EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Miss K	**v**	**1. NN Limited** **2. Mr N**

Heard at: Watford **On**: 5-9 August 2019, and (in chambers) 30 August and 25 October 2019.

Before: Employment Judge R Lewis
Members: Mr A Scott
Mrs I Sood

Appearances
For the Claimant: In person
For the Respondents: Mr P Maratos – Consultant, Peninsula

RESERVED JUDGMENT

1. The claimant was not an employee of the second respondent.

2. The first respondent has not made unlawful deductions from the claimant's pay.

3. The first respondent has failed to pay the claimant holiday pay.

4. All the claimant's claims based on protected disclosure, whether of detriment or automatically unfair dismissal, fail.

5. The respondents and each of them discriminated against the claimant on grounds of sex on six occasions on which the second respondent used gender related language in texts or email.

6. All other claims of sexual harassment or of discrimination on grounds of sex fail and are dismissed.

7. The claimant was not constructively dismissed, and her claims based on constructive dismissal fail and are dismissed.

8. Remedy to which the claimant is entitled under paragraphs 3 and 5 above will be determined at a remedy hearing on **23 and 24 January 2020** for which a separate Case Management Order has been made.

ORDER

In exercise of its powers under rule 50(3)(b) of the Tribunal rules, the tribunal of its own initiative orders that the names of the parties be anonymised in accordance with the heading of this Judgment until the remedy judgment is sent out, or further order.

REASONS

9. The following abbreviations are used in this judgment:

   BMI: The private healthcare company which was the employer of Mr Jeavons-Fellows, and the proprietor of the private facilities where the claimant underwent eye surgery.

   EqA: Equality Act 2010

   ERA: Employment Rights Act 1996

   NN: The first respondent

   HMO: House in Multiple Occupation

   SAMC St Albans Medical Centre

Executive summary

10. Despite the diffuse presentation of this case, it was at heart not complicated. We hope it makes our decisions easier to follow if we summarise.

11. The claimant was a patient of Mr N, an eye surgeon. He offered her employment to work on renovation of a property owned by NN, a family-owned business. The respondents concede that NN was her employer. We find that Mr N was not also her employer. The claimant's employment was wholly undocumented. She was paid almost exclusively in cash. We find that her agreed rate of pay was £100.00 per day, and that apart from holiday pay, she has been paid all remuneration due to her.

12. The claimant's employment began just after her first cataract procedure, and in her first week, she had the second procedure, both performed by Mr N. She was quickly convinced that the procedures were not carried out properly. An independent reviewer wrote (C131/9) that he found 'a very capable surgeon clearly able to perform high quality cataract surgery.' This tribunal makes no finding whatsoever about the quality of the claimant's medical care.

13. The claimant's work was to manage completion of a renovation project. She was quickly sure that her colleagues, and contractors retained by them,

had not been competent or efficient, and that she had identified a raft of regulatory and safety non-compliances. This conviction, which she expressed volubly, brought her into conflict with colleagues and contractors.

14. The claimant had told Mr N before he recruited her that she worked as a 'camgirl'. She has brought a number of claims of sex discrimination. We have upheld claims based on Mr N's usage of gender related language in texts and emails, and rejected all other allegations of sex discrimination or sexual harassment.

15. The claimant's employment ended after nine weeks. There was dispute about whether she resigned, or was constructively dismissed, or expressly dismissed. We find that her employment ended by her voluntary resignation, and that she was not dismissed.

16. Once during her employment, and twice after it ended, the claimant spoke to staff at BMI about Mr N and aspects of NN. We find, for different reasons, that the claimant did not make protected disclosures.

17. Throughout this hearing the tribunal had to address the issue which we describe below as the 'case management challenge.' The difficulty of doing so fairly, proportionately, and within the allocated time, cannot be overstated.

Procedural history before this hearing

18. This claim was presented on 12 July 2018. Day A was 22 May and Day B was 14 June. The first case management preliminary hearing came before Employment Judge Smail on 7 November 2018. He made arrangements for judicial mediation, and for the contingency of mediation failing to resolve the matter. He also gave the present listing. Judicial mediation took place, unsuccessfully, on 10 December 2018. This tribunal had no more information about the mediation than that bare fact.

19. The second case management preliminary hearing was conducted by Employment Judge Jenkins on 1st May 2019. It was conducted by telephone. That was unusual in a case where one side was acting in person, and the hearing proceeded, on direction of the Regional Judge, in light of what he called the claimant's 'insistence'. Judge Jenkins gave further case management orders.

20. The tribunal file suggested a need for significant case management, which was undertaken by Employment Judge Heal at a two-day third preliminary hearing on 4 and 5 July 2019, leading to a lengthy order sent out on 10 July (57E-57T).

Chronology of this hearing

21. Case management and reading time took up all of the first allocated day. Restricted Reporting Orders were made at the end of the first day. The three witnesses who had been ordered to attend by Witness Orders issued

at the claimant's request all attended at the start of the second day of hearing and gave evidence. They were:

21.1. Mr Andrew Jeavons-Fellows, Director of BMI Hospitals, who had been the Chief Executive of the hospital where the claimant had been treated by Mr N at the relevant time. He confirmed that the protected disclosures allegedly made to him had been communicated to him.

21.2. PC Lee Hammond and PC Lee Gough, Officers at St Albans Police Station, gave evidence of an incident on 14 April 2018, in relation to which Mr Hammond had helpfully produced a written statement. It confirmed an email which he had written on 1st October 2018 (C79), which in turn confirmed the print out which the claimant appeared to have obtained from the police (C80). The officers' evidence did not go beyond the written material. It was not clear why it was thought necessary to require them to attend in person.

22. The claimant gave evidence from the late morning on the second day until an early lunch adjournment on the third day. She remained courteous to the tribunal throughout. It was necessary to intervene to ask her to focus answers on the questions put, and to divert her answers from the matters about which she felt strongly, and wished to discuss.

23. After the claimant had concluded her evidence on the third day, the tribunal took the adjournment and Mr N gave evidence for the rest of that day.

24. The tribunal convened early on the morning of the fourth day, 8 August. Ms Clare Lee was interposed as witness on behalf of the respondents, and gave evidence for about 30 minutes. She was then released.

25. After Ms Lee had left and before Mr N was recalled, the tribunal heard the audio of a conversation between the claimant, Mr N and Ms Shurmer on 6 February 2018. We heard about eight minutes, of which there was an incomplete transcript in the bundle (286-287) and to which the claimant added a more complete transcript (286/1 to 286/6). That was the only part of this hearing in which we listened to audio, and it was helpful to do so with a transcript before us.

26. The claimant resumed cross examination of Mr N at around 11.30 am, and shortly before the lunch break, we asked her how much more time she would need. She asked for the rest of the day. After a short break, the tribunal agreed to extend time for Mr N's questioning to 3.30pm, allowing brief time for members' questions and re-examination, as the tribunal had to conclude at 4pm that day. Although we had hoped to conclude evidence and submissions in four days, leaving the fifth day in full for deliberations, that did not seem to us possible, in the interests of justice, given the evident difficulties of the claimant with the tribunal process and cross examination.

27. We heard submissions on the morning of the fifth day, and then reserved judgment. We set provisional dates for the remedy hearing, and explained

the process to be followed in outline. We met again on 30 August, having pencilled in the next two available dates for deliberation, which were in late October. We could not conclude deliberations on 30 August, and arranged to meet again on 25 October. The parties were informed of this.

Case management at this hearing

28. This hearing came before us after four days of case management by three previous judges, including what appeared to be exhaustive case management by Judge Heal only a few weeks earlier. Nevertheless, throughout this hearing, the tribunal was repeatedly asked to address issues of case management. Almost all of these points were raised by the claimant. Many were the product of her inexperience and lack of understanding of the tribunal. Together, they took up a large part of the time allocated to this hearing. We set them out below.

Privacy

29. The respondents applied for orders under Rule 50 prohibiting the naming of any person involved in this case, including witnesses. It was a puzzle as to why this application had not been made earlier. The claimant resisted the application, while acknowledging that material about her might attract privacy orders if requested.

30. The tribunal took the view that this was a case of allegations of sexual misconduct, in which the interests of justice warranted a Restricted Reporting Order, until final judgment on remedy was sent out, prohibiting publication of the names of the claimant, the First Respondent and the Second Respondent. The Order was signed by the Judge on the morning of 6 August, and was then placed on the tribunal door in accordance with normal practice.

31. When this Judgment was in final stages of drafting, the tribunal noted that the effect of that order would be undermined by the combined effect of (1) splitting the hearing so that there would be a delay of some months between judgment on liability and on remedy; and (2) the administrative practice of posting all judgments on line. We noted that neither party had had an opportunity to consider future privacy in light of the findings of the tribunal. We therefore exercised our power, of our own initiative, under rule 50(3)(b) to anonymise the names of the parties as above until the remedy judgment is sent out or further order. We will, at the remedy hearing, ask for the parties' submissions on privacy issues.

32. The Judge explained the effect of rule 44 to the parties, and directed the parties to ensure that no reference was made in the rule 44 copies of the witness statements to either an identifiable child, or to the alleged medical condition of a third party referred to in evidence.

Other proceedings

33. We were told that no other proceedings between the parties are currently in train before any court. The claimant showed the tribunal a request for pre-action disclosure sent by solicitors on her behalf against Mr N (which he said he had not seen). We were told that the claimant has complained to the GMC, where proceedings may be pending. The claimant said that her private health insurers, PPP AXA, are contemplating civil proceedings against BMI and / or Mr N. We could therefore see no existing proceedings which might require this tribunal to delay.

Other relationships

34. Mr N confirmed that he has no current working relationship at Moorfields Eye Hospital, where one member of the tribunal has been a frequent patient. Mrs Sood confirmed having heard a previous case in which Mr Jeavons-Fellows had been a witness. Neither of these matters required any further case management.

Split hearing

35. In view of the volume of material the tribunal stated that this hearing would deal with liability only. A provisional date for remedy hearing was set, which is confirmed in the separate Case Management Order.

Bundles

36. Peninsula had produced a numbered bundle up to page 289. That was the primary bundle to which page references in this judgment refer. The claimant had produced her own un-numbered bundle, indexed according to item number (which she called 'point'). Where we refer to a document from that bundle, we call it C and then use the claimant's item number. Where the item is multi-paged, we adopt the claimant's sub-numbering. Thus C131/9 is page 9 within item 131 in the claimant's bundle.

37. We accept that the bundles were produced at the last minute, in response to Judge Heal's orders. When the tribunal asked why so many of the main relevant documents were not in the Peninsula bundle, Mr Maratos said that the claimant had told Judge Heal that she did not trust Peninsula to prepare the working bundle, so it followed that her bundle contained many of the major documents.

38. The claimant's bundle was not compliant with paragraph 4.1 of Judge Heal's order and was itself a source of muddle, uncertainty and delay at this hearing. It seemed to include much of the Peninsula bundle. It contained many irrelevant pages. It was organised by item, although an individual item could (and did) contain over 100 pages. Many items were multi-numbered. It included an inordinate volume of email trails, often in reverse chronology. While the claimant's command of the bundle was impressive, it was also unique and no other person could be expected to come to grips with a presentation which was neither chronological, nor thematic, nor sequentially numbered. That issue, which was entirely the creation of the

claimant, is recorded for the sake of completeness in this context. It played no part in the case outcome.

Social Media

39. The claimant asked the tribunal to exclude items from the bundle. We declined to do so on a blanket basis, preferring to adopt a pragmatic approach, and assessing the item when it arose in evidence. On that approach, we refused the claimant's request to exclude pages 127-130C from the bundle, which were social media postings made by the claimant in the name of what she called 'an online persona.'

Recordings

40. It was common ground that the respondents had recorded at least some parts of some workplace meetings. The claimant was aware of this: we noted for example that on 30 January Mr N tasked her with recording a meeting which he could not attend 'so I can hear it and write minutes for circulation' (C28). It was not agreed that the respondents had given full audio disclosure or transcribed all items. This issue threatened to engulf this hearing. The tribunal could not go behind the respondents' assertion that all relevant recordings had been disclosed. The only true resolution to the dispute about the accuracy of transcription would have required the tribunal to do that which had been beyond the parties, or to adjourn for them to do so, namely to listen to the audio material in its entirety, compared with the transcripts which existed. We declined to do so. That being so, the proportionate means of dealing with this dispute was that we declined the claimant's blanket request to exclude the respondents' transcripts, and said that her right to object to our considering any specific transcript could be reserved to the point at which that transcript was referred to.

41. The claimant prepared a small number of transcripts. When we were asked to compare them with the respondents' transcripts (eg 284 / 294) they were almost indistinguishable. We were assisted by modest sections of the transcripts. We draw no inference against the respondents or Peninsula from the absence or inaccuracy of any transcribed material.

Adjustments

42. The bundle contained letters from the claimant's GP, and from a consultant psychiatrist, which said, in short, that the claimant had recent diagnoses of adjustment disorder and general anxiety disorder (162, 164). We made adjustments for the claimant in practical arrangements. We offered the claimant breaks when it seemed to us necessary or when she appeared distressed. The claimant showed insight that her health conditions made demands on the tribunal process.

43. During the hearing, including her evidence, the claimant was accompanied by her parents. They were not witnesses. The Judge suggested, and Mr Maratos kindly did not oppose, that it would be appropriate to take the

exceptional step of releasing the claimant from oath during all breaks so that she would have the support of her family. This was done.

44. We record so that there is no dispute about it that the claimant's father at one point explained to the tribunal that he was making gestures to the claimant, not to prompt her, but to make the point that she had answered the question and should finish her answer. There was no comment or objection about this.

45. On the third day, when the claimant was to cross examine Mr N, the tribunal changed the configuration of the room, so that the claimant and Mr N would not be seated next to each other, but would be on opposite sides of the room.

CCTV Footage

46. The claimant complained of a failure by the respondents to disclose CCTV footage. The footage was said to be that of a restaurant where the claimant and Mr N had once had dinner together. The respondents said that any footage was not theirs to disclose, and that inquiries of the restaurant revealed that it had been overridden. Disclosure by either respondent was not the appropriate means of accessing it. The Judge confirmed that short time override of CCTV footage is his usual experience, so that footage is generally not available to the tribunal unless requested shortly after the index event. The claimant's conviction that Mr N had lied to the tribunal about CCTV is unfounded, and seems to us an obvious mis-reading of paragraph 42 of his witness statement.

