RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MRS A NICHOLLS	**V**	**OPTIONS AUTISM (4) LTD T/A OPTIONS KINSALE**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: **MOLD** **ON:** **12TH, 13TH, 14TH & 15TH MARCH 2018**

BEFORE: **EMPLOYMENT JUDGE S POVEY**
MEMBERS: **MRS S HURD**
MR J ALBINO

REPRESENTATION:
FOR THE CLAIMANT: **MR RIGBY (COUNSEL)**
FOR THE RESPONDENT: **MR HENRY (SOLICITOR)**

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The unanimous decision of the Tribunal is:

1. The claim of automatic constructive unfair dismissal is not made out and is dismissed.

2. The claim of indirect sex discrimination is not made out and is dismissed.

3. The claim of sexual and racial harassment is not made out and is dismissed.

4. Written reasons for the judgment will be sent out separately.

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REASONS

1. These are claims brought by Asia Nicholls against her former employer, Options Autism (4) Limited. She claims automatic unfair dismissal, indirect discrimination and harassment. The Claimant seeks compensation. She was employed (childcare practitioner) from 2nd November 2015 until her resignation on 9th February 2017.

2 On 5th April 2017, the Claimant issued her claim with the Tribunal. The Respondent filed its response with the Tribunal on 24th May 2017. It resisted all the claims in their entirety;

The Hearing

3. The Tribunal heard oral evidence from the Claimant and from her former colleagues, Adrian Williams and Michelle Martin. For the Respondent, we heard oral evidence from various current members of staff, Amy McMeekin, Becky Farmer, Derek Marston, Jason Hughes, Mark Williams, Melanie Ramm and Vanya Atkins. We were provided with witness statements for all those witnesses, which stood as each witness's evidence in chief.

4. We were further provided with a paginated lever arch file of documents to which were referred. During the hearing, further documents were disclosed by the Respondent, to which we also had regard. We were also provided with a chronology and a list of issues, which we understand were broadly agreed. By reason of constraints of time, the parties agreed to make their closing submissions in writing and thereafter the Tribunal would issue a reserved decision with reasons. We duly received written submissions from Mr Rigby for the Claimant and Mr Henry for the Respondent and had full regard to them in reaching our decision.

5. Much of the factual narrative in these claims relate to a child in the care of the Respondent. By agreement, the child's identity was anonymised by the Tribunal and he is and was referred to throughout by his initials ('DW').

The Law

Automatic Unfair Dismissal

6. The Claimant relied upon section 100(1)(c) of the Employment Rights Act 1996 ('ERA 1996'), which outlines one of the circumstances in which a dismissal (as defined by section 95 of the ERA 1996) will be automatically unfair (and contrary to the right not to be unfairly dismissed under section 94 of the ERA 1996). It states:

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> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—*
>
> *…*
> *(c) being an employee at a place where—*
>
> *(i)there was no such representative or safety committee, ...*
> *…*
> *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*
> *…*

7. An employee is deemed to have been dismissed where she terminates her contract of employment in circumstances in which she is entitled to do so by reason of the conduct of her employer (per section 95(1)(c) ERA 1996) ('constructive dismissal').

8. To establish whether there has been a constructive dismissal, the principles of contract law apply. The employee must establish the following (per Western Excavating (ECC) Ltd v Sharp [1978] ICR 221):

   8.1. That there has been a fundamental breach of the employment contract by the employer;

   8.2. That the breach caused the employee to resign; and

   8.3. The employee did not delay resigning or act in a manner such as to affirm the employer's breach.

9. Implied into every employment contract is a duty on employers to take reasonable care to ensure the health and safety of their employees and the term of mutual trust and confidence between employer and employee. It is a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the parties (often referred to as the "*Malik term*"). That assessment is an objective one (per Courtalds Northern Textiles v Andrew [1979] IRLR 84; Malik v Bank of Credit and Commerce International SA [1997] ICR 606; Morrow v Safeway Stores plc [2002] IRLR 9; Ahmed v Amnesty International [2009] ICR 1450).

Discrimination

10. Section 39(2) of the Equality Act 2010 ('EqA 2010') states:

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

(a) as to B's terms of employment;

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

(c) by dismissing B;

(d) by subjecting B to any other detriment.

11. Section 19 of the EqA 2010 defines indirect discrimination as follows:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

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

(3) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *marriage and civil partnership;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

12. The Supreme Court provided guidance on the interpretation of section 19 of the EqA 2010 in Essop v The Home Office; Naeem v The Secretary of State for Justice [2017] UKSC 27.

13. Section 40(1) of the Equality Act 2010 ('EqA 2010') states:

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(1) An employer (A) must not, in relation to employment by A, harass a person (B)—
(a) who is an employee of A's;
…

14. Harassment is defined by section 26 of the EqA 2010 and, so far is relevant, states as follows:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to … sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*

- *sex;*
- *sexual orientation.*

15. So far as is relevant, sections 111 and 112 of the EqA 2010 state:

> *<u>111 Instructing, causing or inducing contraventions</u>*
>
> *(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part …5… (a basic contravention).*
>
> *(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.*
>
> *(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.*
>
> *…*
>
> *<u>112 Aiding contraventions</u>*
>
> *(1)A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).*
>
> *…*

<u>Findings of Fact</u>

16. The claims focussed on three incidents during the Claimant's employment, the Respondent's response to those incidents and the subsequent grievance processes.

