



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4104454/2018 Hearing at Edinburgh on 26, 27, 28, 29 and 30
November, and 3, 4 and 5 December 2018, and 25 and 26 February 2019; and
Members' Meeting on 12 April 2019

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Employment Judge: M A Macleod
Mr J Terry
Ms E McArthur

15 Lisa Aird

Claimant
Represented by
Ms S Shiels
Solicitor

20 Scottish Water

Respondent
Represented by
Ms A Stobart
Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims
30 all fail and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 30 April
35 2018, raised against two respondents, namely Scottish Water and Kenny
Laing, in which she complained that she had been constructively unfairly
dismissed by the respondent and unlawfully discriminated against on the
grounds of sex, and, by association, disability.

2. The respondent presented an ET3 on behalf of both then respondents, denying that the claimant had been dismissed or unlawfully discriminated against.
3. A Hearing on the merits was fixed to take place commencing on 26 November 2018 and the seven following days. As it turned out, the hearing did not conclude within the scheduled diet, and continued on 25 and 26 February 2019.
4. The claimant was represented by Ms S Shiels, solicitor, and the respondent by Ms A Stobart, advocate.
5. Shortly before the hearing was due to commence, the claimant withdrew the claim insofar as it was directed against Mr Laing, leaving the respondent as the only respondent in the case.
6. The parties presented a joint bundle of productions, to which were added supplementary documents in the course of the hearing.
7. The claimant gave evidence on her own behalf, and called Monique Helene Fernandez Primrose, Customer Team Leader, as a witness.
8. The respondent called as witnesses the following:
 - Jane Archibald, Team Leader;
 - Kenny Laing, Contact Centre and Scheduling Manager;
 - Janice May Porteous, Team Manager;
 - Ian William Burnett, Waste Water Network Performance Manager; and
 - Richard Lavery, Head of Revenue.
9. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

10. The claimant, whose date of birth is 31 August 1993, commenced employment with the respondent on 4 April 2011, as a Customer Services Advisor (“CSA”). Her letter of appointment dated 4 April 2011 (69) attached her contract of employment (70ff). She was appointed to work as a CSA within the Contact Centre and Scheduling department of the Customer Service Delivery section, based at the respondent’s office in Fairmilehead, Edinburgh.
11. Her normal working hours were 20 per week, on a rotating shift arrangement agreed locally. She was also a member of the Local Government Pension Scheme.
12. The respondent is a public body responsible for providing water and sewage services throughout Scotland.
13. When the claimant commenced employment, she sat in the open plan area to the top right hand side of the first floor plan (378), usually seated at the seats numbered 198 to 200, though at weekends she would move to 180 where fewer staff would be based. Team leaders would sit at smaller banks of desks, as would other managers.
14. The claimant’s direct line manager in the Contact Centre was initially Kenny Gilroy, and then Roderick Bell.
15. The claimant worked in the Contact Centre for approximately 2 years, but then sought to move to the Wholesale Service Desk (“WSD”), where she was based around the area close to the corridor next to the kitchen and toilets, at or around desk number 153. A glass partition separated the WSD from the Contact Centre. In the WSD, her direct line manager was Jane Archibald, a Risk Technician. Ms Archibald answered directly to Janice Porteous, Team Leader, and she in turn answered directly to Kenny Laing.
16. The claimant’s initial appointment was temporary, and following several fixed term extensions to her contract, she was offered a permanent position with the respondent with effect from 1 July 2012 (77).

17. Over time, the claimant became concerned about a number of comments which had been made to her by Kenny Laing, who worked in the area relatively close to where she worked on the WSD.

18. Mr Laing suffers from Charcot-Marie-Tooth syndrome, a form of Multiple Sclerosis, which was diagnosed when he was 21. He has used a wheelchair since 1994, initially a manual chair and now a powered chair with a control arm enabling him to manoeuvre the chair around the office.

19. On 20 July 2015, the claimant emailed Elaine Noble, a trade union official within the respondent's organisation, to ask for advice about the fact that she had not been placed on a development plan (a plan to enable an employee to make progress within the organisation) which she regarded as unfair, and to highlight comments made by Mr Laing to her about Russell Martin, a colleague in the Contact Centre (123).

20. In October 2015, the claimant met with Ms Archibald, her Risk Technician, for a regular one-to-one meeting, at which many matters were open for discussion, including any personal issues which the claimant might feel were having an impact upon her performance at work. Ms Archibald kept a private note of this, and other, conversations, as an aide-memoire (123A). The claimant did not see this and similar notes until they were produced as part of the bundle in preparation for this hearing.

21. In the note, Ms Archibald is recorded as saying that she had noticed a difference in the claimant's mood, and asked her if there was anything she could do or if there was anything bothering her. The claimant said that she had been worrying about "issues with her brother", which remained confidential (and about which the Tribunal did not, quite properly, hear). Ms Archibald noted:

"I advised Lisa I am here to talk to if she has any concerns, as I know she's a worrier (based on previous discussions). I advised this is a good place to take your mind off other problems and throw yourself into work/focus on it. I advised I find this helps. I explained that I am similar in this way, as I build things up in my head and get stressed at times, and that I am always here

to talk. I asked whether the Sumo course helped. She advised it did help a bit, but that she was thinking about what was going on with her family at that time also which she had confided in me prior.”

5 22. At that time, the claimant and Ms Archibald both considered that they had a good working relationship in which they could speak about confidential matters.

23. A further “routine” meeting took place later in October 2015, again noted by Ms Archibald (124), at which the claimant and Ms Archibald were the two people present. Ms Archibald noted, as part of her note:

10 *“Lisa said during the meeting that Kenny had made jokes such of ‘he hoped she wasn’t texting boyfriends’ when he noticed her on her phone, and that she felt this was a bit inappropriate for this to be said to a 21 year old.*

She also said that he had asked her to help put his headset on for him when Janice [Porteous] wasn’t there. She then went on to say that she ‘would never not help him’.

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I asked Lisa whether she wanted me to act on these comments and take them further, and she advised she did not want me to.

I advised that what I had seen is that he is the same with everyone, and has a sense of humour with everyone else within the team. She agreed with these comments.

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I said to her that if she wanted to speak about anything else/needed anything else just to let me know.”

24. Ms Archibald took no action on the claimant’s comment in relation to Mr Laing on the basis that the claimant had asked her not to do so.

25. During the meeting, Ms Archibald said that she encouraged the claimant to consider that if Mr Laing was asking her to help him, that would be a good thing as it meant he was comfortable doing so.

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26. On 29 November, the claimant met again with Ms Archibald (128). In that conversation, she said to the claimant that she had seemed a bit quiet lately and had not been speaking to anyone in the team, to which she said that she was going to the doctor that day to discuss how she was feeling low at the time.

27. Ms Archibald stressed that she was there to support her, and that she was doing the right thing in going to see her doctor. She mentioned a friend who had been feeling down, and had gone to see the doctor, who had prescribed anti-depressants. She said to the claimant that she could always come to speak to her if she felt that would help.

28. On 10 December 2015, an email was sent round the team asking whether they wished to participate in preparing a buffet meal for a "Secret Santa" day. A number of replies were received in succession (131/2), all agreeing to take part. The claimant then replied "I don't want any". Ms Archibald was slightly concerned at how this might come across to the other people in the team, and spoke with the claimant about it. The claimant acknowledged that she could have given greater consideration to how she had written that email. Ms Archibald did not criticise the claimant for not taking part in the buffet, but did want to alert her to the way in which her email might be interpreted by those who saw it.

29. In February 2016, the claimant informed Ms Archibald by Lync (an internal messaging service) that she had applied for a Service and Product Analyst role, for which she had an interview on 4 March 2016 (136). Ms Archibald reacted by saying "*Oh Lisa I had no idea. That's good you have an interview. OK, think we should meet and have a chat.*" The remainder of the conversation centred on trying to identify a suitable time and date on which to meet, and Ms Archibald encouraged the claimant to do as well in the interview as possible.

30. That meeting took place on 29 February 2016 (137). She congratulated the claimant on having obtained the interview, which was an achievement in itself. She then asked the claimant why she did not come to her first to tell

her she was applying for the role as she could have assisted her with the application process and *“I have always said to her I am here with any support if she sees any roles that she wanted to apply for.”*

5 31. They met again on 1 March, during which Ms Archibald gave the claimant further help with her presentation for the interview, which the claimant acknowledged.

10 32. On 21 March 2016, Ms Archibald met again with the claimant (142). By that stage, she was aware that the claimant had been unsuccessful in her interview, and she asked the claimant how she felt about this. She said that she was “OK”. She had received feedback which was very positive in parts and pointed out her lack of experience in other areas.

15 33. Ms Archibald notes that she asked the claimant *“if she was happy working here and she replied that yes she likes working here. But that she has been looking for other roles even outwith SW, and for Licence Providers to keep her options open...I advised Lisa that if she is interested I could send her some links of personality/strength based online tests which would help her highlight her strength/which means she could look for jobs that she can use her strengths to her advantage – she expressed interest and advised she would appreciate this.”*

20 34. Ms Archibald also *“asked her if everything else at WSD was ok at the moment, and if anything was bothering her and she told me no. she said she was happy just coming in, doing her job then leaving.”*

35. The claimant confirmed that she was appreciative of the help which Ms Archibald was offering to her.

25 36. On 22 March 2016, Ms Archibald had a further discussion with the claimant (144) in which she told her that she had noticed a job role online, following the claimant’s previous request that she keep her informed of any jobs which might be available, for example with a Licenced Provider. The claimant thanked her. Ms Archibald noted:

“She said that as she has applied for another role she didn’t want it looking like she wanted out of the WSD, that if she stayed her would she be able to progress. I reminded Lisa of what she had told me yesterday – that she said she was ‘happy coming in, doing her job then leaving’. I asked her to think about whether she really wants more responsibility based on that comment...She advised that she does like working here, and doesn’t want to feel pushed out since she’s been applying for new jobs. I assured her she is not being pushed out and reminded her that she has volunteered to me that she is applying and looking for other roles.”

10 37. On 31 March 2016, Ms Fernandes-Primrose submitted an email to Rhona Reid (147) in the following terms:

“Afternoon Rhona,

In accordance with the Dignity at Work Policy, I am writing to you to raise a formal complaint on behalf of my member Lisa Aird.

15 *The allegation is of Sexual Harassment and inappropriate conduct.*

I am obliged to notify you that we have a dairy (sic) of incidents which has been recorded by the aforementioned member, Lisa Aird against Kenny Laing. If required, we can provide names of potential witnesses to some of the diarised incidents recorded. Due to the sensitive nature of the case, we would ask that our member is not invited to attend any meetings without the attendance of her Union representative. I would ask that this treated with the utmost sensitivity/confidentiality and that we are kept abreast of any developments pertaining to the this complaint (sic).

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25 *I understand that you have been briefed by Elaine Noble. Should you wish to discuss this please feel free to contact me...”*

38. Ms Reid replied that afternoon to thank her for bringing this matter to her attention, and assuring her that such complaints were taken very seriously. She confirmed that an investigation would be conducted, and that they would meet shortly to advise who would be conducting it.

39. On 11 April 2016, Karen Milne, from the respondent's Human Resources department, wrote to the claimant (148) to invite her to meet with Ian Burnett, who had been asked to conduct the investigation, on 21 April 2016, accompanied by her union representative. The email asked her to keep all
5 information connected with the investigation confidential, and to refrain from discussing the matter with others who may be witnesses until the investigation was concluded.

40. The meeting took place on 21 April 2016. Notes of the meeting were taken by Karen Milne, and produced at 153ff.

10 41. The claimant was asked to explain what had happened, and she stated, after moving to WSD in 2013, *"...I noticed fairly quickly after I moved that I was treated differently, even from others who were new as well. It was late in 2014 that I really noticed this."*

15 42. She went on to explain: *"I hadn't spoken to Kenny when I worked in the contact centre. It was only when I moved to Wholesale that I was asked about my personal life. To start with – we had jokes and had a better relationship – but the comments started to go too far in 2014. At the end of 2014 I first spoke to my team leader. I wasn't sure if some things were inappropriate or not and just wanted to ask to see her thoughts – to ask her
20 'Is he allowed to say some of these things?'"*

43. The claimant referred here to the meeting with Jane Archibald in which she had raised issues about Mr Laing.

25 44. She went on to explain that she had been asked to carry out tasks that other people were not asked to do – *"making Kenny's lunch, make his tea. Jane Archibald said that it was only a good thing; that Kenny was like a father figure and he was only looking out for me and I could go far. In terms of doing the other tasks, Jane said that he trusts you and he feels comfortable that he can ask you to do it."*

45. When asked what the tasks were, she replied:

5 *“Janice makes him tea. If she wasn’t there, Kenny would say ‘can you come over’ and he’d ask me to make tea – it was quite regular. We are quite a small team and we would all take turns to make tea for each other but I felt it was only me that Kenny asked to make him tea. I was once asked to make his porridge – but I don’t eat porridge so I didn’t know how to do it – then Janice Dick saw me stressing out about how to make it and she said she would do it instead. That was the end of that...”*

10 *At first, felt I was being helpful, but as it was only me – I felt stressed. When I was making tea – because of Kenny’s disability – I didn’t know what help he needed – whether to place it in front of him or hold it or if he needed a straw. I was concerned about getting it right. I’m a helpful person; I like being helpful but it was only ever me being asked to get it for him.”*

15 46. Mr Burnett asked what were the issues she had raised with her line manager. She said: *“After speaking to Jane, team coach, I felt that I may be making a bigger deal out of this as I’d previously had a good relationship. I noticed that Kenny came up to me more and ask personal questions that he’d not ask the others. He came up when I was sitting. I quite quickly felt that he was taking things too far – everyday I’d tell my mum and dad and they said it shouldn’t be happening. That’s when I really started to notice*
20 *how often things were being said.*

IB: Can you give me examples?

LA: I have a diary of things that have been said. He’d comment on my body – say I was getting too skinny and if I was on a diet...

(Copy of the diary provided to IB and KM.)”

25 47. The claimant went on to mention that on her birthday, 31 August, Mr Laing had asked Janice Porteous to go and buy a scone as a present for the claimant. She said she did not want to be singled out. Mr Laing also made comments to her about not being friends with Russell Martin, and she said he had said that she should forget about a boyfriend as he was not allowing

it. She felt this was taking matters too far, and that she only wanted a professional manager employee relationship with Mr Laing.

