EMPLOYMENT TRIBUNALS

Claimant: Mrs Christine O'Brien

First Respondent: Key Enterprises 1983 Ltd (R1)
Second Respondent: Anthony Robinson (R2)
Third Respondent: Mark Randell (R3)

RESERVED JUDGMENT

Heard at: Newcastle On: 18th, 19th and 20th March 2020

Before: Employment Judge Sweeney
Member: Mr D. Morgan

Representation:

For the claimant: In person
For the Respondents: Mr T Wilkinson, counsel

The unanimous Judgment of the Tribunal is as follows:

1. **The Claimant's claim of victimisation fails and is dismissed**

2. **The Claimant's claims of harassment fail and are dismissed**

REASONS

The Claimant's claim and case management prior to the Final Hearing

1. By a Claim Form presented on 18 July 2019, the Claimant brought the following claims: unfair dismissal, disability discrimination, sexual harassment and victimisation. The claims of unfair dismissal and disability discrimination were dismissed upon withdrawal by the Claimant on 28 September 2019. The remaining claims proceeded to a 3 day hearing in March 2020.

2. Those remaining claims were summarised by Employment Judge Garnon in his case management summary of the preliminary hearing held on 26 September 2019.

Hereafter, the Respondents are referred to as R1, R2 and R3 respectively, and the Claimant sometimes as 'C' and Mrs O'Brien.

The issues

3. Judge Garnon identified the issues to be determined by the Tribunal:

Harassment

3.1. Does C prove on the balance of probability primary facts from which the Tribunal could infer R2 and/or R3 or anyone for whose acts R1 is liable:

3.1.1. Engaged in unwanted conduct which falls within section 26(1), (2) or (3) of the Equality Act 2010

Victimisation

3.2. Did C do a protected act or did the Respondents believe she had done or might do a protected act?

3.3. If so, was C subjected to detriment and/or dismissed at least in part because she did a protected act or because the R1/R2 believed she had done or might do?

4. Additionally:

4.1. if required to, whether the Respondent had shown a non-discriminatory reason for C's treatment;

4.2. whether any of C's claims were submitted outside the relevant limitation period and if so would it be just and equitable to deal with them anyway?

Particulars of alleged harassment

5. Judge Garnon identified some 26 acts in a grievance which the Claimant had sent to the Respondent on 11 June 2019 (see pages **187-190**). He made an order for the Claimant to provide further particulars doing her best to match those allegations to one or more types of harassment. She did that (**pages 42-48**), breaking the allegations down into the following categories:

5.1. Harassment on grounds of gender (A),
5.2. Unwanted sexual conduct (B),
5.3. Harassment in the form of less favourable treatment for refusing R3's advances by creating a hostile or humiliating environment (C)

6. Where, in the findings of fact set out below, any allegation is referred to as category 'A' 'B' or 'C' it is a reference to the categorisation in paragraph 5 above.

7. Judge Garnon also directed the Claimant to set out the protected acts or any suspicion by any respondent that she may do such an act and which she says

caused them to dismiss her and/or subject her to detriment. This was in relation to her claim of victimisation under section 27 Equality Act 2010.The Claimant responded to this in the same document at **pages 48-52**. She relied on what she said was a protected act on 27 March 2019 and on 03 April 2019.

8. In summary the Claimant alleges that during the time she worked for R1 she was subjected to sexual harassment or harassment related to sex by R3 in the form of the 26 incidents set out in her grievance document. She says she asked R3 to stop his behaviour but he continued no more or less than before. She says that she complained of R3's behaviour to R2 by WhatsApp message on 27 March 2019 and again to him and to R3's manager, Kate Larkin, on 3 April 2019. She says that her complaint was not taken seriously by R2 who began to pick fault with her. Following that, the unfavourable treatment of her culminated in her being told on 7 May that she was to be made redundant. She says the redundancy was fabricated as a reason to get rid of her because of the complaints she was making. The Respondents deny she raised a complaint of sexual or other harassment before submitting a grievance on 11 June 2018 in which she set out 26 acts of alleged harassment, only some of which, says the Respondent, related to sex and none of which were upheld on investigation.

The Final Hearing

9. At the Final Hearing, the Claimant represented herself. The Respondent was represented by counsel, Mr Tim Wilkinson. The hearing commenced on 18 March 2020 at a time when there was heightened concern about Covid-19 and when social distancing was necessary. It was only a few days before the UK went into lockdown.