Witness statements

47. We were told that witness statements had been exchanged shortly before midnight on Thursday 1 August, with this hearing due to start the following Monday. The claimant objected to receipt of a very short statement from the respondents of Ms Hillman the following morning, Friday 2 August. She said that it should be excluded on grounds of lateness. We refused her objection. The claimant was not prejudiced by a few hours overnight delay of a document which could have taken her no more than minutes to read.

48. In the event, Mr Maratos told the tribunal at the end of the second day that the respondents would not call Ms Hillman. That gave some disappointment to the claimant (despite her having tried to exclude the evidence) but was a matter for the respondents.

Status

49. Although Judge Heal had identified the issue of employment status to be decided, the respondents conceded that the claimant was at all material times an employee of NN, but not, as she argued, simultaneously an employee of the second respondent personally.

Amendment

50. The claim form was presented on 12 July 2018. Judge Heal's list of issues included a number of matters postdating that date, and which were not referred to in the claim form. There had been no application to amend. Mr Maratos told us that the respondents' position was that they had not agreed to the introduction of matters not already in the ET1. He said that Judge Heal had included them in the list of issues in case they were relevant, and the respondents reserved their right to submit that they were no more than relevant background matters, but that the tribunal had no jurisdiction to determine them.

51. We were troubled by the issue of possible amendment. It seemed to us that the following whistleblowing detriment issues which appeared in Judge Heal's order were not in the ET1: 3.7.1; 3.7.7; and 3.7.9-13 inclusive.

52. We could see no indication in the tribunal file that an application had been made at any time to amend. Although not referred to in Judge Heal's order, we could see the sense of Mr Maratos' explanation. The Judge had recorded the claimant's narrative of the issues as she saw them, and the respondents had reserved their right to raise a jurisdictional defence to them.

53. We have set out separately and in wider context our findings and conclusions on these issues. While it may appear unnecessary to do so, it seems to us right in principle to say that we do not accept that the tribunal has jurisdiction to determine any of these issues. They were not the subject of an application to amend; there was no explanation of their very late introduction into these proceedings; and the lateness may of itself have rendered them not capable of fair trial. We accept that the claimant has been unwell, and we could see that she has struggled with the more technical aspects of this case. She has however had ample time to reflect and prepare, and to take advice, and has applied herself assiduously to pursuing disputes with Mr N. We must decide this case on the footing that the discipline of case management has applied to her as it does to all parties in every case.

<u>Release of the bundle</u>

54. The claimant made two applications. She asked the permission of the tribunal to release the bundle in its entirety to PPP AXA, her private health insurers, which she said required it for the purposes of its own civil proceedings against Mr N and / or against BMI. The tribunal declined to do so. We were concerned to release to a non-party several hundred pages of material, the great majority of which would not be referred to in public hearing, in a case where neither side was professionally represented, but where the claimant had made clear that she was dedicated to the pursuit of claims against Mr N elsewhere. We reminded the claimant that PPP AXA is well resourced, and has considerable experience of the County Court procedures. If so advised, it will be able to make its own application.

55. The claimant applied secondly for limited release of the bundle to members of the public who might attend this hearing. The tribunal declined to read rule 44 so broadly, and broadly for the same reasons as above refused permission. In the event, no member of the public observed any part of the hearing.

Diary

56. During evidence on the second day, the claimant referred to a handwritten diary, in which she said she had made entries shortly after 27 February 2018 about her experience at work. This was a plainly relevant disclosable document, even if, as the claimant said, it would have required redaction to remove personal material which was irrelevant. Mr Maratos made no application, perhaps aware of the impact that that would have had on the hearing timetable, and the tribunal took no steps of its own motion. It was nevertheless a serious omission, given in particular the high value which the claimant appeared to have placed on disclosure by the respondents.

57. There was a lengthy digression on the morning of the third day. The claimant brought a bound A4 diary with her to the tribunal that day. She stated that 40 pages of handwritten material (which she volunteered were difficult to read) contained entries which might be relevant to this case, although a two-page summary was the single most important item. She sought leave to introduce the diary.

58. Although Mr Maratos was prepared, as a matter of expediency, for the claimant to do so, the tribunal after adjournment declined to permit the claimant to introduce the diary material. The tribunal explained that if the diary were to be disclosed, it must be done properly.

59. The difficulty about admitting the material was that on the claimant's account the first step would require her to produce a copy, suitable for disclosure, from which she had redacted diary material which was personal or intimate, and not relevant to this case. Her second step would be to ask the tribunal to vet her redaction, so that the tribunal could assure the parties that the redactions were properly made.

60. As a third step, depending on the true degree of difficulty in reading the claimant's handwriting, some of the diary might need to be transcribed.

61. It would then have to be paginated and copied, and Mr Maratos would have to have the opportunity to take instructions, and Mr N to read the diary entries. It was possible that material in the diary entries might lead the parties to revise their witness evidence or call other evidence.

62. This could not be done on a single day, and probably not in two days. The tribunal noted Judge Heal's order of 4 and 5 July, from which it appeared that Judge Heal had taken exceptional pains to deal meticulously with all detailed disclosure issues. The claimant had had the opportunity then to ask for guidance about the diary.

63. The claimant had had the diary throughout: it was not in the interests of justice to permit such late disclosure, which, if undertaken properly and fairly, would demand a long adjournment. It was not in the interests of justice to permit the document to be produced at such a late stage and in the manner in which it had been produced, and we refused to do so.

Redaction

64. In the course of her evidence on the second day, the claimant raised a concern that the tribunal had not been given unredacted copies of the handful of redacted documents which had been disclosed to her by the respondents. Mr Maratos explained that he had not understood that this point remained live. He undertook to bring unredacted copies of the four identified pages to the tribunal on the morning of the third day. He did so. The Judge checked and confirmed that with one exception the redacted portions related to third parties and were properly redacted from this hearing bundle, and informed the claimant accordingly. The unredacted copies were not retained by the tribunal and were returned to Mr Maratos on behalf of the respondents. The Judge found that one redaction properly excluded legal advice given to Mr N. He permitted the introduction of one sentence, which he read out to the claimant to note. It appeared to be Mr N's comment in light of legal advice (not the advice itself) which we ruled was not privileged.

The case management challenge

65. The tribunal works with inadequate resources, which are a large cause of delay and backlog. In November 2018, Judge Smail listed the case for five days the following August. If this hearing had been adjourned and re-listed, the first available dates in Watford would have been in September 2020. We wished to avoid that, especially in light of the medical evidence.

66. Cases sometimes begin, fail to finish in the allocated time, and then resume part-heard. We knew, from discussion, that the three members of this tribunal were next available for one day in August and two days in late October. We know that resuming a case part-heard is difficult for experienced parties and representatives, but, in our experience, near-impossible, and inherently unfair, for any party in person. We wished to avoid that.

67. The claimant had produced a report from a psychiatrist, who advised that the claimant suffers from an anxiety disorder, and that her health requires a prompt conclusion of this case, and would suffer from further delay. We considered ourselves duty-bound to respect that opinion so far as compatible with our role and responsibilities. As medical lay people, we could see that the claimant manifested signs of stress during this hearing. She was verbose, repetitive, and used time uneconomically. We were duty-bound to offer her such accommodation and adjustment as we reasonably could, consistent with the overriding objective and with fairness to the respondents.

68. The claimant had acted in person for most if not all of this case. That was her right. Her allegations against Mr N were serious. Her approach was highly personalised. It seemed to us (without inquiring into any detail) that it had been only partly possible to establish a relationship of working co-operation between the claimant and Mr Maratos or Peninsula. As a result, there were both unresolved issues (see the case management issues raised at this hearing) and underlying tensions between the parties. We struggled to focus this hearing, and to keep the disagreements about case preparation under control and in proportion.

69. In that setting, the parties had met for case management on 4 July, just over four weeks before the start of this hearing. Case management, which normally takes 2-3 hours, took two days. Judge Heal's order was sent on 10 July. It went into greater detail (eg on disclosure and bundling arrangements) than is usual.

70. The overarching case management problem which presented before Judge Heal was that the issues had not been defined. The claimant plainly wished to introduce fresh allegations which had not been pleaded in the ET1, but had made no formal application to amend. We can see that Judge Heal defined the issues comprehensively, and then endeavoured to do all that she reasonably could to address all foreseeable problems of case management and preparation; and maintain the case in the list for a five-day hearing to start a few weeks later. That was ambitious, even if both sides had been represented by experienced lawyers co-operating fully in case preparation.

71. It was not clear to us that the claimant understood Judge Heal's order. She may not have understood that when Judge Heal wrote that the list of issues was authoritative, she also meant definitive, and that it was not open to a party to add to the list of issues. Where, at sections 3.2 to 3.6, the order set out the variables in public interest disclosure law, it was clear that the claimant did not understand the logic or implications.

72. There were points in the order which neither side addressed in evidence. This created a further case management problem. The claimant insisted that her health demanded prompt resolution. Had the tribunal endeavoured of its own initiative to fill all the gaps in the evidence, the hearing could have lasted twice the allocated time, if not more. We took the view that the parties having been allocated time in November, they had sufficient time to prepare for a hearing the following August, following the discipline and structure that had been given.

73. We faced similar challenges to Judge Heal. Like her, we regarded completion of our task in the allocated time as a priority. That approach required, on both sides, a degree of insight and self-discipline which the claimant struggled to achieve.

Legal Framework

74. The primary legal issue on which this claim proceeded was a claim of discrimination on grounds of sex under s.11, s.13, s.26 and s.39 of the Equality Act 2010.

75. S.13 deals with direct discrimination. S.13(1) provides as follows:

> "A person discriminates against another if because of a protected characteristic A treats B less favourably than A treats or would treat others."

76. That however is a general definition section which of itself gives rise to no rights or liabilities. It must be read with a substantive act of discrimination, usually in accordance with s.39. S.39 sets out a number of forms which discrimination may take. S.39(2)(d) provides that an employer must not discriminate against an employee "by subjecting B to any other detriment".

77. When considering a claim of direct discrimination, the tribunal must have regard to the characteristics of a hypothetical comparator. The protected characteristic need not be the only or the dominant reason for the treatment, but it must be a material reason. The tribunal must take care not to confuse treatment (which is what its decision must be based on) with motive.

78. S.26 defines harassment. For these purposes it occurs if:

> "A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if A engages in unwanted conduct of a sexual nature, and the conduct has the purpose or effect referred to…
>
> (4) In deciding whether conduct has the effect referred to in sub-section … each of the following must be taken into account – the perception of B; the other circumstances of the case; whether it is reasonable for the conduct to have that effect."

79. S.212(1) states as follows:

> "Detriment does not… include conduct which amounts to harassment."

The practical effect of that is that the same conduct cannot be both harassment under s.26 and detriment under s.13 and s.39.

80. When we consider a claim under s.26 the tribunal's task is first to find what facts took place. Having made those findings, it must then find whether the conduct which it has found to have taken place was unwanted. It must then find whether it was related to a protected characteristic. It must then consider whether it had the statutory effect set out above, in light of the factors set out above. A claim for harassment succeeds only if it meets all of the hurdles.

81. Allegations of harassment must consider all the circumstances and are fact specific. The tribunal must be conscious of its obligation to uphold the law and set workplace standards, while not encouraging an unrealistic or hypersensitive culture.

82. In considering discrimination, the tribunal must have regard to s.136, and the burden of proof. It provides:

> "If there are facts from which the court could decide, in the absence of any other explanation, that A contravened the provision concerned, the court must hold that the contravention occurred."

The burden therefore rests on the claimant in the first instance to prove facts from which the tribunal could decide in the absence of explanation that there had been discrimination; it is then for a respondent to put forward an explanation which stands free of any protected characteristic or factor.

83. This claim was also brought as a protected disclosure (also known as "whistleblowing") claim. We do not set out here a discussion of the whistleblowing provisions in any detail. That is because of the unusual nature of this public interest disclosure claim, and we do so below, in context.

84. In the usual whistleblowing case it is for the tribunal to decide first what did the claimant say or write to the respondent; secondly, if the communication was oral the tribunal must find what was said; the tribunal must then decide whether the communication which it has found took place falls within the definition of qualifying disclosure set out in ERA s.43B. It may, depending on the circumstances, have to consider the question of the identity of the person to whom the disclosure was made, and whether that person also fell within the remit of the ERA ss.43B-G.

85. It is a matter of logic, not law, that the tribunal might have to consider whether the individual who made the decision complained of (ie the dismisser or the person who subjected the claimant to detriment) knew of the disclosure relied upon. It is a point of logic, quite simply because if the decision was made by an individual who did not know about the protected disclosure, the protected disclosure cannot have formed any part of his or her reason for the decision.

86. What is unusual about this case is that all protected disclosures relied upon were made by the claimant to a person with whom she had never been in a work or an employment relationship. The first disclosure was one which we accept Mr N did not know about until the first day of this hearing. The second and remaining disclosures were made well after the claimant's employment relationship with NN had ended. Those were unusual circumstances, and we set out the legal framework and our discussion

below, as part of a single discussion of the public interest disclosure elements of this case.

87. The claimant claimed automatically unfair constructive dismissal. She had only a few weeks' employment. S.95(1)(c) Employment Rights Act provides that a dismissal occurs if,

> "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

The fundamental statement of the law remains that of Lord Denning in Western Excavating ECC Limited v Sharp 1978, ICR 221:

> "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, then the employee is entitled to treat himself as discharged …."

88. In that early case the Court of Appeal rejected a test of unreasonable behaviour, and adopted the contractual test which still holds good.

89. The test has been developed through a series of authorities, notably Malik v BCCI 1997 ICR 606, to embrace the situation where an employer,

> "without reasonable or proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties".

90. We emphasise two points. First, the test in constructive dismissal is objective. No matter how strong the claimant's feeling that she has been constructively dismissed, it is a question for the tribunal to decide whether the tests of Western Excavating and Malik have been met. Secondly is the importance of proper cause. Conduct which might otherwise be repudiatory in the Western Excavating sense may nevertheless not constitute constructive dismissal if it is for reasonable or proper cause.

