her to come to a meeting. When they were in the HR office, he closed and locked the door and started to question her about her tea breaks being too long, saying that Mr Long had asked him to speak to her. Key points from the claimant's account are that,

    a. The meeting lasted 1 hour and 40 minutes;

    b. The HR Manager boasted about how he could tell Mr Long and his sisters what to do;

c. He said that he had ordered and designed a new black uniform for the staff and said, while staring at the claimant's breasts, that she wouldn't fit them into the uniform;

d. He said that he had always been attracted to older women;

e. He referred to the claimant's daughter as being pretty and asked how old she was;

f. He caused the claimant to feel very uncomfortable;

g. At one point the claimant's mobile phone had rung and she could see that it was Ms Bird but the HR Manager told her not to answer it;

h. Eventually she said that she needed to go back to the shop floor but the HR Manager said that he needed to talk to her;

i. At one point Ms Thorpe (the security guard) had unlocked the door from the outside and come in;

j. After she left the claimant insisted that she go back to work and as she was trying to unlock the door the HR Manager came up behind her and pressed his penis on the back of her leg;

k. She left and met Ms Bird shortly afterwards and told her what had happened.

16. On the claimant's account, the HR Manager told her not to tell TB what had happened in the office. The claimant says that she later told Mr Murray, who at the time was her manager, "what happened in the office with [the HR Manager]" and asked him to tell Mr Long. Her evidence was that she set her account out in writing that evening (see page 134) and gave it to Mr Murray the following day, which was the 4 September 2016.

17. Ms Bird's evidence (from her statement and oral evidence) was that,

a. She had been aware that the claimant had been absent from the shop floor for about 1 ¾ hours before she returned;

b. When she asked Mr Murray where the claimant was (about one hour after Ms Bird arrived at work) he had told her that he did not know. [Mr Murray accepted that he had told Ms Bird this and that it was untrue but told us that he had been evasive with Ms Bird because he had asked the HR Manager to speak to the claimant about taking too long on tea breaks with Ms Bird herself. This seemed to us to be entirely plausible and therefore Mr Murray's account corroborated Ms Bird's in this respect.]

c. She had tried to phone the claimant but there had been no reply;

d. At about 10.15 am she had seen the claimant walking towards the compound area with the HR Manager. The claimant was clearly distressed and shaking and told her that she'd been locked in the HR office with the HR Manager since 8.30 am; that he'd made inappropriate, rude comments which made her very anxious and, on leaving, he'd pressed his penis against her as she was at the office door.

e. She (Ms Bird) had "accompanied Debbie to tell Steve [Murray] what had happened" (paragraph 3 of her statement) and the claimant had repeated what she had told Ms Bird to Mr Murray. Ms Bird said that Mr Murray seemed unconcerned and that the claimant had reported the matter to Ms French.

18. In her oral evidence, Ms Bird told us that she didn't know if the claimant had actually said that the HR Manager had pressed his "penis" up against her leg. However, she attested that the claimant had demonstrated on Ms Bird what he had done using her as a model. That particular detail was not in Ms Bird's statement, but we found her to be a credible witness who was doing her best to help the tribunal and was not overstating her evidence.

19. Mr Murray's account of 3 September is at paragraph 20 of his witness statement which is amended from the version served on the claimant to remove the line "I did not know what the purpose of the meeting was". He did so because his oral evidence was that he had asked the HR Manager to speak to the claimant about her tea breaks. This was not the only difference between his oral evidence and his statement. He accepted in oral evidence that Ms Bird was present but doesn't say in his statement account that she was.

20. Mr Murray's recollection of the conversation with the claimant (as set out in his witness statement) was that she was annoyed because the HR Manager had shut the door and complained that the HR Manager was a "dirty perv", "had his eyes on all the girls in floristry" and "she did not trust him". His evidence was that the claimant did not appear to him to be upset and had not said that the HR Manager had touched her or said or done anything inappropriate.

21. His oral evidence was that the meeting between the claimant and the HR Manager had been quite a long meeting and Ms Bird had been "driving me bonkers" asking where Ms Richards was. It had been possible that Joanne French was also there when the claimant spoke to him about the meeting. He characterised the experience of line managing the claimant as requiring him to get involved in lots of little "school boy issues". He denied being given the written complaint at page 134.

22. Ms French's witness statement provided the following evidence about the 3 September 2016:

a. Mr Murray had told her that Ms Richards had been seen taking long tea breaks and that Mr Long was aware that she was being spoken to by the HR Manager about tea breaks. [Mr Murray had no recollection of having told Ms French about Mr Long's state of knowledge.]

b. The claimant had been gone with the HR Manager for about an hour. When she returned she was very distressed and said that he had made her feel very uncomfortable, that his behaviour was inappropriate and she wanted to complain to Mr Long.

c. Ms French had been unsure how to advise the claimant because she believed that Mr Long was aware of the reason why the HR Manager had spoken to the claimant.

23. In her oral evidence she said that the claimant's account to her on 3 September had been that she had not been allowed to leave the room, that the HR Manager had locked the door, that he had been up very close to her when she tried to leave, that she wasn't very happy and felt it was very inappropriate.

24. Ms Thorpe's evidence was that she went to the HR Office to give some paperwork in. The blinds had been down, which was unusual. She had knocked a couple of times and there was no response but she knew from the voices that the HR Manager and Ms Richards were in the office. When she had punched the code in to open the door the HR Manager had asked her to come back later so she did so.

25. In oral evidence the claimant explained that she had visited her sister that evening and had been advised to put her complaint in writing. She had sent What'sApp messages to Ms Bird during the evening (pages 190-191) during which she said "I'm boiling about that HR" and "I might speak to Nigel what do you think?". Ms Bird advised her not to saying that it might annoy Mr Long if she got him involved, "Get Steve to speak to Nigel. Someone needs to!" This led to page 134 which the claimant says was written on 3 September 2016.

26. Our conclusions on the events of 3 September 2016 are that it is clear that something happened in the meeting to make the claimant very cross. It was clear to both Ms Bird and Ms French that, immediately after the meeting, the claimant was very distressed. Ms French, in particular, did not seem to us to be overstating her evidence or professing to remember in more detail than she could. She seemed to us to have come to support the claimant at the tribunal hearing because she did not think that she had given as much support to the claimant at the time as she could have – indeed she says as much in her statement (see under incident 3). Our view is that she is a relatively impartial witness because she also gave evidence, in effect, against the claimant by agreeing that the report she had made about the claimant (see page 142) was accurate and that she had regarded the claimant's behaviour on the later occasion as inappropriate.

27. Looking at the evidence of all the relevant witnesses, taking into account our view that Ms Bird also was a relatively impartial and reliable witness. Our view is that the essentials of the claimant's account of 3 September 2016 is consistent with those of Ms Bird and Ms French. However, the claimant's account differs from Ms Thorpe's account: the former says that Ms Thorpe entered the room and the latter that the HR manager told her not to.

