



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4106053/2017**

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**Held in Glasgow on 20 and 21 November 2018**

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**Employment Judge  
Members**

**M Robison  
Mrs J Ward  
Mr D Calderwood**

**Ms T Abraham**

**Claimant  
Represented by  
Mr S Wilson**

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**Westguard Security Limited**

**Respondent  
Represented by  
Mr I Maclean  
Consultant**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the claim does not succeed and therefore is dismissed.

### **REASONS**

#### **25 Introduction**

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1. The claimant lodged a claim with the Employment Tribunal on 15 November 2017, claiming unfair constructive dismissal and sex discrimination. The respondent entered a response resisting the claim. Following a preliminary hearing which took place on 30 April 2018, Employment Judge Wiseman decided that the Tribunal had jurisdiction to hear the claim which was not time-barred.
2. Following a preliminary hearing on 13 November 2018, it was agreed that the claimant would be permitted to give her evidence in chief by way of affidavit, but that she would attend the hearing and be available to be cross-examined.

3. At the hearing, the claimant was asked supplementary questions regarding her evidence and the documents lodged, following which she was cross examined by Mr Maclean. The Tribunal also heard evidence for the respondent from Mr James McMullan, managing director, and Mr Steven McMahon, operations manager.
- 5 4. The Tribunal was referred by the parties to a number of productions from a joint bundle of productions, with a report from an Independent Psychiatrist being added on the first day of the hearing. These documents are referred to by page number.

### Findings in Fact

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds  
10 the following relevant facts admitted or proved.

### Background

7. The claimant commenced employment with the respondent, which is involved in security services and operations, on 10 May 2012 as a mobile security response supervisor. She resigned by text dated 5 July 2018.
- 15 8. Mr Steven McMahon commenced employment with the respondent during 2014. Mr McMahon was engaged as operations manager, and he was the claimant's line manager. Mr McMahon and the claimant were acquainted with each other from working at another security firm.
9. In the claimant's role as a mobile security response supervisor, she would attend  
20 the office at 136 Strathmore Road at the start of her duties and thereafter would be driving to various locations, working night shift. Mr McMahon worked day shift and was largely based at the office.
10. In or around January 2016, the claimant and Mr McMahon commenced a close  
25 friendship which continued until February 2017. During that time they exchanged texts almost daily and sometimes had lengthy telephone calls. They kept the relationship secret from other colleagues because Mr McMahon was in another relationship at the time. Because they did not work together at the same time or in the same place, they would on occasions meet at the beginning or end of their

shifts. On a number of occasions, the claimant entered the office of Mr McMahon and they kissed and/or cuddled each other.

- 5 11. In September 2016, the respondent required to provide security for a public viewing of a Royal Navy ship docked at King George V Docks. There were 10 employees due to attend. Mr McMahon offered to give the claimant a lift because there was restricted parking and they were trying to reduce the number of cars. Unknown to the claimant, Mr McMahon was also giving his daughter and her friend a lift as well. The claimant did not attend that event because she called in sick the previous day.
- 10 12. Around that time, that is the beginning of October 2016, the claimant handed in her resignation. She was interviewed by Mr McMullan. She advised him that she was finding it difficult to work with Mr McMahon because of his attitude, but she did not go into specifics. She said that she did not want to put anything in writing. Mr McMullan spoke informally to Mr McMahon to advise him that she had  
15 complained about the way that he had spoken to her and to alter his manner. Mr McMahon did not mention that he was in a relationship because it was a secret affair. He apologised to the claimant. The claimant retracted her resignation.
- 20 13. In or around January 2017, the claimant expressed concerns about a new relief controller, and advised that she was not prepared to work with him. Although Mr McMahon did not agree that the relief controller had not had sufficient training, in the absence of another alternative, he advised that he would cover the role. He had however been drinking the previous evening, so requested that the claimant collected him from his house. She then offered to drive him home after his shift.
- 25 14. At the beginning of February 2017, the respondent was due to provide security for an event in Perth. Initially four people were required, but that reduced to two, one of whom required to be a woman in order to conduct searches. The claimant vacillated but eventually agreed to cover the shift. It required an overnight stay in Perth. Mr McMullan gave approval for two hotel rooms to be booked. In the event, there was no requirement for security from the respondent at the event.