91. S.103A provides:

> "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 the employee made a protected disclosure".

92. We understand the relationship between the two sections to be that a claimant must prove that the protected disclosure was the sole or principal reason for the conduct by the respondent which led the claimant to resign; and not simply the sole or main reason for the resignation.

93. S.39(2)(c) Equality Act provides: "An employer must not discriminate against an employee… by dismissing B." The word "dismissing" in the Equality Act includes s.95(1)(c) constructive dismissal, and therefore would

include the situation where, for example, an employee resigned as a result of a course of Islamophobic abuse.

94. The tribunal must in such a case carefully consider the interaction of the various provisions. We understand the question to be whether the claimant has shown that she resigned from her employment with NN in response to conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence, where such conduct had, as its sole or principal reason, that she had made protected disclosures; and/or had, as a material factor, the claimant's sex, or that she had refused sexual advances. That is potentially a complex fact find.

General approach

95. In this case, as in many others, we heard evidence about a large range of matters. Where we make no finding about a matter of which we heard, or a finding which is not to the depth to which the parties went, that should not be taken as oversight or omission, but as a true reflection of the extent to which the point was of assistance to us.

96. That comment is true of most of our cases. It was particularly important in this case, where the claimant brought to the hearing an unrealistic understanding and expectation of the tribunal process. We have some sympathy with her failure analytically to disentangle the networks of relationships in this matter. When her focus drifted away from the employment relationship, and in to medical matters, we intervened; where the claimant sought to probe Mr N's relationships with other employees or other patients, that seemed to us irrelevant and disproportionate; and the claimant frequently pursued tangents arising out of events at work, or matters in the documents, about which she felt strongly, but which were not related to the issues for decision by the tribunal.

97. In this case, as in many others, the tribunal faced the issue of hindsight, compounded by disclosure, and by the passage of time. The tribunal's task is to make findings about the events at the time they took place. A decision by any party (eg to resign or to dismiss) can only be informed by the party's knowledge at the time. Information or documents gained subsequently may shed evidential light on the events, but cannot have formed part of the factual matrix at the time. The passage of time, and the work of case preparation, often harden parties' beliefs, and make the task of analysing what they knew, and when they knew it, more difficult.

98. Despite the time available between Day A and the start of this hearing the claimant's understanding and expectation of the tribunal process were limited. She was repeatedly disappointed to be told that there were issues which the tribunal would not consider. These included Mr N's medical competence, the conduct and competence of other people (as she saw them), whether anyone involved in these events was "of good character" and other potential civil claims.

99. The claimant seemed almost bewildered at the end of the first day, during which she had received a great deal of information about the fundamentals of the employment tribunal and this case, almost all of which seemed to take her by surprise. She asked a telling question when she asked why the tribunal had failed to treat her "as a victim". We thought that a telling indication of the claimant's unpreparedness for the legal process. The Judge explained that identification as victim might imply success in the proceedings; that the tribunal could not pre-judge the outcome of the case, and that the responsibility of the tribunal was to place the parties on equal footing, having made appropriate adjustments for the claimant's ill-health.

100. In this case, as in many others, we were referred to emails, texts and WhatsApps. There was cross examination about them. We approach that material with the general cautions that none of those is a medium which encourages reflection or analysis, and that the artificiality of court technique means that cross examination about them may become unrealistic.

101. Mr Maratos cross examined briefly about online postings written by the claimant on her camgirl website. This was not private material: the claimant spoke in evidence of having 48,000 followers. The site was not in the claimant's actual name, and this Judgment does not record the name which was used. The claimant replied that the postings were those of 'an online persona,' not those of the claimant herself, even if they drew heavily on the claimant's own experience, describing her new job in the property business, and her relationship with her doctor and her new boss. We accept that caution, and have attached no weight to the postings.

102. The claimant was courteous to the tribunal. Nevertheless, despite frequent direction, she returned to points which she had been asked to leave to one side. There were a range of matters which were either peripheral, or which were not issues before the tribunal, which she found difficult to put aside. It was repeatedly necessary to remind her for example that we make no decision about the quality of her project management on behalf of NN, or about the respondents' business management model.

103. We heard much evidence about non-parties. Most often named was Ms Shurmer, but we also heard about a host of others involved in Torrington Hall, including contractors and guests. Some of the language used about them was critical or personal. We are conscious that each of those individuals was not a party or (with short exceptions) a witness. None has had the opportunity to answer allegations against them. We have taken care in how we express ourselves about those persons, and we make findings about them only if it is necessary to do so.

Assessment of evidence

104. As is often the case, the parties commented on each other's credibility. We approach credibility with caution. It can be an artificial construct which disregards many realities of human behaviour. It is often based on an assumption, which we do not accept, which is that a party who is untruthful

or inaccurate about a single point should be found by a tribunal to be untruthful or unbelievable on everything he or she says.

105. We have found neither the claimant nor Mr N to be fully reliable witnesses, but for different reasons. We have therefore sought to approach each issue individually and consistently with the remainder of our findings.

106. We find Mr N unreliable in part because he was often careless with material facts. He was careless and inaccurate about the detail of dates, documents and events, although firm and consistent on overarching points. A striking example was his letter to Mr Jeavons-Fellows of 5 June (C133/3), written in reply to being told the previous day of BMI's temporary suspension of his practising privileges. The letter covers many issues. It includes the following about the claimant, which in three lines contains at least four basic errors of fact, (all of which Mr N knew at the time, or could easily have checked), leading to an unjustified conclusion.

> 'This person .. was paid on a self-employed basis to carry out some projects for the company .. her surgery was completed in November 2017, and she was discharged in December 2017; she did her first work for my company in late January ..'

107. We take no point here about self-employment except that there was no record of it in any medium. The claimant worked on a single major project, not randomly on 'some projects'. Her surgery was completed in January 2018, not the previous November. She was discharged in February, not December (C135). She first worked for NN on 2 January, a week before her second cataract operation. If the conclusion implied that there was a gap of several weeks between the end of the doctor / patient relationship (December) and the start of the working relationship (late January), it was wrong.

108. When, as happened a number of times, the claimant pointed out to Mr N an inconsistency in his evidence, he readily accepted that the contents of a document might have been inaccurate, but said that his evidence now was certain and that he was untroubled by the point. Like the claimant, he was plainly angry. Unlike the claimant, he remained composed.

109. The claimant was unreliable in part because emotion clouded any objective analysis of the events in this case, and her mastery of the detail of the case prevented her from distinguishing what was important and material from the irrelevant or trivial. Paragraph 3.1.4 of Judge Heal's order is a good example, setting out two protected disclosure allegations. One was that Mr N had operated on patients without having in place professional indemnity insurance. That is perhaps one of the most serious allegations that can be made against a surgeon. The claimant said in evidence that the basis of this allegation was that Mr N had told her on one occasion that he was working to sort out renewal of his insurance. That was not an admission of having operated on patients without insurance, and the claimant's leap to her conclusion was unjustified by her own evidence. The second protected disclosure in the same sentence of the order was that in addition to operating on patients without insurance, Mr N ran an hotel without a

television licence. The claimant seemed unaware of the bathos of the latter allegation, or of the difficulties which she might face in proving that any workplace detriment occurred in consequence of disclosure of such a trivial matter.

110. The tribunal is accustomed to parties approaching their disputes through binarism, by which we mean the rigorous belief that one side is completely in the right and the other totally in the wrong. That approach rarely assists the tribunal, because it rarely reflects the reality of workplace life. We note that while the claimant adopted that approach, Mr N did not. He was repeatedly generous in evidence about the claimant's functional effectiveness at work, and both personally and through Mr Maratos, he conceded that he had significant shortcomings as a manager.

111. The claimant did not reciprocate: she could see nothing positive in anything said or done by Mr N, and little to criticise in her own actions. She adopted a binary approach to these events which we find was unrealistic, and at times even absurd.

112. When considering evidence, we make a number of allowances in favour of any member of the public. A tribunal hearing is, for most claimants, a unique experience. The structure of the tribunal may feel artificial, and at times intimidating. The hearing may dwell on events which have been upsetting. Delay is unavoidable, and is itself a source of stress. A litigant in person may feel disadvantaged against a represented opponent. We saw indications of all these points.

113. That said, we find that the claimant's language was often unfocused to the point of indiscriminate; at times exaggerated, and frequently repetitive. Her wish to speak appeared so compelling that it seemed easier to allow her to address an unhelpful or irrelevant point than argue about the principle. We noted indications of these factors in the events before us. When Mr Jeavons-Fellows wrote to the claimant on 5 March, he commented that she had covered many, many issues when speaking to Ms Bajraktari; when giving evidence, he glanced fairly cursorily at the long list of protected disclosures, and agreed that the claimant had mentioned all of them. In the context of this case, we have commented on three points: that Judge Heal took two days on case management; that over a day of this hearing required case management to address points raised by the claimant; and that the claimant's father gestured to the claimant that she had finished an answer and should stop.

114. Other matters lead us to find that the claimant was an unreliable narrator. We have noted in the claimant's analysis a tendency to mistake sequence for causation, and a tendency to build large conclusions on small foundations. When we come to consider the events of 27 February below, we find perhaps the most significant example in our fact find. As the incident on 27 February took place a few days after Mr N had had his first meeting with Mr Jeavons-Fellows on 20 February the claimant jumped to the conclusion that the later events must have been caused by the earlier

events. We find no evidential base that that was the case, and we do not find that it was the case.

115. The claimant knew that Mr N had a meeting with Mr Jeavons-Fellows on 20 February. She did not know what was said, and she did not know in full what the meeting was about. She had no means of knowing. She did not know that it was about a number of patients, not just about her. She did not know that her conversation with Ms Bajraktari was not discussed, perhaps because in context it was not as important to Mr Jeavons-Fellows as it was to the claimant.

116. When we look at the list of detriments alleged to follow from protected disclosure, it is evident that a number are events of which the claimant can have had no personal knowledge, except casual conversation or remarks made to her by Mr N. What strikes us is the interpretation which the claimant has put on words or events. As stated above, if Mr N mentioned that he was busy renewing his professional indemnity insurance, that does not mean that he had operated without it; if he mentioned to her that he had been stopped while travelling home, it is not fair to call that being "pulled over for drink driving" which implies that Mr N had been found to be driving over the limit. The claimant knew that Mr N used St Albans Medical Centre as a trading name. She had no reason to conclude that that fact alone was evidence of fraud.

117. A further aspect of the claimant's unreliable analysis was lack of proportion. At least two of the alleged disclosures relied on by the claimant were at the bottom end of trivial (TV licence, protected tree). The claimant gave no thought to the plausibility of alleging that Mr N had retaliated against her for them.

118. In the above context, taken as a whole, we consider the role of text messages as evidence. We repeat our general comments about them above. We accept that the claimant and Mr N had many meetings and conversations, but the major line of communication with which we were concerned was a text trail from 11 December 2017 until 3 March 2018, C5/1 to C5/178, which assisted us considerably.

119. This trail was entirely between the claimant and Mr N. In the index to her bundle, the claimant described it as (emphasis added), '<u>All</u> text messages' between Mr N and herself. We noted that where there were apparent gaps in chronology, there were no obvious indications of items having been removed, or reference to any missing item (eg a reply or other reference to a text which was not in the bundle).

120. We find the text trail helpful because it captured the actual language of the two parties in ordinary, every day communication with each other. It was their unvarnished working day language, not written with any intention that it would be seen by any third party, let alone a tribunal.

121. There were texts which the claimant wrote to Mr N 'as a doctor' and Mr N replied with some medical advice or information. That shows two things:

that the default position for both was that they were writing about work unless otherwise stated; and that both were aware of the two relationships between them. The claimant said in evidence that, 'I felt that Mr N was always my doctor first and my boss second.' We reject that evidence: it is at odds with the contemporaneous texts, which we find show the opposite.

122. The claimant repeatedly told us that she knew shortly after surgery that something had gone wrong (she used more dramatic phrases). There was little indication of this in the text traffic. On 30 January she wrote about her eyes being white; on 3 March she mentioned that there was then a problem. On 3 February (97) she referred a friend or acquaintance to Mr N for medical care: she would scarcely have done so if she did not trust the standard of his care.

123. The text traffic was ordinary to the point of banal. The great majority was about work routine. The language was in generally equally ordinary. There were almost no signs of the emotional turmoil which the claimant said was a feature of her working time at NN.

124. From early on in the texts, the claimant told Mr N about what she saw as shortcomings and mistakes by Ms Shurmer. We are confident that when she did so, the claimant was well aware that she was partly telling Mr N what she thought she had to do and why she was busy; and partly undermining Ms Shurmer with a view to creating a role for herself as her replacement. It is not at all to Mr N's credit as the employer of Ms Shurmer that he was at once complicit in corresponding about Ms Shurmer with a newly arrived manager who had not even been confirmed in post. We make no finding that any of the claimant's criticisms of Ms Shurmer was well-founded.

125. The texts showed no lack of confidence by the claimant: on the contrary, nothing in her early texts showed a new starter's uncertainty on the part of the claimant. Although the claimant told the tribunal that she was in some way over awed (in our word, not hers) to be working for her doctor, we could see no trace of awe or deference in anything she wrote. Her style was the style of senior manager to boss.

126. There was almost no sexual content in the texts from either, and no reference to the cam girl past, or to any alleged sexual encounter or sexual proposition between them. The closest the texts came to sexualised language was in the single exchange of 7 February, which was smutty rather than anything else. There was no reference to the claimant having made protected disclosures, or being a whistle blower, or having been in contact with BMI about Mr N.

127. Taking all of these points together, we find as overview that the text traffic was in general a great deal closer to Mr N's version of events than the claimant's.

128. Drawing these points together, we are reluctant to accept the reliability of the claimant's evidence where it is given without extrinsic corroboration. We

approach Mr N's evidence on the understanding that he was careless about detail, and not necessarily aware, at the time or in tribunal, of when detail was important.

Background findings

129. We have, in our findings, not followed strict chronology. We think it will make our reasoning easier to follow if we at times depart from chronology. We here set out our background findings of fact, so as to set the scene.