28. We find that,

    a. Mr Murray asked the HR Manager to speak to the claimant about excessive tea breaks;

    b. On 3 September 2016, the HR Manager called the claimant into an unusually long meeting given that its aim was a quick telling off about excessive tea-breaks (that is the evidence of all of the witnesses although there are different estimates about the exact length of the meeting);

    c. When the claimant came out of the meeting, 2 people remarked on how upset she was;

    d. Both of those witnesses say that the claimant complained that the HR Manager had behaved inappropriately in the meeting and that she wanted to complain about it.

29. The claimant relies upon a written account (page 134) which includes most of the details which she included in her paragraph 4 but says "I felt him press himself against me" rather than using the word "penis". The respondent denies that this was ever received by them and that the claimant's evidence about the document has not been consistent. The ET1 (which was written by the claimant and her daughter) includes the statement "The claimant wrote to Steve Murray (her manager) that evening about the incident, there was no response." (page 15 paragraph 7). In the further and better particulars (page 41 paragraph 31) it is recorded that she "wrote to her manager (Steve Murray) the same evening about the incident. Again the company failed to support her and provide a safe workplace there being no response to her email". The same statement is made in the revised further and better particulars (page 54 paragraph 9). The respondent argues that the claimant has been inconsistent about the way in which page 134 is said to have been delivered, denies receipt of an email and Mr Murray detailed in his paragraph 19 the attempts that have been made to find an email. The claimant's response is that she did not say that she sent an email and her solicitor, whom she instructed to file the further and better particulars, made an error in referring to an email. Given that, she argues that there has not been a material inconsistency in her account between page 134 and her statement that affects the credibility of the account itself or of her evidence that she wrote to Mr Murray to complain.

30. It seems to us that, in the context of what Mr Murray says he knew and his account of his experience of managing the claimant, he did not think that what she told him on the 3 September 2016 itself was particularly serious. We accept Ms Bird's evidence about the oral complaint to Mr Murray and his reaction to it. We therefore find that Ms Richards told him orally on 3 September 2016 that she wanted to complain about the HR Manager's conduct: that the behaviour had been inappropriate. Mr Murray ought to have realised from what he had been told that the claimant thought that the HR Manager's behaviour was inappropriate in a sexual way. That was enough to trigger on his part a responsibility as her line manager to make enquiries of her. She had nowhere else to go. Mr Murray had enough information on her oral explanation on 3 September to take things further and the claimant expected him to do so. He didn't need the written confirmation of her wish to complain. Therefore, whether Mr Murray received page 134 as alleged by the claimant does not affect our judgment about what he should have done.

31. In any event, we do accept, on the balance of probabilities, that the claimant did hand him the letter which she produces at page 134. The reasons for our conclusion include that she had previously followed up serious complaints in writing. We accept that what happened during the meeting was broadly as the claimant described it to us: we think that the phrase "I felt him press himself against me" is sufficiently clear to be consistent with her later explanation that she felt his penis. We have also concluded that what she told Mr Murray on 3 September 2016 about what happened was broadly as Ms Bird has told us. We take into account that at times the claimant isn't very good at expressing herself clearly and her account is flavoured by her anger and (understandable) emotional response to what happened. Giving due weight to the limitations of the claimant as a reliable witness we conclude that her account of the actions of the HR Manager have been broadly consistent, and we find that he did behave in the ways she alleges and we set out in paragraph 25.2. to 25.8. and 25.10. above.

32. We also note that Ms French recalled a later conversation with Mr Murray in which he commented that he had advised the claimant to "drop it" with reference to her desire to complain about the HR Manager. Mr Murray's witness statement account about the 3 September 2016 was not consistent with his oral evidence (see paragraph 29 above).

33. The claimant's evidence that she had asked Mr Murray both orally and in writing (page 134) to tell Mr Long about it is consistent with the exchange of What'sApp messages. Ms French provides corroboration that Mr Murray knew that the claimant wanted to complain about the HR Manager. There is no evidence that he mentioned the claimant's complaint to Mr Long. Our conclusion is that the claimant reasonably believed that Mr Murray would tell Mr Long about her desire to complain and he didn't.

34. Mr Murray's evidence to us was that he was unable to remember these interactions in any detail and we accept that his recollection is impaired. Our conclusion is that the probable explanation for his failure to act on oral

and written complaints made to him by the claimant on 3 September and the following day was that he did not recognise the seriousness of the incident she was bringing to his attention. There was enough detail in what she was presenting to him, as her line manager, for him to instigate an investigation. In all probability, Mr Murray has just forgotten that he received page 134 because he did not think it a serious matter.

Events in October 2016

35. There was a conversation between the claimant and Mr Long on 8 October 2016. In her evidence, the claimant said that, in the meantime, a colleague had offered to speak to Mr Long's other sister, another co-owner of the respondent, about the claimant's complaint and on 8 October she asked Mr Long if he had heard from his sister about what had happened to her, the claimant. The claimant's account is that Mr Long told her that he had heard from his sister.

36. Despite paragraph 5 of his witness statement appearing to suggest that that conversation never happened, Mr Long gave oral evidence that it had but that it was simply a request by the claimant that he ask his sister, Carol to telephone her. This would have been a relatively unusual request for the claimant to make.

37. This is because, at the time, Carol Long had no involved in the Plants area (see her paragraph 2) and therefore had had no dealings with the claimant apart from preparing wageslips. She was asked from time to time to call individual members of staff about resource allocation and pay. In her witness statement, she expressly denied calling the claimant as alleged in the claimant's paragraph 7 (see her paragraph 4). She amended that in oral evidence to say that she may have called her by making a call to a phone in the bedding area. She denied (see her paragraph 4) that the claimant had ever raised allegations of sexual harassment by the HR Manager with her at all.

38. Pages 136Q and following had been produced by Ms Long to prove that she made no call at the relevant time to the claimant's mobile. However those phone records do disclose that she made a call to the bedding area for 16 minutes and 36 seconds on 8 October 2016 at 14:31. She accepted in cross-examination that page 136A showed her calling a number which she accepted to be her brother's on 8 October 2016 at 10:08 for 2 minutes and again at 14:51 for 5 minutes and 41 seconds. We conclude that the second call to Mr Long so soon after the call to the bedding area phone must have been to tell him the contents of the phone call between Ms Long and the claimant.

39. Ms Long now recollects the claimant telling her about the meeting with the HR Manager on 3 September 2016 but the only detail she was able to recall in oral evidence was that the HR Manager had said that he could tell Nigel Long and the Long sisters what to do and that the claimant had felt uncomfortable.

40. Ms Bird was a witness to that call (see her paragraph 8). Her account was that the call came to the claimant's mobile which contrasts with the claimant who said that it was on the company phone – see claimant's statement paragraph 7. Ms Bird overheard the conversation and gave evidence that the claimant explained what had happened with the HR Manager in the office. The discrepancy between Ms Bird and the claimant about on which phone the call was received does not, in our view, detract from the overall credibility of the claimant and Ms Bird on this point. The claimant has shown through the phone records and cross-examination of Ms Long that, on the balance of probabilities, she took the call on the company phone.