48. The claimant continued:

5 *"I was stressed and struggling to come in the door, I was thinking what is going to happen today. Then things became more physical. I had to take him to the toilet – not inside – but to open the door and wait outside. He touched me on the arm. I had said to him that some things are inappropriate but he continued."*

49. She was asked to expand upon Mr Laing's request to take him to the toilet:

10 *"Normally Janice helps him. That particular day, there were others sitting before me, other members of the team but he went past them and said to me 'follow me'. I went with him and he said 'open this door for me'. Initially I was panic struck – first thought was would I need to go in. I panicked. I opened the second door. Kenny said I was going to have to wait. I thought*
15 *'what am I going to do?' Not sure if you are familiar with the layout of the toilet area but there are two doors, inside the front door there is another door going to a disabled toilet and another going into the ladies toilet straight ahead. I stood there – I was worried if I opened the door too soon –*
20 *Was I going to see something I didn't want to see. Or if it was too late and leave Kenny in there for too long. He was whistling to himself in there. It ended up that he knocked on the door to let me know that I needed to open the door for him.*

25 *That particular day he also asked me to get his salad and mixed the dressing into it. Other people were looking at me because I'd taken him to the toilet and making his lunch. I knew it was only me that he asked to do that. I was stressing out about it.*

30 *I was asked again to take him to the toilet another time. This was the time I was on my break but I'd chosen to stay at my desk. Janice was not there again. He said 'follow me', I didn't want to go but I didn't want to make a scene in front of others. I thought that any day Janice is not there, then he'll*

5 *be asking me to take him even though I don't want to. On this occasion Leanne Donaldson and Autumn McKendrick saw me waiting outside the toilet clearly distressed and asked if I was ok and what I was doing outside a toilet. I put my hand up and told them not to ask as I was so upset I couldn't talk."*

50. She suggested that in the team it is understood that staff are not allowed to let Ms Porteous or Mr Laing see them unhappy in the workplace.

10 51. Mr Burnett asked the claimant if there was any protocol in place as to who should assist Mr Laing with tasks such as making cups of tea or toilet needs when Ms Porteous was off, and the claimant said that in those circumstances there was nobody else to do these tasks and he would ask her alone. She made reference to the headset which Mr Laing used: *"I put his headset on him. I was worried how to position it right. I asked him if it was right and he said 'well does it look right?' I was scared to do it, my hands were shaking whilst doing this for him. My mum says that I've not*
15 *been trained in how to put someone's headset on. No-one has said what to do if Janice is not there."*

52. She confirmed that one other member of staff had been asked to put his headset on, and appeared to be happy to do so.

20 53. Mr Burnett then asked the claimant to go through the entries she had made in her diary, one by one.

54. He referred to the entry: *"13/11 Kenny called me skinny every time he passed that day. I told him I was on a diet as I was unhappy with my weight. He said 'well I am happy with your body'.*

25 *LA: Kenny knows I'm on diets. He knows I have had an eating disorder. I am self-conscious about how I look. Even if I am losing weight – I don't want the whole team hearing about it.*

30 *16/11 Kenny told me and my bank of desks that he has a list of people who I have kissed. He then told everyone at my desk I am a bad kisser when I am drunk.*

LA: About the bad kisser, he cam up and I was mortified that he'd said this in front of everyone. He doesn't have a list. I said 'that is inappropriate'. There was men there. That was the first time I said it to him..."

5 55. The diary went on to refer to Mr Laing asking her whether she had a boyfriend or not, which he would not allow; to Mr Laing telling her to take him to the toilet, which she found degrading and questioned why a male was not asked to help; and to Mr Laing saying to her, while she was on her mobile phone, "stop texting me", which she said made her feel "humiliated and embarrassed."

10 56. The claimant also recorded that on 27 January he had looked inappropriately at her body and said that she looked all right; and that on the same day when Mr Laing came over to her desk she had to physically move her seat as their cheeks were close to touching. On 25 March, she recorded that Mr Laing had blocked her chair in with his so that she could not move. She then said *"He then leaned forward and touched my arm. I asked him what he was doing and he replied 'I wanted to do that'.* She maintained that Holly Myles and Autumn McKendrick were close by, and that she had let them know when she was upset by such events.

20 57. The claimant recorded in her diary that on *"3/2 Kenny called me 'sexy bum' when passing"*. She said that she had instantly recorded this on her phone, and that he had "sort of whispered that".

25 58. She said in her diary that on *"1/3 an old picture of me and Siobhan came up on my iphone. I showed people and said how I couldn't believe it looked the way I did. I showed it to Kenny as he was over participating in the chat and he said 'remember when we all used to fancy Lisa'. I can't remember who he said it to. Pretty sure it was to a male. Although I know Siobhan was at the desk for sure."*

30 59. Having concluded the review of the diary entries, the claimant went on to say that every morning, Mr Laing would ask her whether she was sober; and that when drinking from a large water bottle, he would ask "is that a hangover cure". She said that he did not do this for anyone else.

60. Mr Burnett asked the claimant how this all made her feel. The claimant replied:

5 *“Every day I don’t know how the day will go. My mum and dad text me
everyday – as they know it’s stressful for me and they check on me to ask if
anything else has been said. I worry every day. It’s stressful. Is there
going to be another comment or will he touch me. Lately now I’ve been in
touch with the union there hasn’t been any contact. The stress has been
too much. I’ve been to the doctor about it. I have looked for a new job, a
job where Kenny is not the manager. Keeping the diary every day is
upsetting as it reminds me of all the issues. I’m grateful to have this job –
it’s the best job of all my friends. I like to keep myself to myself. I get
embarrassed about things. A lot has happened in the past year and when
I’ve asked for help nothing happened. Other co-workers say Kenny treats
me like this because I am young and single. I ask why me? I spoke to my
team leader and was stressed because she didn’t want to know or help.
Now I feel the pressure is off because I have spoken to someone and they
are listening. However, things were getting worse with the taking Kenny to
the toilet – I see Janice clipping his nails and cleaning his ears and think to
myself, if Janice is off – what happens next? Is he going to ask me to do
this? I don’t want to do that.”*

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61. She described a feeling of “constant dread” that she would have to do for Mr Laing the things which Ms Porteous regularly did.

62. Mr Burnett asked the claimant to say what she would see as an ideal outcome to this process. She replied: *“To make it stop. For him to take ownership of what he has done. I am sure he sees it. I ignore him and shut him off. He must see a change in me. I’ve tried to get it to stop myself.”*

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63. Mr Burnett obtained a list of witnesses from the claimant whom he should interview, namely Autumn McKendrick, Leanna Donaldson, Holly Myles, Liam Smith, Curtis Farrer, Soibhan Connachen, Nick Rodgers, Garry Miller and Greg Marr.

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64. Shortly after this meeting, Ms Archibald had a meeting scheduled with the claimant for her regular TNA (Training Needs Analysis) on 25 April 2016 at 10.30am. Ms Archibald had a conversation with Ms Fernandes-Primrose in which she confirmed that she would be accompanying the claimant to the meeting. Ms Archibald advised Ms Porteous of this, and Ms Porteous, who was aware that the claimant had presented a complaint about Mr Laing by this stage, advised Ms Archibald to cancel the meeting. Ms Archibald emailed the claimant to confirm this at 9.27am (164A). She had already spoken to Ms Fernandes-Primrose about this, and understood that there was no difficulty, but the matter was then raised with Karen Milne, who spoke to Mark McEwen, who in turn spoke to Ms Porteous and instructed her that the meeting should proceed, and that Ms Fernandes-Primrose should be allowed to attend.

65. As a result, the meeting took place at approximately 1.30pm that day. Ms Archibald wrote a note of the meeting shortly after it ended (165).

66. At the outset she made a note about her impression of the meeting. Ms Archibald felt that it was a “horrendous” meeting, as she considered that the presence of the claimant’s union representative, and Ms Fernandes-Primrose’s approach within it, made her feel that she and the claimant were seeking to act in an accusatory manner. She “felt like it was a total ambush”.

67. In her note, Ms Archibald started thus:

*“**Note** – the below has been recorded to the best of my ability from memory straight after the meeting. I went to this meeting under the pretence it was a standard Training Needs Analysis (TNA) meeting, for the first time Lisa came in with notes of points to raise, and Monique was very much involved in this meeting and brought up points herself, despite my belief this was a BAU TNA meeting which would mean she would have taken an observer’s point of view.”*

68. The note records that in the initial stages the meeting was conducted largely as a conversation between the claimant and Ms Archibald, but that after

some time Ms Fernandes-Primrose became involved and started raising matters on the claimant's behalf. For example, it is noted that:

5 *"Monique advised there are aspects she is not happy with having been discussed before – stating I had previously advised of Lisa 'rushing out the building' at the end of her shift. She advised she has never heard of anyone being addressed to the speed at which they walk out of the building. I asked for clarification on this , and Lisa said that it was previously advised that since she had her car rather than getting the bus that she should be staying later. I advised that it does take time to shut down computers etc*
10 *and that the individual would be expected to work right up until their finishing time. She asked who this had come from and Lisa said Janice. Monique made a motion for Lisa to be quiet and stop talking, then continued to wait for a response from me, to which I reiterated the above.*

15 *Monique also brought up about Lisa not wanting to participate in food/buffets (that happen at WSD for team morale, and are voted for by the majority of the team), and she did not think this was appropriate to bring up. I did not get a chance to consider a response to this as was taken aback at everything being bombarded at me very quickly, but what I had addressed at the time was the attitude in an email from Lisa to the whole team stating*
20 *merely 'I don't want any'. (At this time Lisa had agreed she understood how this might look to others, and that she should have considered how she had worded it prior to sending it)."*

69. At the end of the note, Ms Archibald recorded her views of the meeting:

25 *"During this meeting I felt intimidated, attacked put on the spot and as though it was two people against one. For most comments/accusations I gave a response, but most comments I gave were not responded to, and Monique moved quickly onto the next one, without giving any real comment to my responses, giving me the feeling of being bombarded...I came out of this meeting clearly shaken as was asked by several people whether I was*
30 *OK. I had to be sent home that afternoon from work due to how low I felt.*

Neither Monique nor Lisa appeared to take any notes during this meeting which I found odd due to the extent of things which were discussed. Following this meeting a member of WSD team advised that they saw Monique heading to the meeting with a tape recorder. At no point was this announced to me and was not made visible to me if this was the case. If I had been aware I would not have consented to being recorded. Neither Monique nor Lisa appeared to take any notes during this meeting.”

70. On the evidence, it appears that no such tape recorder was taken to the meeting, nor was any recording of the meeting made by the claimant or Ms Fernandes-Primrose.

71. Mr Burnett continued his investigation by meeting with a number of witnesses. The main witness with whom he met was Mr Laing, on 28 April 2016. Mr Burnett was accompanied by Karen Milne, whose notes were produced (178ff).

72. When Mr Laing was asked whether he understood the purpose of the meeting, he replied that he understood the purpose but not the allegations. He was asked some background questions about the layout and structure of the departments, and then was asked to describe his relationship with her. The notes record the exchange as follows:

“KL: I’m the manager in that team – irrespective of who it is. I have an open and informal way of doing business. It’s possibly something reflected in the Your Voice results which if not the highest in the business, near that. I have regular interaction with her, as I do with all people in my team.

IB: There is no difference in how you treat her compared to others?

KL: No.

IB: What was your reaction when you heard that an issue had been raised by Lisa?

KL: It was quite clear there was something on the go. Her behaviour changed in and around.

IB: Why, what sort of things?

KL: A month ago we noticed increased Union presence around – whispering campaigns, the usual stuff.

IB: Usual stuff?

5 *KL: We get the odd snipe [critical comment] in the team. Recently we introduced a new process where people would get their telephone stats emailed to them every day/week and this was questioned by the Union and this same individual.*

10 *IB: Were you aware Lisa had raised these issues about you prior to the meeting with Mark McEwen?*

KL: No. I knew something was up but where or what, no.”

73. Mr Burnett proceeded to put to Mr Laing the allegations made by the claimant in her grievance.

15 74. Mr Laing denied telling the claimant not to associate with Russell Martin or describing him as the bad boy of Scottish Water, but said that *“I would have made comments – not specific to individuals – in a joking way to the girls in the team, in a fatherly way ‘these individuals are not good enough for you’ or the like.”*

20 75. He denied that he had made comments to the effect that the claimant was skinny and that he was happy with her body; he said he did not recall saying *“Remember when we all used to fancy Lisa?”*; he denied that he had made a comment about the claimant being a bad kisser when she was drunk, asking how he was meant to know that.

25 76. He said, when asked if he had asked the claimant regularly if she was sober or if her bottle of water was a hangover cure, that *“That would be a regular joke in the team, everyone there. It’s not specific to Lisa. A usual comment, an icebreaker, to have a joke with the team.”*

77. Mr Burnett asked him if he had called her “Sexy Bum”, to which Mr Laing replied *“Absolutely not”*.

78. He explained: *“Well, I’ve never said anything about anyone’s body. In terms of photographs, we comment on the photographs in people’s passes [ID Card]. Bad kisser – how would I know that?”*

The being sober bit – it’s the sort of thing if someone saw me with a glass of water on my desk they’d say ‘that you on the vodka Kenny’ and it’s a bit of fun for laughs. Nothing is meant by it.”

79. He maintained that he had not gauged any discomfort from the claimant in relation to his comments to her.

80. When asked about being so close to the claimant that their cheeks almost touched, Mr Laing said:

“No. Don’t remember anything like that.”

81. He later added a comment to the notes: *“On reflection to this question it would not be possible to achieve this. The bulk of the wheelchair and the limited physicality would mean that to move cheek to cheek would mean more movement and manoeuvring by the other person to get into this position.”*

82. With regard to the allegation that he had touched the claimant’s arm, he said that he could remember sitting at a desk next to hers, and putting his arms on the desk, but as to whether they had touched, he said he did not know. When asked if he had said, in response to being asked by the claimant what he was doing, “I wanted to do that”, Mr Laing replied *“No nothing like that.”*

83. Mr Burnett then asked Mr Laing about bumping his chair into the claimant’s chair while passing, to which he replied that this may have happened as he passed her desk “a zillion times a day”, and that he did not make a habit of crashing into folk deliberately.

84. Mr Burnett moved on to the assistance he needed with tasks, such as putting on a headset, making tea, opening the toilet door. He said that the claimant had said she felt uncomfortable about being asked to do these tasks. Mr Burnett asked Mr Laing who normally helped him with these tasks. Mr Laing replied that:

“Depends who is there. You’ll be aware that I cannot use the facilities in FMH, I cannot lift some things. With most doors in FMH I need assistance. I usually ask who is closest at the time. In terms of tea making, I often have many offers for that.

IB: If the full complement of the team is present, who would you normally ask?

KL: Where I usually sit, there is Janice, Sarah and Kevin Roy. Usually it is them that are closest.

IB: Do you spread who does what?

KL: It is who is closest. I’m not in the habit to ask people for tea or anything unless I am comfortable with them and they with me. I am aware of some peoples’ fear of disability.

IB: How do you ensure that people are comfortable to help you?

KL: I can tell. I don’t specifically ask that question. I usually ask ‘would you mind doing that’. I don’t think I’m putting people in a position. I don’t think anyway.

IB: What tasks have you asked Lisa to help you with? What has been her reaction?

KL: What tasks have been raised as an issue by her?

IB: Making tea, getting lunch, putting on headset, opening toilet door. Is Lisa not part of the group of people you normally ask for help to do these things?

KL: Don't think I've ever asked her to make my lunch [should read: get my lunch]. I remember asking Lisa to put on the headset because there was a comment made about that at the time.

IB: A comment from Lisa?

5 *KL: I asked her to put on headset. [I asked her for assistance to put on my headset.] She said 'Where's Janice?' and I said 'Janice is not here. Just throw it on.'*

IB: Did you get the impression if she was comfortable with it or not?

KL: I never considered it.

10 *IB: What about other tasks?*

KL: Yes. To open the toilet door.

IB: Any reaction from Lisa that she wasn't comfortable?