17. The Claimant was employed as a Childcare Practitioner at Kinsale Hall, one of the Respondent's residential care homes and schools, based in Holywell. Her employment began on 2nd November 2015. The Claimant had been employed by the Respondent in the same role from August 2007 until November 2013. The person specification for the job included an ability to deal with complex and challenging behaviour, as well as specific health and social care qualifications. In her own evidence (and it was not challenged), the Claimant confirmed that she had a lot of experienced in this type of work and it was not suggested that she did not meet the requirements of the person specification

18. The Respondent provided residential care and education to children and young people with complex needs, learning difficulties, autistic spectrum disorders and social, emotional and mental health issues. Challenging

behaviour is a common feature. Kinsale Hall accommodated up to 15 children, split into a number of flats.

19. DW moved into Kinsale Hall on 16th May 2016. He was 12 years old and had been removed from his family home after being exposed to highly explicit sexualised behaviour. This had caused associated trauma and attachment difficulties. He had previously been in foster care and mainstream schooling but the same began to break down, leading to his referral to Kinsale Hall. We did not understand it to be in dispute that DW was small for his age.

20. The Respondent's clinical team identified that DW's history impacted upon his behaviour and his understanding of what was socially acceptable. He suffered from heightened states of anxiety and when feeling unsafe or insecure, was prone to seek attention by inappropriate behaviour. Those behaviours could include sexualised touching, aggression and inappropriate or abusive language.

21. Members of staff other than the Claimant had exposure to and experience of DW's inappropriate behaviours. Amy McMeekin, one of the Respondent's team leaders, recalled in her witness statement how DW was "*known to touch body parts to get a reaction…the child wants to feel safe and secure, which is why I think he does like to look for reactions to see if the staff member will stay with him and keep him safe."* She went on to recount how she had worked closely with DW, enjoyed working with him and had experienced him saying inappropriate, offensive and personal comments, arising from his history of trauma and his exposure to both sexualised behaviour and swearing.

22. Derek Marston, another of the Respondent's team leaders, recalled how DW had given him a light slap on his bottom, again to try and get a reaction. Adrian Williams, who was the Claimant's team leader during part of her employment with the Respondent, was of the view (under cross-examination) that it was appropriate for DW to have women around, although he believed that they should not have been specifically working with him. DW's care plan (which was written by the Respondent's clinical team) did not, as far as we were aware, include a recommendation that DW should only be supervised and cared for by male workers. He was also of the view that DW was not the worst behaved of the children in the Respondent's care at the relevant time.

23. Michelle Martin, who had also been a team leader with the Respondent, recounted an incident with DW when he touched her sexually on more than one occasion and made a sexually inappropriate comment to her. It was Ms Martin's opinion (contrary to Mr Williams) that DW should have been cared for in an all-male environment.

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24. During her employment, the Claimant came into contact with, and on occasions cared, for DW. Prior to the specific incidents which are central to these claims, it was not in dispute that there had been two incidents where the Claimant had been physically assaulted by DW, which the Claimant reported in Behavioural Incident Records. On 14th June 2016, DW had head butted the Claimant on two separate occasions (on her cheek and her lip) whilst she was physically restraining him (after he had become agitated, aggressive and threatening, which had led the Claimant to restrain him in the first place). He had also thrown items, including a chair toward the Claimant. On 9th September 2016, DW was again verbally abusive, aggressive and in a heightened state and again the Claimant had to physically restrain him. After letting him go, DW hit out at the Claimant with a piece of wood, catching her middle fingers and causing bruising and swelling.

25. Other than reporting the above incidents in the correct manner, the Claimant did not escalate or seek to take them further with the Respondent or pursue them before the Tribunal. However, there was evidence of both DW's behaviours and of the Respondent's awareness that the Claimant had been assaulted by DW when the first key incident took place on 24th September 2016.

<u>24th September 2016</u>

26. The Claimant prepared a contemporaneous record of the incident with DW on 24th September 2016, in a Record of Conversation document (which was used by staff to record issues which they may wish to raise at supervision). She confirmed in her evidence that she wrote it on the same day, soon after the incident occurred. It recorded that the Claimant and DW were in the sports hall on the trampoline. DW was "*a little inappropriate trying to touch my backside and attempted to touch my breasts."* The Claimant recorded how she successfully redirected DW's behaviour, telling him they would have to stop jumping because of his inappropriate behaviour. She further recorded that DW apologised, was happy to stop jumping and, after a further conversation, the Claimant and DW resumed using the trampoline. The Claimant recorded that "*DW did listen and behaved appropriately for the remainder of the activity."* She had also reported what had happened to the house manager, Sue Hughes, who had come to the sports hall.

27. There was nothing in the contemporaneous note to suggest that the events in the sports hall had had any negative impact upon the Claimant or that she had felt unsupported. There was no reference to the incident in the Day Shift Debrief document or the handover documents, which recorded meetings which the Claimant attended. The Day Shift Debrief did record another child who had not been listening. DW was reported to have had a "*good day – went to cinema*." Unlike the incidents on 14th June and

9th September 2016, the Claimant did not feel the need to complete a Behavioural Incident Record.

28. The incident was also discussed at the Claimant's grievance meeting on 10th November 2016. The Claimant reported again that DW had "*tried to touch my bum and breasts."* The Claimant confirmed that she passed Record of Conversation to Becky Farmer, whose own evidence (both at the time and before the Tribunal) was that she had considered the Record to be an observation, rather than a request for any feedback or further action.