41. We conclude that the claimant asked Mr Long to ask his sister to call her in order that she might tell a director and co-owner of her employer about a conversation with the HR Manager and that she wanted to complain about it. In the 16 minute call she gave enough detail about the meeting to make clear who she wanted to complain about and that something "inappropriate" had happened. She mentioned the same essential details that she had told Mr Murray orally at the time.

42. The allegation that the call was made to the company phone was made in the ET1 (see paragraph 10 on page 16). Until Ms Long's oral evidence the respondent denied that the call had been made.

43. By the time of this phone call the HR Manager was on paternity leave. That had started on 7 October (see Mr de Kerckhove paragraph 5) and we think it probable that by 8 October the respondent knew that the HR Manager had deleted some of his emails. We conclude that the respondent's management was probably beginning to be pre-occupied with the HR Manager's alleged misdeeds in general. He resigned on 10 October. The claimant's complaint to Carol Long is one piece of information presented to the respondent in an emerging picture of a rogue employee.

44. As with the complaint to Mr Murray, we do not think that the respondent took the complaint seriously so when, on 15 October, the claimant was told by Carol Long words to the effect that the HR Manager had been reported to the police, she presumed it included details about the complaint she wanted to make. We accept that the claimant believed at this point that Ms Long had reported an allegation of sexual harassment to the police but this was a misunderstanding on the claimant's part.

45. Ms Firth agreed to step up to the role of HR Manager on an interim basis following the resignation not only of the former HR Manager but also of the equally short lived HR Assistant. This was a daunting task for someone with no previous HR experience. She had previously applied for the role of HR Assistant and had CIPD Level 3 HR qualifications but had never practiced. The HR Manager had resigned and she no support other than the directors. The online HR support was not available until July 2017.

46. On 28 October 2016 Ms Firth recorded on her home laptop a discussion she had had earlier with the claimant. Ms Richards' evidence is that that record

is not a true account of the meeting of that day (see the claimant's statement paragraph 9).

47. When considering Ms Firth's reliability as a witness we note her paragraph 23 in which she relates being given the claimant's resignation letter (page 175), by hand. She amended that paragraph before adopting her statement as her evidence in chief in order to change the date on which she received the letter but otherwise approved the statement that the claimant had said to her that she would see her in Tribunal and had a smile on her face.

48. The claimant, when cross-examining Ms Firth, put to her her own case about that day which was that she had had nothing to do with her and had handed the resignation letter to someone else. It became clear to us that Ms Firth could not remember the occasion on which the claimant handed in her resignation letter with any clarity. The fact that she was willing to say that her paragraph 23 was true when she didn't remember the incident with any clarity damages her credibility generally.

49. Nonetheless, we accept that Ms Firth set down on page 135 what she could recollect of that meeting at the time and, as a result, she did not write down accurately everything that the claimant told her. Our observation of the claimant was that she moves from topic to topic and frequently interrupts which can be confusing to listen to. However, even judging the actions of Ms Firth only by what she recorded the claimant as having told her it is clear that the claimant told her on 28 October 2016 that:

    a. she had felt quite threatened by the HR Manager;

    b. on one particular occasion "he blocked the door to stop her leaving the room";

    c. she had felt anxious and intimidated by this;

    d. she could have had him for what she believed was "sexual harassment";

    e. his actions, words had been strange, had disturbed the claimant and all she had wanted to do was leave the office.

50. For her part, the claimant does not allege that she told Ms Firth the details which Ms Firth denies hearing on 28 October 2016 (see JF statement paragraph 9) but rather that it was Ms Firth herself who first mentioned sexual harassment. This is not the subject of one of the claimant's main allegations and therefore there is no need for us to reconcile all of the differences in the evidence about what was said on 28 October. Nonetheless, our conclusion is that at the very least, on 28 October 2016, the claimant told the acting HR Manager that she considered herself to have been sexually harassed by the former HR Manager and Ms Firth took it upon herself to decide that it had not been *sexual* harassment but that it had possibly been harassment. That is what she recorded on her note which she shared with Mr de Kerckhove.

51. His reaction to the complaint was that it appeared to the claimant that she had been in a locked room but that he didn't think that to be remarkable, given that the office has a key code on the outside and automatically locks when it closes. He also told us that he would have expected that an HR meeting would need confidentiality. His evidence on this point suggests to us that he did not pay attention to the detail of Ms Firth's note which recorded the claimant as saying that the then HR Manager had "*blocked the door to stop her leaving the room*", which is very different.

52. Harassment is defined in the respondent's employee handbook (page 115) in identical terms to the EqA. Ms Firth recognised that the conduct that the claimant described to her was potentially harassment. Mr de Kerckhove told us that had he regarded it as harassment he would have gone to the police, so presumably he did not. We note that his instinct was not to investigate what the claimant said.

53. The respondent appears to have overlooked that when an employee comes to them with a complaint their primary responsibility as an employer is to investigate the complaint, not only because it might be necessary to take action against the subject of the complaint as a consequence but because they have a duty to the complainant. We do not consider that the fact that the HR Manager had, by then, left their employment absolved them from that responsibility. Had they investigated then we think it more likely than not that any details they had not previously understood from the claimant's complaint would have come to light. They showed no understanding that that they were potentially responsible for the then HR Manager's actions despite his departure.

Events of 2017 including resignation

54. It is worth noting that, in about February 2017, Mr de Kerckhove stated (see paragraph 15 of his statement) that he met with the claimant to discuss arrangements for paying her wages, which were due to change. It appears that the respondent was moving to monthly payments rather than weekly. The former HR Manager was mentioned and the claimant told Mr de Kerckhove that he had blocked the door to the HR Office on one occasion. Again, the respondent didn't make further enquiries of the claimant. The claimant had no recollection of that incident.

55. As we say, the respondent did not make further enquiries of the claimant but neither did they clearly state that they were unable to investigate because the HR Manager was no longer in their employment or because the details mentioned by the claimant do not appear to them to amount to a sufficiently serious matter. This left the claimant with the impression that she had raised a complaint. She already believed that it had been reported to the police and this state of belief didn't change.

56. On 16 March 2017 Ms French emailed Ms Firth and complained that the PC Merchandising Manager was extremely upset by a comment reported to her

as having been made by the claimant to SB. SB was, at the time of Ms French's email, a former employee of the respondent who had gone to work for PC. As a result of the complaint, Ms Firth spoke to SB on 17 March 2017 and his account was that, several weeks before he had transferred to PC, the claimant, on hearing that he was changing employer said "*Why on earth do you want to work for Perfect Choice*?" to which he had replied "*Why not?".*

57. As originally reported by third hand hearsay from Ms French to Ms Firth, the comment included the word "bitch", referring to the PC Merchandising Manager. However, when Ms Firth asked the latter about it she was unwilling to make a statement about what SB had actually reported to her. Ms French, as Bedding Manager, thought it sufficiently important to raise it with the respondent's HR. This led to an investigation of the claimant for a potentially disciplinary matter and her allegation is that the motivation for the investigation was a conversation she had had with MP about the PC Merchandising Manager.