10. The matter was listed, as normal for a case of this sort, before a tribunal of three. The tribunal read into the case from 10am to 12pm. While reading into the case, the tribunal noticed references to underlying health issues of the Claimant and her husband who was to be a witness in the case. One of the tribunal members considered that she would need to understand more from the Claimant and her husband about those health issues so that she would be able to assess whether she should participate in the hearing. The parties attended at 1pm. The Claimant explained that she did, indeed have significant underlying health issues as did her husband, Mr O'Brien. There is no need to set them out here. Suffice to say that (and this was agreed) both the Claimant and her husband were on the government's vulnerable adult at risk group for Covid-19 and were, therefore, recommended to avoid public gatherings.

11. The Tribunal was concerned about the courtroom/tribunal environment. This was a new court/tribunal building and the hearing room was not that large – another case was occupying the largest available courtroom. There were quite a few people in the hearing room and the seats were fixed and fairly close together. Mr Wilkinson explained that one of the Respondent's witnesses (Mr Brian Johnson or 'BJ') was no longer going to be called to give evidence. He had apparently developed a cough earlier in the week and had been sent home. He was at the time of the hearing self-

isolating in accordance with government advice/instruction. Mr Wilkinson explained that BJ had been in contact with another witness, Kate Larkin (but only Kate Larkin) but that she was displaying no symptoms of covid-19.

12. The Tribunal was very concerned to hear about the underlying health issues of the Claimant and her husband and the risk they were taking by attending the tribunal over a three day period. Therefore, it asked the Claimant to see if she could make contact with her GP surgery to explain the setting in which she would be appearing over the course of the next three days. The Employment Judge explained that, should the Claimant proceed with the case today and not seek a postponement, one of the lay members ('AT') would, with reluctance, have to withdraw from the proceedings. AT's partner has significant health issues of his own. As the Claimant and her husband were at higher risk of contracting the virus, AT was, understandably, not prepared to put herself in that position. Therefore, it was explained that should the hearing proceed, it would have to be with the employment judge and one member but only if the parties consented. I explained that we could try to find a third member but this was highly unlikely in the current circumstances and that the current delay in starting was already eating into the time-table. If the parties did not agree to a two-panel hearing, then the proceedings would in all probability have to be postponed. The Claimant was given time to make contact with her GP practice so that she could make an informed decision.

13. The parties returned at 2.30pm. The Claimant said that she had been unable to get through to her GP. However, she explained that even if the medical advice was to return home and not to expose herself and/or her husband to the risk of contracting Covid-19, she would proceed in any event if given the choice. She did not want to postpone the hearing as it would be stressful to have to do so and come back in the future. In light of this, and there being no application by the Respondent to postpone the hearing, AT withdrew from hearing the case. The parties both consented to proceeding with a tribunal of two, on the understanding that if there was no agreement that the legal member of the two, the employment judge, would have the casting vote, so to speak.

14. In order to keep to a minimum the number of people attending the hearing, it was agreed that Mr Duncan (who instructed Mr Wilkinson) would leave and not attend the hearing. It was also agreed that witnesses other than Mr O'Brien would wait outside the tribunal until called to give evidence.

15. It was agreed that the issues as identified by Judge Garnon, as recorded above, remained the issues in the case. As it was agreed that the allegations of harassment in the case consisted of the 26 allegations contained in the grievance at pages **189 – 190**. It is more efficient, in setting out our findings of fact below to do so by reference to those allegations (numbered 1-26) and then to stand back and look at matters in the round. There is all the more reason to take this approach given that in her witness statement, Mrs O'Brien does not actually give any evidence about any of the 26 allegations (save in paragraph 2 of that statement in relation to allegation number 2). The witness statement makes assertions that she was sexually harassed

but does not give any detail or evidence on any of the allegations. The Tribunal therefore regarded her grievance statement, on which she was cross-examined, as being a key part of her case and as setting out the key factual issues which it had to decide on the harassment claim, supplemented by the more general assertions and statements in Mrs O'Brien's actual witness statement.

Documents and witnesses

16. The parties had prepared an agreed bundle running to 329 pages.

17. The Claimant gave evidence on her own behalf. In addition she called her husband, Mr Jim O'Brien. She had intended to call an additional witness, Carol Tregidga. However, Ms Tregidga subsequently decided not to attend owing to her own concerns about Covid-19.