15. In or around 5/6 February, the claimant's relationship with Mr McMahon came to an end at her request. Mr McMahon hoped that the relationship could resume at that time, however once that was made clear to him he sent no further texts.
- 5 16. Subsequently, there were some changes to the claimant's shifts made, along with changes to shifts of other staff, to accommodate the needs of the business.
- 10 17. In or around Saturday/Sunday 5/6 May, the claimant became aware that the same relief controller with whom she had concerns was on duty and refused to attend her shift. Mr McMahon was informed. She was advised that if she failed to turn up for her shift that she could face disciplinary sanctions. Having failed to attend, she was advised to attend Mr McMahon's office on the Monday morning. He intended to commence an investigation. He intended to raise other concerns which he had made Mr McMullan aware of relating to the completion of paperwork by the claimant.
- 15 18. On the morning of 7 May, the claimant attended and spoke to Mr McMullan and Mr McMahon with regard to the meeting to discuss disciplinary sanctions. The claimant advised that she was unhappy about meeting with Mr McMahon alone, and Mr Mullan stated that Mr Jamie McMullan, who shared an office with Mr McMahon would also be in attendance. However, Mr Jamie McMullan left the room at the beginning of the meeting and the claimant quickly became unhappy about the questions she was being asked and raised general concerns about his behaviour towards her. She then left the office.
- 20 19. That same day Mr McMahon took advice from the respondent's employment consultants (Peninsula) and wrote a letter to the claimant suggesting that she put her grievances in writing or seek mediation (page 83).
- 25 20. The claimant thereafter was absent on sick leave (page 46) (and did not return to work thereafter).
21. By texts dated 16 and 19 May, Mr McMullen contacted the claimant to ask after her welfare and to "let me know if there is anything we can help with" (page 61). She responded by advising that she was "suffering at the hands of Steven and

his behaviour". Mr McMullan asked her to get in touch by telephone and said "promise I will help" (page 65). The claimant responded, "in what way Jimbo...putting Steven in a chastity belt or a kennel. Its not fair Jimbo I aint done nothing but the right thing". Mr McMullan e-mailed a light hearted response, believing this to be "banter". However having reflected, he texted the next day, "Theresa, I've just looked again at your last message and had thought you were just being funny. But has something happened to you that has been caused by Steven". In response she advised, inter alia that "Stevens actions towards rejection is the cause...I've been constantly harassed by Steven and when his last advance in Feb 2017 was rejected I have once again since then been ignored been treated like something he's trod on and being treated differently all round".

22. Mr McMullan asked her to come into the office on a day that Mr McMahan was not in (p67) and he again promised to sort it out, and repeated his request for her to contact him on a number of occasions (p68-72). On 21 June, the claimant requested a meeting at her house (p72).

23. Mr McMullan attended the claimant's house on 23 June. At that meeting, the claimant advised that Mr McMahan had been harassing her, and that his behaviour towards her had changed since she had rejected his advances. She advised that she could furnish him with copies of text messages. He gave her his personal e-mail address as requested, because she did not want to send the text or pictures to a work e-mail address.

24. The claimant declined to put her grievance in writing, and asked Mr McMullan to deal with it informally. She asked him to keep the texts and photographs private.

25. Mr McMullan considered the texts and the pictures and formed the view that the relationship had been consensual.

26. On Monday 26 June, Mr McMullan called Mr McMahan into his office and asked him to confirm if he had been in a relationship with the claimant or not. Mr McMahan confirmed that he had but that the relationship had finished and that he

had stopped communicating with her some months ago. Mr McMullan advised that if the matter was raised again then he would require to take action.