58. We are quite satisfied that the whole reason that the claimant was investigated was the report by Ms French which was in terms which merited investigation by Ms Firth.

59. The claimant attended an investigation meeting on 27 March 2017 (page 148) and Ms Firth decided that no formal action was needed. That outcome was relayed to her on 24 April 2017 (page 160). The claimant criticises the letter and the investigation: she says that the notes were inaccurate; the letter was written in a victimising tone and the contents of the letter were dishonest. It is said that the claimant has not explained why she makes that allegation. However, she wrote to Mr Long on 16 May 2017 criticising the outcome (page 167 - an important letter which we make more detailed findings about below) and in that letter, among other things, she said that she agreed with the outcome but says that she didn't admit making the inappropriate comments. This is a reference to the statement in the outcome letter "we are dealing with one main issue in hand and that is the comment made to [SB] about [the PC Merchandising Manager] which was not appropriate and as you clearly admitted yourself, you wish you had not said." It seems to us to be implicit in that sentence first that Ms Firth had concluded that the offending comment was made and second that Ms Firth thought that the claimant had admitted making it.

60. In the investigation meeting notes (page 148) the claimant is recorded as having said "Wish I had not made conversation at all now" and further on she denies particular statements and is recorded as saying that what she said were facts. The claimant's reasonable interpretation of the outcome letter is that it recorded her having admitted to making the inappropriate comment and it is clear from the record of the meeting that she didn't admit to it. She regretted having the conversation.

61. The claimant also took issue with Ms Firth's findings that the 2015 incident with the PC Merchandising Assistant was resolved through mediation and that may arise from the meeting not formally being described as mediation

at the time. The result was not that the PC Merchandising Assistant was relocated. We therefore find that the claimant reasonably considered this to be an inaccuracy in the outcome letter.

62. Furthermore, the outcome letter states "The situation with [H] getting upset was not apparently anything to do with [the PC Merchandising Manager] or what she had said. [H] does not wish to get involved or wish to be made to feel awkward." Part of the claimant's defence to the allegations that she had made inappropriate comments was that whatever she had said was her reasonable opinion based upon the actual behaviour of the PC Merchandising Manager. The clear implication from this statement is that Ms Firth has investigated the claimant's allegation (see page 149) that the PC Merchandising Manager had (among other things) made H cry. Neither the PC Merchandising Manager not H work for the respondent although from time to time they work alongside the Bedding Plants staff. Having heard Ms Firth's evidence about this sentence it is clear that she had apparently investigated the claimant's allegation by speaking to the PC Merchandising Manager only and then made a statement in the outcome letter which implied that she had spoken to H. We can see why the claimant thinks that the statement "[H] does not wish to get involved" is disingenuous when the claimant knows that the author has not spoken to [H].

63. Based upon these three matters, it is therefore clear to us why the claimant said she regarded the outcome letter as "dishonest" and the letter understandably caused the claimant to lose faith in the process. The contents of the outcome letter are, to that extent inaccurate, not supported by the evidence and misleading. We do not find them to be deliberately inaccurate but careflessly inaccurate. It is significant from the claimant's perspective because, although there is no sanction upon her, the record of the investigation makes findings of misbehavior against her which she disagreed with and which appear to be based upon inaccuracy.

64. As we said above, the claimant complained about the outcome letter to Mr Long (see page 167) on 16 May 2017 and it is this which she refers to within these proceedings as her grievance letter. The respondent did not treat it as a grievance and continue to argue before us that it isn't a grievance on the basis that it is not headed "grievance", it does not ask for a specific outcome and only asks 2 specific questions – both of which were answered.

65. In the last sentence in the letter to Mr Long, Ms Richards said "I'd like the points which I've raised above to be recognised and addressed please." It seems to us that by this two page letter to the managing director the claimant was complaining about the following:

    a. Inaccuracy in Ms Firth's outcome letter. Specifically that there was a finding that she'd accepted doing something which she hadn't accepted doing. It is potentially significant for an employee to be recorded as having done an act which they deny.

b. That her account (as an employee of the respondent) was rejected in favour of the PC Merchandising Manager's.

c. That Ms Firth had recorded something in the outcome letter about an investigation with [H] which was inaccurate and that caused the claimant to have no faith in the HR function in future: "I do not feel that [Ms Firth] is supportive as my HR advisor. Therefore, I ask that I have no further meetings with [Ms Firth]." It is quite clear that this is a complaint about Ms Firth's handling of the disciplinary investigation.

d. That the company didn't show her duty of care at the time of the sexual harassment incident.

e. She asks what action was taken by the company about her complaint about the HR Manager.

f. She complains that when Mr Long told her off for drinking at work the consequence was that she became dehydrated, suffered a migraine, fainted when she got home and had to visit her GP.

66. It is patent that this should have been regarded as a grievance from the last line alone. Furthermore, it fulfils the criteria of the respondent's own grievance policy. Mr Long's page 170 response to the grievance was plainly inadequate. He responded to a 2 page letter in 7 lines. It is a very dismissive response. Even looking at what it does say Mr Long doesn't explain that the meeting between the PC Merchandising Assistant, Mr Hemmings, the respondent's then HR Adviser and the claimant was regarded as a mediation meeting. He states that they do not have police reference numbers for conversations with the police about the HR Manager. In fact we have heard that there was contact with ActionFraud.police.co.uk and we have been shown that reference number. There was no report to Surrey police so what Mr Long said in his 19 May 2017 letter is misleading.

67. In his paragraph 9(b)(i) Mr Long described the allegation of sexual harassment in the claimant's 16 May 2017 letter as being a new allegation. If he genuinely believed it to be a new allegation the response that she should go to the police was hopelessly inadequate. He gave no serious thought to the fact that one of his female employees is saying that she was sexually harassed at work. That is almost worse if, as he says in his statement, that genuinely was the first he had heard of it. The only basis for sending the claimant to the police is that the employee against whom the allegations were made is no longer in the respondent's employment but that suggests a mindset that the respondent has no responsibility for acts done during that employee's employment.

68. Mr Long made no investigations about the allegation of sexual harassment or the allegation that Ms Firth had misrepresented her investigations in her outcome letter. He made a positive decision not to answer the complaint about the alleged incident on 15 May 2017 on the basis that it had been made against him and that the claimant had expressed a desire not to meet

with Ms Firth. The response at page 170 was discussed with Mr de Kerckhove before it was sent and no thought appears to have been given to whether the latter could investigate that allegation.