KL: No.

IB: Do you assume that people will be comfortable helping with that?

15 *KL: It's just to open the door. No other action required.*

IB: Why did you choose Lisa?

KL: There was nobody else there. After the first ones I mentioned, the people next in line I ask are Lisa and two others. There are usually three people sitting in the desks and I ask the first person available. One person
20 *was on the phone so I asked Lisa.*

IB: What are the arrangements for the toilet used – like those downstairs – an initial door with a disabled toilet inside and the main gents toilets ahead?

KL: Yes but on the first floor the main toilet ahead is a ladies. The disabled one is used by myself and Kevin Roy. I find it difficult to open two doors –
25 *it's not an easy manoeuvre.*

IB: On reflection, if Janice, Kevin Roy not available, how appropriate is it to ask a young woman to help with that?

KL: I'd prefer not to ask anyone to help but arrangements don't allow that. In reality, it is opening a door, no more than that...

5 *KM: You say that all is required is for the person helping you to open the door. When we spoke to Lisa, part of the issue she had with this was being asked to wait outside. Did Lisa have to wait outside to open the door to let you out?*

KL: No, she didn't have to wait.

10 *IB: So when you ask someone to help, do you explain what is required?*

KL: There is no need for explanation. The request is 'can you open this door?'

KM: So when Lisa helped you on that occasion – she did not have to wait outside?

15 *KL: No. What did she say happened?*

IB: That she was standing outside and you were going to tell her when you needed to come out. She says that she found it stressful and that she didn't feel comfortable taking you to the toilet.

20 *KL: I didn't ask her to stand outside. [And I didn't know that she stayed outside,] However, saying 'taking me to the toilet' sounds more involved than it actually is – which is to open the door. That's it.*

IB: What did you say to Lisa when you were asking for help – to accompany you to the toilet to open the door?

KL: Yes, 'please come and open this door for me'.

25 *IB: On reflection, do you think there is a need to explain what is required so that people can feel more comfortable?*

KL: *I don't think it's a comfortable thing for anyone but it is something I have to do. [On reflection, I don't think that I am putting anyone in an uncomfortable position by making a request to open a door]. I imagine that I've met her in the space outside the ladies toilet on a number of occasions over the years she's been working here. It is unfortunately what I have to do. We are currently facing a refurbishment of the MH office and there are opportunities for improvements and I have commented on those to take advantage of the refurb to make changes.*

KM: *So when you are asking people for help with tasks, you are saying that there is a range of people who assist you and no-one is singled out for these tasks?"*

85. Mr Laing confirmed that he had noticed the claimant becoming more withdrawn from the team in the previous month or so. Mr Burnett asked about concerns which he had been brought about the claimant about a month before. He said that there had been some general chat about an evening out, during which there was *"some behaviour noted that some people were unhappy – Lisa was one of them. She appeared to be baiting others."*

86. He said that with regard to the comments about personal appearance, *"I have no knowledge of any eating disorder. I don't recall commenting about anyone's body. About boyfriends, my comment there was a flippant one along the lines of 'you are too young for a boyfriend, forget about them until you are 45' or something."*

87. When asked about people having seen him getting his ears cleaned or nails clipped, Mr Laing said that he did not need assistance with that. He added a note later to the effect that he did recall having a torn nail trimmed by Ms Porteous.

88. Mr Laing said that he was aware that the claimant had spoken to Ms Archibald about putting on the headset. He said that Ms Archibald had asked her if she wanted her to speak to him about it, and she had said no.

89. When asked about the extent to which the team were aware of the issues, he said that everyone was. He went on to say *“I imagine the whispering started when Monique got involved.”*

5 90. He invited Mr Burnett to speak to the other members of the team, in order to obtain a full picture. Mr Laing went on to be very critical of how Ms Archibald had been treated, having been advised to go through with a meeting where she was “threatened by the Union”.

91. Following the meeting, notes were sent to Mr Laing, who made some annotations and returned them.

10 92. Mr Burnett then went on to meet with a number of other witnesses in order to investigate the matter.

15 93. Following the investigation, Mr Burnett arranged to meet with the claimant on 12 May 2016, for an Outcome Meeting. He was accompanied by Karen Milne, and the claimant attended with the support of Ms Fernandes-Primrose. The meeting was recorded in notes at 247ff.

94. Mr Burnett summarised the claimant’s concerns, and then said that *“You told me how these actions have led to anxiety and fear about coming into work. From your account I was convinced that the reported actions and behaviours have had a significant impact on your wellbeing.”*

20 95. Mr Burnett then set out a summary of findings from the investigation, followed by an “Outcome Recommendation”:

“Outline summary of findings from the investigation:

- *Some of the witnesses were aware of this issue as you have made them aware that you have been uncomfortable about comments Kenny has made or tasks he has asked you to assist him with.*
 - *In terms of people being able to recall any instance of inappropriate comments they have heard themselves from Kenny, no-one has stated they heard anything they would consider inappropriate.*
- 25

- *In terms of allegations 1, 2 and 3. Some of the subjects of conversations have been corroborated in some way – such as drinking banter and having a boyfriend. Likewise, some issues such as hitting your chair with Kenny’s chair are mentioned by one individual.*
5
- *Some people have stated that you have made them aware of examples when you have felt uncomfortable, such as when Kenny asked you to help him with the toilet door, put the headset on. For me this backs up a consistent picture of you feeling uncomfortable over a period of time.*
10
- *Your line manager confirmed that you have previously raised a concern regarding being asked to assist Kenny with putting his headset on and this concern was not taken any farther.*

In addition, when I have been considering the individual circumstances of this case, I have taken into account that you are a young woman and that Kenny Laing is a manager and the expectations of that role.
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I’m mindful that your request at our initial meeting was simply that you wish the behaviours to stop; however, I must also ensure that any outcome must be robust enough to address the seriousness of the allegations you have raised.
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As you will be aware, the definition of harassment focuses on the impact of any behaviours and I am convinced that what has happened over the past months has had a significant impact on you.

Outcome Recommendation:

In light of the above, I propose that my recommended outcomes fall under the heading of:
25

‘Actions to resolve the concerns raised by the employee who raised issues under this Policy.’

I recognise the seriousness of the allegations you have raised and there are clearly issues here to be addressed.

I propose that a formal outcome meeting with Kenny Laing is held with his line manager, Mark McEwen and Karen Milne to highlight the concerns raised from this investigation and to state expectations for him for the future. This will be recorded and notes held on his file.

This meeting will cover:

- *Serious nature of these allegations – sexual harassment – not intention but the impact, unacceptable especially in his position as a manager*
- *Future expectations regarding inappropriate comments – regardless of intent – it is inappropriate to make personal comments of any kind*
- *Actions around asking people for help with tasks related to his disability*
- *Potential that any further issues may result in formal disciplinary action.*

I have an expectation that this meeting means he will recognise the impact that his behaviour has had on Lisa and that no further issues will be tolerated.

Must also ensure that there are no negative repercussions from Lisa raising this issue – that Scottish Water's policy is in place to allow people to raise concerns – expectation to return to communication on a professional level - no contact is not an option and people must be able to interact on a professional day to day level in the future.

Helping Kenny with Tasks

In the team, I propose that protocols are put in place for assisting Kenny with tasks. I consider it is important that people are asked by their line managers if they are comfortable helping Kenny with these tasks and to opt

in to a team of volunteers that he can call on if needed and people who don't want to participate aren't asked.

Kenny himself must also be mindful that not everyone will feel comfortable helping him with personal tasks.”

5 96. Mr Burnett identified some team actions, including further training on the Dignity at Work policy as some staff were unaware of it, and then moved to deal with actions for the claimant, which were described as “supportive and optional”:

10 *“With Lisa’s approval, I propose that we move your desk to an alternative location away from the corridor and toilet so that you can feel more comfortable at work. I feel that sitting away from the corridor area means Kenny isn’t passing you so often on his way to the Contact Centre. Up to Lisa if this is wanted.*

15 *I am concerned that you felt no-one in the team took your concerns seriously and no action was taken by your line manager and you didn’t feel able to approach your Team Leader, Janice. I think Scottish Water could have addressed the issues sooner if we had been made aware of them. There appears to have been a gap of several months, when you were keeping your diary as advised by the Union, where you received no support because no one else in Scottish Water had been made aware. So in future, it is your responsibility to raise issues proactively within SW or via your Union rep so that we can address matters. However I would propose that your current line management arrangements are reviewed to help ensure that you feel comfortable that your Risk Technician will support you*

20 *appropriately with any issues you may have in the future.”*

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97. The claimant was given the opportunity to appeal against the outcome but chose not to do so, on the basis that she was satisfied with the outcome set out by Mr Burnett. He confirmed his decision in a letter dated 16 May 2016 sent to the claimant by email (250).

98. In his letter, Mr Burnett noted that Ms Fernandes-Primrose had confirmed that the request to review the claimant's current line management arrangements had come from the claimant, and suggested that David Bowman was her preference as a new line manager.

5 99. On 16 May, Karen Milne spoke to Ms Fernandes-Primrose and the claimant, and confirmed to Mr Burnett by email (252) as follows:

“Good news. Monique and Lisa just wanted to say they were fine with the outcome. They wanted to clarify the outcomes and I said a letter was coming so now you have done this then that will meet that request...”

10 *Once Lisa left the room, Monique asked about how we were going to manage the ‘register’ of helpers for Kenny and to clarify the tasks that people may be asked to do for him – and if SW was going to roll this initiative out across the business or all disabled employees – equality of access and all that. So I’ll draft up an email once I have a chance to*
15 *consider what we can say about that.”*

100. Mr McEwen then met with Mr Laing, in the presence of Karen Milne, on 19 May 2016 (257).

101. The findings of the investigation made by Mr Burnett were set out, and the recommendations made were conveyed to Mr Laing.

20 102. Mr McEwen stressed that even though the investigation showed that most of the witnesses did not see or report anything that they considered inappropriate, it was necessary to remain sensitive to those who may see or take things differently.

103. He then advised Mr Laing that as a result of the investigation there
25 was a need to check with people if they felt comfortable in assisting him with tasks. Mr Laing expressed concern about the approach taken to ask people this question.

104. The outcome was summarised to Mr Laing in a letter dated 25 May 2016 (261).

105. On 26 May, Ms Porteous met with the claimant in order to have a discussion about her reintegration back into the team following the outcome of the investigation. Ms Porteous took notes of that meeting (263ff). The claimant was not provided with a copy of these notes at the time.

5 106. Ms Porteous said that she had received feedback that the claimant wished to continue working at the WSD, which the claimant confirmed to be correct. She said *“Yes I want to be part of the team. I want to be treated like everyone else though I know people find it difficult to talk to me.”*

10 107. Ms Porteous proposed that in order to integrate the claimant back into the team, it would be best for them to meet at regular intervals. The claimant agreed. She then asked *“You understand this means you will be reporting directly to me initially as a first step towards integrating you back into the team?”*. Ms Porteous recorded the claimant as replying *“Yes I understand and I’m happy with that.”*

15 108. When it was confirmed that nobody else would be in attendance, the claimant agreed to this but said she wanted to confirm the position with her union representative. Ms Porteous stressed that she wanted to build trust between them, and that would best happen if it were only the two of them present.

20 109. When the claimant suggested that the team had been told that they had to be seen to be happy all the time, not to come in with any problems, and that the risk technicians had told them this, Ms Porteous replied that *“That’s nonsense Lisa, as we’re at work a long time it’s important to me that everyone feels happy while they’re at work, which means I need to know if anyone is feeling worried or stressed at any time so I can help. I’ve always made it very clear that you could speak to me at any time. You and I have met before and we discussed this very thing, I was very open with you, I told you I used to bottle things up, not talk to anyone then it would grow and grow in my mind into a massive issue. I told you at the time if you ever felt*
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like that you could talk to me.”
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110. They agreed to meet weekly for the foreseeable future, usually at 2pm on a Friday. Ms Porteous advised the claimant that she was aware her Aspire review was still outstanding, and that they would seek to complete this the following week. The meeting concluded with two actions required: the claimant would send her comments on how things were going to Ms Porteous by Thursday 2 June; and Ms Porteous would consider a new seating location and arrange a DSE assessment for her.

111. Following that meeting, the claimant spoke to Ms Fernandes-Primrose, who then wrote to Karen Milne on 27 May 2016 (266).

112. In that email, she summarised what the claimant had told her about the meeting which she had had with Ms Porteous. She complained that Ms Porteous had said that “this has placed a huge amount of stress on Janice and the team”, that she had said that the claimant had allowed an issue to become bigger in her mind and making a huge deal for herself, and that they should have meetings every week without a union representative present.

113. She continued: *“So again – why is Lisa being treated differently? Why is Janice bringing up what has happened, this was supposed to be a new start, why does she require meetings every week? This feels punitive, not to mention excessive. And why is she trying to make her feel guilty over what has happened? I am particularly concerned about Janice’s emphasis on the need for these meetings to be one to one. And was looking for her agreement there and then, she was not happy when she said she wished to discuss with her rep.*

After discussions with Lisa, we are not accepting this. So we will look to get a meeting to come to a solution that suits all involved. Lisa is very upset about this, part of her complaint initially was being treated differently from everyone else, and seems she cannot get away for this issue, no matter what happens.

On top of this, there has been another incident with Kenny yesterday. I will allow Lisa to discuss with you when we meet. We may need to think about

moving Lisa to another department, as we cannot get people to behave appropriately. Lisa is actively looking to leave SW as she feels that Janice and Kenny are unable to move past what has happened, despite the fact that Lisa has actually done nothing wrong.”

5 114. The claimant herself also emailed Ms Porteous on 27 May 2016 (267). She said that she would prefer to have her union representative present in all meetings for the next few months, until such time as she felt “comfortable and well supported”. She continued:

10 *“Whilst I appreciate that you feel that this proposal is, in your opinion, a supportive measure, I feel that I am not sure that I wish to be treated differently from everyone else, and that the frequency of the meetings you have proposed to be excessive and perhaps unnecessary. I would feel more comfortable to have these meetings monthly and if I feel any urgent meetings are required, I am sure that I can come to you with any concerns.*

15 *Please understand the stress that this has placed on me, and how little trust I have for management given what has transpired. I am willing to build that trust again and will work to do this, but it will take time.”*

20 115. Ms Porteous was surprised to receive this email. This was the first time she was aware that the claimant had lost trust in management, and therefore that she did not trust her. She felt that there had been a positive meeting, which was now seen in a different light.

25 116. On 6 June 2016, Ms Fernandes-Primrose emailed Fiona Maxwell, of Human Resources, to raise her ongoing concerns about the proposals made for the management of the claimant (269A). She complained that Ms Porteous was making the claimant feel even more isolated than before, and wanted to know how HR was proposing to address these matters.

117. Fiona Maxwell decided to arrange a meeting involving the various individuals in order to agree a way forward. That meeting was due to take place on 13 June 2016. Prior to the meeting, she met with Ms Porteous to

explain who would be in attendance (275), and told her she should not worry about it.