18. Respondent called the following witnesses:

    (1) Mark Randell,
    (2) Kate Larkin,
    (3) Paul Robinson,
    (4) Anthony Robinson,
    (5) Maggie Wakeley

19. In addition to the 'live' witnesses, the Tribunal read and considered the statements of Carol Tregidga and of Brian Johnson.

Finding of Facts

20. Having considered all the evidence (written and oral) and the submissions made by the representatives on behalf of the parties, the Tribunal find the following facts. While the Tribunal is agreed on the overall conclusions there were some differences between the legal member (the Employment Judge) and the non-legal member, Mr Morgan. Where ever it is necessary to distinguish between the two members this is done. Otherwise, a reference to 'the Tribunal' or to 'us' 'we' means that both members are agreed on the factual conclusions.

The working environment

21. R1 is a registered charity and a company limited by guarantee based in North Tyneside. It provides services to adults with learning disabilities and mental health issues. Those who participate are referred to as 'Service Users' and they take part in a range of community based activities. From March 2018 to 07 August 2019, the Claimant was employed as R1's Office Manager.

22. The workplace in which Mrs O'Brien worked as Office Manager was small and predominantly male. She was one of only two female employees. Brenda Gildea

('BG') left just as the Claimant was joining. The other female employee was Kate Larkin ('KL').

23. R2, Anthony Robinson ('AR'), is the General Manager of Key Enterprises. R3, Mark Randell ('MR') is employed as the Catering Supervisor of Key Enterprises. He was one of a number of supervisors. Others were the bike maintenance Supervisor, Mr Steve Cowgill, horticulture Supervisor, Brian Johnstone and the maintenance Supervisor, Paul Robinson.

24. MR regards himself, and is regarded by others as a bit of a 'joker'. The working relationship between MR and Mrs O'Brien was a reasonably good one for most of the time. There was probably the odd occasion when they did not see eye to eye (an example being the dispute surrounding the vending machine – see allegation 21 below) but on the whole they got on well. Both are mature individuals who engaged in mutual light-hearted exchanges in the course of their day to day dealings. MR's personality is such that he initiated most of these exchanges. The Claimant enjoyed the exchanges to begin with and would often tell her husband, 'JOB' about them such that he used to look forward to hearing about 'the banter' (his word). JOB looked forward to hearing about the 'banter' because Mrs O'Brien talked to him positively about work and about the 'banter'. However, over time, as MR's jokes and playfulness wore off, Mrs O'Brien simply became accustomed to and eventually became somewhat weary of them, especially after she wrongly believed MR to have complained about her in March 2019 (about which see below).

25. R1 has six trustees, three of which were/are female. One of those is Maggie Wakeley ('MW'). As a trustee, MW was not present at the workplace all of the time. For about the first year of AR's employment, MW would visit about 2-3 times a week. Those visits began to tail off towards the end of 2018. Although she did not have much contact with R3, there was a number of occasions when she saw Mrs O'Brien and R3 chatting in reception or in or near Mrs O'Brien's office. Her impression was that they both got on well.

26. MW certainly did not pick up on or hear of any issues between Mrs O'Brien and R3. The first time she learned of any potential issues at all concerning their relationship was when she read the appeal against redundancy document prepared by Mrs O'Brien, at **page 171-172**. During the course of the appeal hearing, MW asked Mrs O'Brien why she did not raise any complaint about MR. Mrs O'Brien said that she did not regard MR's conduct as sexual harassment and that she was able to deal with it herself. The Tribunal found MW to be straightforward and honest in her evidence.

27. While MW may not have been present most of the time, KL was present at the workplace on a full-time basis. KL was and is the Service Manager and the second most senior employee after AR. She was recruited at the same time as Mrs O'Brien. She and Mrs O'Brien got on well. At one point, in about December 2018, both Mrs O'Brien and KL went to have a private word with the Chairman of the company in order to raise their joint concerns regarding AR's absence from the business around

that time. This evidence reflected what the Tribunal had concluded (and which was not in any event in dispute) which was that Mrs O'Brien and KL had a good relationship. Mrs O'Brien was able to confide in KL. It also reflected the Tribunal's assessment overall that KL could be relied upon to address matters of concern which were made apparent to her and which were of concern to her and the Claimant.