69. Turning to the allegation about the 15 May 2017 itself, Mr Long's account has not been consistent if you compare his oral evidence with the account given to Ms Firth when it was finally investigated after the claimant's resignation (page 185). We find that the claimant's account of the effect on her is over-dramatised. For her to say that she was denied the human right to drink is an exaggeration because, we accept – as did she - she could have left the shop floor to get a drink of water at any time. On the balance of probabilities our findings on this are that on 15 May 2017 Mr Long saw the claimant with a water bottle on the shop floor and told her to get rid of it because he didn't want staff drinking from water bottles in front of customers. We reject the claimant's allegation that the 15 May 2017 incident also involved Mr Long shouting at her for careless watering of geraniums.

70. However, the fact that Mr Long thought that the claimant's complaint about 15 May 2017 to be unreasonable was no reason not to answer it and certainly no reason not to investigate the rest of the letter.

71. On 30 May 2017 the claimant spoke to PC Holmes (see her paragraph 16) and discovered that, contrary to her belief, the respondent had not reported her allegation that she had been sexually harassed by the HR Manager to the police.

72. On 5 June 2017 the claimant had permission to leave early for a hospital appointment. On her account, Mr Long shouted at her and asked her when she had clocked on. Mr Long denies the incident. We remind ourselves that the HR Manager was asked to speak to the claimant in September 2016 about excessive tea breaks and think it probable that Mr Long did challenge the claimant when he saw her leaving before the end of her shift. The claimant thought that this was unreasonable behaviour because she had permission to leave. We think (consistent with our finding in relation to the 3 July 2017 below) it likely that the claimant's perception that Mr Long shouted at her is not reliable and find that she did not shout on this occasion.

73. We turn to the claimant's allegation that on 1 July 2017 there was an attempt to victimise her by dissuading Mr Gimblett from talking to her. Mr Raynsford struck us as an impressive witness. We accept that when he spoke to Harry Gimblett to caution him against spending so much time talking to colleagues, and in particular to the claimant, this was a normal managerial act in no way directed to the claimant or an attempt to victimise her.

74. In relation to the events of the 3 July 2017, we have considered the CCTV footage carefully. In paragraph 20 of her statement the claimant describes Mr Long accusing her of not watering dead petunias, shouting "learn to

water", throwing the box of bedding plants at her and shoving 5 boxes towards her with force along the bench. In fact she clarified this to say that the "shoving of 5 boxes" had taken place within the cold house (shown on cameras 39 & 44) and used the word "whacking" in relation to Mr Long's actions. However, in cross-examination of Mr Long this was downgraded to an accusation of "dropping" and "pushing" the plants.

75. The CCTV footage does not support the claimant's description of the event. Mr Long's evidence was that he expected dead plants to be removed, they hadn't been and so he asked the claimant to do so. He said that he didn't shout or shove boxes of plants. Since the CCTV footage does not bear out the claimant's description of Mr Long shouting we have concluded that her evidence on this point is exaggerated and unreliable.

76. Other evidence about this incident came from Mr Murray (see his paragraphs 22 & 23) who said that the claimant had complained about Mr Long's treatment of her on 3 July 2018. He did not believe "that it was a big deal but Miss Richards likes to complain".

77. We also heard from Andrea Raquel Cruz dos Santos who gave unchallenged evidence that in early July 2017, probably the 5 July, a colleague had called WF (whom we understand to work in the HR Office) on behalf of the claimant who then took the phone and told WF that Mr Long had thrown plants at her and shouted at her, that he had scared her and she wouldn't be working overtime. According to the claimant, the call with WF ended when she offered to wait until he returned to site and he said not to bother.

78. We accept that Mr Murray decided not to do anything about the claimant's complaint and this was apparent to the claimant (see her paragraph 20). We recognise that we have concluded that the claimant was exaggerating in her account of Mr Long's actions on 5 July 2017. However it is clear that Mr Murray (and possibly WF from whom we have not heard) presumed her complaint to be unfounded without investigating it.

79. The claimant sent her resignation letter by recorded deliver on 7 July 2017 (page 176 shows that it was received on 8 July 2017) and attended at the garden centre on 10 July 2017 to return her uniform and hand deliver another copy of the resignation letter to WF. She gave the following reasons for her decision:

    a. The respondent had failed ever to address her grievance during her employment at Longacres;

    b. In particular, Mr Long's response of 19 May had not answered her grievances of 16 May 2017;

    c. She was "deeply concerned" the police had no record of the HR Manager being reported to them and the claimant considered

herself to have been misled by Mr Long and Ms Long into believing that he had been;

d. The alleged behaviour of Mr Long on 3 July 2017;

e. The fact that her report of Mr Long's behaviour to Mr Murray on 3 July and to WF on 5 July had not been investigated.

80. The reason why the claimant resigned is, we find, that nothing had been done about her grievances over a number of years, in particular;

a. That Mr Long's reply of 19 May 2017 did not answer her letter of 16 May 2017;

b. She now knows that there has been no complaint to the police;

c. The final event was Mr Long's alleged conduct on 3 July; and

d. "I have reported the incident on Monday to Steve Murray] and again on Wednesday [to WF] … It is now 6th July and I have no confidence it will be dealt with internally, hence my resignation."

81. So although she describes the final event as being 3 July 2017 the last sentence (quoted in paragraph 90.4 above) describes what we find was the trigger for the resignation.

82. The respondent accepted the claimant's resignation (see page 178) and then Ms Firth carried out some investigations of the matters raised in the claimant's letter of 16 May 2017 which she detailed in her letter of 8 July 2017 (see page 183).

The Law applicable to the claim

83. Section 95(1)(c) of the Employment Rights Act 1996 makes it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.

84. In the present case the claimant argues that she was unfairly dismissed because she resigned because of a breach of the implied term of mutual

trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

85. There have been cases in which the employee has successfully argued that an employer's failure or delay in resolving a grievance has amounted to a breach of the implied term of trust and confidence: Claridge v Daler Rowney Ltd [2008] I.C.R. 1267. The question is always first whether, judge ed objectively, the failures of the employer were calculated or likely to destroy or seriously damage the relationship of trust and confidence, not merely whether they were unreasonable. Secondly, the tribunal must consider whether there was reasonable and proper cause for the conduct. In relation to that part of the test, it is unlikely that an employer will have reasonable and proper cause to behave unreasonably. However, whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause: Bournemouth University Higher Education Corp v Buckland [2010] I.C.R 908.

86. If the conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning, then he or she was constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157). As Mr Gillie pointed out (see paragraph 20 of his skeleton argument), if some of the alleged incidents are found not to have occurred, then a Tribunal must consider those events which it has found did occur and ask objectively whether they amounted to a repudiatory breach of contract.