29. In the Tribunal's view, the records of the incident read as a positive example of the Claimant's work and abilities, which she would be quite rightly entitled to rely upon at any future supervisions. They did not raise any concerns regarding the Claimant's well-being, how she was supported or how she managed the situation. Becky Farmer was entitled to conclude that what was recorded was an observation, both of DW's behaviour but also of the Claimant's abilities.

30. However, in her witness statement and her oral evidence, the Claimant's recollection had changed. She claimed that DW had in fact touched her bottom (compared with him trying to do so in the contemporaneous note and at the grievance meeting) and felt that his behaviour had been "*appalling."* Mr Williams' evidence was that, whilst he had not been present at the time of the incident, the Claimant had told him about it afterwards. His reaction suggested an incident far more serious than the one captured in the contemporaneous documents. He would have stopped the Claimant working with DW, both at the time and in the future and he would have "*pushed"* for the Claimant to "*receive counselling for the incident.*"

31. The Tribunal had difficulty reconciling the Claimant's and Mr Williams' evidence in these proceedings with the documentary evidence. We concluded that greater weight could be placed on the documents created at or soon after the events of 24th September 2016. They were a more reliable indicator both of what happened and, more importantly, the impact upon the Claimant. In our judgment, the incident of 24th September 2016 had no adverse impact upon the Claimant. There was nothing either in the incident itself or the in the way the Respondent reacted to it that constituted a breach of the Claimant's employment contract. Rather, she effectively deployed her skills and training to manage an episode of attempted inappropriate behaviour by DW.

<u>6th October 2016</u>

32. On 6th October 2016, DW asked the Claimant to "*suck my cock.*" In response, the Claimant and her co-worker reprimanded DW for his inappropriate language. DW also said, on more than one occasion, that he would kill the Claimant. The Claimant's oral evidence was that she

remained calm and professional. She had not been directly supporting DW but had been in the same flat as him. She accepted that DW would say such things to others, not just herself.

33. At 9pm on 6th October 2016, after DW had gone to bed, the Claimant reported the above events to Mr Williams (as her team leader). He had not been on duty at the time of the incidents. The report was captured in a Record of Conversation form. The Claimant told Mr Williams that she wished to "*put in a Cause for* Concern" and that DW had made her feel "*threatened*." The Claimant also questioned why she had received no feedback to her previous Record of 24th September 2016 (and considered above).

34. Mr Williams agreed to pass the Claimant's concerns on to Ms Hughes (as house manager) and to sit in with the Claimant when she spoke with Ms Hughes about the incidents. The Tribunal were not directed to any specific evidence of Mr Williams implementing the plan of action agreed with the Claimant but it became clear that it had been escalated. Ms Farmer's evidence was that shortly after the incidents on 6th October 2016, she had been made aware of them and of the Claimant's concerns.

35. This was also reflected in an email dated 15th October 2016 from Ms Farmer to the Claimant, acknowledging receipt of the Records from 24th September and 6th October 2016. The email also recorded that the issues raised by the Claimant had been discussed with the clinical team and further training was to be arranged for staff to gain a better understanding about DW and how to manage his behaviour.

36. Unfortunately, the Claimant's email address was misspelt and she did not directly receive the email of 15th October. However, Ms Farmer also copied it to Mr Williams and Ms Hughes, as the Claimant's team leader and house manager. It was not suggested that they had not received the email. Indeed, the Claimant's Record of Supervision with Mr Williams on 21st October 2016 recorded that Ms Farmer was following up the two reported incidents from 24th September and 6th October, suggesting that the Claimant was at least aware of the tenor of Ms Farmer's email.

37. More importantly, Ms Farmer was of the view (set out in her witness statement) that the Record of 6th October 2016 should have prompted Mr Williams to move the Claimant to another location whilst her concerns were being considered. She acknowledged that this had not happened. She also claimed that Mr Williams had not sought any guidance or support from Ms Farmer regarding the events of 6th October 2016.

38. Ms Farmer recalled issues she had had with getting Mr Williams, as a team leader, to rotate his staff more often. She also agreed that Ms Hughes, as house manager, had also had the power to move the Claimant, as had Ms Farmer herself. She also recalled that other staff

were having difficulties with DW and discussions were on-going as to how best to manage his behaviour.

39. However, the Claimant was not relocated and continued working in close proximity to DW. To that end, the Tribunal found the Respondent liable for a failure to act (in one respect) in response to the Claimant's concerns and in a manner which, in hindsight, it was accepted was the proper course of action to take.

30th October 2016

40. Before any additional staff training on DW was arranged, a series of further incidents occurred on 30th October 2016 between the Claimant and DW. It is trite to observe that had the Respondent acted as it accepted it should have done after 6th October 2016, the events of 30th October 2016 would not have occurred (as the Claimant would have been working away from DW).

41. The events of 30th October 2016 were, to a large extent, not in dispute. The Claimant was working in the same flat as DW. An agency worker was also in attendance. Most of the staff and children had gone out for the day. During the course of her shift, DW touched the Claimant's bottom, was asked to stop, did so but touched her again a few minutes later. The Claimant considered DW's actions to be sexually motivated. He later called her "*sexy*" and racially abused her. The Claimant reported the incidents to the team leader and acting house manager, Mr Marston. He attended the flat, spoke with DW and warned him about his behaviour but took the decision that he was unable to move the Claimant because of the limited staff on site at the time. The Claimant wrote her own account of the events in the morning in a Record of Conversation, recording that she felt "*very violated*" and that she wanted to make an official complaint.