130. The claimant, who was born in 1981, introduced her witness statement with the following unchallenged evidence,

> "I did my GCSCE's and A Levels early and left school at 16…. I went to work for a corporate company and ended up managing a large account with strict deadlines and service issues. I managed to solve the service issues and keep the account, all at the age of 17. I went from there to working on behalf of UBS for an actuary and consultancy company…. I decided to try estate agency. I loved it and was very successful. I did a deal with a developer one day who then head hunted me to be his personal assistant and be involved in every aspect of development. ….. I [ ] became a Project Manager. Then we got an offer as a team, to move to one of the largest data centre providers in Europe. … Then the banking crisis hit…. And I was made redundant."

The claimant wrote that after a period of working as a nanny,

> "I didn't know what to do. I felt I had no options and I was given the opportunity of being a cam girl."

131. The claimant met Mr N for pre-operative consultation on 30 November 2017 at a BMI site. He assessed her for cataract surgery, to be funded by private health insurance. Both understood that insurance did not cover the costs of her lenses, or of prescription eye drops. In the course of the consultation he asked her, in accordance with his usual practice, what work she did. She explained that she had not had formal employment for some time, that she had been a nanny, and currently worked as a 'camgirl'.

132. Like the members of this tribunal, Mr N was not familiar with that term, which he asked the claimant to explain. She explained that the work (we understand) consisted of delivering sexually explicit language and actions on webcam, which customers accessed through a pay to view site. There was therefore a sexualised element to the parties' first conversation, which was introduced by the claimant.

133. In the course of the same consultation, the claimant noticed an item on Mr N's computer screen about property, and told him that she had previously worked in property and estate agency. They spoke about their mutual interest in property.

134. Mr N's invoice for that consultation was headed 'The St Albans Medical Centre', and asked that cheques be payable in that name, and sent to that entity (C100). Mr N gave evidence that that is a trading name of NN, and

that in order to preserve the name, he has registered a limited company in the same name, which is dormant. We accept that evidence. We can see nothing unusual or to criticise in that arrangement. The claimant can have had no reasonable basis for alleging that this arrangement was evidence of false accounting (Issue 3.1.2.10, 57H).

135. Mr N carried out the first cataract surgery on 12 December 2017 and on the second eye on 9 January 2018. There were routine follow up consultations after each procedure.

136. We add, for sake of completeness, that the claimant was, and remains, convinced that the surgery was not properly carried out. Mr N is equally convinced that it was. An independent review later conducted on behalf of BMI reported that the surgery had been carried out to a high professional standard. The professional issues which have subsequently arisen (dealt with outside this tribunal) appear to relate primarily to informed consent. (We note, for the sake of completeness, that Mr N mentioned that he has since changed the relevant consent procedures). We noted that the request for pre-action disclosure sent in March 2019 by the claimant's solicitors related to a claim based on informed consent, and not a claim based on the conduct or outcome of either operation.

137. The conversation about property at their first meeting led Mr N to invite the claimant to Torrington Hall St Albans on 16 December and he showed her around. The following day she texted a friend to describe the prospect of working at Torrington Hall as "perfect". In the same text, the claimant told her friend that Mr N had kissed her and invited her to dinner (C243). We accept that Mr N may have pecked the claimant on the cheek at the end of their meeting the previous day. We accept his denial that he invited her to dinner.

138. Mr N was at that time in charge of a renovation project for NN. He was concerned about management of the project. We have no doubt, having heard the claimant over several days, that she was able to speak fluently about the world of property. We accept that she asked Mr N for the opportunity to prove herself, and told him that she would even be prepared to work for a trial period without payment. Mr N offered her employment as Project Manager. When making her the offer, he made no attempt to verify anything she had said about her previous work experience and capability. He took what she said about working in property on trust, and overlooked that any property experience which she had was, on her own account, at least ten years in the past.

139. The claimant started work at Torrington Hall on 2 January 2018. Meetings on that day and the following week, 9 January, were recorded in formal minutes (C1). Mr N was her line manager. She was still his patient. We find that both understood that those were separate relationships. Torrington Hall is a Grade II listed building. It is the biggest item in NN's property portfolio. Mr N said that NN bought it in about 2015, with a view to converting it into a House in Multiple Occupation.

140. Mr N's evidence was that the task of converting Torrington Hall proved more elaborate than he had expected, and that the finish, as it progressed, led to the idea of conversion to a boutique hotel rather than HMO. Although the claimant took up employment on the understanding that she was to prepare a hotel opening, we note (C125) that by late February permission for change of use from HMO to hotel had not yet been obtained. Since about spring 2017, the Project Manager had been Ms Melanie Shurmer. Completion of the project required addressing issues of construction and snagging; furnishing and internal décor; and addressing the regulatory and planning requirements of an HMO, and then a hotel. These ranged from the potentially life threatening (eg fire regulations) to the banal (eg TV licence) to the common sense: managing a boutique hotel required a different skill set from renovation and managing an HMO.

141. Mr N said that guests began to stay in the building in December 2017, although it was still subject to conversion and not fully approved or licensed as a hotel. One item in the bundle suggested strongly that receiving guests was premature (C102). Mr N's evidence was that it began its life as a refurbished and completed boutique hotel in March/April 2018 and has proved successful.

142. Mr N's working method at the time was that he directed the refurbishment project around the demands of full time medical practice and travel. His normal working day might involve a meeting on site about the refurbishment at 8 or 9 am, after which he would spend the day in medical work, and might at the end of the day deal with texts, emails and phone calls concerning the property. It was a significant burden on one person.

143. The claimant's only reporting line was to Mr N. Because of his medical commitments, the claimant had huge autonomy, and Mr N gave almost no supervision. He was heavily reliant on the claimant's reporting. It was obvious to us that the claimant quickly reported to him her opinions of her predecessor, with what seemed to us the obvious implication that Mr N's better course would be to replace Ms Shurmer with the claimant.

144. The claimant was employed to bring the project of Torrington Hall's renovation to a conclusion. Mr N had moved the project goal posts as it progressed, so the task of project managing was not just concluding the functional building works, but the task of completing the project to meet all the requirements which would lead to it opening as a boutique hotel rather than HMO.

145. We find that the claimant worked full time, and at least five or six days per week. Mr N agreed this, and must have been aware of it from an early stage, given the volume of text and e-mail traffic from the claimant. The claimant worked irregular hours, sending texts and e-mails during the night, such that Mr N must also have been aware that she did not work conventional business hours. She sent him texts about work on the evening of her second cataract operation (C5/13). If Mr N expressed any professional concerns about her well-being in doing so, whether as manager or physician, there is no record of them.

146. The claimant overlapped with Ms Shurmer, who remained in post. It was not clear what arrangements, if any, Mr N made for Ms Shurmer to hand over or share responsibilities with a newcomer.

147. The bundles contained a large amount of detailed working material, which showed that the claimant was involved in aspects of each of (this list is not exhaustive): completion of structural building work; snagging; internal completion of construction works, followed by furnishing and fitting of accommodation; gas, water and electricity; regulatory requirements, including fire safety; promotion and advertising; engaging with specialist websites such as Booking.com and managing bookings; welcoming guests, providing breakfast, and dealing with the fallout when things went wrong.

148. In almost all of these categories, she took over responsibility from Ms Shurmer, and worked with contractors who were already appointed. It appeared common ground that in general the claimant did not develop good working relationships with her predecessor or with the contractors. The claimant attributed this to her effectiveness in not permitting them to continue the unacceptable standards of work which had been accepted before her arrival. Ms Shurmer (soon) and Mr N (later) attributed the poor relationships to the claimant's lack of interpersonal skills.

149. There appeared, at the time in question, to be no other employed staff at the Hall, and the claimant therefore, like Ms Shurmer before her, had no line management responsibilities. (In that context, we record a concern as to her and Mr N's limited understanding of employment rights, C5/89).

150. The claimant was energetic and enthusiastic from the start. Mr N responded positively to what he saw as her energy, enthusiasm and effectiveness. In oral evidence Mr N was generous about those positive qualities, but also commented that with the passage of time, he had come to think that much of the claimant's effort was 'hot air.' He said that he had come to the view that what he had seen at the time as effectiveness in people management may have been no more than rudeness and aggression.

151. The claimant remained Mr N's patient. Mr N said that this was a professional 'grey' area and therefore not a matter for this tribunal. There were occasions when the claimant texted Mr N using the phrase 'as a dr.' When he replied about a medical matter, Mr N's language was entirely professional. The claimant's style leads to the inference that all correspondence and texts that we saw were about property work unless the claimant used the "as a dr" formula. She used it occasionally. We do not accept her evidence that she saw the relationship as primarily centred on Mr N being her doctor. We saw little evidence which bore out the assertion that the claimant felt at the time, shortly after surgery, that something had gone wrong with her surgery. We noted, in that context, that on 3 February she appears to have introduced a professional contact to Mr N as a potential patient (97).

152. Mr N was fulsome in his replies to the claimant's work texts, telling her that she would be his eyes and ears in the business; that he had delayed expanding what he called his business empire until the arrival of a person of her calibre to manage it; and that if matters went as well as they had started, she would progress to a senior, well paid position (C5/25, 154, 165).

153. We attach no weight to the correspondence between the claimant and Mr N about the claimant's job title, or to the title which appeared on the business card which we saw (C9). At the time with which we were concerned, NN had a handful of employees; Mr N had little understanding of managing people; the only issue about titles and designation was whether the claimant was superior to Ms Shurmer or the reverse.

154. We accept Mr N's evidence about a curiosity of the Torrington Hall workplace, which was that work meetings were often recorded on a mobile phone, with the intention of their being transcribed and minutes available. The claimant was aware of this (eg on 30 January Mr N asked her to record a meeting which he had to miss, C28). That form of minute taking, which was inherently inefficient, suited Mr N's style of visiting management, despite its shortcomings.

Specific events

155. In that overall setting, we turn to a number of specific background events.

156. There was evidence about the evening of 23 January. The claimant was at home. In separate text messages to a friend, the claimant at 21:40 wrote that Mr N had just arrived and at 23:57 that he had just left (C52/10). In cross-examination Mr N accepted that he had visited the claimant at her flat on one occasion, and expressed surprise at how long the text record implied that he had stayed. We set out separately our finding that there was not a sexual encounter between them on that evening.

157. There was considerable evidence about a disagreement between the claimant and Mr N on 25 January, which was recorded and transcribed (281). There was a conversation about the claimant's wish for a formal employment relationship to be recorded in writing. Mr N asked about references. The claimant was irritated, because she had previously told him that her last formal employment had been before the financial crisis of 2008, so that even if she could obtain references, they would be out of date. She opened up her cam girl website, and showed him what appears to have been customer feedback (of which there were some examples in the bundle). Although Mr N knew that the claimant had worked as a camgirl, this was the first he knew about the website, or the working name which the claimant used online. The transcript indicates that Mr N in commented on the claimant's entrepreneurial skill. We note, from the transcript, the absence of any reference to the claimant's allegation that Mr N had repeatedly been talking about her camgirl work since she had started work three weeks previously.

158. This was the second and final sexually explicit conversation about which there was no dispute. Like the camgirl conversation of 30 November, it was introduced by the claimant, and like the previous conversation, was avoidable in context.

159. On 27 January the claimant made contact with Ms Bajraktari at BMI, which we deal within the protected disclosure section of this judgment. We accept that Mr N had no knowledge of this. That is some indication that the claimant at the time understood that her call was not a matter which she wished to draw to his attention 'as a doctor' and that she saw it as a prescribing matter for BMI. We do not accept the claimant's assertion that she contacted Ms Bajraktari because she was the most senior person at BMI whom she could speak to. We find that the claimant contacted Ms Bajraktari because she was Pharmacy Manager, and the issue which she perceived at the time was her medication. We have no doubt that if the claimant had made clear to BMI that she wished to engage its complaints procedure, or a clinical issue which went beyond prescribing, she would have made contact with another person.

160. We deal elsewhere with the transcribed conversation of 29 January in which Mr N paid the claimant £200.00 and used the words "services rendered". (283). We note that in the same conversation the claimant is recorded as describing Ms Shurmer as untrustworthy and a liar.

161. We deal elsewhere with the ugly dispute on 6 February (286 and 287/1-6), and the language directed at the claimant by Ms Shurmer. The recording and transcript are notable for Ms Shurmer's anger and distress, and Mr N's ineffectualness in resolving the dispute. Ms Shurmer moved out of the Hall, and on about 7 February the claimant moved in. Although Ms Shurmer was then based at NN's premises at London Road, she and the claimant remained in contact, and their work correspondence after 6 February was considerably less heated (eg C41).

162. On 9 February the claimant e-mailed Mr N to tell her that she had caught Ms Shurmer searching through her rubbish (79, 95). The claimant inferred from this that Ms Shurmer was going through her rubbish, at Mr N's direction, to see if there was evidence that the claimant had had sex with a hotel guest. We make no finding on any of these points save that the claimant's conclusions do not follow from the evidential premise.

163. On 12 February Ms Lee made her first visit to Torrington Hall. She had been introduced by the claimant, who had told her that Mr N was 'lovely' to work with. Ms Lee formed a positive impression, both of the Torrington Hall project and of those working there. That introduction and evidence are at odds with the claimant's depiction to us of the problems of working at Torrington Hall.

164. Mr N met Mr Jeavons-Fellows on 20 February to discuss "several outstanding complaints" (C129). We repeat our finding that Mr N was not aware during or after that meeting that the claimant had spoken to Ms Bajraktari about her eyedrops several weeks earlier. The claimant's case

was that the conversation with Mr Jeavons-Fellows (of which she had no direct knowledge) led Mr N to demand sex the next day, and to dismiss her the following week. We reject each of the three limbs: we do not accept that the conversation with Mr Jeavons-Fellows was a personalised conversation about the claimant individually, which provoked hostility on Mr N's part against the claimant. We do not accept that he propositioned her the next day. We do not accept that he dismissed her the following week. This paragraph of our judgment perhaps captures an extreme instance of the claimant's confusion of chronology with causation.

165. On the evening of 21 February, the claimant and Mr N had dinner at a restaurant in St Albans. We deal below with the allegation that Mr N made sexual advances to the claimant on that occasion.