87. Once he or she has notice of the breach the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied. The law looks carefully at the facts before deciding if there has been affirmation of the contract. In Cockram v Air Products plc [2014] ICR 1065, EAT Langstaff P discussed the law about affirmation (see paragraphs 22 to 25) and held that, by itself, mere delay in resigning is unlikely to amount to affirmation: there may come a time when delay on the part of the employee will mean that he or she will be taken to have affirmed the contract and decided to carry on working under notwithstanding the breach. Langstaff P also gave the example of a situation where an employee has called for further performance of the contract and held that that might lead to affirmation being implied from that conduct if it is consistent only with the continued existence of the contract.

88. If an employee has affirmed the contract, he or she is still entitled to rely upon the totality of the employer's acts in a so-called "last straw" case where, following affirmation, there has been another incident provided that the later act forms part of the series (Kaur v Leeds Teaching Hospitals [2018] I.R.L.R. 833 CA). In paragraph 39 of Kaur the Court of Appeal quoted extensively from Omilaju v Waltham Forest London BC [2004] EWCA Civ 1493 repeating the directions that although a final straw may be relatively insignificant, it must not be utterly trivial. At paragraph 40 of Kaur, the Court of Appeal quoted paragraphs 19 to 21 of Omilaju where it is explained that the final straw does not have to be of the same character as the earlier acts but it must add something to the breach of contract, however insignificant. It was further explained that if the employee has affirmed the after a series of acts (or indeed an act) which amounts to a repudiatory breach of contract then they cannot rely upon that breach as entitling them to resign unless he or she can point to a later act which enables them to do so. If the alleged "last straw" which follows affirmation is entirely innocuous then the employee cannot rely upon it.

89. The Court then went on (at paragraph 50) to advise that, in order correctly to apply the *dicta* in Omilaju,

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[6] breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?"

90. Once the tribunal has decided that there was a dismissal they must consider whether it was fair or unfair in accordance with s.98 ERA 1996: Savoia v Chiltern Herb Farms Ltd [1982] I.R.L.R. 166 CA.

> **"Section 98 Employment Rights Act 1996**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) …

(b) Relates to the conduct of the employee,

(c) ...

(3) …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Law relating to EQA claims

91. The Claimant complains of a number of breaches of the EQA. Section 136 of the 2010 Act reads (so far as material):

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

92. That section has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

93. Direct sex discrimination, for the purposes of the present claim, is where the employer treats the female employee less favourably than they treat, or would treat, a male employee in comparable circumstances because of the female employee's sex and is contrary to ss.13 and 39(2)(c) and (d) of the EQA.

94. In UK law, if direct sex discrimination is found to have taken place it is not capable of justification. The aim of the discriminator in taking the action complained of is irrelevant. When deciding whether or not the claimant has been the victim of sex discrimination, the employment tribunal must consider whether we are satisfied that the claimant has shown facts from which we could decide, in the absence of any other satisfactory explanation, that the respondent has discriminated against her in the way alleged. If we are so satisfied, we must find that discrimination has occurred unless the employer shows that the reason for their action was not that of sex. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made. We also bear in mind that discrimination can be unconscious. Although the law anticipates a two-stage test, it is not necessary artificially to separate the evidence when considering those two stages. We should consider the whole of the evidence and decide whether or not the claimant has satisfied us to the required standard, not only that there is a difference in sex and a difference in treatment, but that there is sufficient material from which we might conclude, on the balance of probability, that the respondent has committed an unlawful act of discrimination.

95. Although the structure of the Equality Act 2010 invites us to consider whether there was less favourable treatment than a man in comparable circumstances, and also whether that treatment was because of sex, those two issues are often factually and evidentially linked. If we find that the reason for the treatment complained of was not that of sex but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to. Furthermore, whether or not the alleged discriminator shared the sex of the alleged victim is irrelevant.

96. It is unlawful for an employer to harass an employee (see section 40(1) of the EQA). The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

> "(1) A person (A) harasses another (B) if—
>
> (a)A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b)the conduct has the purpose or effect of—
>
> (i)violating B's dignity, or
>
> (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if –
>
> (a) A engages in unwanted conduct of a sexual nature, and

> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> …
>
> (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."

97. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P (as he then was) said,

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

98. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him or her was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

99. Furthermore, in Weeks v Newham College of Further Education [2012] EqLR 788 EAT, Langstaff P, as he then was, said:

> "17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.
>
> ...
>
> 21. However, it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other

> words spoken and the general run of affairs within the office or staff-room concerned."

100. The tribunal may not consider a complaint under ss.39 or 40 EQA which was presented more than 3 months after the act complained of unless it considers that it is just and equitable to do so: s.123 EQA. Conduct extending over a period is to be treated as done at the end of the period. A failure to act is to be treated as occurring when the person in question decided upon the inaction and that date is assumed to occur, unless the contrary is proved, when the alleged discriminator does an act inconsistent with the action which it is argued should have been taken or when time has passed within which the act might reasonably have been done.

101. The tribunal may extend time for presentation of complaints if it considers it just and equitable to do so. The discretion to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to: Robertson v Bexley Community Care [2003] I.R.L.R. 434 CA. There is no restriction on the matters which may be taken into account by the tribunal in the exercise of that discretion. The tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused? The onus is on the claimant to satisfy the Tribunal that he or she should have the discretion exercised in his or her favour.

102. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals should consider in particular the following factors: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had cooperated with any requests for information; (d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action. However the factors to be taken into account depend upon the facts of a particular case. Furthermore, one of the most significant factors to be taken into account when deciding whether to set aside the time limit is whether a fair trial of the issue is still possible (Director of Public Prosecutions v Marshall [1998] ICR 518). It is also important to consider the balance of prejudice caused to the respective parties.

Conclusions on the Issues

103. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching these conclusions.

104. Turning first to the acts relied on by the claimant as amounting to a breach or breaches of the term of mutual trust and confidence (references are to sub-paragraphs within paragraph 11 above):

    a. In issue 11.1.a. the claimant criticises the respondent for taking 4 months to call a meeting about the claimant's complaint of assault by the PC Merchandising Assistant. In our view, taking into account the fact that the two employees worked for different companies and that would cause some logistical delay, this was not an unreasonable period. That allegation is not made out on the facts.
    b. The claimant's allegation in issue 11.1.b. that the then HR Manager took no action after she reported that PC employees had made her working environment very difficult following her complaint about the PC Merchandising Assistant is made out as a matter of fact (see paragraph 21 above). The complaint is about the lack of appropriate reaction by the HR Manager – Mr Hemming gave evidence that RK told him after the event that he had not had to hold the PC Merchandising Assistant back but that is not evidence about whether or not RK acted thereafter out of spite towards the claimant. Nor do we make findings about whether the complaint was justified; it was not investigated.

    c. In relation to issue 11.1.c. we are satisfied that any report to MP was not the reason for the investigation and therefore that allegation is not made out on the facts.

    d. We have concluded that the respondent, through Ms Firth, did produce an investigation outcome letter on 24 April 2017 which was inconsistent and inaccurate for the reasons we set out in paragraphs 69 to 73 above. The notes of the meeting did not cover everything that was said. The content of the outcome letter was misleading and not evidence based but it was not deliberately dishonest. Overall, we find this allegation made out. We can understand why the claimant describes it as dishonest although, objectively, we do not conclude that Ms Firth deliberately set out to deceive. The misleading and inaccurate contents of the letter reasonably caused the claimant to lose faith in Ms Firth's ability to provide impartial HR services in relation to her employment.

    e. The allegation that the respondent failed to deal with the claimant's grievance which was presented on 16 May 2017 is made out for the reasons set out in paragraphs 76 to 80 above.

    f. The allegation that Mr Long shouted at the claimant is not made out but Mr Murray took no action about the complaint so that part of the allegation is made out.

