EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121921/2018

Held in Glasgow on 18, 19 and 20 February 2020; Members Meeting on 30 March 2020

Employment Judge	**R Gall**
Members	**Ms J Anderson**
	Mr W Muir

Miss D Klukowska	**Claimant** **In Person**
Strathclyde Partnership for Transport	**Respondent** **Represented by:** **Mr G O'Hare -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claim is unsuccessful in all regards. It is dismissed.

REASONS

1. This case was set down to proceed by way of hearing on 18 February 2020 and subsequent 2 days. The Employment Judge to whom the file was passed had earlier dealt with an application for a Deposit Order to be made. It was therefore inappropriate that that Employment Judge dealt with the hearing. This issue only became apparent on the morning of the hearing.

2. The Employment Judge who was then asked to chair the Tribunal hearing the case recognised that it might be perceived by parties that there was a conflict in that he had at one time, whilst in private practice some 12 to 14 years prior to the time of the hearing, acted for the respondents in some matters.

3. When the hearing convened, the Employment Judge disclosed to parties that he had acted for the respondents, then known by a different name, some 12 to 14 years prior to the time of the hearing. He said that he was uncertain as to the precise time and that it might even have been at a time earlier than that. He confirmed that he had looked at the file and did not recognise the names of any parties who were scheduled to appear as witnesses or who were mentioned in any of the written papers on file. His own view was that he could hear the case with the members. He reached this view given the passage of time and the fact that he did not know, and had not heard of, the people mentioned in the claim and response. He also had no knowledge of and had never met any of those currently in charge of the respondents. He wished however to disclose the background and to seek views from parties.

4. The claimant confirmed that she was content that the Employment Judge hear the case with the other 2 members of the Tribunal. The respondents wished a brief adjournment to consider the position. That was granted to them. Some 10 minutes later they confirmed that they were content to proceed with the case with the Employment Judge then chairing the Tribunal continuing in that role for this case. The claimant was asked again at that point if she had altered her view upon reflection. She confirmed that she remained of the view that the case should proceed before the Employment Judge presently involved, together with the 2 other members of the Tribunal.

5. Given the extensive nature of the documentation on file and the very recent passing of the file to the Employment Judge there was then a delay of an hour before the case commenced. This enabled the Employment Judge to familiarise himself more with the file.

6. With a view to ensuring that evidence in the claim was heard in the days allotted to the case, it was proposed to parties that this hearing deal with liability alone. It was explained to the claimant that, if she was successful, a further separate hearing would be set down to determine remedy. Both the claimant and the respondents agreed with this course of action. This hearing dealt only with liability therefore.

7. The claimant gave evidence on her own behalf. For the respondents, evidence was led from the following parties: –

- Janice Morgan, HR manager with the respondents.
- Heather Maclean, information governance and committee services officer with the respondents. She was the line manager of the claimant with effect from the beginning of June 2018.
- Neil Wylie, director of finance with the respondents. Mr Wylie heard the grievance of the claimant.
- The following parties are relevantly mentioned at this point, although no evidence was heard from them: –
- Mary Frances O'Neill, (referred to in this Judgment as MF O'Neill to distinguish her from Hayley O'Neill), formerly with the respondents and formerly line manager of the claimant until the beginning of June 2018.
- Valerie Davidson, assistant chief executive with the respondents.
- Liz Martin, employee of the respondents who worked in the print room.
- Hayley O'Neill, (referred to in this Judgment as H O'Neill, to distinguish her from MF O'Neill), solicitor with the respondents who attended, as notetaker, a meeting between the claimant and Heather Maclean on 10 July 2018.

8. Prior to evidence commencing, the Employment Judge detailed the terms of the overriding objective, and in particular the obligation on the Tribunal to try to ensure, as far as practicable, that parties were on an equal footing. He explained that whilst the Tribunal could ask relevant questions, as it saw it, to witnesses, including claimant, responsibility for presentation of appropriate oral and documentary evidence in her case remained with the claimant herself. He explained the procedure involved by way of evidence in chief, cross examination and re-examination. The Employment Judge confirmed to the claimant that If the Tribunal was to have regard to a document, that document would require to be spoken to or explained in evidence. The

Tribunal would not look through any documents in the bundle and take account of them unless they were spoken to commented upon by witnesses. The rationale for this was explained. Given that, the claimant therefore required to ensure that she gave evidence to the Tribunal about any documents she wished it to consider. This was highlighted to her. Equally it was emphasised that she required to refer witnesses to any documents which were relevant to the case and about which they might be able to speak, if she wished their evidence on any such matter to be considered by the Tribunal.

9. The claimant explained that she might require breaks more often than would sometimes be the case. It was confirmed to her that she should ask at any point if she wished a break and the Tribunal would accommodate that. This occurred from time to time during the hearing.

10. Parties each lodged a bundle of documents. Where a document is referred to from the claimant's bundle, it is preceded by the letter "C". Where a document is referred to from the respondents' bundle, it is preceded by the letter "R".

11. The case brought was one of discrimination and constructive unfair dismissal. The claimant's protected characteristic is that of her nationality. She is Polish. Her claim has different elements. She alleged that she was directly discriminated against in terms of Section 13 of the Equality Act 2010 ("the 2010 Act"). She argued she had been less favourably treated than had 2 other employees, Liz Martin and Heather Maclean. A probationary report had been undertaken by MF O'Neill in relation to the claimant. MF O'Neill had obtained feedback for that report. The claimant said that no feedback had however been sought in relation to an equivalent probationary report for Ms Maclean. The reason for feedback being obtained in relation to the claimant and, as she had it, not for Ms Maclean, was the claimant's nationality, she alleged. The feedback had been accepted. The claimant also maintained that she had been taken to task over relatively minor issues, those being a report of her being frustrated and as to the level of her knowledge on mail merge and organisation of compliments slips. Ms Martin had not however been subject to any comment or criticism over what the claimant viewed as a gap in her knowledge of printing. Ms Martin had also, the claimant said, attacked or

verbally attacked her, again without sanction. Ms Maclean had, the claimant said, threatened her by her behaviour in a meeting held in 10 July 2018. She had not been subjected to investigation or sanction. Mr Wylie in doing his grievance investigation and report had treated her less favourably then Ms Martin and Ms Maclean on the same bases. Ms Maclean was on a 6 month probation period as was the claimant. The claimant made, in relation to Mr Wylie, the point she made in relation to MF O'Neill. Feedback had been obtained in relation to the claimant whereas, she said, it had not been obtained in relation to Ms Maclean. The conduct of Ms Maclean towards the claimant in a meeting on 10 July 2018 had been such that harassment in terms of Section 26 of the 2010 Act had occurred. The acting of Mr Wylie in conducting the grievance also constituted direct discrimination, the claimant maintained. This was as he had treated her differently to Ms Martin and Ms Maclean due to her nationality. The respondents denied those claims.

12. A further allegation was that the claimant's resignation had been accepted following upon her grievance being submitted to the respondents. In lodging her grievance she had done a protected act in terms of Section 27 of the 2010 Act. Acceptance of her resignation was alleged to be the detriment to which she was subjected, that being said to have been done because of the protected act.

13. The claimant also alleged that there had been fundamental breach of contract by the respondents entitling her to resign. As any fundamental breach of contract involved an act of discrimination, she was able to bring such a claim notwithstanding having less than 2 years' service.

Facts

14. The following are the relevant and essential facts as admitted or proved.

Background

15. The claimant was employed by the respondents on the basis of a 6 month period of probation. Her employment with the respondents started on 12 February 2018. She was employed as a Committee and Legal Administration

Support Officer. The holder of that post had in the past reported to the holder of the Information Governance and Committee Officer. At time of the claimant's appointment to the respondents, however, there was no-one in the post of Information Governance and Committee Officer. The claimant was therefore to report to MF O'Neill, senior legal adviser. MF O'Neill in turn reported to the assistant chief executive, Valerie Davidson.

16. Heather Maclean joined the respondents as Information Governance and Committee Officer at the beginning of March 2018. She was engaged on the basis of there being a 6 month probationary period in her employment. At time of her employment, the claimant did not report to her. Both Ms Maclean and the claimant reported to MF O'Neill at that point. The intention was always that the claimant report to Ms Maclean as Information Governance and Committee Officer, once Ms Maclean had some experience in her role.

17. Ms Maclean became line manager of the claimant in early June 2018. A copy of a letter dated 7 June 2018 from the respondents to the claimant confirming the change of reporting line appeared at page R81. Ms Maclean attended a handover meeting, the claimant and MF O'Neill also being present at that meeting. Prior to Ms Maclean becoming the claimant's line manager, Ms Maclean received the claimant's CV and application form. This was passed to her as she was about to become line manager for the claimant and had not been involved in the recruitment process for the claimant. It was therefore regarded as sensible that she obtained a copy of the claimant's CV and application form in order to be aware of her skill set. The documents were passed to Ms Maclean under cover of an email of 6 June 2018 from Ms Morgan, the respondents' HR manager. A copy of that email appeared at R80. It confirmed that the documents were passed at the request of Ms Davidson. Ms Davidson was the compliance officer in relation to data protection matters.

18. Liz Martin worked with the respondents in the print room. She was absent through illness between January and June 2018. She had been employed by the respondents for a few years in the role within the print room. She was competent at her job and had not had any performance issues.

19. The claimant is Polish. Ms Maclean and Ms Martin are British.

Policies and procedures

20. At R60 – 64 probationary guidance produced by the respondents appeared. That confirms that there is to be a meeting between the employee and the manager of the employee after 3 months of the probationary period. This is in order to complete a Probationary Report. Appendix 1 at R 63 and 64 is a template for that Report.

21. There is to be a further meeting prior to the end of the probation period. At the end of the probationary period an extension is possible to the probationary period. Alternatively, an employee may see employment being confirmed at the end of the probationary period or may be informed that employment ends then.

Probationary Report for the claimant

22. At R77 to 79 the Probationary Report completed in relation to the claimant by MF O'Neill appeared. That was a good report, save for one area in respect of which an entry appeared in the column headed "*Requires Improvement*". That entry related to "*Co-operation with Others*". The category was described as requiring consideration of: –

"The extent to which the employee works collaboratively with others in the immediate team and others across SPT to deliver services. Consider the employee's tact, courtesy, and effectiveness in dealing with co-workers, subordinates, supervisors/managers and customers."

23. In the narrative part of that form, having made an entry in the column indicating that improvement was required, MF O'Neill said the following: –

"Dominika is building strong, positive, relationships within the team, particularly in situations where we are all working at full capacity and to tight timescales and deadlines. She received the above-mentioned feedback openly and positively and we will work together to monitor and develop relationships with other teams and departments going forward."

24. The feedback referred to was detailed in a part of the form providing narrative in connection with the relationship with supervisor/manager. A copy of it appeared at R 77. It read: –

"We had a discussion on 9.5.18 about feedback from the business being that Dominika may appear to be frustrated sometimes and that this comes out in her discussions with other SPT staff. This wasn't something she was aware of, and certainly wasn't her intention. She hopes to continue to build solid, positive relationships across SPT. Dominika received the feedback openly and confirmed she will consider how she's engaging and interacting with the rest of the business."

25. To obtain information for the report MF O'Neill had obtained feedback. That is something which would normally be done by the respondents to assist with preparation of such a report. It was appropriate for MF O'Neill to raise this feedback with the claimant. She did it in an appropriate manner. When a probationary report was prepared for Ms Maclean, feedback was obtained. It was obtained from Ms Davidson to whom Ms Maclean reported in relation to part of her role.

Concerns regarding the claimant

26. There were some concerns during the claimant's probationary period as to her interaction with others and, to a degree, with her skills. This caused concern both to MF O'Neill, when she was the line manager of the claimant, and also to Heather Maclean when she became the claimant's line manager. The concerns of MF O'Neill were raised at the meeting between her and the claimant in connection with the Probationary Report set out above.