166. We deal separately with the claimant's departure on 27 February. Ms Lee's evidence to the tribunal was that the claimant told her both by text and phone call that she had walked out.

167. We deal separately with an incident on 14 April, when the claimant came to Mr N's clinic, and he called the police.

Identity of employer

168. The claimant's case was that she was the employee of NN and simultaneously of Mr N personally. Until shortly before this hearing, both respondents denied any employment status. By the time of this hearing, NN conceded that the claimant was its employee from 2 January to 27 February 2018. NN did not deny vicarious liability for Mr N's actions. That being conceded, the question for the tribunal, which was largely academic, was whether the claimant had demonstrated that she was an employee of Mr N as provided by s. 230(1) ERA:

> "An individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment"

169. We find as follows.

    169.1 Mr N is a consultant eye surgeon. He is also involved in the management of a family-owned property portfolio.

    169.2 NN is the vehicle for both activities. It is the supplier of Mr N's medical services to private healthcare providers, and to private patients. It is also the owner of a substantial property portfolio.

    169.3 At the time with which we were concerned, Mr N owned no shares in NN and held no formal office in it. (He told us that he has since become a Director). As we understand it, it was and is entirely owned by Mr N's daughter, who, it was agreed, played no part in the running of NN, or in any of these events.

    169.4 Mr N had the full authority of NN unilaterally to make any decision about its business or any aspect of it; to draw on its funds; to pay its

bills and staff and suppliers; and to make any decision about any aspect of its business.

169.5 There was no evidence that the claimant had any administrative role in Mr N's medical practice. It is possible that she NNped out his medical staff with some random administrative tasks.

170. We find that the engagement for work which Mr N entered into with the claimant was to work in the property business of NN. The claimant asserted that as this included assisting with the management of properties owned personally by Mr N, she was Mr N's employee. Mr N's evidence was that he has, as an individual, contracted with NN for NN to manage properties which he owns personally, and that he pays it a management fee.

171. We noted Mr N's email to the claimant of 21 January (C203):

> 'I emailed .. to give you authority to deal with [NN] and my personal properties on my behalf. Thank you for everything you're doing for me and the company ..'

172. This email seemed to us the high point of the claimant's case on this point. We find that the email as a whole is consistent with the respondents' case, that the management of Mr N's own properties was conducted on his behalf through NN, and that the mere fact of the claimant managing properties owned individually by Mr N is not evidence of an employment relationship between her and Mr N as an individual. We find that there was between the claimant and Mr N individually no evidence of any element of a contract: there was no evidence of an offer, acceptance, consideration, or intention to create legal relations.

173. It follows that in our judgment the obligations of employer to employee were owed to the claimant by NN only, and not also by Mr N. We add for the avoidance of doubt that NN would be liable to the claimant for any contravention of the Equality Act by Mr N as the agent of NN, in accordance with EqA s.110(1)(a); and had we upheld any protected disclosure claim, NN would have been liable for detriments carried out by Mr N as a worker for NN in accordance with ERA s.47B(1A)(1)(b).

The claimant's terms and conditions

174. There was before the tribunal none of the paperwork of a relationship at work. These were all the responsibility of NN to create and issue. There was no offer letter of employment; nothing in writing identifying responsibilities, terms of payment, or any single incident of employment; there was no contract of employment; no payslips; and so far as we know, no P45. If, as Mr N said, he regarded the claimant as a self-employed contractor on a daily rate, there was no confirmation of her engagement or its terms; no record of her attendance or hours worked or invoices (any of which Mr N might have required). The sole document which verified the working relationship was a bank deposit record of £500.00 into the claimant's current account on 25 February (C142), and the accompanying words of the payer.

175. This was systematic dereliction of the responsibilities of employment, by a company engaged in regulated fields which attach huge importance to written records: notably medicine, but also property management, the rental sector, and development control.

176. No order can be made by this tribunal in respect of NN's failure to issue a contract of employment in writing to the claimant. The obligation to issue the contract arises under s.1(2) ERA, which provides,

> "The statement .. shall be given not later than two months after the beginning of the employment."

As the employment started on 2 January and ended on 27 February, the obligation to issue written particulars did not arise.

177. Our task is to find what was the bargain on which the parties agreed which governed the work done by the claimant in the period starting 2 January. There was no evidence on the point in writing. It seemed to us that the burden of proving the existence of the contract and its terms rested on the claimant. Existence of the contract had been conceded. The terms remained in dispute.

178. The claimant asserted that she had been employed to work full-time at a rate of £100.00 per day, reporting to Mr N. Mr N agreed broadly with that proposition. The rate of pay is confirmed by the sole written record of payment. A payment was made by NN through the claimant's bank of £500.00 on 25 February (C142). It was described by the payer as '5 days' work on TH', and therefore corroborates that there was an agreed rate of £100.00 per day.

179. There was dispute about what was in fact paid by the respondents to the claimant. Mr N said that at the end of each week, he paid the claimant cash, of either £500.00 or £600.00, depending on whether she had worked five or six days that week. The claimant denied that any such payments were made. Mr N's evidence was that he had asked the claimant to sign receipts, which she refused to do. He had made no record or memo of payments made. There was therefore no evidence of a payment, except for that of 25 February.

180. The claimant asserted further that there was an agreement that she would work for nothing during her initial trial period while she paid off the cost of her lenses. She said that the payment of 25 February was evidence that she had worked off her debt by then. Mr N denied this. We accept that denial. We do not think that Mr N agreed that a current patient should enter into a form of bonded labour to pay off her medical debts. We think it more likely that he agreed that the claimant could work a trial period, and given his evidence that he understood that she would have no rights during a trial period, we accept that he was casual about clarifying the position.

181. Within the text trail at C5 there were no more than three requests for payment from the claimant (between 8 and 24 February, C5/81, 163 and

173). They were so few, intermittent, and modestly expressed that they did not assist us. The request of 8 February was made too early to be consistent with the case that the claimant was working to pay off her debts. None of the three requests referred to any accumulation of unpaid arrears.

182. As set out below, there was an incident on 14 April, when the claimant went to Mr N's clinic to demand payment of expenses, and the police were involved. We attached weight to the fact that the claimant did not, on that occasion, make any mention to Mr N, or to the police officers, that she was owed substantial arrears of pay in addition to her modest claim for expenses.

183. We have found that the claimant was direct in her communications, and that there was no sign, in her texts with Mr N, of either diffidence or deference. We attach considerable weight to the absence, from the evidence before us, of any evidence of a reference to an accumulation of arrears of unpaid wages. We find that the claimant has not made out her claim to have been underpaid during her employment, and that the claim fails.

184. We add for completeness that the claimant asserted that in the period between late January and early February there was an agreement, also undocumented, that from mid-February the claimant would be paid £40,000 pa, plus a profit share to be determined, and a car allowance. She said that she wrote an email from her work account (no longer accessible) to Mr N to confirm this. Mr N denied the existence of both the agreement and the email. We note that on 17 January (C49) the claimant sent an email, seemingly to herself, setting out broadly those terms. Our finding is that whatever the claimant's desire or understanding, it has not been shown to us that any agreement was made to that effect.

Holiday pay

185. Although holiday pay was a pleaded issue, there was no evidence or submission from either side. We find that for holiday pay purposes the claimant was a worker for NN for the period of nine weeks identified above. We find that during that period she accrued 3.5 days holiday in accordance with the Working Time Regulations, to be paid at the rate of £100.00 per day gross. There was no evidence of holiday payment having been made. We find this claim succeeds against NN. Although the calculation of the sum due is self-evident, we adjourn the point to the remedy hearing.

Protected disclosures

Introduction

186. In most protected disclosure cases the tribunal approaches its task by deciding first what the claimant said or wrote. Then it may ask whether the words used fell within the definition of protected disclosure. It will go on to find what detriment, if any, the claimant was subjected to, and whether the respondent has shown that any detriment was not done on the ground of a protected disclosure.

187. It is part of the logic of evidence, not the statutory definition, that the tribunal may have to find whether the respondent knew about the protected disclosure, and if so, when. The reason is obvious: if a disclosure was made on say 1st July, and the respondent did not know out about it until 1st August, then an event on 21 July cannot have been caused by the disclosure. The tribunal might in some cases ask what reason the respondent might have for retaliating against the 'whistle blower.'

188. This was an unusual protected disclosure case. The claimant made all three disclosures to BMI, an entity for whom she had never been a worker or employee. The first was made on 21 January, when she was still employed by NN. The other two were made on 16 April and around 2 July, well after her employment with NN had ended. Neither party had analysed where this pattern fell within the statutory framework.

The first disclosure

189. We confine ourselves strictly to the disclosures identified in Judge Heal's order. That is important because there was discussion at this hearing about the content of the protected disclosure made on 21 January 2018. The pleaded issue is,

> "The claimant orally told .. [Ms Bajraktari] .. that the second respondent did not have enough time because he was concentrating on other things, that all her procedures on her eye were rushed and this applied to other patients as well. She said the second respondent did not spend enough time on his patients so that she and other patients were not receiving the best care."

190. It was not disputed that in the same conversation the claimant told Ms Bajraktari that she was suffering from reaction to prescribed eye drops, and questioned whether she needed to pay for the eye drops. That was not the protected disclosure in the list of issues. The only pleaded disclosure before us was that set out above.

191. It appears that by 30 January the claimant had also spoken to Mr Jeavons-Fellows about these and other matters (C83). However, the pleaded issue before the tribunal did not relate either to the choice of eye drops, or the claimant's reaction to them, or BMI's policy of charging for eye drops or any conversation with Mr Jeavons-Fellows before 16 April.

192. We find, consistent with our own observations of her speaking style, that the claimant did not make herself clear or concise when speaking to Ms Bajraktari. We attach weight to Mr Jeavons-Fellows' letter of 5 March to the claimant (C84) in which he refers to her "extensive communication regarding your concerns raised" with Ms Bajraktari. We infer from this that the claimant was verbose. She conveyed dissatisfaction, and a sense of grievance, without achieving clarity about specifics.

193. Mr Jeavons-Fellows met Mr N on 20 February. The reason for the meeting was a number of issues raised by a number of patients, of which the common theme (we accept) was not necessarily clinical competence, or

rushed procedures, but adherence to pre-operative procedures, including the use of consent forms. We accept Mr N's evidence about the meeting (WS14),

> "One such complaint was from L … and related to the fact that she had been charged for eye drops to which she had previously suffered an allergic reaction. The complaint did not relate to L's treatment, but to the hospital's charging policy, and was therefore nothing to do with me."

194. On 5 March Mr Jeavons-Fellows sent the claimant a letter which he said in evidence had been drafted for him by Ms Bajraktari, which included the following (C84):

> "After having a meeting with the Consultant, in relation to this complaint, he did not feel this reaction is as a result of the eye drops, therefore stated that he made an informed clinical decision to represcribe them again after your second procedure."

195. That captured Mr N's clinical assessment of what he understood was the issue raised by the claimant, which was that she suffered from allergic conjunctivitis, not a reaction to the drops which he had prescribed. We can make no finding on the clinical point. In the same letter Mr Jeavons-Fellows waived BMI's charges for the eyedrops and confirmed that BMI would refund charges already paid.

196. For sake of completeness we add that the claimant subsequently pursued BMI's complaints procedures, and that BMI's Regional Director, Mr Search, wrote to her on 8 October 2018 (C82) and said the following:

> "I have reviewed the complaint raised by yourself which was received on 21 January 2018, in which you raised concerns regarding the eyedrop treatment post procedure and having been charged for this treatment you did not proceed to use, and concerns that the procedure performed by Mr N was rushed and not sufficiently explained to you."

197. We accept that Mr Search was told by the claimant, at some date not known to us, that that was what she had said to Ms Bajraktari on 21 January 2018. We do not accept it as evidence of what she actually told Ms Bajraktari, or of what Ms Bajraktari reasonably understood she had been told. There is no contemporaneous evidence of the claimant having on 21 January complained of rushed procedures.

198. Giving evidence at this hearing, Mr N twice asserted that the first he knew of <u>any</u> complaint made by the claimant to Ms Bajraktari was on the first day of this hearing, when he read about it in the bundle. He said that that was the first he knew of Ms Bajraktari's involvement in the events in this case. We accept that evidence.

199. That being so, our finding is that on 20 February Mr Jeavons-Fellows discussed with Mr N a number of professional matters raised by a small number of patients. In that context, we find that Mr N was made aware by Mr Jeavons-Fellows that the claimant had raised an issue with BMI about

eyedrops and about charges for eyedrops. That issue was not before this tribunal as a protected disclosure.

200. We accept that Mr N was not aware of any protected disclosure having been made by the claimant to Ms Bajraktari at any time before the start of this hearing in August 2019. In particular, and for complete avoidance of doubt, we find that there was no evidence that when Mr Jeavons-Fellows met Mr N on 20 February he told him that the claimant had alleged that he worked at a rushed pace.

201. We find that it has not been shown that the claimant made the pleaded protected disclosure on 21 January 2018. We accept that she did so on a later date (in the course of an appeal) before 8 October 2018. We find separately that Mr N did not know about the pleaded disclosure, or about any complaint to Ms Bajraktari, until August 2019.

202. We conclude that these findings are fatal to any claim based on the 21 January disclosure. As the second pleaded disclosure was not made until 16 April, it follows that the eight events pleaded as detriments which took place before 16 April cannot have taken place on ground of a protected disclosure, and any claims based on any of them must fail. The nine detriments to which this paragraph refers were issues 3.7.1 to 3.7.8 inclusive. It is therefore not necessary for us to decide whether the finding set out below, which was that the two remaining disclosures relied on were not protected disclosures in law, also applies to the 21 January disclosure.

The remaining disclosures

203. We have decided the remaining protected disclosure claims in their entirety on a preliminary point of law. We have first considered whether any disclosure enjoys the protection of the ERA. We find that none does. All claims based on protected disclosure therefore fail, and we do not need consider each of the elements of each disclosure.