105. We look then at the allegation that the conduct which we have found proved amounted to a breach of the implied term of mutual trust and confidence. Was this conduct which, without reasonable and proper cause, was

calculated or likely to destroy or seriously damage the trust and confidence which ought to exist between employer and employee? The background to Mr Long's letter of 19 May 2017 was that there had been previous complaints of sexual harassment by the claimant that, at the very least, the respondent had recognised as potentially being acts of harassment by the HR Manager (see Ms Firth's conclusions referred to at paragraph 62 above). These were essentially dismissed out of hand.

106. Mr Long wrote that letter having apparently dismissed from his mind the detail of his sister's report of what the claimant had said about the HR Manager's behaviour back in October of the previously year. It was written, we were told, in consultation with Mr de Kerckhove, who had seen Ms Firth's note of 28 October 2016. Even if Mr de Kerckhove thought that all the claimant had complained about was that the HR Manager had blocked her exit from the room that was something which, in our view, should have been investigated yet on each occasion the respondent took no steps to find out what the claimant's concerns were.

107. However it was not just the allegation of sexual harassment which was ignored by Mr Long. The claimant's allegation that Ms Firth had incorrectly recorded her as having accepted that she made inappropriate comments should have been investigated.

108. Our conclusion is that the failure of Mr Long to answer the claimant's grievance and the dismissive response which he gave to it by his letter at page 170 amounts to a breach of the implied term of mutual trust and confidence on its own. There was no reasonable or proper cause for him to respond so dismissively to her grievance letter. His response was not merely unreasonable it was hopelessly dismissive and inadequate. Viewed objectively it would cause an employee receiving that letter to think that their employer did not consider that their complaint about sexual harassment and an inadequate HR outcome to be worthy of serious consideration. We think that this was a serious failing which went to the root of the employment relationship.

109. We remind ourselves that the claimant relies upon a pattern of failing to take her concerns seriously: the HR Manager's failure to respond to her complaint of 26 May 2016; Ms Firth's outcome letter; the letter of 19 May 2017; and Mr Murray's failure to investigate the claimant's complaints about Mr Long's behaviour on 3 July 2017.

110. On its own, Mr Murray's failure to take action in relation to the claimant's complaint about Mr Long's behaviour on 3 July 2017 would not be a breach of the implied term of mutual trust and confidence because the claimant did not have reasonable grounds for her complaint. What it adds to the whole is the repetition of the element of not being taken seriously, of not responding to her grievance, of her not having the support of her managers.

111. However Mr Long's letter of 19 May 2017 was, whether on its own or after the series of other failures to take the claimant's complaints seriously, a repudiatory breach of the implied term of mutual trust and confidence. We

have therefore concluded that there was a repudiatory breach of the contract of employment by 19 May 2017. It was after that date that the claimant found out that, contrary to her belief, there had been no report to the police about the behaviour of the HR Manager.

112. Our findings about the reason for the claimant's resignation include that she resigned in response to a failure on the part of the respondent to reply to her grievance and a failure on the part of the respondent, through Mr Murray and WF, to take her complaint seriously about Mr Long (see paragraphs 89 to 91 above). Applying Kaur, the most recent act which triggered the claimant's resignation occurred on 3 July 2019 when she reported the incident to Mr Murray and 5 July when she reported it to WF. She did not delay or affirm her contract after that: she repeated her complaint on 5 July to WF and was told not to bother waiting for him and resigned the next day.

113. The failure on 6 July 2017 to respond to the claimant's complaint about Mr Long's conduct on 3 July was not by itself a repudiatory breach but neither was it wholly innocuous. There was a repudiatory breach of the implied term by 19 May 2017 but the last failure did add something to the breach and was therefore part of the course of conduct in the Omilaju sense. The claimant resigned in part in response to the failure seriously to consider her complaints about Mr Long's conduct on 3 July.

114. However, in case we are wrong to regard the 3 and 5 July 2018 failure to take her complaint about Mr Long seriously as adding something to the breach of the implied term of mutual trust and confidence we go on to consider whether the claimant affirmed the contract following the repudiatory breach which had occurred no later than 19 May 2019. After that date she tried to find out what had happened to her complaint of sexual harassment. On 30 May she was told that there had been no complaint made to the police. This brought home to her that, contrary to her previous belief, absolutely nothing had been done as a result of her complaints and the other occasions on which she had informed those in authority about what had happened.

115. We remind ourselves of the dicta in Cockram. She did not work under protest. Although the claimant was aware of the repudiatory breach by 19 May 2017 (or on receipt of that letter shortly afterwards) the full level of the respondent's inactivity was not apparent to her until 30 May 2017. There is some delay on her part between then and her resignation. However, looking at all the circumstances, we do not think that it is referable to an intention to affirm the contract.

116. Having reached the conclusion that there was a dismissal we need to go on to consider whether there was a fair reason for it. The respondent has advanced the potential reason of conduct. It is argued that if the claimant resigned because Mr Long reprimanded her and that was a dismissal then the reason for the reprimand (and therefore for the dismissal) was that he believed that she had left dead plants on display and hadn't properly watered other plants. Therefore the claimant's conduct was the reason for

dismissal and, it is argued, the respondent has made out a potentiall fair reason for dismissal.

117. Our findings are that the conduct alleged against the respondent which is set out in issue 11.1.f above has been made out in part. The claimant has not shown that Mr Long acted as alleged but the claimant reported the incident and Mr Murray took no action. Mr Long did take the claimant to task on 3 July and that was part of the reason for her resignation but it did not contribute to the repudiatory breach of the implied term of trust and confidence. Consequently, it seems to us that it cannot be said that the claimant's conduct contributed to the reasons for the dismissal because Mr Long's response to her alleged poor performance did not contribute to the breach of contract.

118. Alternatively, if we are wrong about that, we remind ourselves that Mr Long had taken no steps to discipline the claimant for alleged unsatisfactory performance in the past. The only previous occasions of which we are aware on which she was spoken to were about taking long tea breaks (in September 2016) and the allegedly inappropriate behaviour in speaking to a former colleague about the PC Merchandising Manager. Our conclusion is that it is highly unlikely that she would have been disciplined for not watering properly or leaving dead plants on display. Furthermore, we do not think that there is a realistic chance that such a dismissal for a first disciplinary offence of that nature would have been within the range of reasonable responses.