27. A further example of an issue involving the claimant and a fellow employee concerned Liz Martin. Ms Martin worked in the print room but had been absent through illness. Whilst she was absent the claimant had started work and had covered some of the duties which would normally have been those of Ms Martin, such as monitoring of the use of the franking machine.

28. On return to work of Ms Martin the claimant went to the print room to monitor the franking machine use. An exchange occurred between Ms Martin and the claimant, with Ms Martin enquiring of the claimant as to why she was doing this work now that Ms Martin was back at work. The claimant then spoke to Heather Maclean and said that Ms Martin had attacked her or had verbally attacked her. The claimant said that Ms Martin said that the claimant had to leave the room and that she (Ms Martin) could not be in the same room as her. Ms Maclean said that the claimant should be careful with emotive language as it was very serious to suggest that a fellow employee had attacked her.

29. Ms Maclean subsequently spoke with Ms Martin regarding this matter by way of gathering information to assess the position. Ms Martin said that the claimant had been intimidating and inappropriate. Ms Martin said that she (Ms Martin) felt that she was the victim. She said that the claimant had been demanding, was not listening and had misconstrued what had been said to her.

30. The view which Ms Maclean came to as the manager was that she had two different versions of the interaction and could not determine with certainty what exactly had happened. She said to Ms Martin that she should speak to Ms Maclean if there was any similar interaction. She spoke with the claimant and said that the data which the claimant had collected on the franking machine was enough for there to be an analysis carried out. Ms Maclean was of the view that, having spoken to both employees, the issue has been sorted out.

31. On a separate matter, soon after Ms Maclean had joined the respondents she had approached MF O'Neill saying that she was of the view that requests for holidays could be communicated electronically, thereby saving time and ensuring accurate records were kept. Ms O'Neill agreed that this was a sensible step to take. Ms Maclean spoke with the claimant asking her to do this. The claimant however said that she would not implement this.

32. On another occasion, Ms Maclean asked the claimant to send on an email with a hyperlink. The claimant sent on the email with an email address being given rather than including a hyperlink. Additionally Ms Maclean had it reported to her that the claimant had spoken unprofessionally and inappropriately to IT, demanding something in relation to use of Adobe which was not possible.

33. There was also an issue regarding the inability or unwillingness of the claimant to carry out an exercise involving organisation of documents for a committee meeting. Ms Maclean suggested that, rather than handwrite 28 compliments slips, a label be printed. The claimant argued against the step saying it did not look very professional. She wished to provide a letter to each recipient. Ms Maclean wished the claimant to do as she was asked. She was frustrated as the claimant debated what should be done for some 25 minutes. Ms Maclean expected the claimant, with the clerical experience which she understood that she had from the content of the claimant's CV and application form, to be able simply to undertake the task. She also expected her to do so as she had been asked to do this by Ms Maclean, her line manager.

34. Also associated with this work was a mail merge involving addressing of envelopes or letters. When asked to do this by Ms Maclean, the claimant said that she did not know what to do. This greatly surprised Ms Maclean given the experience which the claimant had said she had and the level at which she had been engaged. The claimant would normally have been leading a team and should, in the view of Ms Maclean, have known how to carry out the mail merge task. Ms Maclean was also concerned at the reaction of the claimant when this matter was raised with her.

35. Ms Maclean raised these concerns with the claimant on 3 July 2018. The claimant appeared to her to be quite blasé about the fact that she did not know how to do a mail merge. Ms Maclean regarded the task involved as being quite straightforward and simple. Looking to the claimant's experience as set out in her CV, a copy of which appeared at R 44 and 45, Ms Maclean would have expected the claimant to have been able to carry out the task and indeed to be able to show others how to do it.

36. Ms Maclean showed the claimant how to carry out the task. The claimant managed to do the task to a standard satisfactory to Ms Maclean. The concerns Ms Maclean had were that the claimant had initially been unable to do the task, her attitude when requested to do this task, and also that she debated what was required in relation to achieving submission of papers with a compliments' slip.

37. On a further occasion, there was a team meeting attended by, amongst others, Ms Maclean as the claimant's then line manager and the claimant herself. In course of that meeting a point arose as to the time period within which a reply required to be given following upon a request under the subject access provisions. Ms Maclean referred to there the requirement being to reply within a specific number of days. The claimant said that the deadline was to reply within a different number of days. Ms Maclean was clear that the deadline was the number of days she had stated. She said that to the claimant in this meeting. The claimant persisted in her view that the correct time for response was a different number of days. Ms Maclean was aware that MF O'Neill was familiar with the deadline for responses. She therefore opened the door from the room in which the meeting was being held and asked MF O'Neill, whose desk was located close to the room, whether the period for reply was the number of days Ms Maclean had specified or the number of days the claimant had stated applied. It was confirmed by MF O'Neill that the time for reply was as Ms Maclean had said. The claimant still did not agree. Ms Maclean viewed this exchange and the way in which it was dealt with by the claimant as undermining the authority of Ms Maclean as her line manager, or attempting so to do.

Raising of matters with the claimant

38. Having had these interactions with the claimant, and having raised her concerns about them with her on 3 July, Ms Maclean spoke with MF O'Neill. She detailed to her what was troubling her about the claimant. It was determined that it was appropriate to speak with the claimant. It was agreed that Ms Maclean and MF O'Neill should speak with the claimant. Ms Maclean would speak regarding the skill levels of the claimant, highlighting the issues

with the hyperlink, the mail merge and the compliments slip as examples of concerns. MF O'Neill would speak regarding the attitude and behaviour of the claimant. She would highlight the claimant's use of emotive language, such as in reporting the issue with Ms Martin. This would build upon the concern which MF O'Neill had raised with the claimant at the Probationary Review time, resulting in the area mentioned above appearing in the "*Requires Improvemen*t" category.

39. Prior to the anticipated meeting with the claimant, a meeting took place on 5 July between Ms Maclean, MF O'Neill and Ms Morgan of the respondents' HR Department. All parties were conscious that the probation period of the claimant was due to finish some 4 weeks thereafter.

40. It was agreed at this meeting between MF O'Neill, Ms Maclean and Ms Morgan that extending probation was one option in relation to the claimant. In the alternative, if the relationship was regarded as being beyond repair, employment of the claimant could not continue.

Meeting between Ms Maclean and the claimant on 10 July 2018

41. Having spoken with the claimant on 3 July, as mentioned above, regarding the issues and then having spoken with MF O'Neill and Ms Morgan on 5 July as also mentioned above, Ms Maclean invited the claimant to a meeting on 10 July 2018. This was not the 6 month probationary review meeting. It was a meeting to discuss concerns, mindful of the fact that the claimant's probationary period was soon to be coming to an end.

42. Unfortunately, MF O'Neill was unwell and was unable to attend on 10 July. Ms Maclean instead invited H O'Neill. H O'Neill attended as notetaker and as an independent witness.

43. This meeting took place on 10 July. Unknown to Ms Maclean and H O'Neill, the claimant recorded the meeting. A transcript of the meeting appeared in the bundle for both parties. It appeared at C121 – 124 and R218 – 223. There were differences in the transcripts. The Tribunal did not hear the recording, other than a very brief part played by the claimant. That was a recording of an

interaction which was at the start of the meeting. The differences in the transcript are not material for the purposes of this Tribunal hearing.

44. This was not a public meeting. It was not the meeting which would be held at the end of the probationary period. It was introduced by Ms Maclean as a meeting to go through "*a couple of concerns*". It was seen by her as a follow-up meeting to the conversation between the claimant and Ms Maclean on 3 July. She was surprised therefore when the claimant herself seemed to be surprised that concerns were being raised with her.

45. It was appropriate to hold this meeting to deal with the matters raised during it, given concerns which had arisen in relation to the claimant. The meeting was not arranged, nor was it conducted, with the intention to engage with the claimant in unwanted conduct related to her nationality with the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

46. The meeting involved discussion of the issues and concerns which Ms Maclean had identified in relation to the claimant's skills relative to the tasks required in her role. It did not progress to the point where any discussion took place as to the behaviours or attitude of the claimant. Before it reached the point where that discussion was appropriate, Ms Maclean had decided that the meeting should come to an end given the way it had developed and that the matter of behaviour and attitude which was to be addressed could be raised at a future meeting.

47. The matters raised were the claimant's knowledge of Excel and mail merge. Ms Maclean was concerned at what she had observed and experienced, being of the view that the claimant's experience as detailed in her CV would have meant that she was familiar with and able to undertake the tasks requested by Ms Maclean in those areas. In fact, as set out above, the claimant had been unable to undertake those tasks due to a lack of familiarity or knowledge with the processes involved.

48. Ms Maclean approached the discussion on the basis of seeking a better understanding of the reason that the claimant was not able to carry out those

tasks, notwithstanding her CV suggesting otherwise. It was Ms Maclean's intention to see if the claimant could herself identify her skills gap. The skills gap would look to the knowledge and skills required for the role which the claimant was carrying out and then compare that to the knowledge and skills which the claimant had, thereby identifying any shortfall or gap. That could then be addressed by looking at ways of obtaining the skills or knowledge. That might involve "*on-the-job*" training, or more formal training by way of external or internal courses.

49. It was Ms Maclean's anticipation that the claimant would recognise the fact that she had been unable to carry out the tasks requested and would work with her to explore what could be done to improve her skills so that she could carry out the tasks. In fact, the claimant did not participate in the meeting in that fashion. Ms Maclean had wanted to achieve by the end of the meeting a plan of action so that she and the claimant could agree upon a way of tackling these issues to resolve them. The meeting closed however without that being aired or agreed. Just prior to the meeting closing, Ms Maclean addressed the fact that the claimant's probation period was due to conclude a month thereafter. Ms Maclean regarded it as fair to explain to the claimant that her probation could be extended for four weeks or that the contract could be terminated, whilst also saying that the respondents were meeting the claimant to assist her with the skills which were needed and with a view to building on the skills which the claimant had.

50. The claimant was upset at the end of the meeting. She sent an email to MF O'Neill, a copy of which appeared at R 87. She said: –

"I am very sorry to be adding to your poor health more issues but I just had a supervisory meeting with Heather and I left devastated and shaky. I don't see myself working for her and I will not be taking further employment with SPT after 12 August when my probationary period ends."

51. That day, some 15 minutes later, MF O'Neill replied to the claimant. A copy of that reply and the response from the claimant appeared at C 301. MF O'Neill referred to the employee support service, Validium. She stated that

the details were available on the intranet and said she would ask HR to make sure that the claimant had those that day. At 12:11 the claimant replied to the response from MF O'Neill. She said that she would "*just go home and try to forget about it although I'm struggling to hold back my tears.*" She also said "*Please don't worry about it right now and get some rest*."

Meeting 10 July 2018 between Ms Morgan and the claimant

52. Ms Morgan, head of HR, met with the claimant shortly thereafter, this on 10 July. She said that she knew that the meeting with Ms Maclean had not gone well and drew the claimant's attention to the employee assistance programme. She explained that this involved assisting an employee by providing tips, techniques and how to handle difficult conversations. She gave the claimant a leaflet. Ms Morgan discussed the nature of a probationary period, saying that either the employee or employer could choose to end probation at any time. She asked whether the claimant wished to continue with the probationary period. This was prompted by the reference in the claimant's email prior to the meeting where the claimant had said that she would not be taking further employment with SPT after 12 August. The claimant said that she did wish to continue for the moment. Ms Morgan encouraged the claimant to think about what it was that she wanted. The claimant said that she would carry on working with the respondent but would start looking for jobs. She said that the difficulty was not with work but was with "*the person*". Ms Morgan said to the claimant that it seemed to her that there was a personality clash. The claimant agreed, although then said that this was not the case as she was a friendly person. The claimant said to her that she felt "*kind of threatened*" by her meeting with Ms Maclean. She then changed that, saying that Ms Maclean criticised her.