204. We have taken this approach, conscious of the guidance of the EAT in Black Bay Ventures v Gahir 2014 IRLR 416, to avoid 'rolling up' protected disclosure claims. However, that guidance seems to us to relate to the risk of rolling up the existence of disclosures with the alleged detriments. A tribunal may be tempted not to consider whether there have been disclosures, but to go instead to the respondent's explanation for the alleged detriments and to find that they are well made explanations, ie that the respondent has shown that the ground on which the action was taken was not that there had been a protected disclosure. We do not understand the guidance of the EAT in that case to prevent the tribunal from first determining, as we do, that there has not, on evidence, been in law any protected disclosure.

BMI: general

205. It was common ground that all disclosures before the tribunal were made to employees of BMI. The first was made on 21 January 2018, when the

claimant was still employed by NN. The others were made between mid-April and July 2018, after that employment relationship had ended.

206. At the times in question the claimant's relationship with BMI was that it was the company which managed the hospital where she had been treated by Mr N, and where she had received prescription medication.

207. BMI was in a contractual relationship (which we did not see) with NN for the provision of Mr N's services; it may also have had a separate relationship with Mr N personally, and a further separate relationship with the claimant's insurers. BMI was subject to the regulatory requirements of the health sector.

208. The question which arose was whether, in making disclosures to BMI, the claimant could bring herself within the framework of ERA ss 43B-43G. A number of possible relationships provided for within ERA plainly do not arise. The claimant was not a worker for BMI, and BMI was not the claimant's employer (s43C); or legal adviser (s43D); or a Minister of the Crown (s43E); or a prescribed person (s.43F and SI 2014/2418, which lists prescribed persons).

ERA section 43C

209. That left two potential relationships. For avoidance of doubt, we deal first with s.43C, although it was scarcely referred to at this hearing. The sub-section requires the disclosure to be made to the person responsible for the relevant failure, and does not apply if it is made to any other third party. A typical example might be if a builder employed by a construction company reported to a scaffolder's representative that its scaffolding was put up unsafely. S.43C(1)(b) provides (emphasis added),

> "A qualifying disclosure is made in accordance with this section if the worker makes the disclosure .. where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of a person other than his employer .. to that person."

210. We find that s.43C does not apply, because the claimant did not, in her April or July disclosures, complain of an event which was solely or mainly a failure by BMI.

ERA section 43G

211. Section 43G provides a number of hurdles and may be seen as a backstop provision to deal with all other possibilities. It may be a last resort for a whistle blower who, for example, takes her disclosure to the media. It provides in its entirety,

> 'A qualifying disclosure is made in accordance with this section if—
>
> (b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
>
> (c) he does not make the disclosure for purposes of personal gain,
>
> (d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.'

Disclosures to Mr Jeavons-Fellows

212. At issues 3.1.2.1 to 3.1.2.16 inclusive Judge Heal set out a large number of disclosures alleged to have been made to Mr Jeavons-Fellows. We find that on 16 April 2018 the claimant met Mr Jeavons-Fellows by appointment. He had written to her previously, in response to her complaints about charges for her eye drops, so he knew both that she was dissatisfied with the outcome of her surgery; and that she expressed herself in an unstructured way. Mr Jeavons-Fellows attended the tribunal on witness order, and without having prepared a witness statement. In evidence, Mr Jeavons-Fellows was asked to read Judge Heal's list of issues. Having done so, fairly cursorily as it seemed to us, he agreed that all the topics listed had been mentioned to him by the claimant. He did not specify what exactly she had said about any of them, or how or when. We accept his

general evidence, and we find that the great majority, if not all, disclosures were made by the claimant on 16 April.

213. When we turn to the structure of s.43G, we ask first if the claimant reasonably believed that her disclosures were true. For the purposes of this discussion, we take it that she did. In so saying, we accept that there was not, at this hearing, systematic analysis of the basis of the claimant's belief in each of the disclosures one by one. In a number of instances where this was considered in a little detail, it was plain that there were serious questions as to the reasonable basis for the belief. We have referred elsewhere to the claimant's tendency to leap from small facts to big conclusions.

214. We accept that the claimant did not make any disclosure for the purposes of personal gain. (In so finding, we disregard her request to BMI to waive its prescription charges, because while that may have been why she complained about her eyedrops, that was not the protected disclosure which was pleaded for us to consider). We must then turn to the conditions in s.43G(2), any one of which must be met, if the disclosure is to be a protected disclosure.

215. The test at s.43G(2)(a) is that

> "The worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer".

216. The April and July disclosures were made weeks after the claimant's work relationship with NN had ended. Any conflict with NN (eg as to failure to pay her) had crystallised. The claimant had embarked on processes of conflict. The conflict was primarily with Mr N, whom she thought of as her employer. Our over-arching finding is that in that setting, the claimant could have had no reasonable belief that she might be subjected to detriment, in the proper sense, by NN on or after 16 April. In order to clarify that finding it is necessary for us to set out findings about the events of 14 April 2018. (which formed the basis of issue 3.7.12).

Events on 14 April 2018

217. On the evening of 14 April Mr N was in clinic with a patient in St Albans. The claimant arrived unexpectedly at the clinic. She wished to challenge him about unpaid expenses which she alleged she had incurred on behalf of NN, and which she said had not been reimbursed. By that date, Mr N was alert to the existence of conflict with the claimant. He decided that he did not want to see her alone. He called the police (C80). He did not ask for the claimant to be arrested, as she has pleaded. He asked for police help.

218. He left the clinic with his patient before the police arrived, and asked the claimant to walk a little distance behind him. We attach no weight to the claimant's concern that the word 'following' was used. We do attach weight to the fact that Mr N did not want to walk next to the claimant in a public space. As they walked along the pavement, they met the two Police Officers, who accompanied them to the Police Station. The Officers gave

evidence that they spoke to the two separately. The Officers thought that there was a civil dispute, and tried to mediate between them. The claimant told the officers that she wanted her expenses of about £300.00 paid. Mr N told the officers that he would pay them if the claimant would sign a complete release of liability and confirm in writing that she was owed nothing more. The claimant declined to do so and there the matter ended. The claimant had, during this episode, had many opportunities to express a claim for thousands of pounds in arrears of pay, and did not do so.

219. Pleaded issue 3.7.12 was that Mr N subjected the claimant to detriment by

> "Trying to have the claimant arrested on 14 April 2018 in order to stop her from making the disclosure on 16 April 2018."

220. Although the claimant added to that in evidence, the above was the only pleaded point. It fails on its facts. We accept that Mr N did not try to have the claimant arrested; he asked for help from the police; secondly, the second half of the allegation is inherently absurd, as Mr N could not know the claimant's future intentions. Finally, we would accept Mr N's explanations for his conduct as discharging the burden of proof set out in s48(2). He gave a common-sense response and problem-solving reaction to the claimant's unexpected arrival at clinic premises.

221. The claimant also said in evidence that after her employment ended she felt in fear of physical attack from Mr N. We could find no reference to this in the bundles, and we suspect that her answer was opportunistic, and given in reply to the tribunal's question on the point. A legitimate sense of fear in response to threat could in principle constitute a detriment. When asked why she felt in fear, her answer was that she knew that he had cut branches off a tree (or trees) at Torrington Hall which was subject to a preservation order. (This formed issue 3.1.2.16 in Judge Heal's list, and was therefore within the range of disclosures which Mr Jeavons-Fellows agreed had been made to him at some point). Mr N's evidence was that he had lopped the tree, after it had died, relatively recently. Taking this part of the claimant's case at its highest, our finding is that even if before 16 April the claimant thought that Mr N had cut the branches, it would be fanciful to say that that event could be the foundation of a reasonable belief that he might pose a physical threat to the claimant.

222. It follows that we do not find that the events of 14 April, or the lopped tree, assist the claimant to make good the test under s.43G(2)(a). We find that whether considered separately or together, neither of these matters has been shown to have been the basis of a reasonable belief, held on 16 April, that NN would subject the claimant to detriment.

223. Section 43G(2)(b) provides

> "The worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if disclosure is made to the employer."

224. The claimant gave no evidence on this. We find that there could have been no reason to have formed this belief. We say so because the claimant's

allegations related to regulatory events documented outside the control of the respondents. Hospital and clinical records of the medical issues were with BMI. Evidence of the regulatory issues at Torrington Hall lay with the regulators (eg the local authority).

225. Where the complaints were based on what was allegedly said one-to-one by Mr N to the claimant, there was no evidence to destroy or conceal. In so finding, we bear in mind that we have heard at length about recordings. We find that the respondents recorded and downloaded office meetings on mobile phones, in the absence of paper minutes. There was not a general recording system in place. The claimant's case was that Mr N admitted wrong doings (eg professional indemnity cover; drink driving) in one to one conversations. She made no allegation that any of them had been recorded or put in writing.

226. Drawing the above together, we conclude that the April and July disclosures do not fall within s43G(2)(b).

227. Section 43G(2)(c) provides,

> "That the worker has previously made a disclosure of substantially the same information to his employer or [a prescribed person]"

228. The claimant gave no positive evidence about this. She said in evidence that she had spoken to Mr N before speaking to Ms Bajraktari about her eye drops. For reasons already stated, we go no further into that point. As to the other disclosures, the claimant said in evidence (Judge's note),

> 'I went to see Mr Jeavons-Fellows because I couldn't take the issues forward with Mr N personally.'

229. We accept the sense of that evidence, which was that by 16 April, the claimant understood that her line of communication to Mr N was closed. Certainly, she must have seen this from his actions two days before, when he called the police. We find that the claimant had not previously made to NN the disclosures set out by Judge Heal which were made to Mr Jeavons-Fellows.

230. We therefore conclude that the January pleaded disclosure was not made; and that the April and July disclosures relied on were not made in circumstances which fall within the framework of protected disclosure. It follows that in law the claimant has not made any protected disclosure, and that any claim based on protected disclosure fails. We repeat that while this finding is determinative, we would in the alternative have found that the tribunal had no jurisdiction to hear the claims about any detriments which were not pleaded in the original ET1.

Sexual allegations

Usage of x in texts and emails

231. The allegations of sex discrimination, whether of harassment or direct discrimination, set out at sections 4 and 5 of Judge Heal's order, are about 30 factual allegations of harassment and 4 allegations of direct discrimination, although some of the allegations at least are multiple (eg 5.1.4). We approach these allegations in separate categories. The categories reflect our analysis, not that of either party.

232. We deal first with allegations relating to the use of X in text traffic and emails. These form allegations 4.1.10, 12, 13, 14, 15, 17, 18, 20, 22, 23, 25 and 5.1.4. The recurrent theme, as expressed in allegations 4.1.25 and 5.1.4, was that the use of X in text message constituted an unwanted kiss. Most usages were one x or two. Almost all usages were in texts rather than emails.

233. Our reading of the text traffic at C5 as a whole is that the first occasion on which X appears is in the first text, sent by the claimant on 11 December 2017. That was the day before the claimant's first cataract operation, and before any working relationship with which this tribunal was concerned. It reads in full (C5/1),

> "Hey N, sitting here rather worried about if tomorrow is happening or not. Managed to scrape together £100 but I am seriously broke. Will that do for now pls? X"

234. The second x was that on the evening of her second cataract surgery on 9 January, the claimant texted Mr N "I can see again: (thank you X)." Mr N replied two hours later, simply "XX" without any words (C5/3).

235. Thereafter and throughout the text traffic, X is used occasionally and seemingly at random by both as a routine closing salutation. There are many texts in which it is not used; there are some in which it is. There is no general discernible pattern which relates the use of an X, or the number of Xs, to the content. The content of the texts relates almost exclusively to work events.

236. We accept that when Mr N replied to praise a piece of work done by the claimant, or comment on some positive business development, he was inclined to use two Xs, and occasionally more. He sometimes did this without any supporting words, ie by sending a text which contained xx's only. That of course may have reflected no more than time pressure.

237. On 7 February, and (we think) for the first time he used three Xs. The claimant had reported having taken a hotel booking from Denmark, and he replied (C5/78):

> "Fantastic K. Things are really coming together. And of late it has all been down to you. We now need to build you a team of similarly enthusiastic and able people so you can plan and supervise rather than do everything. XXX."

238. That is followed by many texts in which no X appears on either side.

239. On 15 February the claimant notified Mr N that she had had a busy day, "Fielded 60 phone calls yesterday as well as everything else I'm doing," to which he replied with five Xs but no words (C5/131-132).

240. Following regulatory concern about whether the hotel fire alarm met appropriate standards, the claimant notified Mr N on 22 February that it had passed a test by one decibel. We quote the reply in full (C5/165):

> "Absolutely fantastic news girlie – I was secretly concerned about that. WONDERFUL"

That is followed by ten Xs, which the claimant in evidence called "over the top". Later the same evening the next text from the claimant starts more prosaically (C5/165),

> "We've got black bags scattered all around" (C5/165).

The final Xs are a group of single Xs in texts from the claimant on 24 February (C5/171).

241. The claimant pleaded (issue 4.1.19) that 'on 12 February she tried to stop Mr N from sending kisses on text message'. Text traffic that day was extensive (C5/94-115). It included roughly ten usages of x by the claimant and one by Mr N. We can find nothing in that traffic, or in emails that day at C10, where the claimant tried to stop Mr N's usage. The imbalance in usages that day indicates the opposite.

242. Our task in assessing email traffic between the claimant and Mr N is hindered by the scattering of their correspondence throughout the claimant's bundle. We find that Mr N's use of x in email appears a great deal less frequent than in texts. We find that as in texts, it was used randomly, as a closing salutation.

243. It is not our task to comment on whether this usage was sensible. It is our task to find whether Mr N's use of X meets the statutory test of harassment under section 26 or of direct discrimination under section 13. We find that it does not.

Harassment

244. When we consider the approach under section 26, we do not find that it was "unwanted" conduct. Our finding is that on both sides the use of the letter X (of whatever number) constituted no more than a social salutation. We do not accept the superficial equation between the written x and a physical kiss. There was no indication that the claimant found the usage to be unwanted conduct, as is illustrated by the absence of any pattern of which we could say that x was used unilaterally or disproportionately by Mr N. We found no evidence of her asking Mr N to moderate the usage. We do not find that it created a hostile environment for the claimant: there was no evidence of it having done so.