118. The meeting took place at 2pm on that date. Ms Porteous kept notes of the meeting (276ff). In attendance were Ms Maxwell, the claimant, Elaine Noble, Ms Fernandes-Primrose, Carolyne McCreath (an HR consultant) and Ms Porteous. The claimant opened the meeting by saying that she felt isolated, and treated differently, particularly as she did not have a team coach. She suggested that David Bowman would be a good choice for team coach for her (that is, to be her line manager, at the same level as the other risk technicians).

119. Ms Porteous confirmed, however, that Mr Bowman did not “share Lisa’s view”, and went on to say that as the claimant did not trust management, management did not trust her. On questioning, Ms Porteous confirmed that she had shared the claimant’s comments with her management team, to which the claimant responded by expressing that she felt “so hurt”. Ms Porteous found this comment surprising on the basis that several of the team coaches had accompanied staff to their investigatory interviews as part of the grievance procedure, and therefore were aware of the circumstances.

120. Ms Porteous went on to say that nobody was willing to manage the claimant, and explained why there was a lack of trust in the claimant by referring to her understanding of the meeting of 26 May which had, she said, been twisted beyond recognition by the claimant.

121. There followed a lengthy discussion, at the end of which Ms Porteous confirmed that she had not been given a copy of the outcome of the grievance process, and therefore did not know precisely what the recommendations were. It was accepted that there were failings on the part of HR in communicating about this. It was agreed that there would be a further meeting in a week’s time, and that the claimant and Ms Noble would meet with Ms Porteous the following morning to conduct her Aspire review.

122. The Aspire meeting passed without difficulty, and Ms Porteous made it clear that she was very comfortable having Ms Noble present during such meetings.

123. The follow up meeting took place on 21 June. Notes were taken by Ms Porteous (292). The same individuals attended, except Ms Maxwell and Ms McCreath.

124. Ms Porteous asked the claimant how she was feeling. She said that she was feeling *“a lot happier and enjoying coming to work”*. They discussed where she was to be seated, and other matters. Ms Porteous confirmed that in the meantime she would continue to be the claimant’s line manager, to which she recorded the claimant as having laughed and said that this was fine.

125. A further meeting took place on 8 July 2016, with the claimant, Ms Noble and Ms Porteous in attendance (295). The claimant confirmed that she was happy with the location of her seat. She accepted the feedback she had received from others in relation to some work issues.

126. At the conclusion of the meeting, Ms Porteous noted as follows under the heading of “General”:

“Lisa said she thinks our meetings are going well and wondered if they could now be extended to monthly, if she had any issues or concerns in between that time she would speak to me. Lisa said she had discussed this with Elaine.

I said ‘yes fine by me’ I added we’re all busy people (looked at Elaine) and monthly would be preferable. I asked Lisa if that meant only me and Lisa or would she still like Elaine to attend.

Lisa said she would still like Elaine to attend the next two meetings.

Elaine confirmed she’d spoken to Lisa about this; she saw this as a very positive step forward and stated she has advised Lisa to speak to me (Janice) directly in between that time (without Elaine) if she had any issues.

I asked Lisa to promise she come to me if she has any issues or if anything is worrying her as 'I know what you're like, you're very sensitive and get anxious, we've discussed this in the past you and I, you take things to heart then everything gets out of proportion, grows arms and legs'. Lisa agreed and confirmed she would come to me."

127. On 3 August, a further meeting took place with the claimant, Ms Noble and Ms Porteous in attendance (298).

128. Ms Porteous asked the claimant about some performance issues which had been raised with her, such as billing errors. She then asked if anything was bothering her, to which she replied "no". Ms Porteous asked her about Monday 1 August, when it had been said that the claimant had banged her locker door and thrown her bag on to her desk, without saying hello to those around her. She stressed that this was not acceptable, and that she wanted to ensure that everything was okay. The claimant acknowledged she could be more aware of her surroundings. She wondered why it was that her performance was being highlighted, and felt she was being singled out. Ms Porteous stressed that she was aware of everyone's performance, and that she was not being singled out.

129. Ms Porteous then recorded that *"Lisa said she would be happy to meet with me on my own next time without Elaine in attendance...Elaine interjected at that point to confirm she had discussed this with Lisa, Elaine said she felt the meetings were going well and that it was clear we had built up a good relationship, which she saw a very positive step forward."*

130. When Ms Porteous met with the claimant on 26 August 2016, without any others present (301), the claimant confirmed that she was *"Happy feeling good, been speaking to more people at work about work (Leanne, Autumn)."* There was a discussion about where she saw herself in 5 years' time, following which the claimant mentioned her CV and suggested that they might look at it in the future, to which Ms Porteous confirmed she would be happy to help.

131. On 8 September 2016, Grant McIntosh met with Ms Porteous (307). Mr McIntosh was the Revenues Team Leader, and he explained that he had received an application from the claimant to be seconded to his team. He said he was keen to interview her. He wanted to understand why the claimant was no longer managed by Jane Archibald but by Ms Porteous.

132. Ms Porteous explained:

- *“Lisa had taken offence at some comments made by Kenny*
- *Had approached Union instead of speaking to me or Jane*
- *Investigated – no case to answer*
- *Line management moved to me*
- *Between Elaine Noble (Union) and me, we have resolved the situation”*

133. She said that the claimant had great attendance, was punctual and good productivity, but quality could be an issue. However, she said that the claimant was receptive to feedback, and thought she would fit in well in the team and do a good job. She commented that as an introvert the claimant found it difficult to cope in an extrovert environment like the WSD.

134. Mr McIntosh considered that there were positive aspects to this move, and determined to speak to Marie Paton, the Revenue Team Manager, about this.

135. Ms Porteous noted that the claimant had not mentioned to her that she had applied for this position. She was surprised and disappointed at this. Given that this was a secondment, the claimant would require the permission of her current team to be seconded from them to another team.

136. On 26 September, the claimant returned from leave and asked to speak with Ms Porteous (308). She said that she had applied for the secondment with Mr McIntosh’s team, and thought that this would be good opportunity for a fresh start. Ms Porteous confirmed that Mr McIntosh had

spoken to her about this and expressed her surprise that she had not mentioned it to her herself, but agreed that this would be a perfect move for her. She also said that they did not normally do secondments so would need to seek advice. When the claimant raised concerns about it being a seconded role, Ms Porteous reassured her that she would still have a job with the respondent, and salary and benefits would remain in place.

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137. On 28 September, the claimant emailed Ms Porteous (308) to ask her to confirm that the WSD did not allow secondments. She felt her meeting with Mr McIntosh had gone well. She sent the claimant a copy of the secondments policy.

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138. On 30 September 2016, Ms Porteous and Ms Noble met to discuss this. Ms Noble opened the conversation by saying that she needed to understand why Ms Porteous was blocking her move. Ms Porteous replied by saying that she was not blocking her move, and that in fact she thought this would be a great move for the claimant. She stressed that the claimant had not discussed this with her before applying, and that she would have to obtain the authorisation of Mr Laing. She also confirmed that the claimant would have a place back within the Contact Centre set up as a Customer Advisor, which may not be in the WSD.

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139. After further communications, the claimant was offered the secondment within the Revenues Team, and expressed happiness to Ms Porteous about this.

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140. The claimant met with Ms Porteous on 11 October expressing anxiety about moving to the Revenues team, and her unwillingness to move back to the Contact Centre (311). She complained that she did not feel wanted. Ms Porteous sought to point out the positive aspects of the move, and expressed frustration that she was saying all of this after they had sorted the move out for her. On 12 October Mr McIntosh emailed Ms Porteous to confirm that the claimant had accepted the secondment offer, though she was off sick at this point (312).

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141. On 17 October 2016, the respondent wrote to the claimant (313) to offer her secondment as Exemption and Allowance Adviser within the Wholesale Revenue Management Team, commencing on 24 October 2016, and not exceeding 28 February 2017. She was entitled to the same terms and conditions as before, with the addition of a 5% Temporary Responsibility Allowance for the duration of a secondment. The claimant accepted the secondment and moved to sit with the Revenues team, on the second floor of the respondent's office.

142. On 8 March 2017, the claimant was offered a further secondment as a Wholesale Finance Analyst within the Wholesale Revenue Management Team (327). Her manager was to be Magdalena Dubiel, and the secondment was until 31 July 2017. She was to receive a 10% Temporary Responsibility Allowance during that secondment.

143. Her secondment in that post was further extended on 22 May 2017 until 31 October 2017 (329), and thence, on 26 July 2017, to 31 December 2017 (332). On 23 November 2017, the respondent wrote to the claimant to inform her that her secondment as Wholesale Finance Analyst was being extended until 31 January 2018.

144. The claimant was absent on holiday until approximately 11 September 2017. Upon her return, the Billing team, of which she was now part, had been moved to the 1st floor, into the former Contact Centre area of the floor. Although that desk was not directly in the line of sight of Mr Laing's, she would require to pass his desk if she had to attend a meeting in the Lewis or Jura meeting rooms.

145. In early December 2017, a meeting took place in a lounge bar, called the Pavilion, next to the respondent's offices, to inform the staff, including the claimant, of the progress made in the process of refurbishing the building. As a result of that progress, Mr Lavery informed staff that the claimant's team and the WSD were to move to desks on the ground floor. Those desks can be seen on the plan at 377. The WSD were to be placed at the far left hand corner of the ground floor, and the Exemptions team at

the set of desks near the Uist meeting room, diagonally opposite but with some distance between them. It was clear that the two teams were to be considerably farther apart than they were to be on the 1st floor. This information was given to staff, including the claimant, at that meeting. The exact date of that meeting was not clear from the evidence but we concluded that it was before the claimant handed in her resignation.

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146. The claimant applied for a position in the school office at Liberton High School in September 2017. She was interviewed in early October 2017, and was offered the position at the end of October, subject to checks with Disclosure Scotland. She accepted the offer, recognising that it was conditional upon the background checks being carried out. She was informed by Liberton High School on 11 December 2017 that her start date for the new post would be 8 January 2018, and accordingly handed in her notice of resignation from employment with the respondent on 12 December 2017.

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147. The claimant submitted her resignation while absent on sick leave. She came in to the office and handed her letter of resignation to Mr Lavery on 12 December. The letter itself, which was dated 11 December 2017, read as follows:

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“Dear Richard,

This letter is to notify you that I have decided to resign from my role as Finance Analyst with Scottish Water.

25

As my secondment with the Billing Team ends in January, I would be expected to return to the Wholesale Service Desk. A place where I have fond the working conditions to be unacceptable and extremely unprofessional as well. I have experienced continual sexual harassment from a colleague and bullying thereafter whilst working in that department, this has caused me undue stress and health problems. I have therefore had to seek employment elsewhere.

Please accept this letter as my official notice of resignation. My contract requires me to give 4 weeks' notice, therefore I believe my last working day here would be Friday 5th January 2018.

5 *Despite my negative experiences in another department I wish to thank you for the opportunities that you have given me during my time in the Billing Team. I have really enjoyed my time working within this team and if there is anything I can do to make the transition to my new job easier, please let me know.*

Yours sincerely,

10 *Lisa Aird*

148. Mr Lavery made a short note of his discussion with the claimant when she handed in this letter (338). When he realised what the letter said, he suggested that they go to a private office to discuss matters further, to which the claimant readily agreed.

15 149. He noted that she was resigning, and that she had obtained a new role at a school, starting on 8 January. She confirmed that she had been happy in Billing. He noted that *"Motivation has been job security and not wanting to return to WSD, concerns about stress and health implications."*

20 150. She went on to tell him that she felt that her health had suffered during her last year in WSD, and that harassment had continued while she was in Billing:

- *"Watching her walking down corridor and smirking*
- *Smirking at her whilst being picked up in car park*
- *Janice passing her in corridor without looking at her*
- 25 • *Neither has actually spoken to her."*

151. She said that her desk move to the 1st floor had exacerbated matters, and that she had felt she had a promising career in WSD and now has not.

She said she felt aggrieved that Mr Laing had never apologised nor attempted to resolve the issue.

152. Mr Lavery asked the claimant if she wanted him to raise this with Human Resources, but she asked him not to do so. Following the meeting, he consulted with Karen Milne, who recommended that an exit interview take place, with Helen Hewitson of HR in attendance, in order to gain information from the claimant as to the reasons for her resignation.

153. Mr Lavery invited the claimant to attend an Exit Interview, which took place on 5 January 2018. Mr Lavery was in attendance with Helen Hewitson, People Consultant, and the claimant attended and was accompanied by James Cluness, Union representative.

154. Notes were kept as a summary of the meeting (342).

155. The claimant set out the history of the events in WSD as she saw them. It was noted:

15 *“Following the investigation LA said that she had not had a team leader and reported directly into Janice Porteous. She described an incident when Janice had told LA that no team leader wanted her. LA said that everyone else could see that she was being singled out and that even new starts noticed that she had no team. LA changed seats and she understood the reason for this but this also meant that she was out of the team. She no longer rotated tasks as the rest of the team did and was on the same task for 5 months and training new starts but couldn’t understand if she was training why she was getting negative comments...*

20 *These points made LS [LA] conscious of going to the toilet and just walking. Her friends stopped talking to her and at group huddles she stood at the edge. HH asked if LA had highlighted this incidents and how it had made her feel to People Consultant. LA said that she had spoken to the Union (not JC) and was told to be strong and get on with her work. LA said there were a few meetings after the investigation to try and rebuild the relationship but nothing since. LA said that she had been trying to just*

solely survive and thought that if she raised these incidents with People it might make things worse and so she felt she couldn't go to HR...

5 *LA described that she took the secondment in RL's team as she was clearly not wanted where she was but that when the secondment ended she would go back to the Wholesale Service Desk however Janice said if she came back it would be to the contact centre. LA was concerned that she had heard that Janice had told Marie (RL's team) that she should reconsider taking LA on. RL confirmed that Marie did speak to Janice as is normal when taking someone on. He said he didn't know the detail of the feedback*
10 *but that they were more than happy to have LA. RL said very clearly that there had been no concerns with LA while she had been in his team.*

15 *LA then described how she is a shell of her previous self but that she felt safe in RL's team. Even in the new team, LA described Kenny tilting his chair and smirking at her when she walked along the corridor which made even walking to her desk traumatic. LA felt that she couldn't even go to the canteen and often ate lunch in her car and sometimes when she was particularly struggling, her mum would come and meet her. She said that RL's team had kept an eye out for her. RL asked if things had been better since she had left the Wholesale Service Desk. LA said that it had helped*
20 *to leave the team and that Billing team had said they would help and that meant the world. She said that it helped that she knew RL was only interested in her work which was great as she was trying to do well..."*

156. Mr Lavery advised the claimant that he had been aware that she did not want to go back to her previous role, but not of any further background
25 until she had received the resignation letter from her. He said that it had been his intention to extend her secondment until spring in order to support the year end peak in Exemption volumes but that this would not have addressed her concerns about working close to Mr Laing's team as the intention was to continue to have the two teams located together.

30 157. Ms Hewitson stressed that the respondent would "never knowingly" have placed the claimant back in her previous role, and that there were

options which could have been considered. She said that the claimant could have reconsidered as these options were still available, but the claimant confirmed that she was due to start a new job “which she was excited about”.