53. Unknown to Ms Morgan, the claimant recorded this meeting with her. The transcript of that meeting was produced by both parties in their bundle. The transcript prepared by the claimant appeared at C127 – 129. The transcript prepared by the respondents appeared at R224 – 228. Any differences in the two transcripts are not material in the context of this case.

54. In a passage which appeared at C129 and R 228, after Ms Morgan had referred to a final probationary review being carried out and whether the claimant wished to carry on until that time, the claimant said

"I'll probably do that and see if I'll find a job I'll just start looking from this week and if I find a job elsewhere, I'll just leave because I can't see it working for me."

55. The claimant said that she would sleep on whether she wished to continue her probation and employment. She thanked Ms Morgan for meeting with her and the meeting concluded. The respondents did not regard the claimant as having resigned at this point. Their view was that the claimant had intimated that she was leaving but then wished time "*to sleep on it*".

56. The following day the claimant asked for information regarding the probationary guidance and the relevant forms. Ms Morgan sent that to her.

Resignation of the claimant

57. Ms Maclean spoke with Ms Morgan. She explained to Ms Morgan what had happened at the meeting on 10 July. She said that the claimant had left the meeting upset and had not taken the feedback very well. Ms Maclean decided that it was appropriate to invite the claimant to another meeting. That meeting was to be a one-to-one meeting. It was therefore to be of the same nature as the meeting of 10 July had been. The intention was that an improvement plan would be discussed and agreed at this meeting involving on-the-job training, classroom training or potentially training by visiting another area of the business. Support was to be put in place to assist the claimant to remedy the lack of knowledge or ability in the areas which had been raised with her.

58. 10 July 2018 was a Tuesday. In addition to Saturday 14 and Sunday 15 July being non-working days, Monday 16 July was also a non-working day due to a local holiday.

59. Ms Maclean had access to the online diary of the claimant. She checked that before issuing to the claimant the invitation to attend the meeting. That is standard practice within the respondents' organisation in that situation. She

picked a time when the claimant's diary showed her to be free. The invitation was to attend a meeting on 18 July between 10:30 AM and 11 AM. That invitation was declined by the claimant, the notification being sent to Ms Maclean on 17 July at 12:10 PM. A copy of that notification of the meeting being declined appeared at R 90.

60. By email of 17 July sent at 13: 51 PM Ms Maclean asked the claimant when suited her to meet, saying she would "*send a reschedule*". She took this step following discussion with Ms Morgan as to how best to proceed.

61. Ms Maclean thereafter checked the diary or meeting scheduler again. She found that the claimant remained available at the time initially proposed for the meeting. She then emailed the claimant on 17 July at 15:40 PM saying: –

"I've just checked the meeting scheduler and it shows you as available. Can you let me know why you can't attend the time and date?

Thanks

Heather"

62. The claimant replied by email of 17 July at 16:16 PM saying: –

"I declined it because we no longer need to go through it – I'm leaving on 10th of August."

63. A copy of that email exchange appeared at R90.

64. Ms Maclean sent a copy of the claimant's email to Ms Morgan and to Ms Davidson for their information. A copy of her email to them sent on 17 July at 16:17 PM appeared at C311. Ms Morgan and Ms Davidson were therefore aware of the claimant's statement that she was leaving on 10 August on receipt of that email on the afternoon of 17 July.

65. By this email of 17 July the claimant submitted her resignation. Prior to that email being sent, the claimant sent to MF O'Neill an email on 17 July timed at 14:50 PM. It forwarded to MF O'Neill, Ms Maclean's email sent at 13:51 PM. In that email, as detailed above, Ms Maclean had said that she would send a

reschedule in relation to the proposed one-to-one. MF O'Neill was absent from work through illness at this point. In her email to MF O'Neill forwarding the email from Ms Maclean, the claimant said: –

"Hello Mary Frances,

I hope you're feeling better and we will see you shortly in the office.

Could I kindly ask you to inform Heather that one-to-one sessions will no longer be required seeing that I"ll be leaving in three weeks time?

I would much appreciate it."

66. Being aware of these emails, Ms Morgan had come to the view that the claimant had resigned, having intimated her decision to leave the respondents, effective at the end of her probation period. Her view was that having indicated that as her intention earlier but then having decided that she wished to sleep on it, that being on 10 July, the claimant had on 17 July been explicit in her decision to resign.

67. Ms Morgan took external legal advice, however, on 17 July on this point. That advice confirmed her view that resignation had occurred. Ms Morgan spoke with Ms Davidson to update her on the situation explaining that the claimant's resignation was accepted, that being the decision of Ms Morgan and one which she was authorised to take. Ms Morgan said that she would arrange a meeting with the claimant to explain the leaving arrangements to her. Ms Morgan updated Ms Davidson as MF O'Neill was absent through ill health.

68. The following morning, 18 July Ms Morgan sent to the claimant an email, a copy of which appeared at R 92. It said: –

"Hi Dominika,

I understand that you have advised Heather that you will be leaving SPT on 10 August.

I have put a meeting in the diary today at 10 AM for us to have a chat."

69. In reply, in an email sent to Ms Morgan at 9:07 AM, the claimant said: –

"Good morning Janice,

I will meet you there at 10 AM."

Grievance lodged by the claimant.

70. That meeting did not however proceed at 10 AM. At 9:40 AM the claimant attended the office of Ms Davidson, assistant chief executive of the respondents. She spoke briefly with Ms Davidson. Unknown to Ms Davidson, this meeting was recorded by the claimant. A copy of a transcript prepared by the claimant appeared at C131.

71. This meeting was relatively short. In course of this meeting the following two exchanges occurred, VD being Ms Davidson and DK being the claimant: –

"DK: I'm not sure you are aware of this but I told Heather that I'd be leaving on 10 August.

VD: OK"

And

"VD: so, have you formally handed in your resignation?

DK: Not yet… not yet"

72. By this time Ms Davidson was aware of the emails from the claimant and that Ms Morgan had accepted the resignation and was to intimate that to the claimant, having obtained legal advice on the effect of the claimant's emails given their terms.

73. The claimant handed to Ms Davidson a letter intimating her grievance. A copy of that letter, headed "*Formal Complaint against Heather Maclean*" appeared at R 97 – 100.

74. Ms Davidson informed Ms Morgan that the claimant had met her and had submitted a complaint or grievance. Ms Morgan was concerned that she might be named in the complaint or grievance. Her view was that if that was the case, it would be inappropriate for her to meet with the claimant at 10 AM as

she had planned. Ms Morgan therefore rearranged the meeting with the claimant, scheduling it for 2 PM. She did this to enable her to check whether she was referred to in the claimant's grievance. Ms Morgan was not however mentioned in the grievance. The meeting between her and the claimant was therefore rescheduled for 2 PM that day. It proceeded at that time.

Meeting 18 July, the claimant and Ms Morgan

75. The meeting which took place between the claimant and Ms Morgan on 18 July was relatively brief. Unknown to Ms Morgan, the claimant recorded that meeting. A copy of the claimant's transcript appeared at C133 and 134. The respondents' transcript appeared at R229 – 231. Any differences between the transcripts were not material in the context of this hearing.

76. In the meeting Ms Morgan referred to the claimant having resigned from her post. She referred to the emails sent the previous day by the claimant, one to MF O'Neill, which had been redirected in the absence of MF O'Neill through illness, and also the email to Ms Maclean at 16:16 PM. She confirmed that that was why she had scheduled the meeting for the morning of 18 July and confirmed that the claimant's resignation was accepted.

77. The decision taken by Ms Morgan on behalf of the respondents to accept the resignation of the claimant was taken on 17 July, prior to submission of the complaint or grievance by the claimant. It was therefore unrelated to submission of the complaint or grievance by the claimant.

78. The claimant did not say at any point, whether at this meeting or otherwise, that she wished to retract her resignation. The respondents confirmed to her that she could leave work at that point. They subsequently remitted payment to her of sums due in relation to her employment, including in respect of her period of notice. They waived recovery of monies which might have been sought by them relating to holiday leave taken by the claimant in excess of her *pro rata* entitlement at date of termination of her employment.

Ms Martin and Ms Maclean

79. As stated above, Ms Martin had worked in the print room of the respondents' organisation for some years. There had never been any performance issue with her.

80. The claimant was of the view that an email chain in which she was involved demonstrated that there was an issue with knowledge on the part of Ms Martin as to printing of documents. The email chain appeared in both bundles. For ease of reference, the page numbers for the chain are given from the respondents' bundle. They are at R192 and 193.

81. From the emails of 11 and 21 June 2018, page R193, it appears that there was a printing job to be carried out involving three bound copies of a document being produced. There was an issue over some pages which did not print correctly. The important elements of email chain appeared at R192. Both emails on R192 come from MF O'Neill. They were both sent on the morning of 21 June 2018. They both went to print room, being the email address used by Ms Martin, who is referred to in the emails as "Liz". A copy was sent to the claimant and Ms Maclean. The first one was sent at 9:36 AM. The second one was sent at 9:44 AM. They read as follows: –

Email 1

"Morning Liz

Yes – I think Dominica had put the Data Protection Act into folders. If there are pages wrong in the version that I sent to you, let me see if I can find an alternative…

Kind regards"

Email 2

"Another thought ladies, Heather, would you mind picking up with Liz on how to print so that 4 A4 pages of Word/PDF text are printed onto one A4 page?

Going forward, it would be better for us to quarter the number of pages required when we are printing things like legislation and guidance. It'll make the text small, but it's still legible.

Thank you

Kind regards"

82. This did not reflect a performance issue with Ms Martin. It was not reflective of Ms Martin lacking a skill. It was not an instruction that Ms Martin be trained on a particular matter. It was a suggestion as to a better means of proceeding in the future. Ms Maclean took it as being a request that she herself become familiar with how it might be possible to print four A4 pages onto one page.

83. Had there been an issue with Ms Martin, a supervisory meeting would have been held with her, as occurred with the claimant. The purpose of that would have been to identify any issue and skills gap and to see what could be done to address and resolve that.

84. The claimant had been upset following the meeting with Ms Maclean on 10 July. She had stated in meeting Ms Morgan on the same day that she did not wish Ms Maclean to be her supervisor. She expressed her view that Ms Maclean's tone with regard what she saw as the criticism of her skills was inappropriate. She said that she felt "*kind of threatened*" (R226) or "*even threatened*", (C128) depending upon which version of the transcript is preferred. The claimant went on to say that she had been called to a meeting with Ms Maclean so that Ms Maclean could "*point out*" and "*criticise*" her for a lack of skills, something she found "*a little bit inappropriate from her tone*", also saying what was expected of her was "*unrealistic*".

85. The respondents' health and well-being policy, a copy of which appeared at C143 – 146 provides in clause 4.3 that line managers will "*Put in place measures to minimise the risk to employee well-being, particularly from negative pressure at work.*" Other elements set out provisions in relation to stress amongst team members and the duties of line managers.

86. Ms Morgan was of the view that what she had heard from the claimant resulted from a clash of personalities between the claimant and Ms Maclean. She was conscious of concerns about the use of language by the claimant in her reference to Ms Martin having attacked or verbally attacked her and in her reference to Ms Maclean having threatened or kind of threatened her. She had regard to the claimant almost immediately referring to having been criticised and to Ms Maclean's tone having been in the view of the claimant "*a little bit inappropriate*". With those elements in mind, she assessed the position. As a result of that assessment, she concluded that it was not necessary to speak with Ms Maclean regarding the matters relative to Ms Maclean raised with her by the claimant. She also did not view it as appropriate for her to take them up with MF O'Neill as line manager for Ms Maclean.