245. We make the further finding that the usage was not related to the protected characteristic of sex. It was a conventional social usage. Although it was between man and woman, we find that it was no more related to gender than a handshake or a peck on the cheek. When Mr N expressed himself with multiple x's, we find that he did so, as speedy shorthand, to express his delight that a piece of work had been done to a good standard and effectively, not to express sexual engagement with the claimant. All harassment claims based on the use of x fail.

Direct discrimination

246. We must in the alternative (in accordance with section 212 (1)) consider whether the claimant was subjected to a detriment on grounds of sex by Mr N by, in the words of issue 5.1.4,

> "Sending 'kisses' to the claimant in text messages and emails."

247. We approach and decide this part of the claim on the basis that for reasons already stated, the company is vicariously liable (EqA, s.110) for the actions of Mr N, and that our findings are of joint and several liability. Although the strictly correct approach is first to ask whether the conduct complained of constituted a detriment, we hope our reasoning will be easier to follow if we approach the matter in a different order.

248. We accept first that Mr N would not have sent x's to a hypothetical male Project Manager. There is therefore a difference of treatment. We accept that the difference is at least in part because of the protected characteristic of sex, bearing in mind that we must consider the reason for the treatment, not the motivation of the alleged discriminator. We mean that we need not (and do not) find that Mr N used x's because he was writing to a woman. We need only find that he would not have used x's if he were writing in identical terms to a man.

249. We accept that the burden of proof shifts, and that we must consider what explanation has been put forward. The difficulty is that Mr N answered this allegation in a wider, and more serious, context of answering allegations of sexual contact. He admitted to using language which had been 'familiar', and at times inappropriate, but he did not analyse the matter to greater depth. We would find that Mr N has not discharged the burden of proving a non-discriminatory reason for the treatment, ie an explanation of his usage of x's which is untainted by the protected characteristic of gender.

250. The matter does not however end there: we would find that there was a difference in treatment, without a non-discriminatory explanation. Does the treatment fall within EqA s.39(2)(c), ie is it 'any other detriment'? The issue which troubles us is whether Mr N subjected the claimant to a detriment in the Shamoon sense, namely an event which a reasonable worker would have considered placed her at disadvantage within the work setting. We find that he did not, for the same reasons set out above in our discussion of unwanted conduct in the s.26 context. The conduct was random, reciprocal, and had no particular meaning, express or implied. In reaching that finding,

we have in mind our findings below on the issue of consent. We mean that we do not, when reading the usages of x, find that they are evidence of an abuse of the power of a superior over a subordinate, and that they contain no indication of consent which was not freely given.

Gender related language

251. We place in the second group those claims evidenced by traffic in which Mr N used expressly gender related or gender specific language. There were six pleaded instances.

252. At issue 4.1.4 the pleaded words were 'you gorgeous woman' (C5/9). The context was that on 10 January, in response to positive work news, Mr N texted, 'Music to my ears, you gorgeous woman.'

253. At issue 4.1.9 the pleaded words were 'My three angels' (C24). The context was that Mr N made a dinner arrangement with the claimant, Ms Hillman and Ms Shurmer on 29 January.

254. At issue 4.1.10 the pleaded words were 'You're doing great, baby.' The ful context was that in reply to an email about an IT issue, Mr N wrote to the claimant (C120):

> "You're doing great baby.
> Thank you.
> We need to secure in our office PC's a copy of the 'vector file' for the logo that AdWorks produced …"

255. At issue 4.1.12 the pleaded words were 'My right hand lady' (C13). The context was a text of 31 January, in which Mr N wrote, in response to a work development, 'Thank you L. You're going to be my right-hand Lady, and we're going to go far.'

256. At issue 4.1.13 the pleaded words were 'my girl' (C5/64). On 1 February, in reply to the claimant describing what she had done that day, Mr N replied, 'Well done my girl xx.'

257. At issue 4.1.16 the pleaded words were 'Good girl. (Be a good girl!)' (C5/76). The full context was that on 7 February (the day after the explosive row between the claimant and Ms Shurmer) the claimant texted Mr N to say that a client had made contact, and the following exchange took place.

> The claimant: "He's taking me out for dinner and he owns the company. Going to negotiate a corporate rate for all his staff xx".
>
> Mr N: "Good girl. (Be a good girl!)"
>
> The claimant: "Lmao. [ie Laughed my arse off] That's mel not me FYI"
>
> Mr N: "True. And she has the parasites to prove it."

258. All these allegations were relied upon as harassment on the grounds of sex.

259. We find that each of these usages constituted unwanted conduct. We make that finding in reliance on the absence of any form of reciprocal or parallel language used by the claimant. We are conscious that at the time, the claimant made no objection. Where an imbalance of power is in play, the absence of objection is a matter which we approach with caution. Even though there was little deference in this working relationship, we must take care not to equate absence of express objection with consent.

260. We find that each usage was inherently related to the claimant's sex.

261. We find that individually and cumulatively, each usage created a degrading atmosphere. We accept, in the claimant's words, that she found the atmosphere, at least, difficult and unpleasant, because the language used by Mr N was belittling, patronising and demeaning. On five occasions (the 'angels' being the sixth) he expressed job-related praise in subjective gender-specific language.

262. In so finding, we note in particular that issues 4.1.4 and 4.1.10 refer to Mr N's response to a successful work based initiative. We note that the former was in the claimant's second week of employment, and the day after surgery. Mr N's expression of delight (music to my ears) had no objective relationship with whether the person achieving the success was either a woman or gorgeous. His comments about IT and the claimant's achievement at issue 4.1.10 were professional recognition, apart from the word 'baby.' We read the exchange at 4.1.16 in the context of the row the day before.

263. We have found above that the use of the phrase "good girl" meets, in our judgment, the test of harassment under section 26 Equality Act. We find that taken as a whole, including the ugly language in Mr N's final text, the exchange constituted harassment under issue 4.1.16 going beyond the words "good girl". Taken as a whole, the language used by Mr N was unwanted and demeaning in relation to sex.

264. We accept that there were occasions when Mr N expressed praise which was not related to gender. We accept that the pleaded incidents were a small number out of many interactions. We consider these six events both individually and cumulatively in upholding the claimant's claim that each constituted sexual harassment by each respondent.

Uncorroborated allegations

265. In a third group we place allegations of language or behaviour of which there is no extrinsic evidence or reference. We use the phrase "extrinsic evidence or reference" to refer to two separate strands, neither of which is present. One would be corroboration from another person, eg a witness who was present when sexualised conduct took place or sexualised language was used. There was no evidence of that kind. The other would

be inferential evidence from existing traffic, eg a reference in a text or email to, for example, something that had been said or done previously.

266. We have set out earlier a discussion of our findings about the general credibility of the claimant and Mr N. In this category of claims, we put the following issues identified by Judge Heal, all of which fail because we find them to have been uncorroborated, in the sense which we have given, and we decline to accept the claimant's uncorroborated assertions of them: issues 4.1.1, 4.1.2, 4.1.3, 4.1.5, 4.1.6, 4.1.8, 4.1.11, 4.1.24, 4.1.26, and 4.1.30. In light of that over-arching finding, we add brief findings in relation to some of the individual issues.

267. We reject the assertion (4.1.1) that Mr N made repeated reference to camgirl. In so finding we note the absence of any reference in any text or email; and the absence of any reference in the recording of the camgirl conversation of 25 January.

268. Each of issues 4.1.2, 4.1.3 and 4.1.5 to 4.1.8 inclusive, 4.1.11 and 4.1.26 (first use) contained an allegation of inappropriate sexualised language and/or behaviour on Mr N's part. We reject each for the reasons already stated.

269. Issue 4.1.21 was that Mr N "sent the claimant a clip on WhatsApp … showing a girl in a short skirt pouring oil over the front of her car instead of in the right place." A poor quality copy of a still of the WhatsApp was at C243. We are unable, on the basis of C243 alone, to make a finding that sending the WhatsApp was unwanted conduct related to the protected characteristic of sex. There was insufficient evidence on which to do so.

Allegations about 23 January and 21 February

270. In a fourth category are two allegations of overt sexual behaviour, relating to events on 23 January and 21 February. The latter was issues 3.1.7.5 and 4.1.24.

271. The claimant alleged that Mr N came to her home on 23 January at around 9pm and stayed for about two hours. She relied on text traffic to her friend (C52/10) to verify that there had been a visit of that duration that evening. Mr N agreed that he had visited the claimant's home on one occasion. The claimant alleged that in the course of that evening, Mr N asked her, and she agreed, to show him in person the sexually explicitly show which she undertook as a cam girl. The claimant did not allege that sexual intercourse had taken place. This allegation followed from one which we have rejected, namely that as soon as the claimant started work, he repeatedly made reference to the claimant's work as a cam girl. Mr N denied that and agreed with the claimant in principle that as the camgirl work was a piece of information which he had acquired in the professional medical context, he regarded it as confidential.

272. We reject the allegation because it is uncorroborated and unreferred to. It is dependent upon the claimant's evidence only. The claimant relied on one

strand of evidence in support. Recorded material confirmed that on 29 January Mr N gave her £200.00 in cash, and used the phrase "for services rendered" when he did so. The claimant alleged that that referred to sexual services which she claimed to have given in the show on 23 January. Mr N could not recollect why he had used the phrase, but denied that it bore the interpretation sexual services.

273. We do not, in this tangled matrix, read those three words as evidence that Mr N had sexual contact with the claimant for which the £200.00 was payment. That seems to us too heavy a burden to attach to too flimsy and ambiguous a shred of evidence. We decline to do so.

274. The claimant's evidence about the evening of 21 February was that in conversation at the restaurant, Mr N brought up the camgirl past, and propositioned the claimant for sex. Her evidence was that her reply was to the effect that 'that isn't going to happen.' The claimant's case was that this conversation was part of a chain of causation from Mr N's conversation with Mr Jeavons-Fellows the day before, and what she alleged was her dismissal within a week. Mr N's evidence was that (1) he did not know of the claimant's disclosure to Ms Bajraktari on 20 or 21 or 27 February 2018; (2) that he did not proposition the claimant; and that (3) the claimant left her employment of her own free will on 27 February. We find separately for the respondents on the first and third limbs of that evidence.

275. We reject the second limb (sexual advances on 21 February) in part because we reject the allegations raised about the context of what preceded and what followed the dinner on 21 February; and partly because the allegation rests on the claimant's uncorroborated word. We note also, and rely on, the text traffic over those days, 261-266, which is entirely routine, and consistent with that of the previous weeks. Nothing in it suggested that their working relationship had just been changed, either by Mr N's meeting with Mr Jeavons-Fellows, or by anything said at the restaurant.

276. Issue 4.1.25 repeated an allegation about the use of x's, and we repeat all our general findings about that matter. The pleading made the point that two texts with x's were sent on 22 February, the day after the claimant had rejected Mr N's advances. We find that Mr N did not make the advances. We add that one usage that day was of two x's (C5/163) and one of ten (C5/165). There was nothing said or implied in the text traffic of 22 February about any incident the day or evening before: we have, on the contrary, found above that Mr N used x's on occasion to express a positive response to a work event, and that the usage of ten was part of his response to the positive alarm test.

Work related grievances

277. In the final category of allegations of sexual harassment are work place events, which appear on their face to have no relationship with gender, but which the claimant has pleaded as such. We put in this category issues 4.1.26 (second use), 4.1.27, 4.1.28, 4.1.29, 4.1.31, and 4.1.32, and 5.1.1, 5.1.2 and 5.1.3.

278. In this final category, issues 4.1.26 (second), and 5.1.3 relate to pay. We made our findings above in relation to the claimant's terms and conditions and payment, and we have referred to the dereliction of management documentation. We can see no basis whatsoever on which the respondents' shortcomings have been shown to be related to the protected characteristic of gender. There is simply no material upon which the tribunal could find facts which caused the burden to shift and therefore those claims fail.

279. We find that issues 4.1.27 and 4.1.28 had no relationship whatsoever with any protected characteristic. They arose from the claimant's poor working relationship with Mr Sutherland. That in turn arose from her criticisms of him and of Ms Shurmer. We make the same finding about issue 4.1.29. There was nothing whatsoever which linked the claimant's poor relationship with Ms Shurmer with any protected characteristic. We deal separately with issue 4.1.31 (alleged red eyes). Issue 4.1.32 was part of the events of 27 February, and we refer to our findings elsewhere. Neither of those events had any relationship whatsoever with any protected characteristic.

280. We have likewise dealt elsewhere with the 'good girl' exchange of texts (issue 5.1.2). As we have upheld the claim that this constituted harassment, we must, in accordance with EqA s.212(1) reject the claim that the same event amounted to direct discrimination.

Claims of direct discrimination

281. It was common ground throughout this hearing, and we find, that the claimant fell into dispute with most, if not all, of those who had been working at Torrington Hall before she arrived, including Ms Shurmer and Mr Sutherland. We can find nothing in those disputes which relates to the protected characteristic of gender. Those claims fail because the claimant has not proved facts which caused the burden of proof to shift.

282. Allegation 5.1.1 fails because the factual basis has not been proved. We do not accept the claimant's assertion that Ms Shurmer searched her rubbish to see whether she had had sex with a hotel guest. There is a logical problem about the allegation, but we simply say that the factual basis has not been proved, and given the explosive nature of the relationship between the claimant and Ms Shurmer, we would make the same finding even if we accepted that Ms Shurmer had searched the claimant's rubbish.

283. Allegation 5.1.2 mirrors issue 4.1.16 which we have upNNd as a claim of harassment. It cannot therefore succeed as a claim of detriment by direct discrimination, in accordance with s.212(1).

284. Issue 5.14 is a claim of direct discrimination by,

> 'Sending 'kisses' to the claimant in text messages and emails.'

285. We repeat our earlier findings on the usage of x, whether approached as harassment or direct discrimination. We repeat that we do not equate the use of x with a physical kiss.

Limitation

286. The respondents argued that parts of the claim were statue barred. Day A was 22 May. We find that all events on and before 23 February 2018 were on their face out of time. The last event of gender related language which we have upheld as a claim took place on 7 February. It seems to us however just and equitable to extend time to hear those claims. The claimant, as we have found, saw these events as an intertwined continuum, culminating in her resignation. She could not predict how our findings would fall out, and she is not to be criticised, as a lay person, for ignorance or inexperience of the law on limitation. Delay in this case has been a matter of days, and has not been a source of prejudice to the respondents.