5 158. The claimant was offered her new role as a Clerical Assistant working in the office of Liberton High School, employed by the City of Edinburgh Council, commencing on 8 January 2018, on grade GR3. Her hours of work are 36 per week, and her starting salary £16,195. Her terms and conditions (347) confirmed that she was to receive an actual pro rata
10 salary of £14,090.70, and that she would be a member of the Local Government Pension Scheme provided by Lothian Pension Fund. Lothian Pension Fund also provided the pension scheme of which she was a member when employed by the respondent.

158. The claimant had a period of absence from work in October due to
15 eye surgery.

160. She was upset by the events surrounding the move back to the 1st floor in September 2017, and then by being informed that the more permanent move for the two teams, to the ground floor, was to take place in January 2018. She described a panicky feeling which would affect her on a
20 regular basis during that period from September 2017, and how she sought to avoid seeing Mr Laing and Ms Porteous during that time. She communicated a great deal with her mother, who behaved very supportively towards her and met her on a number of occasions at lunchtimes when concerned that the claimant was upset.

25 161. The claimant was offered the opportunity to have counselling by the respondent, and took that up, again during the course of 2017, for approximately 5 sessions.

Submissions

30 162. The parties’ representatives made submissions at the conclusion of the evidence. These are summarised briefly here.

163. For the claimant, Ms Shiels commenced by summarising that this is a case of unfair constructive dismissal, with a background of discrimination. The conduct complained of, she said, was conduct extending over a period under section 123 of the 2010 Act, to be treated as done at the termination date.

164. She submitted that the evidence showed that the issue here was the treatment of the claimant by Mr Laing from the start, and by others within the team. This treatment continued into the claimant's secondment into Mr Lavery's team, because of the close proximity of the two teams, bringing back all the claimant's stress and concerns. There was evidence of Mr Laing smirking and staring at the claimant over a period of time, which renders this a continuing series of acts.

165. If this is not accepted, Ms Shiels argued that the Tribunal should consider it just and equitable to allow the complaints to be received albeit late.

166. She then addressed the claimant's claim of direct discrimination on the grounds of sex, under section 13 of the 2010 Act. She relied upon comments which would not have been made to a man.

167. The claims for harassment on the grounds of sex were based on the comments made by Mr Laing, engaging in unwanted conduct in making comments to her related to sex, such as boyfriends, and getting pregnant, under section 26 of the 2010 Act. She also submitted that some of the requests for personal assistance by Mr Laing were requests, such as to open the toilet door, which were not made to a man.

168. The victimisation claim, under section 27 of the 2010 Act, related to conduct following the claimant having raised a grievance, and that conduct included the conduct of the grievance itself, as well as what the respondent failed to do in implementing the recommendations following the grievance outcome.

169. The claimant also advances a claim of disability discrimination by association, which, Ms Shiels said, could be direct discrimination or harassment.

5 170. Ms Shiels then submitted that the claimant was very young when first employed at the respondent's offices. Young women, she said, are now more aware of discrimination, but still lack awareness of their legal and statutory rights. People who challenge such conduct should be supported if attitudes are to change. What often happens, she submitted, is that the victim is blamed, or there is an attempt to assassinate her character or
10 deride her competence. In this case, the grievance was "fudged". The claimant believed that her grievance was upheld, at least in part, whereas the respondent believed that the grievance was not upheld.

171. Ms Porteous told Mr McIntosh that the outcome was that there had been no case to answer. Ms Shiels observed that perhaps this is what Mr
15 Laing had told her.

172. She submitted that the claimant was open and honest in her evidence, calmly and honestly dealing even with those parts of the evidence which might be embarrassing to her. She was unaware at the time of what
20 any of the witnesses said in the grievance investigation until the preparations for this hearing. What does seem clear is that there was a lot of discussion within the team about the grievance.

173. The claimant was looking forward to promotion and development, and in 2015 believed she was going to be the next members of staff put forward for development. She went to Ms Archibald when she was upset
25 that this was not going to happen. She raised complaints with Ms Archibald, and it is clear that she did not share the claimant's view of what she was telling her. She started keeping a diary but did not want to mention it to Ms Archibald because she was not confident that she would receive a sympathetic hearing, after Ms Archibald had suggested that it would be a
30 good thing that Mr Laing request her assistance, as he felt comfortable round her.

174. With regard to the unfair dismissal claim, Ms Shiels noted that the respondent may seek to argue that the claimant had affirmed the breaches up to the point of the grievance because she agreed to go back into the WSD team, but none of the recommendations were implemented, and she was ambushed by Ms Porteous for an integration meeting.

175. Things improved for her when she moved away to Mr Lavery's team on secondment. In September 2017, when she realised that her team was moving back to the same floor as the WSD she became worried. Her new team was supportive, but everything went back to how it was before, with Mr Laing staring at her, and nobody from her old team speaking to her. She applied for the job in Liberton High School after a couple of weeks in that environment. She did not know how long the secondment was to continue for, and knew that she could not return to her old team when it ended.

176. Throughout September to November, the claimant remained hopeful that her secondment would be extended, or even that her position may be made permanent, but all that changed on 5 December 2017, said Ms Shiels, when she discovered that both teams would be working permanently on the same floor.

177. Ms Shiels said she considered Ms Fernandes-Primrose to be an impressive and measured witness. She made clear that what the claimant had been subjected to was unacceptable and needed to be resolved.

178. Ms Shiels criticised the noting of informal meetings by respondent's managers, which she considered to be inappropriate.

179. She submitted that Mr Laing was not a reliable witness. He said he did not remember being told about the importance of confidentiality by Mr McEwen, and was not forthcoming in answer to some questions put to him. He admitted that he needed assistance to get out of the toilet door, something which was specifically denied in the ET3. It was more plausible to believe that he would knock on the door to alert others to the need to open the door for him when he wanted to get out of the toilet, than that he

would hold the door handle and put his chair in reverse to attempt to open the door.

180. Mr Laing was strongly opposed to a voluntary register of those willing to help him with daily tasks, as he felt that he could ask anyone to help him. Ms Shiels submitted that he is entitled to reasonable adjustments, and to assistance, but that that is an obligation falling on his employer, and not on his colleagues. He was not willing to engage with an Occupational Health discussion about what reasonable adjustments could be offered by the respondent. She pointed out that there are schemes which are available to Mr Laing as a person with disabilities.

181. When Ms Porteous took the claimant away on her own for the reintegration meeting, Ms Shiels described this as a “despicable act”. She should have had the right, she said, to have had her union representative present with her at such a meeting.

182. Mr Burnett’s investigation was inadequate, as he failed to offer protection from collusion among witnesses. It was not appropriate to allow team leaders to accompany witnesses to meetings. David Bowman accompanied Autumn McKendrick to her investigation meeting, and it was later said that he was not willing to be the claimant’s line manager. Mr Burnett admitted that he did not investigate all the issues, something which Ms Shiels said was a serious failure. He did not ask obvious or probing follow up questions. The claimant did not get the chance to see the “case against her”, and what was provided was “worse than useless”.

183. The Dignity at Work policy clearly provides that at the conclusion of the investigation there should be a report. The claimant was singled out and treated differently from other staff, in the things which she was asked to do. She had never seen anybody else being asked for help or being spoken to about the other comments. No men were mentioned in the ET3 or brought as witnesses to address the issue of men being asked to carry out personal tasks (for Mr Laing).

184. Mr Lavery accepted that the real stumbling block for the claimant wanting to stay with the respondent was the proximity to the WSD.

185. Ms Shiels then addressed the various heads of claim. She referred the Tribunal to certain well known authorities. Certain conduct, she submitted, will always amount to breach of contract, including discrimination, victimisation and singling someone out for detrimental treatment; breach of the grievance procedure may be a breach of the implied term of trust and confidence; failure to provide support to the claimant to enable her to carry out her duties would also be a breach; the failure by Mr Laing and Ms Porteous to cooperate with the implementation of the recommendations of the grievance outcome and the failure of Ms Archibald to protect the claimant's mental health would all amount to breaches of the implied term.

186. She submitted that breaches which the respondent may argue have been affirmed are in fact capable of being revived, referring to **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 CA**. She argued that in this case, the claimant alleged that breaches had occurred, and they continued following the outcome of the grievance. The claimant cannot go back on her previous affirmation but she invited the Tribunal to look at the post-affirmation conduct to establish whether that is also repudiatory. Viewed cumulatively, the course of conduct amounted to a breach of the implied term of trust and confidence.

187. The respondent has, she said, conceded that it did not take reasonable steps in relation to Mr Laing in connection with the outcome of the grievance, and this only has to be connected with the protected characteristic to be identified as harassment on the grounds of sex. The complaints speak for themselves. Some are related to sex – such as being asked about boyfriends – and some are of an overtly sexual nature. There is no evidence that Mr Laing ever spoke to any of the men about anything but football. None of the men were told they looked all right or were skinny, nor were they asked if they had a girlfriend or a boyfriend. Men would not have been called “sexy bum” or “sexy arse”.

188. The claimant makes a claim that she was discriminated against by association with the disability of Mr Laing. While this is normally related to the claimant's personal circumstances, section 13 and section 26 do not require that. (At this point, Ms Stobart accepted that this was a stateable claim).

189. Ms Shiels submitted that the respondent's failure to make reasonable adjustments for Mr Laing was the unlawful discriminatory background which required Mr Laing to seek the assistance of others, and if they were uncomfortable with that, there was no doubt that it was related to Mr Laing's disability.

190. The Tribunal must consider the effect on the claimant of Mr Laing having to ask people for help. He said he did not think about it. The claimant said she was uncomfortable helping Mr Laing because she was worried she would do it incorrectly. The issue with the toilet door was that she did not know that she was not required to wait. The claimant felt, she said, that she feared she was being "groomed to become Janice Porteous's number 2".

191. Gestures and facial expressions are capable of amounting to unwanted conduct on the part of Mr Laing towards the claimant.

192. With regard to the question of remedy, the claimant's schedule of loss was tendered to the date of the Tribunal hearing. The claimant found another job immediately but with a lower salary. She was so desperate to leave that she was prepared to take that lower salary. Ms Shiels submitted that she would hope that the claimant will recover from the stress after a year or so. Future continuing loss could be justified up to 6 months. The claimant refused any medical treatment.

193. The claimant's new job places her in the same pension scheme, but with a difference in the contributions she requires to make. As to injury to feelings, the claimant seeks an award in the middle band of **Vento**. The treatment to which the claimant was subjected went on over a long period and had a detrimental effect upon her health and confidence. Ms Shiels

submitted that some of the things done were “horrific”, such as the way the grievance was treated and the way the outcome was handled.

194. Ms Shiels invited the Tribunal to find in favour of the claimant on all heads of claim, and to award her compensation in line with the schedule of loss.

195. For the respondent, Ms Stobart presented a written submission. Again, a summary of that submission is set out here.

196. She set out the findings in fact which she considered it appropriate for the Tribunal to make, and then addressed the different claims presented by the claimant.

197. Ms Stobart submitted that the claimant was not a credible nor reliable witness. She argued that the claimant was prepared to exaggerate and embellish to the point where it is unclear what is true and what is not. As an example she said that Ms Porteous would carry out certain personal tasks for Mr Laing, which moved from Ms Porteous once trimming a ragged fingernail to cleaning his ears and brushing his hair, both of which are false. The claimant, she said, also made false claims that she was the only person who was asked to help Mr Laing with personal tasks, but it was inconceivable that she would not have seen others being asked to help him.

198. Ms Stobart said that another wilful misinterpretation by the claimant was when she alleged that Ms Archibald was trying to encourage her to leave the company because she gave her an advert for an external job. This was an example of the claimant twisting the truth to make Ms Archibald appear unsupportive, when the truth was that she was a supportive manager.

199. By contrast, Ms Stobart submitted that Ms Porteous was a clear and straightforward witness, who does not dissemble and records matters whether they are to her advantage or not.

200. With regard to Mr Laing, Ms Stobart described him as being in a difficult position of being accused of matters which he did not recognise. It

was not surprising that he was angry when presented with the accusations during the investigation, but in any event he did make certain concessions, and made other denials. He accepted making certain comments to the claimant about texting, about boyfriends and about alcohol, though Ms
5 Ms Stobart suggested that these were not personal comments but more directed at the team. He was accused of smirking at the claimant after the grievance investigation was completed, and he denied this. He was taken
10 aback by the allegations and became withdrawn from involvement with people, and more reluctant to ask them to help. Ms Stobart argued that this more withdrawn disposition made it very unlikely that he would be smirking
at the claimant or moving his chair in her direction. She invited the Tribunal to find that Mr Laing was a credible witness who did not engage in sexual harassment.

201. She submitted that the investigation carried out by the respondent
15 into the grievance was thorough. The witnesses were drawn from a pool suggested by the claimant, and included witnesses who the claimant believed would have heard the inappropriate comments which she alleged were made. It was reasonable, she said, not to put to witnesses precisely
20 what the claimant had alleged had been said but to ask more generally whether they had heard anything inappropriate being said by Mr Laing. She submitted that neither the claimant nor her union representative had complained at the time they received the outcome that the process had
25 been unfair, and accepted the findings made and the recommendations issued.

202. Making Ms Porteous the claimant's line manager was not
unreasonable, said Ms Stobart, given the difficulty in finding another team
30 leader who was either able or willing to manage her. Ms Porteous believed that the meeting which she then conducted with the claimant were constructive and positive, but found that the claimant had "twisted" what had been said. However, following further meetings, she submitted, the claimant was much happier coming into work and things were going well.

203. Ms Stobart then addressed the sequence of events leading to the claimant's secondments, and her subsequent resignation, citing that the reason for resignation was in fact that she had sought and secured alternative employment at Liberton High School.

5 204. Ms Stobart submitted that the harassment claims are out of time. The claims relate to conduct which allegedly occurred in 2015 and 2016. There is no continuing course of conduct and in any event the claimant would have to show that the unwanted conduct is related to either her sex or disability. If the claims are out of time the Tribunal should not exercise its
10 discretion to allow them to proceed even though late. She argued that had the claimant wished to raise proceedings in relation to harassment following the investigation, she could have asked her trade union to do so on her behalf, but did not do so.

205. In the event that the Tribunal finds that it is in the interests of justice
15 to allow the claim of harassment to proceed, Ms Stobart submitted that the claimant was not a credible witness, and that had inappropriate remarks been made to her in the circumstances she suggested others would have said that they had heard something. For there to be a finding of harassment, she said, the Tribunal would require to find that Mr Laing made
20 remarks such as 'sexy bum' on occasions, or that he made gratuitous comments about her body while looking her up and down. There should be no such finding here given that the claimant's evidence was generally exaggerated, Mr Laing denied it and no other witness confirmed that they had heard him make such remarks.

25 206. She then addressed the claimant's claim of disability discrimination, based on Mr Laing's disability. She accepted that an employer may in theory discriminate against an employee on the basis of a protected characteristic which the employee does not possess. Here, the claimant is suggesting that she was treated less favourably because she was obliged to
30 assist the claimant with personal tasks, and others were not. Being asked to open a door was not less favourable treatment on the grounds of disability.

207. In addition, said Ms Stobart, the claimant has suggested that she was harassed based on the protected characteristic of Mr Laing. There was no unwanted conduct here, and in any event, being asked to open a door does not constitute unwanted conduct.