87. MF O'Neill was the line manager of Ms Maclean as mentioned. She took feedback from parties she regarded as appropriate in forming a view as to whether Ms Maclean's probationary was to be extended or whether she would/would not be confirmed in post. Ms Maclean was confirmed in post at the end of her probationary period.

88. Although the claimant had reported to Ms Maclean that she had been attacked or verbally attacked by Ms Martin, that matter had been a properly dealt with by Ms Maclean, in that she had investigated it and had come to a view, having spoken to both parties, that there had been no attack. She had taken steps to address the exchange which had occurred.

Grievance investigation and outcome

89. Neil Wylie was asked to hear the grievance complaint lodged by the claimant on 17 July. He is director of finance and has responsibility for procurement, ticketing, digital IT, free bus passes, the contact centre operated by the respondents, booking for the mega bus and also has responsibility for the bus stations run by the respondents. Mr Wylie has heard many grievances and has training appropriate to the carrying out of that role.

90. On receipt of the grievance from the claimant, Mr Wylie read this and sought to understand what exactly it was about which the claimant was complaining. He found it hard to understand the points which the claimant made or sought to make.

91. A grievance meeting was held with the claimant on 27 July 2018. Mr Wylie and the claimant were present. Ms Reid was also present as HR adviser and notetaker. Notes of that meeting appeared at R 178 – 190. Those notes were agreed with the claimant as being accurate.

92. In course of the grievance meeting it was agreed that the grievance could be summarised as involving 7 allegations. Those 7 matters were what were dealt with by Mr Wylie in his grievance outcome letter. A copy of that letter appeared at R 167 – 177.

93. The 7 allegations were as follows: –

"1) You believe that the comments made by Heather Maclean to you in the meeting on 10th July about your lack of skills/competence were incorrect and unfair e.g. mail merge process, compliments slip etc.

2) You believe there had been a misuse of your personal data

3) You believe that you were criticised by Heather Maclean for not being able to identify where your gaps in skills were and that you found the communication from Heather Maclean during the meeting was unclear and not constructive

4) You believe that you were publicly humiliated and criticised in front of your colleague by Heather Maclean, which, in your opinion, is a form of bullying.

5) You feel that you have been discriminated against because of your nationality.

6) You did not feel you had an avenue within the organisation for your concerns to be addressed.

7) You believe you were victimised, in that you say you were asked to leave, after you submitted a formal complaint."

94. Points 1, 3 and 4 were similar and related to the meeting between Ms Maclean and the claimant on 10 July 2018. Point 5 related to the matter with which the Tribunal is concerned namely alleged discrimination due to nationality. The claimant alleged that she been treated differently from others in the organisation. Her nationality was Polish. The nationality of the others to whom she referred was British. Those others were Ms Martin and Ms Maclean. Point 7 is also a matter of decision for this Tribunal. Elements in points 1, 3 and 4 are of potential relevance to this Tribunal hearing insofar as they are said to support the allegation of discrimination.

95. At the meeting with the claimant on 27 July 2018, in a passage which appeared at the foot of R179 and moved onto R180, Mr Wylie asked the claimant what she was looking to achieve from her grievance. The claimant said that she was looking to see people brought to justice as she been treated unfairly, that she had no desire to come back to work and that she sought compensation. At no time at that stage or at any other point during the meeting with Mr Wylie did the claimant say that she had sought to retract her resignation or now sought to retract her resignation.

96. Although the claimant said that the meeting between herself and Ms Maclean held on 10 July was to humiliate her and had said in her letter intimating her grievance that she felt threatened and discouraged during the meeting, she did not disclose to Mr Wylie that she had a recording of the meeting. The claimant also did not initially disclose to Mr Wylie that she had recordings of the meetings on 10 and 18 July with Ms Morgan and a recording of the meeting on 18 July with Ms Davidson. She also did not say to Mr Wylie that she had, prior to meeting with him, written to Councillor Bartos, chair of the respondents, complaining about the matters raised in her grievance. She had written to Councillor Bartos on 22 July 2018. A copy of her letter appeared at R101 – 104.

97. On becoming aware of the letter that the claimant had sent to Councillor Bartos, Mr Wylie wrote to the claimant by email on 7 August 2018 setting out questions which he wished the claimant to answer as they were matters raised by her in her letter to Councillor Bartos. The questions asked and the responses of the claimant to those appeared at R125 – 127.

98. In response to the questions asked about the meetings with Ms Morgan the claimant give some detail and also said "*Please see attached recording*." In response to the questions raised as to the meeting with Ms Davidson the claimant supplied answers and then stated "*Please see attached recording called Valerie Davidson*." These recordings were sent to Mr Wylie and considered by him as part of the grievance process and determination. The claimant did not however make Mr Wylie aware of there being a recording of the meeting of 10 July between herself and Ms Maclean. Mr Wylie became aware that there was such a recording only when the claimant appealed against his decision.

99. In conducting the grievance investigation Mr Wylie interviewed Ms Morgan, Ms Davidson, Ms Maclean, Mr Griffin and H O'Neill. Notes of these interviews appeared at R145 – 156 (interview with Ms Morgan), R157 – 166 (interview with Ms Davidson), R128 – 141 (interview with Ms Maclean) and R118 – 124 (interview with H O'Neill).

100. The claimant was given a full opportunity by Mr Wylie to set out her grievances and to comment fully as to the issues she regarded as existing and which had led to her grievance being intimated.

101. Mr Wylie regarded H O'Neill as being very straightforward and matter-of-fact. He was conscious that she was a solicitor and had attended the meeting between the claimant and Ms Maclean in the capacity of notetaker. He therefore regarded her as approaching that meeting and having attended it in an independent capacity.

102. From his enquiries, including speaking to H O'Neill, Mr Wylie regarded the meeting on 10 July between the claimant and Ms Maclean as having been difficult but as having been carried out in the right manner. He did not regard

there as having been anything in the tone used by Ms Maclean which would have given the claimant a valid basis of concern. As the claimant had not disclosed to him that there was a recording made by her of this meeting and had not volunteered to give him that recording, he required to base his view ultimately upon interviews with the claimant, Ms Maclean and H O'Neill.

103. In relation to other points raised by the claimant, Mr Wylie had regard to the comments of the claimant and to those of Ms Morgan and other witnesses interviewed by him in reaching his view upon the grievance submitted by the claimant.

Decision on grievance

104. Mr Wylie issued his decision letter on 31 August 2018. A copy of it appears at R167 – 177. Mr Wylie took account both of the grievance as initially presented by the claimant and that as detailed to Councillor Bartos. He enclosed with his decision letter notes of the grievance hearing which had taken place on 27 July 2018. He also confirmed having considered the documentation which was passed to him, including the audio recordings of meetings between the claimant and Ms Morgan on 2 occasions and the claimant and Ms Davidson on one occasion. Those audio recordings had been sent to Mr Wylie by the claimant on 7 August 2018, as mentioned.

105. In relation to the issue over skills/competencies, specifically the matters of mail-merge and the task in relation to compliments slips, he did not uphold the claimant's allegation that the comments by Ms Maclean at the meeting on 10 July were incorrect and unfair. He recognised that negative feedback as to work, skills or performance is difficult for a recipient to hear. He said that this was so "*no matter how it is delivered*". By that he meant that even if delivered with sensitivity, if the message is that skills fall short, or that a task has not been well carried out, it is not easy for someone receiving such a message to hear it.

106. Mr Wylie regarded it as being within the remit of Ms Maclean as the claimant's line manager to assess the needs of the role and the skills of the claimant relative to that. The comments made by Ms Maclean were, Mr Wylie said,

based on experience of Ms Maclean and were not incorrect or unfair. They were part of a conversation which it was anticipated would continue further in relation to skills gaps and development. The comments made as to what might happen at the end of the claimant's probationary period were not regarded as being incorrect and unfair. Mr Wylie viewed them as being appropriate given that the meeting was taking place when there were 5 weeks left of the claimant's probationary period. In his view Ms Maclean would be expected to be explicit as to potential outcomes of the probationary period.

107. Point 3 of the grievance was that the claimant believed she had been criticised by Ms Maclean for not being able to identify where her gaps in skills were. She also said she had found the communication from Ms Maclean during the meeting to be unclear and not constructive.

108. It was regarded as relevant by Mr Wylie that there was to be a follow-up meeting to the meeting held on 10 July. That meeting was to assist identification of any skills gap and to discuss management of the claimant's performance in the run-up to the scheduled ending of the claimant's probationary period. He noted that the claimant had declined the invitation to attend the follow-up meeting. Based on the information he obtained from the claimant, Ms Maclean and from H O'Neill, Mr Wylie said that he had not found criticism or communication which was unclear and not constructive. He said that raising concerns around work performance would be part of what was expected as an ongoing performance conversation. He did not uphold this allegation.

109. Point 4 of the grievance was the claimant's view that she had been publicly humiliated and criticised in front of her colleague by Heather Maclean, a form of bullying as she saw it.

110. Having narrated the background of the meeting which was to involve Ms Maclean, MF O'Neill and the claimant, that MF O'Neill then became unwell and was unable to attend with H O'Neill being present to take a note of the meeting, Mr Wylie set out his conclusion. He said he had not found anything to substantiate management of the meeting by Ms Maclean as having been

inappropriate and that there was no evidence to suggest the communication, tone or demeanour were inappropriate and constituted bullying. He noted that the meeting was in private with a colleague present as notetaker. The claimant had not raised any objections to that course or asked for alternative arrangements. It was appropriate that Ms Maclean had been explicit in relation to potential outcomes of the claimant's probationary period. Mr Wylie did not uphold that element of the grievance, concluding at R172 by saying:-

"It is unfortunate that you feel you were humiliated and criticised and whilst I cannot comment on your personal feelings, I have found no evidence of any intention to cause this reaction or any evidence of inappropriate actions in the meeting."

111. Point 5 was the allegation that the claimant had been discriminated against because of her nationality. Relevant to this Tribunal hearing was one of the examples which the claimant gave to Mr Wylie, that of Ms Martin. The claimant said that Ms Martin did not know how to print several pages onto one page. In her view this was a performance issue but was not addressed by Ms Maclean. This was different treatment. The claimant's allegation was that this was because of the claimant being Polish and Ms Martin being British.

112. The claimant referred to the email detailed above from MF O'Neill, R192. Mr Wylie said that his interpretation was that MF O'Neill wanted the print room to print more text on each page. He said that there was no indication that Ms Martin could not do this or that there were concerns regarding her ability to do it. He had found no evidence of concerns being raised regarding the performance of Ms Martin at any stage during her work in the print room, which had been where she had worked for more than 4 years. He went on to say that when he had asked the claimant if she knew how Ms Maclean dealt with the issue, the claimant had said that she was not aware of that.

113. On this point, Mr Wylie concluded at page R 173 as follows: –

"Accordingly, it would appear that (a) you are not aware whether a legitimate performance concern existed or not regarding Liz's ability to print and (b) if a performance issue did exist in respect of Liz's work in the print room, whether

action was taken or not. In light of this, I'm struggling to see how you can claim that you have been treated differently. When I spoke to Heather about the email you produced, her evidence was that she was unaware of any issues regarding Liz's performance and, if there were any, they must have been addressed by Mary Frances.

In any case, as noted above in response to allegations 1), 3) and 4) I find nothing in Heather's actions or conduct in your performance meeting on 10th July to be inappropriate."

114. The conclusion Mr Wylie reached was that none of the evidence the claimant had presented supported the allegation that she had been discriminated against because of her nationality. He did not uphold the allegation.

115. Point 7 was the allegation by the claimant that she had been victimised in that she was, she said, asked to leave after she had submitted her formal complaint. Mr Wylie analysed the timeline. He noted the emails sent by the claimant on both 10 July and then on 17 July as detailed above. The emails on 17 July confirmed the claimant's intention to leave the respondents on 10 August. Ms Morgan had on 18 July sought to arrange a meeting with the claimant having expressed her understanding that the claimant had informed Ms Maclean that she would be leaving on 10 August. The grievance was lodged after that, at 9:40 AM on 18 July.