Constructive Dismissal

287. The claimant brought a claim of constructive automatically unfair dismissal. She did not have two years' service. She brought the claim under the sex discrimination and public interest disclosure provisions. As identified at issues 2.1 to 2.3.10, and 3.8 it was disputed that the claimant had been dismissed in accordance with section 95(1)(c) Employment Rights Act 1996. The respondents' case was that she had resigned.

288. Our finding about the circumstances of the claimant's resignation is set out below. We repeat our general caution that the claimant has confused chronology for causation. That is a frequent difficulty. It is a particular difficulty in this case, because the chronology shows a large number of things happening in a short period of time. In other words, almost from the start of the claimant's employment, and continuing to its end, the following events were in train:

- The claimant had eye surgery from which she was recovering; although on 31 January the claimant described her eyes as returning to their normal colour, she later developed a concern that her eyes were red and unsightly and that something had gone wrong with either the surgery or her eyedrops;

- She worked to address what she saw as the shortcomings in the work of her predecessors and the contractors whom they had retained;

- She worked to engage with other external advisers, agencies, contractors, and she dealt with regulators;

- She reported back to Mr N, putting herself in the best possible light (if need be at the expense of Ms Shurmer and others);

- She fell into conflict with those at work whom she had criticised;

- She was responsible for preparing and then opening Torrington Hall to guests, and for reporting to Mr N;

- She associated events with each other, and was not good at analysing them separately.

289. We find that the claimant's general perception, throughout the period with which we were concerned, was that all these events were at all times intertwined. We do not agree that she was correct in that understanding.

290. On 6 February 2017, the claimant had a noisy confrontation with Ms Shurmer, witnessed by Mr N. It appears that a regular business meeting exploded into open conflict. Ms Shurmer poured out a string of adjectives about the claimant, of which the over-arching point was that the claimant was found by everyone else at the Hall to be rude, aggressive and impossible to work with. Mr N tried to make some form of peace, and tried to maintain a place for the claimant within the business.

291. It appeared on 6 February that the claimant and Ms Shurmer could not work together any longer, and a form of accommodation was made between them. Ms Shurmer left living and working Torrington Hall to take responsibility, based at NN's offices, for management of the remainder of the NN property portfolio. This was a substantial job. The claimant remained working at Torrington Hall, and remained responsible for bringing Torrington Hall to its final state of readiness to open as a hotel. She moved into Torrington Hall at about the same time and lived in accommodation there. She had her own room and brought her own possessions and clothes to keep there. Her role was partly to ensure that there was a member of management in residence at all times.

292. This was a short-term separation arrangement. Despite the verbal violence of the confrontation between them, we noted in the bundle texts and e-mails which indicated that within a reasonably short time after 6 February, the claimant and Ms Shurmer were in normal, if cool, communication about work matters (eg C11, C40). We accept that as part of those communications, there were occasions between 6 and 27 February when Ms Shurmer came back to the Hall for normal working purposes.

293. On 20 February the claimant was in text correspondence with Mr N about the need for a designated Health and Safety Officer, Fire Marshall and First Aider. She wrote that she could not be considered "since I am not employed" (C5/155), and that she could not take any of those responsibilities "unless you give me a contract".

294. Mr N replied on 20 February (C5/157). He said that there should be a meeting the following day, writing,

> "Normally the meeting should proceed without me but there's probably no point you and Mel meeting. Mel will no longer be involved in running TH but for now she will run all other properties including staff facilities."

295. The claimant took the second sentence as meaning that she had been promoted, at Ms Shurmer's expense, and now held higher status than did Ms Shurmer. It was not clear to us that that was Mr N's intended meaning, or a reasonable interpretation of his text.

296. On the morning of 27 February the claimant and Ms Shurmer met in the kitchen at Torrington Hall. Mr N had asked them to be at a meeting. There was nothing untoward about this. He was entitled to make the request, and relations between the two were capable of being civilly conducted.

297. It was not necessary for us to decide whether this was a formal meeting. There was an encounter which was not recorded. We accept that there was an immediate confrontation between the claimant and Ms Shurmer on the question of whether Ms Shurmer had a role at Torrington Hall, and if so what it was; and if not, why she was there. The underlying question was whether the claimant or Ms Shurmer was higher in status. The claimant said that Ms Shurmer told her that Mr N had promoted her over the claimant's head; Mr N said in evidence that if Ms Shurmer did say that, it was not at his request or with his authority. It might, in other words, have been said to make mischief. If so, the claimant rose to the bait.

298. Mr N was present for part of the encounter and was taken aback, but he had no real reason to be; he had repeatedly ducked establishing a management line or hierarchy between the two, even though what he had said to the claimant on 20 February appeared reasonable and capable of expression in neutral terms. He could for example have told the claimant and Ms Shurmer that they were on equal status in different parts of the business, both reporting to him. He did not do so.

299. The confrontation developed. The claimant said loudly that she could not and would not work with Ms Shurmer. She put to Mr N that it was 'her or me.' There was no reasonable basis for her to do so. All that was required of Mr N was clear lines of authority and responsibility to be defined. We accept that Mr N tried unsuccessfully to calm things down. The claimant cleared her room of her possessions, put them in her car, and left.

300. Mr N's evidence was that the claimant left after he failed to respond to 'her or me' by immediately confirming that he would make the choice and that it would be in favour of the claimant. We accept that evidence. For reasons which are not wholly clear to us, the claimant misinterpreted Ms Shurmer's presence at Torrington Hall on 27 February; put to Mr N a demand that Ms Shurmer be permanently removed; and when he failed to accede to the demand, walked out of her job, not necessarily intending to return and thereby bringing the employment relationship to an end. We do not accept the claimant's case that she left temporarily because she needed a break after three weeks living and working at the Hall. If that were so, she did not need to clear her belongings, or speak as she did to Ms Lee and Mr N.

301. There was a dispute about whether the claimant, as she said, returned her keys and company credit card as she left. Mr N denied that she did and

said that as a result, the credit card had been cancelled and the locks changed. This point did not assist us, and we make no finding, save to comment that either version is capable of being consistent with termination of employment in the heat of a very angry moment.

302. Shortly afterwards, the claimant telephoned Clare Lee, and told her that she had 'walked out' of her job and was not returning. She spoke to Ms Lee later in person, and repeated what she had said on the phone. We accept Ms Lee's evidence that there were two conversations that day to the same effect.

303. On the afternoon of 1 March, the claimant texted Mr N twice, the second text stating, "We need to talk" (C5/176). On the morning of Saturday 3 March, the claimant texted Mr N as follows (C5/177):

> "What will be will be in life. Neither of us can change what's happened so not talking to me now is solving no purpose. There are things we have to agree. I do also have a problem with my eyes, you saw me just last week, as a Dr so know this. If I haven't heard from you by Monday [5 March] I will need to move it forward somehow."

304. Mr N replied to say that he was tied up all weekend and asked the claimant to call him back mid-day Monday. She made the call, but he did not answer (C247).

Discussion

305. We turn to the matters which the claimant alleged were a fundamental breach which caused her to resign. We refer to the list of issues.

306. We do not accept that issue 2.3.1 or 4.1.24 (sexual advances) took place.

307. As to issue 2.3.2, (xx's in texts on 22 February) we have rejected the allegation that they were sexual advances. We accept that on 22 February, and in reply to the decibel text, Mr N sent the claimant a text with ten x's, on which we have made findings above.

308. We do not agree (issue 2.3.3) that the claimant was not paid in full, although we note that the first documented payment was made on 25 February. We do not find that any pay issues were a material cause of her resignation.

309. We do not accept the claimant's allegations about Mr Sutherland at issue 2.3.4 or at 2.3.5 that Mr Sutherland removed the claimant's keys. Mr Sutherland was a contractor, and also Ms Shurmer's partner. The claimant was on poor terms with him. We do not accept that he threatened her, and we do not accept that any actions on his part were capable of constituting a breach of contract by NN.

310. Issue 2.3.6 was that the claimant was demoted in favour of Ms Shurmer. We can see that that allegation lies at the emotional heart of the events of 27 February. The final communication in writing which we saw about the claimant's status was that of 20 February quoted above.

311. However, it is difficult to disentangle what the claimant was demoted from or to, in the absence of any form of contractual documentation, or of any form of structure which applied to her and Ms Shurmer. We accept that if Ms Shurmer said something which implied demotion, it was not with the authority of either respondent. In oral evidence the claimant said that Mr N told her to listen to Ms Shurmer and do what she said. We accept that Mr N may well have told the claimant that she needed to work more collaboratively with Ms Shurmer and not automatically reject everything that she had said or done. We do not find that he appointed Ms Shurmer to a post which was senior to the claimant, or that that was the claimant's reasonable interpretation of what took place on the morning of 27 February.

312. Our conclusion is that on 27 February, neither respondent had said or done anything to the claimant which either demoted her, or which implied that she had been or was to be demoted. At its highest, Ms Shurmer had said something to the claimant which was at odds with what Mr N had written to her on 20 February. The claimant had by then seen the weakness in Mr N's style of management. She was an assiduous user of email and text. She could have asked for some written confirmation of the position. Instead, she accepted what she understood Ms Shurmer had said, accepted (without asking Mr N) that it came from the respondents, and exploded.

313. Issue 2.3.7 is in the category of uncorroborated and unevidenced allegations about Mr N's personal conduct with the claimant and we reject it.

314. Issue 2.3.8 is the following:

> "In February 2018, the claimant had bright red eyes and the second respondent told her that he would sort it out but he did not do so. The second respondent did not treat the claimant's eyes properly".

315. Although on 31 January the claimant had written that she had (C5/60) 'two eyes that are the whitest they have been since the op' she wrote on 3 March (C5/178), 'I do also have a problem with my eyes, you saw me just last week, as a dr, so know this.' In evidence, she said, 'If he had fixed my eyes as he said he would, I would have carried on working for him.'

316. We make no findings about any clinical issue. We have found that the claimant became convinced during her employment that her surgery had been badly handled. We accept that that was her belief. We make no finding that it was well founded. We repeat that the independent professional criticism of Mr N in the bundle related to informed consent issues, and not to treatment.

317. There was no evidence that her eye treatment was a material consideration in the claimant's resignation. Indeed, her 3 March text suggests that she was still being treated (or at least seen clinically) by Mr N, and wanted that to continue.

318. This issue fails because it has not been factually made out as pleaded. That said, we do not find that Mr N's clinical competence formed any part of the employment relationship of trust and confidence between the claimant and NN. We reject the claimant's oral evidence that if her eyes had been 'fixed' she would have remained working for NN. There was nothing which she said, wrote or did on 27 February to suggest that.

319. Issue 2.3.9 relates to the credit card and whether Mr N 'barged' into the claimant's room at the hotel to retrieve it. We do not find that he barged in. We accept that in the emotional fallout of the events on 27 February there was dispute about the company credit card.

320. The final matter of constructive dismissal at issue 2.3.10 is the following:

> "On 27 February there was a major fire risk and/or major fire safety concern in the building about which the second respondent did not seem concerned."

321. There was a recurrent issue as to whether or not the property met the regulatory fire standards. It was intertwined with the issue of whether Ms Shurmer had previously supervised the project properly, and whether the contractors whom she had instructed had carried out their duties properly. The allegation that Mr N was unconcerned about fire safety is without foundation. We find that he was concerned to operate within an approved regulatory framework; but that he was equally concerned by apparent changes in the advice he was given, and the cost implications of having to carry out remedial work.

322. We have found that there were no rejected sexual advances on 21 February, and to the extent that the claim of constructive dismissal rested on that heading, it fails.

323. The claimant submitted in the alternative that she brought a claim of constructive dismissal under section 103A Employment Rights Act. That would require her to show that the events which she complained constituted repudiatory conduct, had as their sole or principal reason the fact that she had made a protected disclosure or disclosures. Chronologically, that can only refer to the disclosure to Ms Bajraktari.

324. That argument fails because we accept Mr N's evidence that the first he knew of any protected disclosure made to Ms Bajraktari was on the first day of this hearing. He did not, when he met Mr Jeavons-Fellows on 20 February, learn of the claimant's disclosure to Ms Bajraktari. We accept that evidence. That therefore cannot have been the cause of anything happening between 21 and 27 February which caused the claimant to leave her employment.

325. We find that the claimant resigned from her employment of her own free will. She may have done so in haste and anger, but there was no evidence that she tried to retract her resignation, and we decline to read her texts of 1 or 3 March as so saying. We find that she resigned in anger when she met Ms Shurmer at Torrington Hall because she had formed the view that Ms

Shurmer was unlikely to return to Torrington Hall, and understood that this put her hierarchically above Ms Shurmer. It may well be that Ms Shurmer used language to add to the claimant's irritation and aggravation.

326. In finding that the claimant resigned of her own free will, we attach considerable weight to the evidence of Ms Lee and to the claimant's text traffic of 1 and 3 March to Mr N. In particular, her text of 3 March, which we have quoted, seems to us something of a fatalistic acceptance that matters had gone beyond repair, but that she and Mr N should at least endeavour to part company on the best possible footing.

327. For avoidance of doubt, we do not find that any of these matters had any relationship whatsoever with any protected characteristic, protected disclosure, or any form of sexual conduct, or any sexual advance.

Remedy hearing

328. It is not for us to advise the claimant, and she may now wish to seek expert professional advice before the remedy hearing proceeds.

329. We record that the fundamental principle of the remedy hearing will be that the claimant is entitled to a remedy only on those matters which have succeeded and no other. As her claim for any form of constructive dismissal has failed, she is not entitled to any remedy for loss of income post-termination of employment. As the only claim for sex discrimination which has succeeded relates to the language used by Mr N, that is the only part of the discrimination claim for which she is entitled to a remedy.

330. The parties are reminded that all privacy orders will lapse when the remedy judgment is sent out. The parties will have the opportunity to make submissions on this point at the remedy hearing.

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Employment Judge R Lewis

Date: ……31.10.19……

Sent to the parties on: ...05.11.19.....

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For the Tribunal Office