5 208. Ms Stobart argued that the claimant was not subjected to any detriment following the making of the Dignity at Work complaint

209. She then addressed the constructive unfair dismissal claim. She referred to section 95 of the Employment Rights Act 1996 (ERA), and said that the employer's conduct must involve a repudiatory breach of contract.

10 210. The alleged breach was that the behaviour of Mr Laing, and of Ms Archibald and Ms Porteous amounted to repudiatory breach of contract, but Ms Stobart argued that the claimant said that she resigned in response to an anticipatory breach, namely that she was to be put back to the WSD. If this was the case, the claimant should have resigned in response to the
15 actions of her managers in 2016, but she did not.

211. The respondent conducted a thorough investigation and formed a conclusion, in which it was said that the claimant was uncomfortable as a result of a number of matters, including the request to open the toilet door. However, she said, they did not accept that the claimant had been sexually
20 harassed by Mr Laing. Following the grievance procedure, Ms Porteous was not made aware of the outcome and recommendations, but any misunderstanding did not amount to a fundamental breach of contract. The claimant did not resign, and continued professionally.

212. The claimant had no particular dealings with Mr Laing after May
25 2016. There was an unfortunate incident at the buffet but Mr Laing was "raw" at how he had been treated by the respondent, and made a comment which was not intended to be heard by the claimant. The claimant was offered a job outwith Scottish Water, but did not accept it, preferring to remain in the employment of the respondent, which demonstrated that there
30 was no repudiatory breach of contract.

213. The claimant, she said, pointed to a continued course of conduct, wherein Mr Laing smirked and stared at her in order to intimidate her. Ms Stobart invited the Tribunal to find that he did no such thing. The claimant made no complaint about this. The matter was not put to Mr Laing in cross examination.

214. Ms Stobart said that the claimant resigned in relation to an anticipatory breach, namely being moved back to WSD. There is nothing to suggest that she would have been moved back to WSD, and if she had stayed would have been likely to have her secondment extended. She could have contacted HR to make clear her concerns and fears, but did not do so.

215. Ms Stobart argued that the reason the claimant resigned was that she accepted a new job in November 2017, and her start date was confirmed the day before she resigned, therefore demonstrating that her resignation was unrelated to any repudiatory breach of contract.

216. Ms Stobart argued that if the Tribunal were to find that the claimant was unfairly dismissed, or discriminated against, her compensation should be very limited due to her failure to mitigate her losses by seeking more lucrative employment since joining Liberton High School, and also the injury to feelings award should be in the lowest band.

The Relevant Law

217. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, inter alia

“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which

he is entitled to terminate it without notice by reason of the employer's conduct.”

218. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for claims of constructive dismissal is **Western Excavating -v- Sharp [1978] ICR 221.**

219. In considering the issues the Tribunal had regard to the guidance given in **Western Excavating** and in particular to the speech of Lord Denning which gives the “classic” definition:

“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, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.”

220. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

“...whether the employer's conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably,

if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."

221. What the Tribunal required to consider was whether or not there was
5 evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

222. We were also referred to, and took account of, the well-known
10 decision in **Malik v Bank of Credit & Commerce International SA [1997] IRLR 462**, in which Lord Steyn stated that "The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

15

223. It is also helpful to consider the judgment of the High Court in **BCCI v Ali (No 3) [1999] IRLR 508 HC**, in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is "whether that conduct is such that the employee
20 cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice."

224. In **Jones v Collegiate Academy Trust UKEAT/0011/10/SM**, the
25 EAT stated: "It is important to note that an objective test is to require whether the conduct complained of is calculated or likely to destroy or seriously damage the relationship; the subconscious of intent of the respondent is irrelevant as the Employment Tribunal correctly held... The subjective perception of the employee is also not relevant. The respondents' conduct must be repudiatory in order to establish a breach of
30 the implied term; it must be conduct by the respondent which objectively considered it likely to undermine the necessary trust and confidence in the employment relationship."

225. **Omilaju v Waltham Forest London Borough Council [2005] 1 All**

ER 75 is helpful in considering whether or not the resignation of an employee is a response to a last straw in a series of acts by the employer which amount, together, to a fundamental breach of contract. It is noted in that judgment: “The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.” This endorses the view of the court in **Lewis v Motorworld Garages Ltd [1985] IRLR 465**: “The breach of this implied term of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?...This is the ‘last straw’ situation.”

226. The Tribunal also took into account the Employment Appeal Tribunal decision in **Wright v North Ayrshire Council UKEATS/0017/13/BS** from June 2013. In that case, having examined the line of authorities relating to claimants who resign for more than one reason, Langstaff J cautioned against seeking to find the “effective cause” of the claimant’s resignation, but found that Tribunals should ask whether the repudiatory breach played a part in the dismissal.

227. Finally, under this head, the Tribunal was referred by parties to **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 CA**, and considered this as part of its reasoning.

228. Section 13(1) of the Equality Act 2010 (“the 2010 Act”) provides:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

229. The Tribunal also had reference to section 26(1) of the 2010 Act:

“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...”

230. Section 27(1) of the 2010 also provides:

“A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.”

231. Section 27(2) confirms that a “protected act” includes *“making an allegation (whether or not express) that A or another person has contravened this Act.”*

Discussion and Decision

232. The Tribunal required to identify the issues for determination in this case. It appears that it was expected that a Joint List of Issues would be produced to the Tribunal, along with a Joint Statement of Facts, in advance of the full hearing (paragraph 8, Employment Judge Porter’s Note dated 13 July 2018)(61). A Joint Statement of Facts appears among the Tribunal papers but no Joint List of Issues.

233. However, it appeared to us that the issues were relatively clearly defined, as follows:

- 1. Was the claimant unfairly constructively dismissed by the respondent in terms of section 95(1)(c) of ERA?**

2. **Was the claimant directly discriminated against on the grounds of her sex in terms of section 13 of the 2010 Act?**

3. **Was the claimant subjected to harassment on the grounds of sex under section 26(2) and/or section 26(3) of the 2010 Act?**

5 4. **Was the claimant subjected to victimisation on the grounds of sex under section 27 of the 2010 Act?**

5. **Was the claimant directly discriminated against on the grounds of the disability of Mr Kenny Laing, under section 13 of the 2010 Act?**

10 6. **Was the claimant subjected to harassment on the grounds of the disability of Mr Kenny Laing, under section 26 of the 2010 Act?**

7. **In the event that all or any of the foregoing claims succeed, what remedy should be awarded to the claimant?**

234. It is important, in defining these issues, to note that the claimant's claim, originally directed against both the respondent and Mr Laing, was withdrawn insofar as directed against Mr Laing prior to the commencement of the hearing on the merits, and therefore the Tribunal must consider those claims which remain as against the respondent.

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1. Was the claimant unfairly constructively dismissed by the respondent in terms of section 95(1)(c) of ERA?

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235. In order to identify whether or not the claimant was unfairly constructively dismissed in this case, it is necessary to consider the reasons given at the time of resignation by the claimant for her taking that decision, and then to establish whether that resignation was caused by or taken in response to a repudiatory breach or repudiatory breaches of the contract of employment between the claimant and the respondent.

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236. The claimant's letter of resignation, which was dated 11 December 2017, having been composed on the evening of that day, and handed in to Mr Lavery on 12 December 2017, set out her reasoning as follows (337):

“Dear Richard,

This letter is to notify you that I have decided to resign from my role as Finance Analyst with Scottish Water.

5 *As my secondment with the Billing Team ends in January, I would be expected to return to the Wholesale Service Desk. A place where I have found the working conditions to be unacceptable and extremely unprofessional as well. I have experienced continual sexual harassment from a colleague and bullying thereafter whilst working in that department, this has caused me undue stress and health problems. I have therefore*
10 *had to seek employment elsewhere.*

Please accept this letter as my official notice of resignation. My contract requires me to give 4 weeks’ notice, therefore I believe my last working day here would be Friday 5th January 2018.

15 *Despite my negative experiences in another department I wish to thank you for the opportunities that you have given me during my time in the Billing Team. I have really enjoyed my time working within this team and if there is anything I can do to make the transition to my new job easier, please let me know.*

Yours sincerely,

20 *Lisa Aird”*

237. The letter, which was reinforced by her subsequent discussion with Mr Lavery, identifies the claimant’s concern at the prospect of returning to the WSD following the conclusion of her secondment to the Billings team; refers to the “continual sexual harassment” which she suffered in the WSD;
25 refers to the “bullying thereafter”; and then refers to her undue stress and health problems, which had caused her to seek employment elsewhere.

238. The ET1 sets out the basis upon which it is claimed that the claimant was constructively unfairly dismissed. The claim describes a series of acts, the cumulative effect of which was to entitled the claimant to resign. It was

stated (28)that *“The Claimant could not return to work for [Mr Kenny Laing] or his team, nor could she work in a location near to it. The FIRST Respondent told the Claimant that she would have to return to her previous post with [Mr Kenny Laing]. This anticipatory breach was accepted by the Claimant.”*

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239. In addition, the claimant alleged that the respondent failed to afford any opportunity to the claimant to obtain redress of her grievance against Mr Laing; failed to provide a suitable working environment for the claimant to carry out her duties after she raised the grievance against Mr Laing; and failed to secure for her a permanent position in another team. It is alleged that each of these failures undermined the relationship of trust and confidence between the claimant and the respondent.

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240. It is important to consider the sequence of events which led to the claimant’s resignation, in order to seek to understand what led her to make that decision, and to place the decision in its full context.

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241. The claimant raised a grievance under the respondent’s Dignity at Work procedure on 31 March 2016, in which she made allegations of sexual harassment and inappropriate conduct against Mr Laing.

242. That grievance was investigated by Mr Burnett, and following a series of interviews, he produced a letter confirming the outcome of the investigation on 16 May 2016.

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243. A number of criticisms were directed at the investigation process carried out by Mr Burnett, by the claimant and her representative during this hearing.

244. It was said that the investigation did not ask the correct questions of the witnesses, in that no specific comments alleged by the claimant to have been made to her by Mr Laing were put to those witnesses for comment. Mr Burnett explained that he felt that open questions, which did not lead the witnesses, were better than placing a specific allegation before those witnesses. He asked witnesses if they had seen any inappropriate conduct,

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and received a variety of answers, but none of which revealed the extent of concern raised by the claimant. In doing so, Mr Burnett acted quite reasonably, in our judgment. It is not expected that an employer in such circumstances is in a position to carry out a quasi-judicial investigation, and it must be noted that the investigating manager must tread carefully to avoid taking, or appearing to take, sides. We did not consider that Mr Burnett's questions were unfair or insufficiently detailed, and we found his explanation for his approach to be reasonable. In fact, we considered that Mr Burnett took a thorough and balanced approach to his task, by interviewing all the witnesses identified by the claimant, and doing so in a measured and fair way.

245. It was said that an investigation should inevitably produce a report. In our judgment, this was a criticism which lacked merit. The letter following the investigation amounted to a set of conclusions, and provided recommendations which Mr Burnett decided upon as a result. The letter also followed a meeting in which Mr Burnett had laid out his conclusions and recommendations in person to the claimant and her representative, offering the opportunity for clarification to be sought if necessary.

246. We concluded that the grievance process was carried out in a reasonably fair and balanced manner by Mr Burnett, and we were fortified in that conclusion by the fact that the claimant and her trade union representative, Ms Fernandes-Primrose, pronounced themselves satisfied with the outcome, and did not submit an appeal against the decision.

247. Ms Shiels, in her oral submission, described the respondent's handling of the grievance process as "horrific". We regarded that as a rhetorical device in submissions, rather than a realistic view of the respondent's actions. Mr Burnett gave evidence before us and both in his evidence and in the actions apparent from the productions struck us as a fair and independent minded manager who conducted the investigation in an impartial manner.

248. It was of interest to us that the claimant regarded her grievance as having been upheld, whereas the respondent did not. Our conclusion is that Mr Burnett was unable to conclude that the claimant had been subjected to sexual harassment or inappropriate conduct by Mr Laing, but that at the same time the claimant's distress expressed during the investigation was genuine, and therefore that while no specific findings of fault appear to have been made against Mr Laing, he took the view that something needed to change, which is why he issued the recommendations he did.

249. We noted that the Dignity at Work procedure set out a number of possible outcomes from an investigation, at paragraph 4.6.5 (84), including actions to resolve the concerns raised, an open and constructive discussion with all parties to resolve issues, mediation, disciplinary action or no further action. Mr Burnett rejected both disciplinary action and taking no further action, but took "action to resolve the concerns raised by the employee".

250. We considered that the manner in which the grievance procedure was handled did not amount to conduct which could be regarded as repudiatory of the contract of employment. The claimant had said to Mr Burnett that what she wanted from the grievance was for the conduct to stop, and he put in place what he viewed as reasonable measures to achieve that outcome. It is plain that Mr Laing was upset and angry when he was made aware of the recommendations, suggesting that he would be considering taking legal advice. He did not, by any means, regard the matter as having been resolved entirely in his favour. Ms Porteous referred to the outcome as "no case to answer", but it is plain that her knowledge of the specific terms of Mr Burnett's decision was very limited at the time.

251. The claimant also criticised the respondent's actions following the grievance outcome. In particular, she argued that the respondent completely failed to implement the recommendations made by Mr Burnett. The Tribunal therefore examined the respondent's actions following those recommendations.

252. The recommendations made by Mr Burnett can be summarised as follows:

- 5 • A formal outcome meeting to be arranged with Mr Laing by Mark McEwen and Karen Milne to highlight the concerns raised from the investigation and to state expectations for him in the future, emphasizing the seriousness of the allegations, with no further issues to be tolerated;
- 10 • There should be no negative repercussions for the claimant arising from this grievance;
- Protocols should be put in place for assisting Mr Laing with tasks, so that only those who were comfortable being asked for assistance by him should be involved;
- Further training on the Dignity at Work policy to be given to the team;
- 15 • For the claimant, her desk to be moved to an alternative location away from the corridor and toilet (if she wished); and her current line management arrangements should be reviewed following the claimant's concern that no-one took her concerns seriously.

20 253. Taking each of these in turn, we considered whether the recommendations were in fact implemented by the respondent.

254. A formal outcome meeting was held with Mr Laing on 19 May 2016, by Mr McEwen and Ms Milne. It is plain that Mr Laing was upset and annoyed by what was said to him on this occasion, but there is no doubt that this recommendation was implemented.

25 255. It was recommended that there should be no negative repercussions for the claimant following the raising of these issues. We examine this point in more detail below, but it is clear that this was communicated to Mr Laing following the outcome.

256. Protocols were to be put in place for ensuring that only those who were comfortable with being asked to help Mr Laing with certain tasks were involved. This did not specifically affect the claimant. Following the grievance outcome, there is no evidence that Mr Laing asked the claimant for assistance with any task, and in particular the claimant has not suggested that she was asked by Mr Laing to do anything for him, such as opening the toilet door, putting on a headset or making tea for him. As a result, there is no basis upon which it can be found that there was any repudiatory breach of the claimant's contract of employment in relation to this matter.

257. It is not clear what action the respondent actually took about this. Mr Laing's evidence suggested that he was very unhappy with the proposal that there should be any kind of protocol put in place before he could ask a colleague for assistance. He, and also Ms Porteous, saw his requests as no more than the requests of an employee for help by his colleagues. However, whether the respondent actually took action on this point, it is quite clear that there was no further impact upon the claimant.