28. KL, however, never got any sense that things were not right between Mrs O'Brien and MR. What she saw from fairly close quarters was a relationship of equals. As she observed things, their relationship was balanced and equal and they appeared to get on very well with each other. She saw nothing in their exchanges or engagement to raise any suspicion regarding MR's behaviour or motivation towards Mrs O'Brien. It was not until 03 April 2019 that Mrs O'Brien mentioned any concern at all about MR's conduct. We deal with that below. The Tribunal found KL to be an impressive and reliable witness.

29. Nobody who gave evidence described the working environment as being one where explicitly sexualised language or 'banter' by staff was a regular feature at work. It was recognised that some of the service users served by the Respondent had severe learning disabilities and other mental health issues – some were registered sex offenders – and that from time to time the service users may display sexualised tendencies or say something sexually inappropriate. However, even then there was no evidence that this was common or that the Claimant was subjected to this. The only evidence of any overtly sexualised behaviour in the workplace was in relation to the Claimant's own conduct in about January 2019. This is particularly relevant to one of the Claimant's allegations of harassment against MR (allegation 6b below).

30. Other than that, the Tribunal concludes that despite the workplace being predominantly male there was no culture of sexualised banter or acceptance of such banter by management or staff.

Grievance by the Claimant against Steven Cowgill

31. On 19 October 2018, Mrs O'Brien initiated the Respondent's grievance procedure by raising a complaint about the conduct of the bike maintenance supervisor, Mr Cowgill (**page 147**). She complained about Mr Cowgill's treatment of her on 12th, 15th and 19th October 2018 in that on each occasion she considered his manner to be threatening, intimidating and aggressive.

32. The grievance was acknowledged on the same day by AR (page **149**) who initiated an investigation. Relevant witnesses were interviewed and AR held a grievance meeting with Mrs O'Brien. At the grievance meeting, Mrs O'Brien described that she felt belittled, undervalued and threatened by Mr Cowgill when he said to her in an aggressive tone '*you are management aren't you'* (this was about an issue regarding the keys to a van which a service user had accidentally taken home). KL interviewed Mr Cowgill. AR wrote to Mrs O'Brien on 05 November 2018 regarding the outcome (page **161**).

33. Mr Cowgill's sister was at the relevant time a trustee of the Respondent, a fact Mrs O'Brien was aware of at the time. She did not feel inhibited in raising a complaint against Mr Cowgill because of this. Mrs O'Brien acknowledged that AR conducted the grievance satisfactorily and showed no reluctance to investigate it.

34. From this point we set out first the facts relevant to the decision to dismiss the Claimant by reason of redundancy (the allegation of victimisation against R1/R2). We then set out our findings in relation to the allegations of harassment. It is neater and easier to follow if we separate things in this way, even if the factual account does not always flow seamlessly in a chronological order.

Restructure leading to the Claimant's redundancy

35. AR had himself only joined R1 in January 2018. He inherited a particular structure which included BG as the Finance Officer. AR then set about recruiting KL as a General Manager and the Claimant as Admin Supervisor in the expectation that the management team would consist of AR, KL, BG and the Claimant. However, approximately a month before KL and Mrs O'Brien started, BG handed in her notice. Consequently, Mrs O'Brien agreed to take on BG's bookkeeping duties, although she had no financial qualifications. The balance of the finance duties (payroll and accountancy support) were outsourced to a 3rd party called VODA, an organisation with whom Mrs O'Brien had worked in the past. Mrs O'Brien was re-designated 'Office Manager'.

36. The other aspect of Mrs O'Brien's role was office management: procurement, ordering supplies for example. AR's original plan had been for Mrs O'Brien to manage BG and an administrative assistant, Mr Younger. However, due to BG's departure, Mrs O'Brien managed only Mr Younger and even then, in name only. In practice, there was very little administrative support for Mrs O'Brien to undertake or manage.

37. By about March or April 2019 AR concluded that the structure was failing to deliver with regard to financial support. Part of the managerial tasks of the Office Manager were in practice undertaken by KL and by him and what remained of the finance tasks after the financial support work was financial admin work (invoicing, payments, petty cash and Service User expenses). This, AR concluded, did not warrant a management grade salary.