119. Our conclusion is that the claimant was dismissed and that the respondent has failed to show that the reason for the dismissal was a potentially fair one. Alternatively, the dismissal was not within the band of reasonable responses open to the employer. The claim of unfair dismissal succeeds.

120. There was an unreasonable failure to comply with paragraphs 33 and 40 of the ACAS Code of Practice on Disciplinary and Grievance (2015) in that the respondent did not arrange for a formal meeting to be held without unreasonable delay after the claimant's grievance letter of 16 May 2017 and did not set out what action they proposed to take in order to resolve all elements of her grievance.

121. In relation to the wrongful dismissal claim, the respondent dismissed the claimant and there was no notice given. Therefore the wrongful dismissal claim succeeds.

122. We now consider the claim of direct sex discrimination. Our findingsare that the acts relied upon as sex discrimination (see paragraph 11.11 above) are not made out on the facts. By that we mean that the claimant has not shown that Mr Long shouted at her on any of the 3 occasions when that is alleged against him or behaved with aggression as in issue 11.11.c. It is that element which the claimant alleges was different in his behaviour towards female employees and male employees. We do not find that Mr Long's management of the claimant on these occasions amounted to a detriment to her and there is certainly nothing from which we could infer that

his actions were less favourable treatment than he did or would have given to a male employee in comparable circumstances or that the reason for his actions was that of sex.

123. The issues in the sexual harassment claim and sex related harassment claim are set out at paragraph 11.15 above. Our findings about the actions of the HR Manager on 3 September 2016 are set out in paragraph 25.2. to 25.8. and 25.10. above. The claimant has therefore shown that the allegations set out in 11.15.a.i to vi. happened as a matter of fact. These actions were unwanted conduct and were clearly of a sexual nature. We accept that the actions of the HR Manager had the purpose or effect of violating the claimant's dignity and or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The claim of sexual harassment contrary to s.26(2) of the EqA is made out, subject to the employment tribunal having jurisdiction to hear that complaint.

124. Our factual findings in relation to the other matters alleged to be harassment related to sex are that:

    124.1. In relation to issue 11.15.b above, the claimant did write to Mr Murray as alleged and Mr Murray did not respond to her letter. She did not write an email. A response by Mr Murray was wanted and the lack of response was therefore unwanted.

    124.2. In relation to issue 11.15.c. above, the claimant asked Mr Long to ask Ms Long to call her. He did so. There is no unwanted conduct here.

    124.3. In relation to issue 11.15.d above, the claimant reported the HR Manager's misconduct to Ms Long. Ms Long did talk about the police report that had been made during that phone call but did not make a positive representation that she had reported the HR Manager to the police for sexual harassment. Therefore this allegation is not made out on the facts.

    124.4. In relation to issue 11.15.e., out findings are the same as for issue 11.15.c. The claimant was not told that the allegations had been reported to the police although she mistakenly believed that to be so.

125. The allegations set out in paragraph 11.15.e. to g. are not made out. Mr Long did not shout at the claimant or tell her to "get rid of" her bottle of drinking water thereby denying her any right or entitlement to drink water. To the extent that Mr Long's actions were unwanted it is clear to us that they were unrelated to sex. Furthermore, since he was merely asking an employee not to drink on the shop floor, it was not reasonable for the claimant to consider that his actions had the proscribed effect of harassment. We are not satisfied that this normal management action had the proscribed purpose or effect. Similarly, although the claimant had permission to leave and all Mr Long did was to check that the claimant had

the right to leave to attend her appointment. This was a normal management act which could not reasonably have been regarded to have to proscribed effect.

126. There was a course of conduct between 3 September and 15 October 2016 concerning the claimant's report of the HR Manager's behaviour. In each case action was wanted and therefore lack of action was unwanted. The last such incident was on 15 October 2016. Although the claimant has shown that she wanted action and we have found that they should have acted by making further enquiries, that is not the claimant's pleaded case.

127. Furthermore, the link to sex is not made out in relation to the acts or omissions of Mr Murray, Mr Long and Ms Long. We have to consider whether the unwanted conduct was related to sex. The failure to support her made her working environment worse but that did not amount to sex related harassment.

128. Our conclusion is that one act (or series of acts) of sexual harassment set out in issue 11.15 above is made out, those of the HR Manager on 3 September 2016. Time for presentation of the claim therefore expired on 2 December 2016. The complaint based upon that allegation was presented on 21 September 2017, more than 9 months out of time. It is therefore necessary for the tribunal to consider whether it is just and equitable for it to consider the claim, notwithstanding the fact that it was not presented in time.

129. In the present case, as Mr Gillie has argued, it is clear that the respondent's witnesses have been unable to recall clearly some of the matters about which they were being questioned which happened more than 2 years before the date of the hearing. There is no doubt that this has prejudiced their ability to respond to the complaints. However, our view is that this difficulty was contributed to by their reaction to the claimant's complaints and was therefore largely of their own making. Furthermore, we have found that the incidents with which the respondent's witnesses were personally involved did not amount to unlawful acts of sex related harassment notwithstanding their poor recall. In the context of those parts of the claim which have succeeded, therefore, the respondent has not been significantly prejudiced.

130. The HR Manager resigned a little more than 1 month after the incident. The circumstances in which he left mean that it was most unlikely that he would ever have been called as a witness for the respondent. The delay has not, in our view, led to the unavailability of a relevant witness.

131. The claimant informed a number of members of the respondent's management about her allegations against the HR Manager: Mr Murray, Mr Long, Ms Long, Ms Firth and, indeed, Ms French. She did so in terms which should have put them on enquiry and made clear that she wished to complain. They never clearly told the claimant that they were not investigating her complaint. Ms Firth provided Mr de Kerckhove with as much information about the complaint as she had herself. The claimant was

misled into thinking that the complaint had been reported to the police and she was content for it to be dealt with that way. We do not conclude that the respondent's management made positive representations that the police were investigating the claimant's allegation of sexual harassment. However, knowing that the claimant was alleging sexual harassment, they informed her that the alleged perpetrator was being investigated by the police. Had they investigated her complaint as they should have done then they would have had records of their several interactions with her. It is for that reason that we are of the view that they contributed to the reasons for their lack of information and also that the claimant relied upon the implication that her complaint was being investigated by the police and that that was a reason for her delay.

132. There would be clear and considerable prejudice to the claimant in not being permitted to proceed on a claim which we have found to be well founded. For all those reasons, it is just and equitable to entertain the claim of sexual harassment notwithstanding the fact that it was not presented in time.

133. No evidence has been adduced by the claimant to substantiate the allegation of unauthorised deduction from wages and we therefore dismiss that claim.

_____
Employment Judge George

Date: …19 March 2019……..

Sent to the parties on: 21 March 2019

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For the Tribunal Office