116. It was Mr Wylie's view that Ms Morgan was being reasonable in accepting the emails as resignation of the claimant. Having listened to the recordings of the meetings as supplied to him by the claimant, he confirmed that the claimant was at no point dismissed or asked to leave. Instead it had been intimated to the claimant by Ms Morgan that the claimant's resignation had been accepted with the claimant having it confirmed to her that she could leave immediately with no financial detriment and without working her notice period.

117. Mr Wylie noted that, although in the letter to Councillor Bartos the claimant said that she had changed her mind and that this was evident, she had not in fact stated to any member of staff that she wished to continue with SPT or

that there had been a mistake of some sort in understanding her wish. At each stage she had confirmed her decision to leave.

118. The conclusion reached by Mr Wylie was that submission of the claimant's formal grievance or complaint had "*no bearing whatsoever on SPT's decision to accept the resignation. The two matters are entirely separate and the timeline noted above demonstrates that you had resigned prior to submission of the complaint. As previously discussed, SPT investigates all grievances even if the complainant has left the organisation. That is the case with your grievance*." This element of the grievance was not upheld.

119. The grievance and the allegations of the claimant as to the behaviour of others were not upheld by Mr Wylie.

120. The investigation carried out by Mr Wylie was thorough. He spoke to the relevant personnel. The claimant did not ask him to undertake investigative meetings with any other party. The view formed by him as to there being no basis on which it appeared that there was a performance issue with Ms Martin was one which he was entitled to take upon the information he obtained. He himself did not have any role in the performance management of Ms Martin. He had no such role in the performance management of Ms Maclean. He did not have any role in the appointment of Ms Maclean, whether on a probationary basis or on a permanent basis. He did not regard there as being anything before him from the comments made by the claimant which warranted investigation in relation to the actings of Ms Maclean as line manager of the claimant.

121. The view which Mr Wylie came to was not one reached by him due in any regard whatsoever to the nationality of the claimant, Ms Martin or Ms Maclean. The claimant's nationality played no part whatsoever in the decision by Mr Wylie not to uphold any of the elements of the claimant's grievance. It did not play any part in the decision which he made that the claimant had not been treated less favourably than Ms Maclean and Ms Martin due to her nationality.

122. Whilst the claimant may have viewed there as being a performance issue with Ms Martin and Ms Maclean and may have regarded the points raised with her

in particular on 10 July as being unfair, there was no evidence whatsoever that the nationality of the claimant or of Ms Martin and Ms Maclean played any role whatsoever in the decision-making of the respondents, whether that was the decision-making of Ms Maclean or of Mr Wylie.

Issues for the Tribunal

123. The issues for the Tribunal were: –

(i) Was the claimant treated by Ms Maclean, MF O'Neill or Mr Wylie less favourably than the comparators she referred to, Ms Martin and Ms Maclean, because of the nationality?

(ii) Did the conduct of Ms Maclean at the meeting between herself and the claimant, attended by H O'Neill, on 10 July 2018 constitute harassment of the claimant by Ms Maclean in that Ms Maclean had engaged in unwanted conduct related to the claimant's nationality, the conduct having the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(iii) Was acceptance of the resignation by the claimant victimisation by the respondents of the claimant, as it constituted a detriment to which the claimant had been subjected because the claimant had done a protected act, the protected act being submission of a grievance on 18 July?

(iv) Was the conduct of Mr Wylie in declining to uphold the grievance of the claimant, specifically point 5 thereof, discriminatory conduct in that he had treated the claimant less favourably then he treated or would have treated Ms Martin and/or Ms Maclean because of the nationality of the claimant?

(v) Had the claimant resigned in circumstances where there had been a fundamental breach of contract by the respondents of a discriminatory nature entitling the claimant to make a claim of (constructive) unfair dismissal to this Tribunal?

Applicable law

Direct discrimination

124. Section 13 of the Equality Act 2010 ("the 2010 Act"), provides that a person discriminates against another person if because of the protected characteristic, that person treats the other person less favourably then they treat or would treat others.

125. Section 23 of the 2010 Act says that on a comparison of cases for the purposes of Section 13, there must be no material difference between the circumstances relating to each case.

126. Section 26 of the 2010 Act states that a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating the other person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. It goes on to state that in deciding whether conduct has the effect just mentioned, each of the following must be taken into account –

- the perception of the person involved who has been potentially subjected to harassment
- the other circumstances of the case
- whether it is reasonable for the conduct to have that effect.

127. In addition therefore to considering evidence from a claimant as to the effect of conduct alleged to have been harassment upon that person, the Tribunal also requires to consider whether it was reasonable for the conduct to have had that effect. When applying the objective standard, the Tribunal must consider the position keeping in mind the particular claimant in the case. That is confirmed, for example, in *Reed and another v Stedman* 1999 IRLR 299.

Burden of Proof

128. Section 136 of the 2010 Act states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that there has been a contravention by the respondent of a provision of the 2010 Act, the Tribunal must hold that the contravention occurred. It is then for the respondent to show that it did not contravene the provision if a finding of discrimination is not to be made.

129. The case of *Ayodele v CityLink Ltd and another* 2018 ICR 748 underlined that there was no need for a respondent to be required to discharge the burden of proof unless and until the claimant had shown a *prima facie* case of discrimination that required to be answered.

130. Other relevant cases are *Igen Ltd and others v Wong and another* 2005 ICR 931 *("Igen")*, *Laing v Manchester City Council and another* 2006 ICR 1519 ("*Laing*"), *Madarassy v Nomura International plc ("Madarassy")* 2007 ICR 867 and *Hewage v Grampian Health Board ("Hewage")* 2012 ICR 1054.

131. As a result of these cases, and also that of *Barton v Investec Henderson Crosthwaite Securities Ltd* 2003 ICR 1205 *("Barton")*, principles have emerged.

132. The claimant must prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that an act of discrimination has occurred. If such facts are not proved, the claim will not succeed.

133. The Tribunal must keep in mind that it is unusual to find direct or obvious evidence of discrimination. The Tribunal must be alert to drawing such inferences as may be properly drawn from primary facts.

134. The key element to be kept in mind is that the statutory provisions must be applied. An assessment of the findings of primary fact is required. Although there is reference to a 2-stage analysis of the evidence, the Tribunal does not require to hear the evidence and argument, separating those into 2 stages.

The reality is that a Tribunal will have heard the evidence in the case prior to undertaking this analysis.

135. As was emphasised in *Madarassy*, "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*"

136. The case of *Hewage* saw the Supreme Court make it clear that the provisions in relation to the burden of proof only have a role to play where there is some doubt as to the facts necessary to establish discrimination. In a case therefore where a Tribunal can make positive findings on the evidence one way or another as to whether discrimination has occurred, the burden of proof provisions have no relevance.

137. *Laing* confirmed, in a similar vein, that *"if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for the Tribunal to say, in effect, "there is a nice question as to whether or not the burden shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it is nothing to do with race*".

138. Applying the approach in *Madarassy*, and looking for something more than a difference in status and a difference in treatment, the Tribunal must keep in mind that what is required as that element need not be a great deal.

139. It is not enough however for the claimant simply to show that he or she has been treated badly or even unreasonably. That will not be sufficient to establish of itself that there has been less favourable treatment amounting to discrimination in terms of the 2010 Act. Where a claim of direct discrimination is made, there must be evidence from the claimant to support the contention that treatment received was less favourable as compared to treatment of others who did not share the same protected characteristic. Unreasonable treatment is not of itself sufficient to infer discrimination and cause the burden

of proof to shift. This was confirmed by the House of Lords in *Glasgow City Council v Zafar* 1998 ICR 120.

140. The case of *Chief Constable of Kent Constabulary v Bowler* EAT 0214/16 saw the EAT state "*Merely because a Tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.*"

141. In reality if a Tribunal finds behaviour to have been unreasonable, that is likely to impact upon its assessment of credibility.

Constructive unfair dismissal

142. Section 95 (1) (c) of ERA provides a right on the part of an employee to resign and to claim constructive dismissal in circumstances where the conduct of the employer is such that he/she is entitled to terminate the contract without notice. Such an occurrence is known as a constructive dismissal.

143. For a claim to be successful, the claimant must establish that there has been a fundamental breach of contract by the employer. The onus therefore is upon the claimant.

144. The test as to whether there has been a fundamental breach of contract is an objective one. It is for the Tribunal to assess the facts and circumstances and to come a view on that.

145. The well-known case of *Western Excavating v Sharp* 1978 IRLR 27C *("Western Excavating")* sees the Court of Appeal through Lord Denning state that for constructive dismissal there must be conduct by an employer "*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.*"

146. Another well-known case, that of *Malik v BCCI SA* 1997 IRLR 462 provides the basis of there being an implied term of trust and confidence in the contract

of employment. It states that an employer is not, without reasonable and proper cause, to conduct itself in such a manner as is calculated or is likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

147. The intention of the employer is not a factor in assessing whether there has been fundamental breach of contract.

148. Although a period of service of 2 years is necessary before a constructive unfair dismissal claim can competently be brought, where discriminatory conduct is said to have occurred, a claim of that type can be brought notwithstanding there being a period of service of less than 2 years.

Time Bar

149. A claim of discrimination must be brought within 3 months of the act of discrimination complained about. Time can be extended if the claim is not brought within that time if the Tribunal considers it just and equitable to extend time. This is terms of Section 123 of the 2010 Act. In terms of that Section, if there is conduct extending over a period, then any such conduct is treated as done at the end of that period.

Submissions

Submissions for the claimant

150. A copy of the claimant's submissions is at Appendix 1 to this Judgment. What follows is a summary of those.

151. The claimant detailed elements which she said supported her case. As commented upon below, she referred in submission to aspects which were not part of the evidence before the Tribunal, whether in written form or spoken to. Some parts of her submission related to matters which were not in the case as set out in her claim form and further particulars. One example of that, is her reference to the grievance appeal. Evidence about that was not led at the Tribunal hearing.

152. Having rehearsed the issues for the Tribunal, the claimant turned to findings in fact which she said the Tribunal should make. Again, some of those were matters in relation to which the Tribunal did not have evidence before it. As one example, she refers in submission to her previous role as a self-employed holistic therapist and to Polish culture. Those were not matters about which the Tribunal heard in evidence.

153. What the claimant referred to as being findings in fact were essentially her comments on the evidence and also, in some areas, further matters which in her view assisted her claim.

154. The claimant went on to highlight what she said were inconsistencies in the statements of the respondents' witnesses. She described those as having come about as the respondents' witnesses were making up a story to present her as "*abrupt, dismissive and argumentative*".

155. In relation to mail merge, the claimant said that this was not a function required to analyse data, that being the skill which she had and had stated in her cv that she had. This had not however been part of the evidence.

156. The claimant advanced her interpretation of the evidence, as she recalled that evidence. She urged the Tribunal to consider that interpretation and to find in her favour. The analysis she undertook in her submission is detailed. She raises points which were not put to the respondents' witnesses in cross-examination.

157. Legislation and case law is referred to by the claimant. She referred to *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2008 ICR 396 *("Shamoon")* and the comment therein that if a claimant has a protected characteristic and has been treated differently from someone else who does not have that protected characteristic and that is the only difference between the cases, the irresistible inference will be that the reason for the different treatment is the protected characteristic. Other cases mentioned by the claimant were *Barton, Igen, Giwa-Amu v DWP* 1600465/17**,** *London Borough of Islington v Ladele* 2009 LGR 305 and *Laing*. She analysed the burden of proof and its shifting nature.