258. The evidence demonstrated that the team did receive further training on the Dignity at Work policy, and accordingly this recommendation was implemented.

259. The two recommendations relating to the claimant were that she should be moved to a different location, if she wished, and that her line management arrangements should be reviewed so that she would be comfortable with her risk technician.

260. The claimant was moved, with her agreement, to a different location, away from the corridor and toilet area. While she seems to have raised some concerns at a later stage about this, these were unrelated to the grievance, and accordingly the recommendation was implemented.

261. The review of the claimant's line management arrangements was also carried out. The upshot was that the claimant was left without a risk technician, or a direct line manager at the level to which she was

accustomed like Jane Archibald; but that Ms Porteous took over the line management of the claimant. This was clearly a lingering issue for the claimant while she remained in the WSD. She considered that she was being singled out for different treatment, and was, certainly initially, uncertain about the new arrangements. However, it is plain that in time, she grew to become more settled, and eventually reached the stage where she was content to meet with Ms Porteous without being accompanied by her trade union representative.

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262. Our conclusion in this regard is that the decision to institute the arrangement whereby Ms Porteous became the claimant's direct line manager, while unusual, did not merit a finding that it was an act in breach of the implied term of trust and confidence between employer and employee. The claimant did not raise, formally, any concern about this matter, and while she did not have a risk technician as her line manager, she did have a new line manager as anticipated by the recommendation, and accordingly, we concluded that this recommendation was implemented by the respondent.

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263. Accordingly, the claimant's assertion that the respondent completely failed to implement the recommendations arising from the grievance outcome is not borne out by the evidence, and we cannot sustain it. Further Ms Shiels' description of the respondent's handling of the recommendations as "horrific" was not one we were prepared to accept either. They implemented the recommendations, perhaps not precisely as the claimant would have wished, but in a manner which was not unreasonable in all the circumstances.

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264. It is of significance, in this context, to note that both in the meeting conducted by Mr Burnett and in his letter confirming the outcome he stressed that *"In future, I urge you to raise issues proactively to Scottish Water or via your Union representative so that we can address concerns timeously."* (251) The respondent made it quite plain to the claimant that they would address any further concerns which she had, but that she would require to raise those concerns proactively. In our judgment, that was a

very clear statement to her that she must take action on her concerns, in order for the respondent to be in a position to deal with them.

265. We consider that this point was well made by Mr Burnett, and reflects well upon his impartiality and his wish to ensure that the claimant knew that she could raise issues with him, without hesitation. The claimant had had the support of two trade union representatives, both of whom had been strongly supportive of her, and therefore it is important to note this instruction in order to understand and place in proper context what followed.

266. It is our conclusion that the respondent handled the grievance and the follow up to it in a reasonable and fair manner, and that their actions in this regard fell far short of repudiatory conduct, amounting to a breach of the implied term of trust and confidence between the claimant and the respondent.

267. The claimant also asserted that what happened following this amounted to repudiatory conduct on the part of the respondent, and we turn to examine this period following May 2016 to determine whether or not there is a basis for such a claim.

268. The evidence of the claimant concentrated on a number of points:

- the behaviour of Mr Laing towards her following the grievance outcome;
- the attempts by Ms Porteous to prevent her moving to Mr McIntosh's team on secondment;
- the decision to move the Billings team to the 1st floor in close proximity to the WSD in September 2017; and
- the decision to move the Billings team and the WSD to the ground floor together in January 2018.

269. It is appropriate to consider these matters in relation to the claim of constructive dismissal.

270. The claimant said in evidence that following the grievance outcome, Mr Laing did not speak directly to her, and therefore there were no further comments to which we were directed as inappropriate comments towards her. There was a comment during a buffet lunch, when Mr Laing made an observation, not to the claimant but within the claimant's knowledge, that he should not be reported for having made a comment to one of the other team members. The claimant interpreted this as a reference to a complaint having been made against him by her.

271. What the claimant was most concerned about, she said, was the way in which Mr Laing looked at her when she was in close proximity to him, especially after September 2017 when the Billings team moved to the 1st floor, into what had been the contact centre and close to the WSD. She accused Mr Laing, in evidence before us, of staring at her, smirking at her and on occasions would turn to face her as she walked past him.

272. Mr Laing denied this, and Ms Porteous supported his denial in her evidence. She described Mr Laing as having been adversely affected by the claimant's grievance, and as having been withdrawn from contact with staff. The Tribunal was not persuaded that there was a course of conduct which amounted to a repudiatory breach of contract in this regard by the respondent.

273. For the Tribunal, the critical element in this aspect of the case was that at the conclusion of the grievance outcome, the claimant was clearly advised that if she had any issues she should proactively raise them so that they could be dealt with. She did not raise any further complaints with the respondent until she resigned. She did not ask her union representative to raise any matters for her, nor did she seek the assistance of what had, in our judgment, been a very supportive Human Resources department. While it is perhaps understandable that the claimant, feeling as she did that she was already isolated from some of her colleagues, did not wish to raise any further matters – and the Tribunal acknowledges that it may have been difficult for her to do so – the reality is that she had been able to raise such concerns before, and that she had been told in clear terms that if any

conduct concerned her in the future she must bring it to management's attention.

274. As a result, the Tribunal is unable to find that the respondent, as an organisation, was made aware of the claimant's concerns about the conduct of Mr Laing towards her after the grievance outcome in May 2016, and therefore cannot have been guilty of such failure as to amount to a repudiatory breach of the claimant's contract of employment. In our judgment, the respondent had dealt fairly and thoroughly with the claimant's earlier grievance, and therefore, with the support of those from whom she had previously sought support, there is no reason to believe that a further grievance would not have been taken equally seriously by them.

275. Accordingly, we do not find that the claimant's allegations against Mr Laing following the grievance were ever raised with the respondent, and so the respondent cannot be said to have breached her contract by the way in which this was dealt with.

276. The claimant also criticised Ms Porteous for having attempted to block her secondment to Mr McIntosh's team. We found this accusation very difficult to understand. It was clear to us that Ms Porteous was entirely supportive of the claimant's wish to move on secondment. All that was said to the claimant was that it was unusual for staff to be seconded, but Ms Porteous never said to the claimant that she would not be able to move. The evidence clearly demonstrated that Ms Porteous spoke well of the claimant to Mr McIntosh, and clarified the misunderstandings which had been generated by the claimant herself saying that WSD were blocking the move.

277. By this stage, the claimant's attitude towards her team and her management had been soured by the events leading to that point, and perhaps that view coloured what she said to Mr McIntosh. In any event, she was permitted to move on secondment, a move which was successful for her, and it was as a result of the actions of Ms Porteous that that move was facilitated.

278. In September 2017, the claimant was concerned to find that she had to move back to the 1st floor, not far from the WSD. This was a move which was known and stated to be temporary, as a result of renovations taking place within the building. The claimant was not returned to work in WSD.
5 Her evidence before the Tribunal was that she became very uncomfortable there due to the proximity to Mr Laing and his behaviour towards her during that time, but again there is no evidence that she raised that as a concern or as a grievance with the respondent's management. She did not make clear that she found a move back to the 1st floor to be unacceptable or make
10 herself unavailable for such a move. Of itself, this move, a temporary one, was not, in our judgment, an act which amounted to a breach of the claimant's contract of employment.

279. There was a contradiction in the claimant's position while on secondment, with regard to her attitude to what should happen at the end of
15 the arrangement. She was told from the outset of the secondment that there would always be a job for her in the WSD team, but that it would be likely to be in the contact centre. She was anxious, she said, about the prospect of moving back into the WSD, owing to the proximity to Mr Laing (and, it seemed to us, due to the concerns she had about working along
20 side some of the staff who had not supported her as she had expected during the grievance, as well as working under Ms Porteous), and expressed a reluctance to do so. However, she was also unhappy at the prospect of moving back to the contact centre, which she saw, in effect, as a retrograde step, since staff generally progressed out of the contact centre
25 into the WSD team itself. We understood this contradiction to arise from the claimant's uncertainty as to what she wanted to do within the organisation, and also as to the likely length of her stay within the Billings team, where she professed herself much happier.

280. Finally, the claimant said that she resigned because she was
30 informed, at a meeting on 5 December 2017, that she would be moving with the Billings team to a permanent home on the ground floor, where the WSD would also be located. She said that this was the point at which she decided to resign, as she could not face the prospect of working either in

the WSD or close to them. This, it is said, amounts to an anticipatory breach of the contract of employment.

281. In her ET1, the claimant also attributed her resignation to certain failures of the respondent. She complained that the respondent failed to afford her any opportunity to obtain redress of her grievance against Mr Laing. We do not accept this to be correct. We have found that the grievance and its outcome were appropriately and fairly dealt with by the respondent.

282. The claimant complained that the respondent failed to provide a suitable working environment for her to carry out her duties after she had raised the grievance against Mr Laing. It is not entirely clear what this refers to, but we understand it to mean that the claimant felt that she should not be located close to Mr Laing, so as to avoid those feelings which were engendered by seeing him. The difficulty for the claimant here is that since she did not raise those concerns with management following the grievance outcome, there is no breach of contract in their not having responded to those concerns. In any event, the claimant's own comments to Ms Porteous as they met regularly following the grievance outcome, initially with Ms Noble and then on their own, demonstrate that she appeared to the respondent to be increasingly settled and happy having returned to work within the WSD under Ms Porteous's management. That may not be what she truly felt; but that was what she communicated to the respondent, who were entitled to rely upon those statements.

283. The claimant then complained that the respondent failed to secure her a permanent position in another team. The Tribunal does not accept that this amounted to a breach of the claimant's contract. She took the decision, herself, to move to another team on secondment, in the full understanding that that was a temporary arrangement which, on termination, would lead to her return to the WSD. That was the arrangement which she voluntarily entered, and the respondent complied with that arrangement, and indeed extended it on several occasions, to the

point that while she remained in employment she never had to return to the WSD.

284. We do not consider that the respondent acted in breach of the claimant's contract of employment, such as to justify her resignation in response to a repudiatory breach. The move to the ground floor was not a move which we considered to amount to a breach of the implied term of trust and confidence. The claimant had not seen fit to resign following the move back to the 1st floor in September 2017. As it turned out, had she been required to move to the ground floor, she would have been located some distance further away from the WSD than she had been located on the 1st floor. This would have represented, in truth, an improvement for her.

285. It is important, however, to consider whether the claimant resigned in response to these actions, or for some other reason. She resigned on 12 December 2017. In October 2017, she was interviewed for a position with Liberton High School, a position which she was successful in securing. She was told that subject to certain checks, which in her case she must know were routine, she had been offered the job, and she accepted it, in November 2017. She waited until 12 December to resign because she was advised on 11 December that the start date for her new job was confirmed.

286. We have concluded that the claimant resigned from her post with the respondent as a result of having secured a new post in Liberton High School, and not as a result of having been subjected to a breach or breaches of her contract of employment. The claimant did not raise formally her concerns about the conduct of Mr Laing or Ms Porteous, or her fears about the move to the 1st floor and then to the ground floor, with the respondent at any stage. When Mr Lavery spoke to her on 12 December, and when Mr Lavery and Ms Howieson met with her for her exit interview, they assured her that she would not have been moved back to the WSD if she had not been prepared to do so because of her ongoing concerns, and they also confirmed to her that they had been preparing to extend her contract. Had the claimant raised with the respondent's management her concerns we are persuaded that they would have taken steps to allay her

fears and ensure that she would not be required to move into a position with which she was not comfortable. Mr Lavery struck us as an entirely professional and honest witness, and we accepted his evidence on this point.

5 287. Accordingly, we have not been persuaded that the claimant in this case resigned in response to a breach or breaches of contract by the respondent, but we have concluded that she resigned in order to take up an alternative position with Liberton High School which she had secured some 4 to 6 weeks before her resignation.

10 288. As a result, it is our judgment that the claimant was not constructively unfairly dismissed by the respondent, and this claim made by the claimant must fail and be dismissed.

2. Was the claimant subjected to harassment on the grounds of sex under section 26(2) and/or section 26(3) of the 2010 Act?

15 **3. Was the claimant subjected to victimisation on the grounds of sex under section 27 of the 2010 Act?**

289. We take these two claims together under the same heading, as they occupy common ground, albeit that there are different considerations in relation to each.

20 290. The claimant's claims in relation to harassment can be found in the ET1, at paragraphs 6 to 8 of the Legal Conclusions (29).

291. The claimant complained that she was harassed by Mr Laing who engaged in unwanted conduct relating to sex; that she was harassed by Mr Laing who engaged in unwanted conduct of a sexual nature; and that the claimant was treated less favourably than she would otherwise have been by the respondent as a result of rejecting the unwanted conduct of a sexual nature and rejecting the unwanted conduct related to sex.

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292. The claims of harassment related to the period up to and including the claimant's grievance against Mr Laing, in 2015 and early 2016, except

to the extent that they relate to Mr Laing's alleged conduct in smirking and staring at her after the grievance outcome was known.

293. The claimant complained that Mr Laing harassed her on the grounds of sex in a number of ways:

- 5 • In 2015, Mr Laing instructed the claimant to carry out personal tasks, including making his lunch, porridge and cups of tea, when Ms Porteous was absent. She was not aware that anyone else was asked to carry out these tasks for him;
- 10 • On 31 August 2015, the claimant found that Mr Laing had bought her a scone for her birthday, and did not understand that he did the same for anyone else;
- On 13 November 2015, the claimant alleged that Mr Laing called her "skinny" several times when she passed him;
- 15 • On 16 November 2015, the claimant alleged that Mr Laing had told her in front of people that he had a list of people that the claimant had kissed, and that the claimant was a "bad kisser when she was drunk";
- 20 • On 15 January 2016, Mr Laing asked the claimant, she alleged, if she had a boyfriend, and that she should forget about having a boyfriend as he would not allow it;
- On 19 January 2016, in front of colleagues, the claimant alleged, Mr Laing told her she was becoming far too skinny, and that when she replied that she was on a diet, he said "I like your body";
- 25 • On 26 January 2016, the claimant alleged that she had been instructed by Mr Laing to take him to the toilet; and also had passed her when she was using her mobile phone and said "stop texting me". He also asked her to take him to the toilet the following day;

- On each occasion when Mr Laing approached the claimant's desk, he would move so close to her that she would have to move her chair so as to prevent his cheek touching hers;
- On 3 February 2016, Mr Laing allegedly called the claimant "sexy bum" while she was walking past him;
- On 25 March 2016, the claimant alleged that Mr Laing blocked her chair with his wheelchair and stroked her arm, saying that "I wanted to do that".
- The claimant alleged that Mr Laing would repeatedly ask the claimant if she was drunk, making reference to her water bottle containing alcohol or a hangover cure.

294. Of these, it appeared to the Tribunal that the allegation which related to conduct of a sexual nature was that on 3 February 2016, when the claimant said that Mr Laing called her "sexy bum" as she passed. In our judgment, such a comment would amount to unwanted conduct of a sexual nature. The claimant suggested in the grievance process that others would have been bound to hear such a comment, so close were they.