27. On the issue of whether the relationship was reciprocal the claimant advised in a text, “Jimbo sorry just to put the reciprocal thing to bed....I laughed most ideas and plans from Steven off where I should have told him to do one! Being my manager made this difficult...to the point I would avoid work or be late or avoid him so no reciprocal feeling except in his head” (page 78).
28. The claimant’s request to have a later start (to avoid Mr McMahan) was refused by Mr McMullan because of the needs of the business. Her request to transfer to Edinburgh was accepted, but she was required to meet any additional travel expenses, as a result of which she declined to accept the offer.
29. By text dated 5 July 2018, the claimant resigned (page 80). Mr McMullan asked her to reconsider, but when she confirmed her position, he wished her well (p81).

**Relevant law**

10. Section 26 states that a person harasses another if that person engages in unwanted conduct related to the protected characteristic of sex (s.26(1)) or of a sexual nature (s.26(2)) and that conduct has the purpose of effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.
11. Section 26(3) states that a person harasses another if they engage in unwanted conduct of a sexual nature or that is related to sex and the conduct has the purpose or effect of violating dignity or creating an offensive environment etc and the conduct was because of the employee’s rejection or or submission to the conduct.
12. In deciding whether the conduct has the proscribed effect, the Tribunal must take account of the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect (s.26(4)).

13. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (the 1996 Act). Section 94(1) states that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) states that an employee is dismissed if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly known as "constructive dismissal".
14. In *Western Excavating Ltd v Sharp* 1978 IRLR 27, the Court of Appeal set out the general principles in relation to constructive dismissal. Lord Denning stated that "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".
15. The duty of mutual trust and confidence is a term which is implied into every contract of employment. This means that an employer must not, without proper and reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee (*Mahmud v Bank of Credit and Commerce International SA* 1997 IRLR 462 HL, *Baldwin v Brighton and Hove City Council* 2007 IRLR 232 EAT).
16. Where there is a breach of the implied term of trust and confidence, that breach is "inevitably" fundamental (**Morrow v Safeway Stores plc** 2002 IRLR 9 EAT).

#### Claimant's submissions

17. Mr Wilson lodged written submissions which he supplemented with oral submissions. First he set out the relevant law and summarised the evidence. The

claimant's evidence was that during the period from September 2016 to January 2017 she was subjected to a large number of text messages and phone calls of a sexual or suggestive nature that she found distressing and described as unwanted advances, and to two instances of non-consensual sexual conduct, when she was kissed and cuddled. She gave evidence of times when Mr McMahan's behaviour was ignorant, when he ignored her and barked orders at her, treating her differently from other staff which she ascribed to her refusing his sexual advances. While the claimant complained about his behaviour to Mr McMullen in October 2016, it was common ground that she did not go into detail but nor did Mr McMahan attempt to say they were involved in a relationship.

18. In June 2017, she provided him with a copy of text exchanges, which he viewed as reciprocal despite the claimant making clear that was not the case and failed to take steps to deal with it. The fact that she did not wish the complaint to become formal should not have prevented a reasonable employer from commencing a disciplinary process, but instead he preferred the version of Mr McMahan and ignored the claimant's assertion of unwanted harassment.
19. Her evidence was that once she had disclosed that information, because of feelings of embarrassment or worthlessness, she could no longer work in that environment. This is not incompatible with her further oral evidence that she would have been prepared to work if her hours had been changed or if she could transfer to in Edinburgh to avoid him, but she was not prepared to meet the cost of that. Both reasons were in her mind when she resigned.
20. On the issue of unfair dismissal, Mr Wilson submitted that the harassment suffered was sufficiently serious for any reasonable person to accept that the relationship of trust and confidence had been broken, with the failure of the respondent to take action when appraised of the circumstances being the final straw.
21. Mr Wilson relied on the letter from the GP and the report of the independent psychiatrist, and put forward a schedule of loss.