42. When the rest of the staff and children returned from their day trip at 6pm, the Claimant reported her concerns to Ms McMeekin, who captured them in a contemporaneous Record of Conversation. The Claimant agreed in her oral evidence that the Record was accurate. Given its proximity to the actual events described, the Tribunal afforded significant weight to Ms McMeekin's record.

43. To the extent that it differed, the Tribunal preferred Ms McMeekin's record to subsequent accounts of the day put forward by the Claimant. In particular, the Tribunal again had difficulty reconciling what the Claimant reported to Ms McMeekin at the end of her shift on 30th October 2016 with the account she advanced in her witness statement. The contemporaneous records (both from the Claimant and Ms McMeekin) were, in our judgment, a more accurate record of both the events of the day and the Claimant's reaction and feelings towards the same.

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44. There were however a number of factual issues which were in dispute. The Claimant alleged that Mr Marston had in fact been watching football on the television on 30th October 2016, when he should have been fulfilling his duties as acting house manager. This specific allegation was serious and was denied by Mr Marston. The Tribunal noted that this allegation was not raised by the Claimant in her conversation with Ms McMeekin. That record was contemporaneous. It was accurate. In addition, the Tribunal found Mr Marston's evidence in this regard plausible. He explained how he was supporting a teenage child with a mental age of four, whose television preferences would not have included football. Although not directly material to the issues before us, the Tribunal found that, on balance, the Claimant's subsequent recollections of Mr Marston watching football were not made out when weighed against the totality of the evidence.

45. The Tribunal also accepted Mr Marston's evidence of how he decided to manage the situation he was faced with on 30th October 2016, given the limited staff available to him, the children who had remained on site (and their care needs) and the fact that he had not been appraised of the previous incidents between the Claimant and DW. His oral evidence to the Tribunal was consistent with the account he gave to the Respondent when interviewed on 31st October 2016. To that extent, Mr Marston was not to be blamed for the failure to move the Claimant. He did the best he could in the circumstances he was presented with.

46. However, the Respondent, as already found, was at fault for not moving the Claimant in the first place (following the events of 6th October 2016). Given that the Respondent was aware of the Claimant's concerns, the Tribunal also found the Respondent failed to reasonably manage the on-going situation. A reasonable employer would have ensured that staffing levels were not so constrained on 30th October 2016, which would have enabled a more flexible and proactive response in the event of further incidents between DW and the Claimant (given that she was continuing to work in proximity to him). A reasonable employer would have also appraised Mr Marston of the concerns raised by the Claimant, so he could take them into account when deciding how to deal with the day's events.

47. The Respondent's response to the events of 30th October 2016 was, however, proactive and considered. After finishing her shift on 30th October 2016, the Claimant was not due back into work until 2nd November 2016. Ms McMeekin informed Ms Farmer of her conversation with the Claimant of 30th October 2016. On 31st October 2016, Ms Farmer spoke with Mr Marston about his recollections of the previous day's events (which she recorded in a Record of Conversation). On 1st November 2016, Ms Farmer emailed the Claimant, informing her that a meeting had been arranged with the medical staff to discuss DW. Upon the Claimant's return to work on 2nd November, Ms Farmer met with her prior to her shift starting. However, the Claimant was due to go out on an activity with other

staff and children and preferred not to discuss matters with Ms Farmer at that time. It was agreed that they would try and meet the following day.

The Grievance Processes

48. The meeting scheduled for the 3rd November 2016 never took place. Instead, the Claimant, through her union, wrote to the Respondent and re-stated her concerns regarding the two incidents with DW on 6th and 20th October 2016, raised the same as a "*complaint"*, reflected the advice from her union to refuse to work with DW in the future until her complaint was fully investigated and undertake a full risk assessment before the Claimant returned to work on 5th November 2016. The letter made no reference to the events of 24th September 2016, although as discussed above, the same was subsequently raised at the first grievance meeting on 10th November 2016.

49. On 4th November 2016, the Claimant was issued with a Fitness for Work certificate by her GP, citing "*stress at work related problem, causing anxiety attacks"* for why she was unfit to work for three weeks.

50. On 8th November 2016, Melanie Ramm (Administration Manger) emailed the Claimant's union representative, acknowledging and responding to his letter of 3rd November 2016. A meeting was arranged for the Claimant (and her union representative) to meet with Vanya Atkins and Ms Ramm on 10th November 2016 to "*share with us her grievance and for us to look at any appropriate support that we can put in place."*

51. The Tribunal had sight of the minutes of the grievance meeting held on 10th November 2016. It was not in dispute that a copy of those minutes was provided to the Claimant on 17th November 2016. The Claimant was invited to amend or add anything to the minutes. It was not suggested by either party that the minutes were anything other than a broadly accurate record of what was discussed and agreed at the meeting. They confirmed that the Respondent was treating the complaint as a grievance and was initiating its formal grievance procedure.