295. This matter was investigated by Mr Burnett. He did not conclude that such a comment had been made, and no other witness suggested that it had. Mr Laing strongly denied it, both in the internal investigation and before us.

296. There are two conclusions which we have reached about this matter. Firstly, we are unable to conclude that such a comment was made. The matter was fully investigated by the respondent, and no evidence was received other than that of the claimant to support this allegation. We heard from Mr Laing some two years after the alleged incident when he was quite resolute in his denial. The claimant was also quite resolute in her assertion as to the allegation before us. There was no specific finding by Mr Burnett that such a comment was made, and the claimant pronounced herself contented with the outcome of the investigation. Accordingly, we cannot

conclude on the balance of probabilities that such a comment was made. Secondly, however, the allegation was made before the Tribunal in the ET1 on 30 April 2018, more than two years after the incident. It is a matter which is well out of time for raising such an allegation before the
5 Employment Tribunal. In our judgment, it would not be just and equitable for the Tribunal to extend the period of time within which such an allegation should be brought to the Tribunal. In all the circumstances, the claimant having pronounced herself satisfied with the outcome of the grievance investigation, we cannot conclude that it would be fair or in the interests of
10 justice in any way to allow such a serious allegation to proceed when it is so ancient.

297. Accordingly, we do not uphold this allegation.

298. On the more general aspect of the various comments which were alleged to have been made to the claimant (and we deal with the requests
15 for assistance below), the Tribunal is unable to find other than that there was a general atmosphere within the office whereby staff were encouraged to tell managers about their personal lives, and “banter” took place between managers and staff relating to alcohol, boyfriends and other matters.

299. Mr Laing accepted that he made comments about the claimant (and
20 other female staff) not being married to particular individuals within the office, nor being married before they were 40. He maintained that such comments were made in jest. He also agreed that on one occasion, the claimant told him she was on a diet, and he replied that he did not think she needed to lose weight, though he denied looking her up and down, or
25 saying “I like your body”. Beyond this, Mr Laing denied that he made comments about the claimant being a bad kisser, or having a list of people that the claimant had kissed.

300. We were troubled by the evidence of a culture of casual “banter” between managers and staff, especially where a senior male manager
30 makes comments of a personal nature to younger female members of staff. The sense that management were anxious to ensure that staff felt

comfortable disclosing personal matters to their line managers struck us as creating an uncomfortable atmosphere for those who did not wish to do so. It is clear that for a time the claimant was comfortable discussing certain personal issues with Ms Archibald, her line manager, and in those
5 circumstances it may be seen to be perfectly acceptable to do so but this would not invariably be the case.

301. In our judgment, the respondent should have been more alive to the fact that a senior male manager makes casual comments, such as those highlighted and accepted by Mr Laing, to a much more junior female
10 member of staff, could be quite different to a comfortable, casual bantering atmosphere which the management, unaccountably, wanted to foster within the office. The team, we heard, was rated the most successful in the business, which may have fortified them in their belief that their methods and practices were quite acceptable.

302. However, we do not find that these comments, accepted by Mr Laing, amounted to harassment on the grounds of sex to the claimant. It was not substantiated – and the findings of the investigation bear this out – that the inappropriate comments alleged to have been made by him to the claimant were in fact made, and it is clear that the other comments made were made
20 to others as part of the general culture of the team. We are not persuaded that Mr Laing engaged in the consistent harassment of the claimant on the grounds of her sex. The respondent took very seriously the allegations which were made, and did not find them to be substantiated. Our interpretation of the grievance outcome was that Mr Burnett felt that the claimant's sense of discomfort within the team was genuine, and that it was
25 necessary to address that. That seemed to us to be a reasonable outcome, and as we have observed, the claimant was content with that outcome, as was her union representative.

303. It is appropriate to address some of the allegations more particularly.

304. The claimant suggested at one point that Mr Laing had come up next to her at her desk, stroked her arm and when challenged had said "I wanted
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to do that". We did not accept that this happened the way the claimant alleged it. In evidence before us, the claimant demonstrated that the claimant had stroked her upper arm, between shoulder and elbow. It was quite clear to us that Mr Laing, due to his disability, is unable to move his hand to that level. At one point we were able to observe that he wished to push his glasses up his nose, an action familiar to those who wear glasses, and he required to pivot his arms against the desk and push forward in order to move his hands up towards his face, which he bent low over the desk, to achieve this movement. We found the claimant's description of this action, which Mr Laing also denied, not to be credible.

305. The claimant alleged that at one point, while she was using her mobile phone, Mr Laing came up to her and said, in the hearing of others, to "stop texting me". Mr Laing said that that was said because there had been communications around the team discouraging the use of mobile phones when they should have been working, and that this was his way of letting the team know that he was aware that they were using their phones when they shouldn't be, "wrapped around humour". We found this comment to be an unusual and inappropriate one, for a manager to make to a junior colleague, and it gave rise to a concern, again, about the general culture of "banter" within the team. Ultimately, while we accepted that the claimant may have felt uncomfortable by the use of such a phrase, we did not conclude that of itself this amounted to harassment on the grounds of sex. In any event, this fell into the category of events which happened before the grievance was presented by the claimant, with the consequence that it was dealt with by the respondent in that process.

306. The claimant focused on the tasks which Mr Laing asked her to carry out. From the evidence, we have concluded that she was asked on two occasions by Mr Laing to open the door to the corridor in which the disabled toilet was located; and that on one occasion she was asked to place a headset on his head, prepare and give him a cup of tea, pour hot water into a bowl of porridge and open a salad container for him. We do not consider that any of these requests was out of the ordinary, nor amounted to harassment on the grounds of sex. The claimant clearly felt that she was

being singled out by Mr Laing – indeed, this was a theme of her case – but in our judgment the evidence shows that she was not, and that others were able to help with tasks for which they had been asked to help by Mr Laing, both male and female.

5 307. It was alleged by the claimant that Ms Archibald facilitated the
“abuse” being carried on by Mr Laing. We found this to be an unfair
accusation. Ms Archibald, who presented before us as one who was badly
affected by the criticisms directed at her, had offered the claimant to take up
her concerns about Mr Laing at a higher level, but was instructed not to by
10 the claimant. For the claimant then to criticise Ms Archibald for complying
with that instruction does not strike us as fair, and we do not find that Ms
Archibald was complicit in any “abuse” being carried on by Mr Laing.
Indeed, it was clear to us that Ms Archibald was a caring and careful
manager who sought to look after and promote the interests of her staff.

15 308. Ms Porteous emerged from evidence as one who had been friendly
and had worked alongside Mr Laing for many years, and expressed herself
very strongly and loyally to him. We do not find that Ms Porteous was guilty
of facilitating any abuse by Mr Laing. She was incensed by the grievance
outcome, describing it as “disgusting” before us, on the basis that she
20 considered that staff should, as a matter of simple courtesy, be prepared to
help a colleague who is unable to carry out certain tasks for themselves.
She expressed the strong view that colleagues should simply not see the
wheelchair, nor the disability, but should treat Mr Laing as they would any
other colleague.

25 309. What this analysis omits to recognise is that the claimant’s discomfort
came, at least in part, from the fact that she did not think others were being
asked to carry out such tasks, that she was uncertain as to what Mr Laing
actually needed or wanted, and that Mr Laing was a very senior manager
who, in her view, had focused upon her in an unwanted way. We did not
30 consider that the claimant was unable to see past Mr Laing’s disability, but
she struggled with the relationship for these reasons. However, we were
unable to sustain the claimant’s allegations about Mr Laing’s conduct in full.

310. There is, in any event, no basis for suggesting that the actions of Mr Laing amounted to a continuing course of action. We found Mr Laing generally to be a credible and straightforward witness, much affected by the allegations, and we accepted his, and Ms Porteous's, evidence that following the grievance he withdrew from contact with the claimant. The allegations of smirking and staring at the claimant were not proved, in our judgment, as they were too vague, were unsupported by any other witness, were denied by Mr Laing and Ms Porteous and were not based on the grounds of sex.

311. As a result, the allegations which were set out in the grievance of conduct relating to sex were raised before the Tribunal more than two years after the alleged incidents. We conclude that they were not raised before then because the claimant was happy with the outcome of the grievance process, and regarded, as did the respondent, that chapter as having been closed. It would not be just and equitable, in our judgment, in terms of section 123 of the Equality Act 2010 to allow such old allegations to be raised as part of this process as they are so long out of time, and thus they are time barred.

312. We have therefore concluded that the claimant's claims that she was harassed on the grounds of sex, or for having rejected the unwanted conduct, cannot be upheld, and are therefore dismissed.

313. Similarly, the claimant alleged that she was the subject of victimisation on the grounds of sex, for having raised the grievance against Mr Laing. This focuses on the allegations made by the claimant following the grievance outcome. She complained that she was subjected to detriments by the respondent, her colleagues and management following the raising of the grievance.

314. We were not persuaded that the claimant was so victimised. The respondent handled the grievance openly and fairly, conducted a thorough investigation and produced an outcome with which the claimant was satisfied, and the respondent's managers were not. No further grievance

was raised. The claimant clearly felt uncomfortable within the team for a period of time, but the evidence demonstrated that due to the efforts of Ms Porteous, as well as the claimant and particularly Ms Noble, she began to feel more comfortable within the WSD and professed herself happier at work as a result.

315. We do not find that the respondent, her colleagues or management subjected the claimant to any detriments as a result of having raised the grievance, as a protected act, and accordingly, we do not uphold the claim of victimisation, which fails and is therefore dismissed.

5. Was the claimant directly discriminated against on the grounds of the disability of Mr Kenny Laing, under section 13 of the 2010 Act?

6. Was the claimant subjected to harassment on the grounds of the disability of Mr Kenny Laing, under section 26 of the 2010 Act?

316. Under these heads of claim, the claimant complains that she was directly discriminated against and subjected to harassment on the grounds of the disability of Mr Laing.

317. The details of this claim are set out in the further particulars of claim (30Aff).

318. The claimant complains, under section 13 of the 2010 Act, that the less favourable treatment which she suffered was that she required to assist a disabled manager with personal tasks, and in particular that she found the instructions to assist her male manager to the disabled toilet facilities distasteful and degrading. This was less favourable treatment as compared with other employees who were not required to assist in this way.

319. In her submissions, Ms Shiels said that if any kind of unlawful conduct were required in the background of this matter, that would be the respondent's failure to make reasonable adjustments for Mr Laing, which required him to seek assistance from others, and if they were uncomfortable with that and found it embarrassing, it was related to his disability.

320. This is an unusual example of what is commonly known as a claim for discrimination by association. It is quite clear that the claimant does not require to possess the protected characteristic in question in order to suffer discrimination on the ground of disability.

5 321. What requires to be identified is the unlawful act complained of. In our judgment, this is unclear in this case. We understood from the claimant in evidence, and Ms Shiels in submission, that the reason for the claimant's discomfort was not Mr Laing's disability but the fact that she was being asked for assistance, unlike other staff. If the unlawful act is said to be that
10 a disabled member of staff asks a colleague for assistance, the only basis upon which the respondent can be liable for such an act is that they have failed to make reasonable adjustments, with the effect that the claimant is placed in an embarrassing or degrading position.

322. We have no evidence before us on which to draw a conclusion that
15 the respondent has failed to make reasonable adjustments for Mr Laing in this case. The reasonable adjustment which the claimant seeks to demonstrate here, as it seems to us, is that Mr Laing should have provision made for him so that he can readily identify a team of volunteers willing to help him when he needs assistance. However, that is not a reasonable
20 adjustment sought, or even contemplated, by Mr Laing. He was clearly upset that such an arrangement would have to be put in place.

323. We cannot find that there is any unlawful act which has led to the claimant being discriminated against on the grounds of Mr Laing's disability. It is plain from the evidence that she was not the only person whom Mr
25 Laing asked for help – the investigation demonstrated that others were asked from time to time to help with particular tasks. There was evidence that the claimant was not the only person to be asked to assist with the opening of the door to enable Mr Laing to use the disabled toilet; and in any event, it stands to reason that since the claimant only identified in evidence
30 two occasions when she was asked to help him with that door, over a period of some 5 years, there must have been other occasions when others were asked to help.

324. In any event, we do not consider that requesting a colleague to open a door to a corridor in which the disabled toilet was located amounted to a discriminatory act. The claimant's reaction to being asked was quite extreme, but appears to have been based around a fear that she may be asked to assist him once he was in the toilet. On the first occasion when he asked her to help, it must have been apparent to her that all that was required was for her to open the door into the corridor.

325. The request was to open a door. We agree with the respondent that this was a minor and unexceptionable request. Accordingly, we are not prepared to sustain the submission that this amounted to any form of discriminatory treatment towards the claimant, nor that she has demonstrated that others were not asked to do the same thing for Mr Laing.

326. This is a very sensitive area, both for the claimant and for Mr Laing. We quite understand Mr Laing's distress at being told that he had to identify a group of willing volunteers to do what he saw as simple courtesies. The tasks he required to have carried out were minor, and not especially personal in nature. It is not unreasonable for a disabled person – and Mr Laing does suffer from a condition which prevents him being able to carry out some simple tasks on his own behalf – to rely upon colleagues to help him when needed, in the same way as any colleague would require to ask for assistance if they needed it.

327. We are unable to find that the claimant was discriminated against on the grounds of Mr Laing's disability.

328. The claimant also complains that she was harassed on the grounds of the disability of Mr Laing. She complains that being asked to carry out personal tasks was unwanted conduct which had the purpose or effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment.

329. We reject this argument. For a person with a severe disability working in a workplace such as the respondent's it is simply necessary that those around him treat him in such a way that he is able to carry out his

duties. Ms Porteous put it very strikingly when she said that she regards the wheelchair used by Mr Laing as invisible, and just sees the person. For the claimant to suggest that being asked for help by Mr Laing with some simple tasks – opening a door which he could not himself open, preparing a cup of tea, pouring water on porridge or putting a headset on him – amounted to degrading or humiliating treatment would, if replicated by others, mean that Mr Laing would find it impossible to carry out his work.

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330. Accordingly, we do not find that asking the claimant for help with such tasks, on what amounted to a few occasions, could amount to harassment on the grounds of Mr Laing's disability. It is our conclusion, therefore, that this claim must fail, and be dismissed.

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331. Ms Shiels also submitted that Mr Laing only asked the claimant for help because she was female, and that he did not ask male colleagues for help. She argued that the claimant suffered less favourable treatment and was harassed because of the combined effect of sex and disability discrimination. It follows from the conclusions which we have reached in each of the separate claims that we do not accept this to be correct. We do not find that the claimant was treated less favourably, nor harassed, on either ground, nor on the combined effect. We do not accept that the claimant was only asked to carry out tasks because she was female. The evidence demonstrates that others, including males, were asked to assist Mr Laing, and willingly did so.

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332. It is accordingly our conclusion that the claimant's claims of discrimination on the grounds of Mr Laing's disability fail, and must be dismissed.

8. In the event that all or any of the foregoing claims succeed, what remedy should be awarded to the claimant?

333. Given that we have not found that any of the claimant's claims succeed, no award is made.

Employment Judge: Murdo A Macleod

Date of Judgement: 17 May 2019

5 Entered in register: 17 May 2019

And copied to parties