158. In relation to comparators, the claimant set out the position as between herself and Ms Maclean on the one hand and as between herself and Ms Martin on the other. She said that in *Shamoon* it had been said that a comparator was someone who shared "*some*" of the same characteristics as the claimant. The claimant also set out in tabular form the action or decision which she said had been taken in relation to both herself and her comparator, whether Ms Maclean or Ms Martin.

159. As far as the treatment differed and was said to be due to nationality, the claimant said that on the evidence the Tribunal could properly conclude that the less favourable and not equal treatment she maintained she had experienced was because of her nationality. There had been no adequate explanation by the respondents. The inference could be made on the basis of "*almost common sense*". She referred to *North West Thames Regional Health Authority v Noone* 1988 ICR 813.

160. In relation to unfair dismissal, the claimant narrated the facts as she regarded them. She said that she had said on 10 July that she did not see herself working for Ms Maclean. After Ms Morgan had raised the matter with her, she withdrew her resignation she said, that withdrawal being accepted by Ms Morgan. On 17 July the respondents had sought to arrange a further meeting with her. She had said that she would be leaving on 10 August. The respondents had accepted her resignation after intimation of her grievance.

161. Her resignation had been submitted on 17 July in the heat of the moment, she submitted. The respondents ought to have investigated the matter to ascertain her true intentions. The case of *Kwik-fit (GB) Ltd v Lineham* 1992 IRLR 156 was referred to by the claimant. Similarly she referred to the case of *McHugh v The Sign and Graphic Centre Ltd t/a O'Reilly Signs UD* 334/2008. She set out her position as to why the evidence established that she had resigned in fear.

162. By accepting her resignation "*based on the grounds of Equality Act breach, failure in assessing special circumstances, and failure of applying cooling-off period*" the claimant said that the respondents had unfairly dismissed her.

163. That unfair dismissal had occurred after submission of her grievance, that being a protected act. Victimisation had therefore occurred.

164. The claimant set out the conduct which she said constituted harassment. The conduct was, on the balance of probabilities, she said, and in the absence of other explanation, because of her race given that it differed from treatment by the respondents of Ms Martin and Ms Maclean who, the claimant said, were in similar circumstances.

165. The purpose of the conduct was to criticise her and to humiliate her, the claimant submitted. It met the test under Section 26. It was also reasonable to consider the conduct as having the effect required for a claim under Section 26 to be successful. The case of *Weeks v Newham College of Further Education* UKEAT 0630/11 was referred to by the claimant. It was also relevant that hostility could justify an inference of discrimination if there was nothing else to explain it, said the claimant. The impact on the claimant of meeting with Ms Maclean was known to the respondents. The Tribunal should have regard to the whole circumstances rather than looking at matters in isolation. The case of *Read and Bull Information Systems Limited v Stedman* 1999 IRLR 299 was referred to by the claimant.

Submissions for the respondent

166. The written submissions for the respondents, are attached as appendix 2.

167. Mr O'Hare highlighted that the onus was initially on the claimant in a discrimination claim. He referred to Section 136 of the 2010 Act. He submitted that in this case the burden had not shifted to the respondents. If it had, they had given an adequate explanation of what had happened to demonstrate that there was no discriminatory act. It was not necessary for the Tribunal to go through a 2 stage process.

168. Mr O'Hare detailed the provisions of Section 13 and Section 26 of the 2010 Act. He referred to the case of *Richmond Pharmacology v Dhaliwal* 2009 IRLR 336. That set out the principles to be applied in determination of a claim under Section 26. He drew the attention of the Tribunal to the subjective/objective

element within Section 26. He commented on the claim, looking at the objective element within Section 26 and its application to the evidence. He drew attention to the case of *Betsi Cawaladr University Health Board v Hughes and others* UKEAT/0179/13. "*Violating*" was said in that case to be a strong word, with the Tribunal requiring to consider the conduct and its effect against that standard.

169. The conduct must be related to a protected characteristic. The case of *Nazir and Aslam v Asim and Nottinghamshire Black Partnership* UKEAT/0332/09 was of relevance.

170. The provisions of Section 27 of the 2010 Act were outlined.

171. The statutory provisions under Section 123 of the 2010 Act were detailed by Mr O'Hare. The case of *Bexley Community Centre v Robertson* 2003 EWCA Civ 576 was referred to in support of the principle that if a claim is presented out of time, the onus is on the claimant to persuade the Tribunal to extend time, with there being no presumption that time will be extended. Mr O'Hare's position was that there was no conduct extending over a period. The employer was not responsible for any ongoing situation. There was no basis, he said, on which it could be argued that it was just and equitable to extend time.

172. Moving onto the claim of constructive unfair dismissal brought, Mr O'Hare referred to *Western Excavating*. He referred to the implied term of mutual trust and confidence. He emphasised the test which the Tribunal should apply as to there being fundamental breach of contract. That was an objective test. The case of *Wood v WM Car Services Ltd* 1982 ICR 666 was cited by Mr O'Hare with a quote from it being set out by him, that quote being "*the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*". The conduct of the employer could be one off act or a series of acts with a last straw occurring. The test had not been met in this case.

173. Mr O'Hare then turned to credibility. He set out various elements of evidence in relation to which he said the claimant had not given credible evidence. He

referred in particular to the fact the claimant had made allegations as to Ms Maclean's behaviour in the meeting on 10 July, yet had not disclosed the existence of recordings of that meeting until the grievance appeal. MF O'Neill had not been mentioned in the grievance. The Tribunal should keep in mind that the claimant was loose in use of strong language in describing events. There had been no claim brought against Ms Davidson notwithstanding the allegations the claimant had made at the Tribunal hearing. In relation to resignation, the claimant had said that she had not intended to resign by the emails she had sent. They were however clear and unambiguous. The claimant herself had admitted that reading the emails they would be interpreted by management as confirmation that she was leaving. The email sent to H O'Neill, R91, should be regarded by the Tribunal as having been sent as the claimant had resigned rather than being sent, as the claimant had it, to make H O'Neill feel guilty. Ms Morgan had not tried to convince the claimant to leave. She had set out how a probationary period worked.

174. As far as Ms Martin allegedly not knowing how to print properly was concerned, the claimant for the first time at Tribunal had said that MF O'Neill told her that Ms Martin did not know how to print turning 4 pages into one. That had not previously been pled or said as part of the grievance. When cross examined the claimant had said she did not think was relevant to raise it in the grievance. It was however a key element which might have given some support to her grievance. This evidence at Tribunal, as with the other evidence touched on above, was not credible.

175. Mr O'Hare contrasted this with the evidence from the respondents. Their witnesses had been honest and credible, he said.

176. Dealing specifically with the complaints, Mr O'Hare said that there had been no harassment at the meeting on 10 July between Ms Maclean and the claimant. The context of that meeting was important. The claimant did not like to be challenged. She accepted that she did not wish to be managed by Ms Maclean. She was prone to taking offence and was hypersensitive, said Mr O'Hare. He accepted that Ms Maclean had said the meeting did not go well

because she was nervous. That did not mean however that there had been discriminatory conduct.

177. Applying the objective standard, it was not reasonable for that meeting to have had the effect upon the claimant required for there to be a successful claim under Section 26.

178. Insofar as there was a difference in evidence as to the tone of that meeting, and also the meeting between Ms Morgan and the claimant, the evidence of the respondents' witnesses should be preferred.

179. If discriminatory conduct had occurred, the respondents should be found to have taken all reasonable steps to prevent harassment. The defence in terms of Section 109 applied.

180. There had been no direct discrimination, Mr O'Hare submitted. The claimant had not been treated less favourably than Ms Maclean or Ms Martin. Feedback had been sought for Ms Maclean. There was no *prima facie* case as far as alleged discrimination by MF O'Neill was concerned. In any event the claim against her was time-barred.

181. Ms Maclean had raised genuine concerns that she and Ms O'Neill had with the claimant. Nothing had occurred because of the claimant's nationality. There was no performance issue in relation to Ms Martin. There was no less favourable treatment. If there was any such less favourable treatment, it was not due to the claimant's nationality.

182. As far as Mr Wylie was concerned, his role had been to hear and investigate the claimant's grievance. He did this thoroughly. He was not to deal with any issue regarding Ms Maclean or Ms Martin. He did in any event look into the claimant's allegations but did not uphold them. There was no basis on which it could be successfully argued that his actions comprise treating the claimant less favourably due to her Polish nationality.

183. The claim against Mr Wylie was first made in further and better particulars by the claimant and so was out of time. Raising the grievance was a protected act. The timeline however was such that the claimant had resigned before

submission of a grievance, with the respondents accepting her resignation before the grievance was submitted. There had been no victimisation given that timeline.

184. There was also no fundamental breach of contract which would successfully found a claim of constructive unfair dismissal. It might be that the circumstances placed the claimant under some stress in that she been asked to attend a meeting where performance concerns were going to be raised. That step had been taken however and the way in which the respondents had tackled the issue did not amount to fundamental breach of contract, applying the appropriate test.

Claimant's reply to respondents' submissions, Appendix 3

185. The claimant's reply rehearses much of what was in her initial submission. She counters the points the respondents made with what she regards as the answers to those points. She expresses the view that the respondents have not proved that conduct, which she claims to have been discriminatory, was not on the grounds of her nationality.

186. In analysing the actions of the respondents, she sets out definitions of "*strong language*" and "t*hreatening*". She details what in her submission should to be drawn from the facts as she sees them. It is alleged by her that there was a conspiracy involving Ms Davidson, Ms Maclean, Ms Morgan and Mr Wylie.

187. She advances the proposition that she did not resign. There were legal ways for her to be dismissed but she was not dismissed legally or fairly, she says.

188. The claimant goes on to say that there was no documentary evidence of feedback being obtained in relation to Ms Maclean. There was no documentary evidence of there being no issues with the performance of Ms Martin.

189. The claimant submitted that there was an issue with Ms Martin's performance, saying that the email in question was one asking Ms Maclean to train Ms Martin on how to print in the particular way involved.

190. In relation to time-bar, the claimant said in these submissions that she was not aware that no feedback had been taken in relation to Ms Maclean until September 2018 when that ought to have occurred but had not. As far as Mr Wylie was concerned, the claim had been raised within 3 months minus one day of the grievance outcome.

Respondents' reply to the claimant's submissions, Appendix 4.

191. In a brief reply to the submissions of the claimant, Mr O'Hare said that the claimant's submissions lacked coherence and clarity. They had referred to evidence which was not before the Tribunal or to aspects which had not been pled by the claimant. They had raised allegations against Ms Morgan when there was in fact no claim against her. The claimant had confirmed that there was no claim against Ms Davidson but made allegations in submission against Ms Davidson. Quotes set out by the claimant in her submission were specific extracts from minutes and were not placed in context. As far as a claim was concerned in relation to a cooling off period being necessary in relation to resignation, there had been such a period, namely that between 10 and 17 July.

Discussion and Decision

192. There were various elements to this claim. The Tribunal's conclusions are now set out in relation to victimisation, harassment, direct discrimination and constructive unfair dismissal.

193. The Tribunal recognised in considering the evidence and indeed the submissions that English is the claimant's second language. It also kept in mind however that the claimant's written English is very good indeed. It demonstrates an awareness of and ability to articulate legal principles in the relevant areas of law. The claimant's comfort with use of the English language was also illustrated by her ability to reflect her recollection of evidence led during the case. The claimant's understanding of English was also apparent in the hearing. She was well able in her evidence in chief to detail her case and to assist the Tribunal with any questions it had. She understood and responded fully to cross examination questions. She then cross examined the

respondents witnesses, engaging with them and challenging them in the areas she wished to raise with them.