52. From considering those minutes, the Tribunal found that the Respondent (through Ms Atkins) asked the Claimant on several occasions what support she wanted and what changes and outcomes she would like to see in light of her experiences with DW. The Claimant attended the meeting with her union representative, who was involved in the discussions which took place. However, and allowing for the Claimant's health at the time (per her fit note), her responses to what she wanted from the process were far from clear. Ms Atkins agreed to look at the support that could be provided, investigate DW's behaviour and take advice on how it could be managed, consider whether the Claimant should work with DW again and look at why the Claimant had not been supported to date. The Claimant also raised concerns at the perceived lack of

support from Mr Marston on 30th October 2016. Ms Atkins also re-stated that "*I will investigate these matters and we will complete the stress risk assessment…and we will consider you not working with DW."* It was agreed that the stress risk assessment would take place on 17th November 2016.

53. In the Tribunal's view, the Respondent did all that was reasonably expected of it at the meeting on 10th November 2016. We were unable to find fault with the approach taken, the investigations proposed or the immediate course of action pursued.

54. There was a further meeting on 17th November 2016, during which the stress risk assessment was undertaken. A return to work plan was agreed, which included the Claimant being moved to a different house (upon the same being registered), limiting contact with DW (and avoiding altogether any one to one contact) and attending a training day at her new house. The Claimant was scheduled to return to work on 26th November 2016, on agreed reduced hours as part of her supported return. The Claimant was also provided with access to counselling, paid discretionary company sick pay (as requested by the Claimant at the meeting on 10th November 2016) and Mr Marston would meet with the Claimant once she returned to work to express his regret at how the events of 30th October 2016 had made her feel.

55. Again, the Tribunal concluded that the Respondent's actions in this regard were appropriate and reasonable, given what had been complained of at that time. It was a considered and practical response, including steps which sought to address the concerns raised and facilitate support, recognition and a structured return to work.

56. Despite this, the Claimant voiced her on-going concerns about what was being done about her grievance, when she had a supervision session upon her return to work on 26th November 2016.

57. The Claimant returned to work as agreed on 26th November 2016. Unfortunately, the Claimant became upset during her shift on 2nd December 2016. She was signed off as unfit to work by her GP on 5th December 2016. On 9th December 2016, Ms Atkins wrote to the Claimant, acknowledging her fit note, recapping the support package put in place following the meetings in November 2016 and inviting the Claimant to a further meeting to explore and discuss further support she might require. On 28th December 2016, the Claimant wrote to Ms Atkins and Ms Ramm in response. She queried when the investigations into her grievance of November 2016 would be completed, asked that the outcome of the risk assessment of 17th November 2016 be treated as void (as she was feeling unwell when it was carried out) and raised a number of other concerns regarding the on-going support and return to work plan.

58. A further meeting between Ms Atkins and the Claimant took place on 12th January 2017. Mr Marston was also invited, to apologise to the Claimant (and as agreed in November 2016). Ms Ramm also attended as a note taker, as did the Claimant's friend, Susan Griffiths (who also took notes). The Claimant's union representative did not attend.

59. The Tribunal had sight of the minutes taken by Ms Ramm. The accuracy of them was in dispute. They were received by the Claimant on or around 20th January 2017. In a letter to the Respondent dated 27th January 2017, the Claimant included what she claimed was a more accurate account of what had been said at the meeting. She also subsequently claimed in her letter of resignation dated 15th February 2017 that the minutes prepared by the Respondent mocked her and contained "*fabrications, omissions and anomalies…"* which were "*a final and last straw due to the way I felt…"*

60. The Tribunal had reservations regarding the Claimant's allegations as to the accuracy of Ms Ramm's minutes:

    60.1. No other witness evidence was adduced by the Claimant as to what happened at the meeting on 12th January 2017. We found that omission surprising, since Ms Griffiths attended the meeting and, according to the Claimant, took notes. Ms Griffiths attended the hearing to support the Claimant. As well as not having the benefit of her recollections of the meeting, we were also not provided with her contemporaneous notes (if the same still existed);

    60.2. Even in her letter of 27th January 2017, the Claimant admitted that her own recollections of the meeting (even with the benefit of a note taker) were far from exhaustive, conceding at times that she could not recall exactly what was missing from Ms Ramm's minutes;

    60.3. Given our findings that the Respondent had acted reasonably and in good faith in the way it responded to issues post-30th October 2016, we were more inclined to conclude that Ms Ramm's minutes would have similarly been prepared diligently and in good faith.

61. For all those reasons, the Tribunal preferred the minutes prepared by Ms Ramm as a more accurate record of what was discussed at the meeting on 12th January 2017.

62. Mr Marston apologised to the Claimant, as previously arranged. He also agreed, at the Claimant's request, to put his apology in writing. However, it was clear from the minutes that there emerged a difference between the parties as to the progress or otherwise of the grievance process. Ms Atkins believed the grievance process commenced in November 2016 had been resolved, with the outcomes regarding the Claimant's supported return to

work (including her relocation, minimal interaction with DW, access to counselling, payment of discretionary sick pay and the apology from Mr Marston). What was now being raised by the Claimant (both in her letter of 28th December 2016 and during the meeting on 12th January 2017) constituted new matters, which were initially being investigated under an informal process. The Claimant disagreed, stating that the process had always been a formal grievance, had continued to be so and nothing meaningful within that process had been undertaken or resolved.

63. Whatever the parties' initial views, the Claimant was afforded an opportunity to set out, in detail, her further concerns (contained in eight points) and to express what outcomes she was seeking. It was agreed that an investigation into the Claimant's further concerns would be opened. The Claimant stated that she would not consider returning to work until "*this had been investigated and I have an outcome."* However, in the interim, it was agreed that the Claimant would have a weekly telephone call with the manager of the new house she would be working at, to keep her up to date with how the new service was developing. Ms Atkins also committed the Respondent to undertaking a further stress risk assessment before any return to work by the Claimant.