**Respondent's submissions**

22. Mr Maclean submitted that it was rare that there would be direct evidence to support a claim of harassment, but here there was a clear conflict of evidence with regard to whether there was a consensual relationship or not.
- 5 23. He invited the Tribunal to prefer Mr McMahon's evidence because his position is supported by the documentary evidence. In particular, Mr McMahon's position is that the relationship ceased in February, and it was accepted by the claimant that there were no further texts or phone calls after that date.
- 10 24. Reliance should not be placed on the texts which the claimant forwarded to Mr McMullan in May because her evidence was that she had selected certain messages; but in any event there is a message from the claimant professing love for Mr McMahon. The same was true of the larger bundle of texts, while looking at the texts in isolation, it can be argued that these do not show reciprocation, they do not show the full picture. Mr Mclean made references to certain texts  
15 which do show reciprocation, by the use for example of LOL, of numerous xxx and of a picture of her knees.
- 20 25. There is no evidence until the end of her employment that she objected to or rejected the approaches of Mr McMahon. The texts lodged show friendly conversations between two individuals, and do not support a claim of harassment. When the issue was first raised in October 2016 regarding his attitude, no accusations of harassment were made. All of this suggests that the claimant was in a relationship with Mr McMahon and if that is the case then the claim of harassment is not made out.
- 25 26. With regard to the detriments, there is very little evidence to support her claims. While she asserts that there were changes to her shift pattern, she has not supplied details. In any event the respondent states that any changes to her shift pattern was for procedural and business reasons.
27. With regard to the claim for unfair dismissal, if it is accepted that there was no evidence of harassment, then the constructive dismissal claim must fail. However,

if the Tribunal does not accept that, then Mr Mclean submitted that the real reason for the resignation was that as at May 2017, the claimant was facing disciplinary charges. In response to the claimant's assertion that the disciplinary action was a discriminatory act, Mr McLean said that in the particular circumstances, where  
5 the claimant had refused to work because she did not like the person in the controller's position, the claimant should realise that she was facing disciplinary action. There was a difference between the situation in January, when Mr McMahan was available to assist and when the claimant had attended at her workplace, whereas in May she had refused to attend at all.

10 28. With regard to remedies, Mr Mclean took issue with the level of damages sought and argued that the psychiatric report did not make it clear that it was the actions of Mr McMahan which had caused the depression and it was possible that underlying issues had been aggravated. Further, the claimant was able to get work fairly quickly after her resignation, and again after her subsequent  
15 resignation in December. He submitted that any award should be in the lower band of the Vento scale.

29. With regard to the statutory defence, Mr Mclean asked the Tribunal to take into account the fact that the respondent had no knowledge of the conduct in October 2016, although dealt with the complaint about Mr McMahan's attitude; and by  
20 June 2016, the respondent did what they could given the claimant's request that the matter should be dealt with informally, but by the beginning of July she had resigned.

### **Tribunal's discussion and decision**

#### **Observations on the witnesses and the evidence**

25 30. In this case although the key facts were not in dispute, there was a central question in dispute and that was whether or not the parties were in a relationship, whether or not the advances were wanted, welcome and consensual. Parties recognised that our conclusions on this question were critical to the outcome of this case.

31. As is clear from the findings in fact, we have found that the parties were in a consensual relationship. We came to this conclusion after careful consideration of the evidence which we heard, and the documentary evidence lodged, for the reasons that follow.

5 32. We should say first that we had no hesitation in accepting the evidence of Mr McMullan, whom we found to be credible and reliable. His evidence was quite clear and unhesitating. We got the impression from his evidence, and supported by his text messages to her, that he was concerned for the claimant's welfare and genuinely concerned about what he had heard, and concerned to do the right thing in response. We noted that he candidly explained that while he had initially thought the reference to how to deal with Mr McMahan was "banter", it dawned on him shortly after that she was being serious and he made clear his concerns. We accepted his evidence that he had seen nothing to give him cause for concern, that his view on reading the texts was that the relationship was consensual, and we accepted that in not dealing with matters formally, he was respecting her wishes.

15 33. We came to the view that the claimant did not tell the truth about her relationship with Mr McMahan. We were of the view that the evidence which she gave was very limited, and we noted that she did not elaborate on the evidence she had given in her affidavit regarding the contact she had with Mr McMahan.