194. In assessing credibility, the Tribunal preferred the evidence of the respondents' witnesses where there was a conflict between evidence for the claimant and that for the respondents. The claimant was, in the view of the Tribunal, prone to seeing things as she wished rather than as they were. She misinterpreted documents and also mis-recalled them. As one example, she said that there was a performance issue with Ms Martin. That was how she read the email from MF O'Neil at page R193. She returned to this point in submission as detailed above. It was not however the case that the email set out a performance issue, or instructed that Ms Martin be trained or be shown how to do something. Its terms did not read as the claimant represented they did. The evidence from the respondents' witnesses was of Ms Martin being experienced in printing matters and of there being no performance issues with her. In submission, the claimant referred to the email being one in which MF O'Neill "*asked Mrs Maclean to show Mrs Martin how to print 4 pages on to one A4 page*". The email did not say that. That was how the claimant viewed it. That interpretation affected her thinking on this matter. She also made assumptions, such as that Ms Martin had not been spoken to about this matter or the interaction when she was checking the franking machine. She assumed that Ms Maclean had not been subject of feedback. She had no basis, however, for regarding these as being matters of fact, as she said they were. The Tribunal accepted evidence that the facts were contrary to the claimant's assumptions.

195. There is a general point about the claimant's submissions. The Tribunal treated them with caution.

196. The claimant set out in her submissions various points in relation to which the Tribunal had not heard evidence. She set out background about which the Tribunal had not heard. She referred to documents about which no evidence had been led. She advanced arguments that were not part of a case both in terms of the evidence led and notice of her case given in the claim form and further particulars. One example is para 61.3 of the submission where the

claimant refers to the email in relation to the printing of 4 pages onto one page. The email does not ask Ms Maclean to show Ms Martin how to print, although that is what the claimant submits it says. As a further example, the claimant submitted that she had not resigned. This was not her position at Tribunal. Her position at Tribunal focussed upon the circumstances of resignation and when her resignation had been accepted. She accepted at Tribunal that reading her emails would convey to the reader that she was intimating or had intimated her resignation.

197. It appeared therefore the Tribunal to be the case to that the claimant simply did not like being tackled about anything which in the view of the respondents was a concern. It is never pleasant to have to hear and take on board points made about areas where performance is not as good as it could or should be. The claimant however remained, it appeared to the Tribunal on the evidence, convinced that she was right and others were wrong on any such matter. She then attributed the contrary, and to an extent critical, assessments of others to sinister, discriminatory motives being at play. There was however no evidence of any such approach by the respondents. That was so whether looking at the individual instances of alleged discriminatory activity, or the cumulation of instances weighed together.

198. In summary, the claimant was not regarded by the Tribunal as being credible in key areas where her evidence differed from that of the respondents' witnesses.

199. Ms Maclean, Ms Morgan and Mr Wylie all struck the Tribunal as credible and reliable. The claimant was not, in the opinion of the Tribunal, deliberately lying. She found it difficult, the Tribunal concluded looking at her actions and views during her time of employment and hearing her evidence and explanations at Tribunal, to see things as they were in reality. The respondents had sought to assist her as an employee. They had properly applied their procedures in relation to her. Those procedures were, on the evidence accepted by the Tribunal, there being no contrary evidence, similarly applied to others, including Ms Maclean.

200. The particular elements of the claim are now considered.

Victimisation

201. The claimant's position was that her resignation had been accepted only after she had intimated her grievance. She alleged that, her grievance being a protected act, her resignation had been accepted because she had done that protected act. Acceptance of her resignation was the detriment to which, in her case, the respondents had subjected her.

202. The Tribunal found this element of claim unsuccessful on a fundamental point. It regarded the evidence as being credible and clear that the respondents had accepted the resignation of the claimant prior to her grievance being intimated. The evidence of Ms Morgan on that point was accepted. She was the decision maker in the acceptance of resignation. The claimant pointed to an email which, she said, supported her position that Ms Morgan only became aware of her resignation after intimation of the grievance. That was the email which appeared at C308. The email however at C 311, being an email from Ms Maclean to Ms Morgan and Ms Davidson, demonstrated that Ms Morgan was aware of the claimant's decision to resign on 17 July, the grievance only being handed in on 18 July.

203. Ms Morgan decided to accept the claimant's resignation on 17 July. It is true that the respondents only made it known to the claimant on 18 July that her resignation was being accepted. Again however that was done, in the view of the Tribunal, when Ms Morgan emailed the claimant on 18 July prior to the grievance being handed in, expressing her understanding that the claimant informed Ms Maclean that she was leaving on 10 August and looking to meet with the claimant at 10 AM. By that time, Ms Morgan had on the preceding day taken advice from solicitors as to the terms of the emails sent by the claimant. That advice was that those emails were clearly confirming the resignation of the claimant. The emails from the claimant were clear and unambiguous. She did not ever say to Ms Morgan, Ms Maclean or indeed Mr Wylie, that she wished to withdraw her resignation, had attempted so to do or even that she wished further time to reflect upon her decision.

204. The respondents had not hastily accepted resignation in that the claimant had initially stated on 10 July that she planned to leave their employment. Discussion took place with her. It was agreed that she would "*sleep on it*". It was therefore perfectly appropriate and reasonable to assume when she intimated her position in clear terms on 17 July that she meant what she said. It is also relevant, as mentioned, that she did not seek to retract her resignation or to withdraw it at any point.

205. The claimant's resignation having been accepted prior to intimation of the grievance, acceptance of her resignation was not something done because of the protected act. It cannot therefore form the basis of a victimisation claim.

206. The respondents, quite properly, dealt with the claimant's grievance by investigating it and coming to a conclusion upon it. The grievance procedure was undertaken. The investigation was a full one. Much consideration was given to the grievance. These facts all underlined to the Tribunal that the respondents were not keen simply to "*wash their hands*" of the claimant after her resignation.

207. The Tribunal was in any event entirely unclear as to how it could be said to have been a detriment for the resignation as tendered by the claimant to have been accepted in the circumstances of this case in particular. It was the claimant's decision to tender her resignation. As mentioned, this was not something she did "*in the heat of the moment*", nor was it something which she sought to retract. It was something which she repeated as being her decision.

208. The Tribunal did not however reach the point of requiring to determine whether there has been a detriment through acceptance of resignation. Acceptance was not because of the protected act in that it occurred prior to the protected act, on the evidence the Tribunal accepted.

Harassment

209. The Tribunal was entirely satisfied on the evidence that the conduct to which the claimant referred was not conduct related to a relevant protected

characteristic, namely nationality. It was also entirely satisfied that the conduct to which she referred did not in any event have the purpose of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Tribunal was also satisfied that, notwithstanding the view of the claimant, it was unreasonable for the conduct to have that effect.

210. The Tribunal accepted that the conduct about which the claimant gave evidence in relation to this potential ground of claim was unwanted as far as she was concerned. It involved discussion about her skills and abilities to do elements of the job for which she was employed. She was being asked to discuss the situation which had arisen in relation to mail merge and in respect of compliments slips. It was being said to her that her period of probation was coming to an end and that it might be extended or alternatively that her employment with the respondents might be brought to an end at conclusion of her period of probation.

211. It was important for the Tribunal to have regard to the test which has to be met in terms of the 2010 Act. That involves taking into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have the effect of harassment as defined in Section 26.

212. It was not, the Tribunal found, reasonable for the conduct to have the effect of harassment in terms of Section 26.

213. The allegation arose in relation to the conduct of Ms Maclean both in arranging and in conducting the meeting on 10 July 2018. That meeting however had aired legitimate concerns in relation to aspects of the claimant's performance. It followed upon the meeting with the claimant conducted by MF O'Neill where concerns had been noted. There had been instances which gave rise to a basis on which concerns could have, and indeed should have, reasonably been raised with the claimant as to her performance. Ms Maclean did not call the meeting without reference to anyone else or without there being a basis on which concerns could appropriately be raised. She aired

those concerns with the claimant on 3 July. She met with MF O'Neill and Ms Davidson on 5 July. MF O'Neill and Ms Davidson agreed that it was appropriate for Ms Maclean and MF O'Neill to meet with the claimant. Indeed, it was fair that they did so having regard to the concerns and to the approaching termination of the claimant's probationary period. Unfortunately, MF O'Neill was unable to attend the meeting on 10 July. Ms Maclean conducted the meeting.

214. It is never an easy matter for a line manager to hold such a meeting with an employee who has, perhaps surprisingly in the case of the claimant given her CV and apparent skills, not exhibited a particular skill or particular level of skill. In relation to mail merge, it was a surprise to the respondents that the claimant said she did not have knowledge which it had been anticipated she would have had. Equally from the employee's point of view it is never pleasing to have an issue with absence of expected knowledge, or lack of skill, aired and discussed. Whilst the objective might be to address that to remedy the position, it is almost inevitable that the employee regards the communication of the difficulty as being critical in its nature. That does not mean, of course, that it is not correct to raise and to tackle any such issue, particularly as skills gaps can often be closed.

215. Looking at the areas of the transcript of the meeting to which the Tribunal was taken in hearing the evidence both from the claimant and Ms Maclean, the Tribunal did not regard the conduct of Ms Maclean as constituting harassment in terms of Section 26 of the 2010 Act. There was nothing to suggest to the Tribunal, other than the perception of the claimant herself, that the meeting had been hostile, intimidating, degrading, humiliating or offensive its tone or content. The Tribunal accepted that the claimant may have found the comments hard to hear or to accept. She may have regarded them as unfair. The Tribunal kept in mind however that it is appropriate for an employer to address issues of performance. That is perhaps particularly so during the probationary period. As mentioned above, the meeting was called in appropriate fashion. It was conducted in the presence of an independent

notetaker. It raised relevant matters. It was part of a process which was going to involve a further meeting.

216. The Tribunal was of the view that Ms Maclean, being somewhat inexperienced in taking meetings of the type which occurred between her and the claimant on 10 July, had not perhaps handled it as confidently as she might have. Her interaction with the claimant was, to an extent, awkward and clumsy. That was considered by the Tribunal to be due to inexperience on the part of Ms Maclean. Insofar as the conduct of the meeting by Ms Maclean was not perfect, it was not however even close, in the view of the Tribunal, to meeting the elements of behaviour required for a claim of Section 26 of the 2010 Act to be successful.

217. There was no basis on the evidence heard by the Tribunal on which it was reasonable for the conduct alleged to have been regarded as harassing, as defined in Section 26 of the 2010 Act, in its nature or to have had that effect upon the claimant.

218. Importantly, there was also simply nothing which suggested to the Tribunal that the conduct was related to the claimant's nationality. That was an essential element if the claim was to be successful

219. It was in the view of the Tribunal, to the respondents' credit that they held such a meeting to address the position. They intended to hold a subsequent meeting. The claimant declined to attend the further proposed meeting.

220. The Tribunal was entirely satisfied that it was appropriate for Ms Maclean to raise the fact that the probationary period was drawing to a close and that the options existed of extending that period or employment terminating at the end of the probationary period. Not to do so would have left the claimant potentially thinking that all was in order or at the very least, being surprised if the probationary period had been extended or if her employment had come to an end at its finish.

221. It was surprising to the Tribunal, if the tone of the meeting on 10 July with Ms Maclean had been so offensive to the claimant, that she did not in her

grievance meeting with Mr Wylie reveal to him that the meeting had been recorded by her and indeed play or send the recording to him. That is particularly so when she ultimately, although not initially, revealed that she had recorded the meetings with Ms Morgan (2) and Ms Davidson. She sent those to Mr Wylie.

222. There was a degree of support from this for the view that the claimant did not in fact find the meeting humiliating, degrading, offensive, intimidating or hostile, whilst being upset at its content. Had it had the effect upon her as detailed in Section 26, making the recording available to Mr Wylie would have been one way of providing a ready illustration to him of just why it was that it was reasonable for the claimant to have formed that view.