64. In a letter to the Claimant dated 18th January 2017, Ms Atkins confirmed what had been agreed at the meeting, reflected that Mr Marston had provided a written apology and confirmed the appointment of an independent manager (Jason Hughes) to investigate the Claimant's concerns. The letter also included a copy of Ms Ramm's minutes of the meeting of 12th January 2017.

65. Drawing all this evidence together, the Tribunal made the following relevant findings:

    65.1. The Claimant first raised a formal grievance in the letter written by her union representative on 3rd November 2016. That letter was limited to the two incidents with DW on 6th and 30th October 2016. At the meeting on 10th November 2016, the Claimant also raised her concerns regarding the incident on 24th September 2016;

    65.2. The Respondent agreed to provide support to the Claimant, including undertaking a stress risk assessment (conducted on 17th November 2016), minimising her future contact with DW (and prohibiting one to one contact altogether), proposing to relocate her to a new house, arranging an apology from Mr Marston and arranging counselling;

    65.3. The Respondent was entitled to conclude that it has reasonably addressed the Claimant's grievances and that a satisfactory outcome had been achieved. The Claimant attended training and returned to work on 26th November 2016. Whilst she expressed her

dissatisfaction in a supervision session, what she was seeking was confirmation that "*something had been done"* even though she was aware that she would not be told about every action taken by the Respondent;

65.4. It was not until the Claimant's letter of 28th December 2016 that her further concerns were raised. These had not been raised in her previous grievance. The concerns were explored further at the meeting on 12th January 2017 and an independent investigation opened.

66. It was not the case, as submitted by the Claimant, that the Respondent failed to conduct a proper investigation. In the Tribunal's judgment, the Respondent responded reasonably to the concerns raised by the Claimant, at the time that they were raised. The November 2016 grievances were accepted by the Respondent and they responded in a reasonable, effective and proactive manner. They took on board the Claimant's concerns, moved to limit her contact with DW, secured an apology from Mr Marston and provided emotional and practical support.

67. Similarly, when the Claimant brought forward her further list of concerns in December 2016 and January 2017, the Respondent again took them seriously and initiated a formal investigation. They also responded to the Claimant's concerns, agreed to provide further support and to undertake a fresh stress risk assessment.

68. The steps put in place by the Respondent to support the Claimant from January 2017 were initially positive. Two telephone calls took place between the Claimant and Simon Capstick, the manager of the new house the Claimant was being relocated to. Mr Capstick's contemporaneous records of those conversations (held on 18th and 26th January 2017) were seen by the Tribunal. It was not suggested to us that they were not accurate. Whilst the Claimant was understandably cautious about when she would be fit enough to return to work, the discussions included such topics as a phased return, what support Mr Capstick could give to the Claimant, the importance of the Claimant not feeling under pressure to return to work and the specific work being undertaken at the home.

<u>The Claimant's Resignation</u>

69. In her telephone conversation with Mr Capstick on 26th January 2017, the Claimant stated that her fit note was due to expire, she had an appointment with her GP on 30th January 2017 and she did not envisage being well enough to return to work by the time her current note expired. On 3rd February 2017, the Claimant contacted Ms Ramm, explained that she was not well enough to return to work and was seeing her GP for a further fit note. On 7th February 2017, the Claimant informed Ms Ramm

that she was seeing her GP on 9th February 2017 and would provide an update on her fitness for work after that appointment.

70. On 9th February 2017, Ms Ramm received two forms of communication. The first was an email from ACAS, informing the Respondent of the Claimant's intention to bring an Employment Tribunal claim and referring to her as a "*former member of staff."* The second, by recorded delivery, was the Claimant's letter of 8th February 2017, resigning.

71. Ms Ramm wrote back to the Claimant on the same day, acknowledged receipt of her resignation letter but invited her to reconsider given that there was an ongoing investigation into the most recent concerns raised. On 14th February 2017, the Respondent received three separate reference requests for the Claimant from prospective employers, in respect of jobs the Claimant had applied for (all of which were in or allied to the care and support sectors). On 15th February 2017, the Claimant wrote to the Respondent, refused the request to reconsider her resignation and set out in detail her reasoning. On 17th February 2017, Ms Atkins wrote to the Claimant, accepting her resignation.

The Outstanding Grievance

72. In a letter of 18th February 2017, Ms Atkins invited the Claimant to a meeting on 2nd March 2017 to discuss the outcome of Mr Hughes' grievance investigations. A copy of his investigation report was forwarded to the Claimant on 22nd February 2017. That report, dated 20th February 2017, did not uphold the Claimant's grievances, although he did recommend further training on correct recording practices.

73. The Claimant responded on 26th February 2017. She declined the opportunity to meet with Mr Hughes on 2nd March 2017 but requested an appeal of the grievance outcome. She subsequently submitted detailed written submissions and attended an appeal hearing on 20th March 2017, again accompanied by Ms Griffiths. The appeal was conducted by Mark Williams, Head of Complex Needs Services. By a letter dated 18th April 2017, he did not uphold the Claimant's appeal, providing his reasons therein.

Conclusions

Automatic Unfair Dismissal

74. It was not in issue that the Claimant was employed for less than two consecutive years at the date of her resignation. Her unfair dismissal claim was founded upon section 100(1)(c) of the ERA 1996. As her claim was one of constructive dismissal, the Claimant also had to establish that she was entitled to resign by reason of the Respondent's conduct (per Western

Excavating (ECC) Ltd v Sharp). That conduct had to engage section 100(1)(c) to succeed in her unfair dismissal claim.