20 34. We considered that the text messages which we viewed were indicative of a consensual relationship. The claimant herself said that she had selected particular texts to forward to Mr McMullan (pages 54-60). These texts relate to the period around early February 2017. Even then, we noted in these texts that the claimant responded (page 59) "love u always" and "love u always with all my heart...need you as a friend" which we considered were indicative of a relationship between the two which had come to an end. We thought the use of the broken heart and tears emojis by the claimant was also indicative of her confirming that this was the end of the relationship. We were of the view that reference to being a friend is the natural language of a person who has been in a relationship with another but that relationship is finishing.

35. That accorded with Mr McMahon's evidence that the relationship had ended around the beginning of February. Indeed, that is the point at which it was accepted by both that the texts stopped. There was nothing otherwise to explain why the texts had stopped in February. Had Mr McMahon been sending texts making unwanted advances since at least September 2016 (no texts prior to this date having been lodged), then if these advances were not being reciprocated, there was no other evidence about why they might have stopped at that time.
36. We noted in particular the claimant's evidence in response to a question from her own solicitor whether she and Mr McMahon had been on friendly terms that she denied that. She said that the relationship had been professional, and the same as all the other members of staff. It was this in particular that convinced us that she was not telling the truth. The texts which we saw were very clear evidence of, if nothing else, at the very least a close friendship.
37. We accepted in any event that not all of the texts were lodged and that the texts that were lodged sought to support the claimant's assertion that the behaviour was not reciprocated. We noted in particular that the claimant relied in her evidence to texts which were sent by Mr McMahon to her in regard to the job at King George V Docks but that these texts were not lodged. We therefore accepted Mr McMahon's evidence that the texts which were lodged in support of the claimant's case were not comprehensive, and that there were some missing. We noted that he felt unable to reply to Mr Wilson's assertion that the texts did not indicate a reciprocal relationship because there were some missing, which we found to be sincere and credible. Further, as he pointed out, there were no texts lodged where she indicated that she was feeling harassed or asking him to stop sending texts or phoning or contacting her.
38. Further we accepted Mr McMahon's evidence that he could not produce other texts that might put beyond doubt the question of the reciprocal nature of the relationship because he had deleted the texts given that he said that he was having an affair which he at the time sought to keep secret from his partner. However we agreed with Mr Maclean that even in respect of the texts that were lodged there was evidence to support a close relationship between the two.

39. We carefully considered, but ultimately came to the view that, the text responses could not be explained by the “power relationship” between the two. While we accepted that Mr McMahon was the claimant’s line manager, we did not accept the claimant’s response that these texts were simply her effort to “be polite and not ignorant”, with her suggesting that the statement “love u always” was a “friendly reply”. We thought that the fact that he had a nickname for her, and she had a nickname for him was also indicative of a very close, informal and reciprocated friendship. She made reference in evidence to the texts being daily and frequent lengthy telephone calls.
40. We also gave consideration to her claim in a text to Mr McMullan that it was “all in his head” or that Mr McMahon was fantasising about a relationship with her, as was put to him by Mr Wilson. We gave careful consideration to her evidence in that regard in light of the medical reports lodged, but we could not accept, particularly in light of the texts, that Mr McMahon was imagining that he was in a relationship with her or that his advances were being reciprocated. While it may have been that the claimant was unsure whether to commit further to a relationship with Mr McMahon, we were of the view that the actions, behaviour and conduct of the claimant made it clear that Mr McMahon’s approaches, conversations and advances were being reciprocated.
41. We accepted that the complaint she made about him in October 2016, and other vacillations of the claimant, were explained by the claimant and Mr McMahon having fallen out or had a “lover’s tiff” as he put it. We noted further that she made no complaint about Mr Mahon from February until May, and that was when she was called in to explain why she had refused to cover her shift. We noted too that she did not ask, even after she had decided to resign, for the matter to be investigated formally, although after her resignation there could be no repercussions for her. While it may well be that the claimant resigned because she could no longer work with Mr McMahon, that can be explained by the failed relationship, and is no indication that it was because of any harassment.
42. In contrast, we accepted the evidence which we heard from Mr McMahon that the parties had been in a relationship. We accepted that his evidence, which he gave

in a spontaneous and very candid way, was credible. Although on occasion we thought that he did not fully understand the questions he was asked, he sought to answer the questions as honestly as he could. We thought his evidence was consistent, and candid even when being pressed in cross examination. Further,  
5 his evidence was very largely consistent with that of Mr McMahon, and that became clearer in cross examination.