223. It was also appropriate for Ms Morgan when meeting with the claimant to refer to probation being a period during which there was a two-way street, with either party being able to call it to a halt. There was no behaviour by Ms Morgan founding a successful claim under Section 26

Direct discrimination

224. The claimant had her own view as to performance issues existing with Ms Martin and Ms Maclean. Ms Maclean's evidence was that that in other areas, about which the Tribunal did not hear, there had been interaction by the respondents with her (Ms Maclean) in relation to her performance. This was not a case therefore where Ms Maclean was for some reason beyond criticism as far as the respondents were concerned. Her performance was kept under review by MF O'Neill and Ms Davidson.

225. There was no difference in treatment of the claimant and Ms Maclean at the 3 month probationary report stage. Feedback was appropriately obtained in relation to both employees. It was not the case, as the claimant believed, that feedback had been obtained in relation to her, with no feedback being obtained in relation to Ms Maclean. The Tribunal accepted Ms Morgan's evidence that feedback was appropriately obtained at the relevant point in relation to performance of Ms Maclean.

226. The allegation against MF O'Neill that she had obtained feedback on the claimant when no feedback on Ms Maclean had been obtained was not therefore based on fact. The Tribunal did not accept that there was any difference in the process involved in relation to each of those employees. It was appropriate for MF O'Neill to raise with the claimant the feedback obtained.

227. If there had been any difference in treatment, there was no evidence whatsoever that the claimant's nationality was in any way a factor in this. Further, the Tribunal regarded the act of MF O'Neill, if it had been found to have been discriminatory, to have been carried out in May 2018. It was a distinct "*stand alone*" act. MF O'Neill was not involved in any of the other acts said to have been discriminatory. There was evidence of "*linkage"* between the alleged acts of the different employees of the respondents. This act was not part of conduct extending over a period.

228. This element of claim was brought out of time and would not have succeeded had it been regarded by the Tribunal as being well founded. There was no evidence before the Tribunal which would have enabled it to find that it would have been just and equitable to extend time to enable this element of claim, although brought out of time, to proceed.

229. As to the allegations against Ms Maclean, when the claimant had spoken to Ms Maclean about what the claimant regarded as unacceptable behaviour towards her by Ms Martin, Ms Maclean had not ignored it. She had investigated the matter by speaking with Ms Martin. Further, she had not then simply accepted Ms Martin's word as against the claimant's. She had concluded that she could not determine who was right given the contradictory positions and absence of any witness. She therefore took steps to try to ensure that there was no risk of repetition of any issue between the claimant and Ms Martin.

230. The claimant also raised with Ms Morgan the behaviour she said she had experienced at the hands of Ms Maclean. The Tribunal accepted, however, that Ms Morgan had not simply ignored this or accepted that Ms Maclean was

in the right and the claimant in the wrong. Ms Morgan had assessed the language used by the claimant and her reference to feeling "threatened" or "kind of threatened", followed by a reference by the claimant to being criticised. She took account of earlier concerns about the emotive language used by the claimant in relation to Ms Martin when it was suggested that she had been attacked or verbally attacked by her. She concluded that there was a clash of personalities between the claimant and Ms Maclean, with the claimant gelling with MF O'Neill and not gelling with Ms Maclean. She raised this with the claimant when she met with her on 10 July following the claimant's meeting with Ms Maclean. It was something which the claimant appeared to accept at that meeting with Ms Morgan.

231. There was simply nothing to suggest that the respondents, whether acting through MF O'Neill or Ms Morgan, or indeed Ms Davidson had proceeded as they did in relation to the claimant and as they did in relation to Ms Maclean, with their conduct being to treat one differently to the other because of nationality. In relation to the instances where there was any difference in treatment, their circumstances differed. Evidence existed of there being an issue with skills and performance on the part of the claimant and also with her behaviour and attitude. The claimant had her opinion in relation to Ms Maclean. There was simply nothing however in the facts which the Tribunal found which could have led it to the view that, on a *prima facie* basis, discriminatory conduct by the respondents had occurred. The burden of proof did not shift to the respondents.

232. Mr Wylie was tasked with dealing with the claimant's grievance. The claimant's case at Tribunal in relation to Mr Wylie was that she raised issues of the behaviour of Ms Maclean towards her which were not taken further by Mr Wylie.

233. The Tribunal considered the evidence it had. It accepted that Mr Wylie had assessed the position. He had taken steps to investigate the grievance raised. He came to a view as to the merits of the grievance and in particular as to the nature of the conduct which the claimant said that occurred by reason of the

behaviour of Ms Maclean. He found that Ms Maclean had not been unfair. He found that there had been no discrimination.

234. The clear conclusion of the Tribunal was that the grievance had been thoroughly and properly investigated. Appropriate interviews had been conducted. The decision letter of Mr Wylie was cogent and well-reasoned. The Tribunal considered the evidence from Mr Wylie and the manner in which he gave it. It considered the grievance investigation which had been carried out by him and about which he had spoken in evidence. It considered his decision and the reasoning he explained in evidence. The Tribunal gained no sense whatsoever that Mr Wylie had treated the claimant less favourably as compared to the way that he treated Ms Maclean. He had looked into the claimant's allegations in her grievance carefully and diligently. He reached the conclusion that he would not uphold the grievance and the allegations within it. He set those out fully and clearly in his outcome letter. It was a conclusion with which the claimant was no doubt disappointed and with which she did not agree. On the evidence the Tribunal heard, there was, however, no hint of discriminatory conduct on the part of Mr Wylie.

235. The other element of direct discrimination which the claimant said had occurred was the treatment she experienced as opposed to the treatment Ms Martin experienced.

236. There were performance issues in relation to the claimant which it was appropriate to raise and discuss with her. The Tribunal recognises that the claimant does not accept that as being the case. It is not for the Tribunal to determine whether the claimant professed to have or ought to have had the skills which the respondents regarded as being unexpectedly lacking on her part. What can be said however by the Tribunal is that it viewed the raising of these matters with the claimant as being legitimate. This was particularly so in the context of a probationary period being current at that point. In contrast, there was no evidence as to there being performance issues in relation to Ms Martin. The claimant read the email at R192 as confirming that Ms Martin did not know how to carry out a task. That clearly was the claimant's view of the content of that email. It was not how it was read by the respondents and did

not read in that fashion from the perspective of the Tribunal. It simply could not be read as the claimant read it. Ms Maclean regarded it as, in effect, a request that she should become familiar with the printing process described. In reality, of course, the claimant did not know whether Ms Martin had been involved in performance reviews or training as a result of the point which had arisen. It was difficult therefore for her to argue that she had been involved in a performance issue whilst Ms Martin had not. The fact that the claimant was, at this point, approaching the end of her probationary period, underlined that it was appropriate that the matters which were raised with her were subject of discussion with her. Ms Martin was experienced in her role and had not been subject to any previous performance discussions.

237. In the view of the Tribunal, there was no evidence of there being a performance issue with Ms Martin which had been ignored by the respondents as against the claimant being taken to task. Further, and in any event, there was no evidence whatsoever before the Tribunal that if there was any difference in treatment, that was because of a protected characteristic on the part of the claimant.

238. Insofar as it might be said that matters regarding the claimant were investigated, whereas anything involving Ms Martin and Ms Maclean was not, this was not so. Ms Maclean investigated the difference of view, and indeed perception, between the claimant and Ms Martin. As part of that she spoke with Ms Martin as well as with the claimant. She came to a view. Ms Morgan was aware of the view the claimant had of Ms Maclean. She put it in the category of there being a clash of personalities. She mentioned this to the claimant who, certainly initially, agreed. The probationary period and process, with its reviews and taking of feedback, was applied in relation to Ms Maclean just as it was in relation to the claimant. Ms Maclean had herself been subjected to some form of disciplinary procedure, details of which were not before the Tribunal. The fact that there had been some such procedure, however, demonstrated that there was no situation of Ms Maclean being "*immune*" from criticism or sanction.

239. There was nothing to suggest that Ms Martin or Ms Maclean were proper comparators in that they were not in the position of having performance, behavioural or skills issues providing a basis for an argument to be made that those performance, behavioural or skills issues had been ignored in their cases but that such issues had been highlighted by the respondents with the claimant. Even if that were so, without "*something more*" in that scenario what was being suggested was a difference in treatment and the difference in status. There was nothing in the evidence which suggested a basis on which it could be inferred that there was something from which the tribunal "*could conclude*" that on the balance of probabilities that the respondents had discriminated.

240. The claim of direct discrimination did not therefore succeed.

Overall assessment.

241. The Tribunal kept in mind the need to look, in its assessment of whether discriminatory treatment had occurred, not just at individual instances. It was also appropriate to "***stand back"*** and to look at the overall picture and the possible cumulative effect. Assessment of whether everything, when put together, led to the view of there potentially having been discrimination, was appropriate.

242. Whether looked at individually or on a cumulative or overall basis, the Tribunal was satisfied that no discrimination as alleged in terms of the 2010 Act had occurred.

243. The claims of discrimination are therefore unsuccessful.

Time Bar

244. Although, on the merits the claim did not succeed, there were two areas of claim where time- bar was argued by the respondents to be applicable.

245. Firstly, the respondents said that the allegation of discrimination by MF O'Neill in failing to obtain feedback in relation to Ms Maclean, whilst obtaining that for the claimant was something which occurred more than 3 months before the

claim had been presented. The claimant maintained that the failure in relation to Ms Maclean had occurred in September 2018, meaning that the claim was presented in time.

246. Had the Tribunal been of the view that there was a failure, that failure would have occurred by allegedly different treatment of the claimant when feedback was obtained in relation to her. That would mean that the claim in relation to this ground was presented out of time. It was not, in the consideration of the Tribunal, part of a continuing course of conduct by the respondents. There were no circumstances advanced in evidence as to why time should be extended, that being just and equitable. Had this element of claim been soundly based therefore, it would have remained unsuccessful due to being time-barred.

247. The respondents also maintained that the claim that Mr Wylie's actions were discriminatory was time-barred. That allegation was first introduced by the further and better particulars lodged by the claimant. Insofar as it might have been said that a new ground of claim was being introduced by those further and better particulars, no objection had been taken. They had therefore become part of the claim.

248. Had the Tribunal been of the view that this ground of claim was well-founded, it would not have been of the view that it was time-barred.

Constructive unfair dismissal

249. The Tribunal was quite clear that there was no fundamental breach of contract by the respondents. There was no behaviour which breached the implied term of trust and confidence. There was no repudiatory conduct by the respondents.

250. There was certainly conduct by the respondents with which the claimant was unhappy. That is as recorded above. There are instances in every employment situation where an employer or employee will behave in a way which the other does not welcome. That does not, if it is the employee's behaviour which is at stake, justify dismissal as a matter of law. Equally if it is

the employer's behaviour which is being considered, it does not in law justify resignation. The nature and extent of any such behaviour is key.

251. The respondents legitimately raised matters of behaviour and skills with the claimant. They did so in a manner which was appropriate.

252. The actings of the respondents said to constitute fundamental breach of contract are as detailed above. Their actings were not however such as to amount to repudiatory conduct. The Tribunal recognised that the claimant did not find the actings of the employer to her liking. She chose to resign. That was a matter for her. In terms of law however the Tribunal was clear in its view that resignation was not acceptance of repudiatory conduct by the respondents. There was no fundamental breach of contract on their part entitling the claimant to resign.

253. Further, the claimant had not resigned in the heat of the moment. The respondents had, very fairly, persuaded her to "*sleep on*" her decision to resign on 10 July. They did not press her on whether she had altered her view. Her resignation on 17 July was in clear and unambiguous terms. She had had a week to consider her position and chose to resign.

254. The claim of constructive unfair dismissal is therefore unsuccessful.

255. In conclusion, on the basis of the foregoing, the claim being unsuccessful, there is no requirement to hold a hearing to determine remedy.

Employment Judge: R Gall
Date of Judgement: 30 April 2020

Entered in Register,
Copied to Parties: 30 April 2020