75. The incidents involving DW and the subsequent grievance processes were, in the Tribunal's view, sufficiently connected to the Claimant's health and safety and to what she reasonably believed to be harmful or potentially harmful, that they each engaged section 100(1)(c). The key issue was whether, in reacting to the information brought to its attention by the Claimant, the Respondent acted in a manner which entitled the Claimant to treat her employment contract as terminated. The Tribunal began by considering each incident in turn, before addressing the Claimant's response to any breaches.

76. We did not consider the incident on 24th September 2016 or the Respondent's response to it to be a breach of contract, as claimed or at all, for the reasons given above (at Paragraphs 26 - 31). Similarly, we were not of the view that in handling the subsequent grievances the Respondent had acted in breach of the Claimant's contract. Rather, the Respondent responded reasonably to the complaints as they were raised. We did not find that the Respondent failed or delayed unreasonably in investigating and responding to the complaints. In addition, the Respondent was entitled to conclude that it had resolved the initial grievance of November 2016, both in the proposals put forward and the Claimant's engagement with and, to a degree, acceptance of the same. Whatever criticisms might be subsequently raised as to what the Respondent could and should have done differently, none of them, in our judgment, constituted a breach of any of the terms (implied or express) of the Claimant's employment contract.

77. However, the Tribunal did find that the Respondent erred in its response to the incident of 6th October 2016 (at Paragraphs 32 – 39). It was accepted by Ms Farmer that the Claimant should have been moved away from direct working with DW after 6th October 2016. The failure to do so exposed the Claimant to events of 30th October 2016. The Tribunal did not conclude that the fact that the Claimant was working with DW on 6th October 2016 was, in itself, a breach of her contract. At that stage, the Respondent had no reason to relocate the Claimant (particularly given our findings regarding the events of 24th September 2016). Any breach arose after 6th October 2016, when the Respondent should but didn't move the Claimant. Any breach ended after the events of 30th October 2016, when the Respondent responded by implementing a package of measures to support the Claimant, including limiting her exposure to DW and initiating a move to another location.

78. As such, at its highest, the Respondent acted in breach of the Claimant's contract between 6th and 30th October 2016 (by failing to move her away from working contact with DW). As a result of that failure, the Claimant was exposed to the events of 30th October 2016 (as found above at

Paragraphs 40 – 47), events which but for the Respondent's failure to move the Claimant, would not have occurred. Taken as a whole, the Tribunal concluded that the events from 6th to 30th October 2016 constituted a fundamental breach of the Claimant's contract (by breach the implied duty on the Respondent to take reasonable care to ensure the health and safety of its employee) which arose after the Claimant brought to the Respondent's attention (on 6th October 2016) circumstances connected with her work which she reasonably believed were harmful or potentially harmful to her health and safety (and thereby engaging section 100(1)(c) of the ERA 1996).

79. Did that breach cause the Claimant to resign? The simple answer is no. She did not resign for another three months, citing a number of additional issues (including the grievance procedure) as cumulatively leading her to that decision. As explained above, the Tribunal did not find any other issue to have been in breach of the Claimant's contract of employment.

80. There was also another compelling factor at large. During November 2016, when the Respondent sought to address the Claimant's concerns and institute a package of support measures, the Claimant engaged fully in that process. She met with Ms Atkins, shared her concerns (both existing and new), enquired about her sick pay, asked for a written apology from Mr Marston, attended training at the new location and spoke on two occasions (as arranged and agreed) with her soon-to-be new manager, Mr Capstick. Those were not the actions of an employee who reasonably believed that her contract of employment had come to an end by reason of her employer's conduct. Rather, the Claimant's actions were wholly consistent with the breach been waived and a clear sense that the contract of employment subsisted and continued.

81. In the alternative, the Claimant failed to act in a timely manner and failed to resign in response to the fundamental breach of her contract. She delayed for three months, during which time her actions were consistent with a waiver of the breach. The Tribunal did not agree with the Claimant's contention that the minutes of the meeting held on 12th January 2017 contained "*fabrications, omissions and anomalies."* If, as she claimed in her resignation letter, those minutes were the final straw that triggered her decision to resign, the same was not a breach of her contact, still less a fundamental breach.

82. Either way, her claim of unfair constructive dismissal was not made out and was dismissed.

Indirect Sex Discrimination

83. The Claimant identified the relevant PCP as follows (per the agreed List of Issues):

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> *A practice of placing female workers or employees in the position whereby they were required to care/supervise for male service users with violent and/or sexualised behaviour.*

84. We reminded ourselves of the training and experience required of the Respondent's staff (both by the Respondent and the various regulators), who are employed to work in often challenging and difficult environments. It was not in dispute that the Claimant was suitably qualified and experienced to undertake her role.

85. We were also mindful of the often indiscriminate and chaotic behaviours displayed by many of the children in the Respondent's care, including DW, which necessitated the employment of specialist clinical teams.

86. The identified PCP was applicable to the Claimant, albeit the Tribunal recognised that the "*male service users"* were children, that DW was 12 years old and physically small. In addition, all the evidence (including his age and background) supported the clinical view that whilst his behaviours were sexualised and at times violent, his intentions were wholly different (namely, to garner attention, which led to feelings of security and safety).