43. We accepted his evidence that when he approached her to cuddle and kiss her that her body language was “welcoming” in the sense that she did not push him away and reciprocated; and that he would not have done that if they had not been  
10 in a relationship. We noted that he readily accepted that the claimant herself would not have known that he was also giving his daughter a lift to the King George V Docks event. Although he initially said that the relationship had ended on 4 February, we thought that his explanation about the texts after that date, and his evidence that this was “the beginning of the end” was a credible explanation.

15 44. We accept that there would be some change in the way that he interacted with her because they were no longer in a relationship or indeed friendship. However we accepted that he was simply getting on with his job as operations manager. We got no sense of any anger or bitterness towards her in the way he gave evidence we accepted his evidence that he always acted professionally towards  
20 her.

45. We also took account of the medical evidence. We noted that the claimant did not consult her GP regarding this issue during the whole period of the exchanges with Mr McMahon. We noted too that the first contact was after the meeting in May, and that she did not go back to her GP again until the December.

25 46. We took account of the fact too that despite her illness, she got two new jobs in relatively quick succession. While we accept that the claimant may well be unwell, clearly the psychiatrist’s report is based on what he was told, that may well be the result of the failed relationship with Mr McMahon. Whatever the cause, we do not accept, for the reasons discussed above, that it can be attributed to any  
30 harassment she claims to have suffered.

### **Sexual harassment**

47. When it comes then to the claim of sexual harassment, essentially unwanted conduct which has the purpose or effect of violating an employee's dignity, then the claimant's claim must be said to fail at the first hurdle, that is it cannot be said to have been "unwanted" since we have found that the conduct was welcome, consensual and reciprocated. We therefore find that the claimant's claim under section 26(1) of the Equality Act must fail because the requirements for harassment are not made out.

48. While we have found that there were changes in shifts, we have found that this was a normal occurrence, and while we have found that she was called into an investigation meeting, we have found that this was because she had refused to work with another member of staff. We accept too that relations between the claimant and Mr McMahon had changed after February 2017, but that is to be expected after a relationship ends. In any event, we accepted that Mr McMahon's conduct towards her was professional.

49. However, even if we had found that conduct of Mr McMahon post February 2018 was to her detriment, and was because the relationship had been terminated, the relevant provisions of section 26(3) were not made out either because that requires first for the claimant to prove that she has suffered sexual harassment. In this case we have found that there was no unlawful harassment, and therefore we could not say that there was less favourable treatment because of the claimant's rejection of Mr Mahon's advances.

50. The claimants claim under the Equality Act therefore fails and is dismissed.

### **Constructive dismissal**

51. We understood Mr Wilson to rely on the harassment to support his submissions that there was a breach of trust and confidence amounting to a repudiatory breach. However we also understood him to accept that if the Tribunal were to find that that the relationship was consensual and the conduct reciprocated, and

therefore did not amount to harassment, that the facts would not support that finding.

52. We have as discussed above found that there was no harassment. Indeed on the evidence which we heard we found that Mr McMullan showed nothing but concern for the claimant, and was anxious to help her in whatever way he could. In such circumstances, we find that there is no breach of the implied term of mutual trust and confidence.

53. Thus having concluded that the claim of sexual harassment is not well-founded, we find that there was no breach of the implied term of trust and confidence and therefore the claimant was not entitled to resign and claim that she had been dismissed unfairly.

54. The claimant's claim under the Employment Rights Act therefore fails and is dismissed.

15 **Employment Judge: M Robison**  
**Date of Judgment: 29 November 2018**  
**Entered in register : 29 November 2018**  
**and copied to parties**

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