87. It was not in issue that the Respondent required male, as well as female, staff to work with DW. Did requiring female staff to work with children such as DW place them at a disadvantage when compared with their male colleagues? In our judgment, it did not. We heard evidence (which was not challenged) that DW had touched male staff inappropriately. His intentions were not sexually motivated – they were ways of seeking attention. He would do whatever he considered effective to get that attention. His history included exposure to sexualised behaviour and the clinical view was that he was simply copying what was effectively learnt behaviours. He would act inappropriately whatever the gender of the staff member.

88. In reaching that conclusion, the Tribunal was particularly aware of the specialized nature of the work undertaken by the Respondent and its staff including the Claimant. Had the behaviours of DW been exhibited by an adult male service user who had only physical care needs (as opposed to emotional and psychological needs), it would have been far more arguable that requiring female staff to work with and be exposed such behaviours put them at a disadvantage compared to their male colleagues. The behaviour in that scenario would, all things being equal, have been sexually motivated. But in the case before us, it was not.

89. In addition, whilst DW's behaviour had an adverse impact upon the Claimant, it could not be said that such an impact was the sole preserve of female staff. It could not be reasonably suggested that a male member of staff who was inappropriately touched or sworn at by DW could not feel uncomfortable, distressed or, at times, violated.

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90. There would undoubtedly be cases where it was appropriate to confine the care of certain children to all-male or all-female environments or to ensure that they were cared for on a 2:1 ratio or higher. But those are decisions for the clinical experts, after assessing and considering what was in the best interests of the child as much as the staff. In DW's case, those with that expertise had determined that a mixed environment was appropriate. We were not presented with any expert evidence that called that clinical judgment into account.

91. For those reasons, we were not satisfied to the required standard that there was a causal connection between the PCP and any disadvantage suffered by female employees, whether in respect of caring for DW or other children in the Respondent's care. It follows that there was similarly no causal connection between the PCP and any disadvantage suffered by the Claimant.

92. Even if we were wrong in that analysis, and the Claimant had established both group disadvantage by reason of the PCP, the Tribunal was of the view that the PCP was a proportionate means of achieving a legitimate aim. It was difficult to envisage how services such as the Respondent's, charged with the welfare and care of highly vulnerable and challenging children, could effectively operate if placing male children in the care of female staff was discriminatory. That was more so where, as here, the clinical care plan did not suggest or recommend a need for same-sex care.

93. As such, the Claimant's claim of indirect sex discrimination was not made out and was dismissed.

Harassment

94. In his written submissions, Mr Rigby also contended that the Respondent's acts and omissions constituted unlawful harassment, pursuant to sections 111 and 112 EqA 2010. Reliance was placed on the decision in Unite v Nailard [2016] IRLR 906, although its application to the Claimant's case was not developed in any detail.

95. The third-party harassment provisions previously contained within section 40 of the EqA 2010 were repealed on 1st October 2013. Rather, the Claimant contended that by being required to continue working with DW, the Respondent made it possible for him to further harass her (contrary to section 26). As such, the Respondent instructed, caused or induced contraventions of section 26 (per section 111) or aided those contraventions (per section 112).

96. What the Tribunal drew from Nailard (particularly at [100] to [103]) was that inaction or omission could only support a claim of harassment under section 26 if the failure to act was in some way related to the Claimant's sex or race. Reliance was placed upon an old Race Relations Act case but

the test was broadly the same as under the EqA. If an employer failed to take action, that failure led to the commission of unwanted conduct by a third party and helped to create the resulting hostile, intimidating atmosphere and the failure to take action was because of a protected characteristic, then the employer may be liable (Conteh v Parking Partners Ltd [2011] ICR 341). However, these authorities were concerned with section 26 (and its predecessor), not sections 111 or 112.

97. We were unable to find any case law regarding the interpretation or application of sections 111 or 112. Neither party drew our attention to any relevant authorities. In addition, the Equality & Human Rights Commission guidance and the Explanatory Notes to the EqA make no reference to a failure to act satisfying the requirements of either provision.

98. The Tribunal did not understand it to be the Claimant's case that the Respondent's failure to move her away from DW after the 6th October incident was in any way because of the Claimant's sex or race. Even if it had of been, we were unable to find any evidence to support such a contention. The case law above recognised when an omission could lead to a claim of harassment, which, in our judgment, further reinforced the lack of any authority that a failure to act, without more, could found a claim under sections 111 or 112. The language of both sections is far more indicative of the need for overt action by the Respondent - the words "instructing, causing, inducing and aiding" are, in their ordinary sense, indicative of active rather than passive involvement.

99. For all those reasons, and given our findings of fact, the Tribunal concluded that the Respondent's failure to act between 6th and 30th October 2016 was not capable of founding a claim under section 26 of the EqA 2010 because the Respondent's omissions were not because of any protected characteristic of the Claimant's (whether sex, race or anything else). In addition, the ordinary meaning of sections 111 and 112 of the EqA 2010 required something more than a failure to act or a failure to take action. The absence of any authorities to the contrary further supported the Tribunal's conclusions in that regard.

100. In the circumstances, the Claimant did not make out her claims of harassment under the EqA 2010 and the same were dismissed accordingly.

Order posted to the parties on

RESERVED JUDGMENT

22 August 2018

EMPLOYMENT JUDGE S POVEY

Dated: 20th August 2018

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For Secretary of the Tribunals