38. Therefore, in April 2019 AR proposed to the Board that Mrs O'Brien's role be split into two, namely:

    38.1. A dedicated financial role to undertake day-to-day financial administration, provide financial reports, cash-flows, departmental breakdowns and year end accounting, and

    38.2. A 'front of house' Administration Officer based at reception.

39. AR reasoned that this would enable R1 to staff the reception area at all times and to employ a finance officer with accountancy qualifications (OU Certificate of Accountancy & ACCA) and more in-depth experience of the operation of accounting packages.

40. He put his report to the Board of Trustees in a paper on 30 April 2019 (**page 162**). The Board approved the report following a discussion. Following approval by the Board, AR met with Mrs O'Brien on 07 May 2019. He told her that due to a restructure she was to be made redundant with effect from 07 August 2019. Thus, the first that Mrs O'Brien heard about redundancy was on being given notice of termination. She was not warned of the risk of redundancy prior to this. There was no consultation with her. It was a bolt out of the blue. The news was a shock and it upset her considerably. One of the allegations against MR relates to this day (see allegation 9 below)

41. R1 and R2 were advised by an external HR consultant that there was no need to consult Mrs O'Brien prior to telling her of her redundancy, she being an employee with less than two years' continuous employment. MW, who was not present during any of the evidence other than for her own evidence also confirmed this to be her understanding based on that advice. AR did not, therefore, consult Mrs O'Brien because he believed that the organisation did not have to do so owing to the fact that she had been employed for less than two years.

42. R1 followed through on the restructure proposal and recruited an employee with financial experience into a Finance Officer position. We accept that this has improved the financial performance (**page 176**). R1 also recruited a front of house admin/reception officer providing admin support and management of digital media across the organisation. What, therefore, AR had intended to put in place in order to better deliver to R1 he has achieved.

43. The Claimant's appeal against the termination of her employment was heard by MW on 16 May 2019 but rejected by her in a letter sent on 20 May 2019.

Harassment

44. We now turn to other findings of fact relevant to the allegations of harassment. We have considered all of the allegations separately but also stepped back and considered the picture as a whole less we lose sight of the 'wood' by concentrating on the individual 'trees'. Each allegation is identified below by a number in brackets from (1) to (26) which corresponds to the numbering used by the Claimant in her grievance and as repeated in her further particulars.

45. Before setting out our findings on the individual allegations, one issue of dispute that emerged during the hearing and which it is necessary to resolve is when, if at all, did Mr O'Brien (JOB) express to Mrs O'Brien that she should report MR's conduct as harassment. Neither Mrs O'Brien nor JOB address this in any detail in their witness statements. In paragraph 5 of his statement JOB said there were many comments

about her clothes, her looks and how she smelled and he felt after a while that this was bordering on harassment and that she should report MR. JOB says only that he told his wife to report MR's behaviour to her manager. He does not give approximate date for this conversation but he says when he told her Mrs O'Brien replied that she had already mentioned it to AR but he had told her it was just MR's sense of humour and she therefore had no confidence in AR to deal with it. When pressed as to when this conversation took place JOB said it was before November 2018.

46. The Tribunal did not consider JOB's evidence to be consistent or reliable. In his oral evidence JOB said that he had always looked forward to hearing from his wife about MR's banter at work and that she regularly reported back to JOB about the day's goings on. However, he maintained that Mrs O'Brien told him that MR had asked her out when she came back from the Wheatsheaf pub in summer 2018. JOB said Mrs O'Brien had been upset because MR had asked about their relationship in the pub. Yet when cross-examined Mrs O'Brien said that she did not regard what had happened in the Wheatsheaf as harassment. We return to the Wheatsheaf allegation below.

47. JOB could not have had the conversation referred to in paragraph 45 before November 2018 as he maintained. That is because the first time Mrs O'Brien raised anything to AR regarding MR's conduct was during her supervision session in January 2019 when she reported to AR that MR had made a comment about her not being a manager. In response to that AR said that this may have been MR's attempt at humour. This is reflected in the note of 15 January 2019 (**page 144**) which is dealt with more fully below (paragraph 67 below) There was no other occasion when AR is said to have referred to MR's humour as an explanation for any comment made by him. Therefore, the conversation as described by JOB could not have happened before January 2019, if it happened at all.

48. Further, if, as JOB had suggested in his oral evidence to the Tribunal, that it was summer 2018 when he had been told that MR had asked JOB on a date and that she was offended by this, and that he had told her to complain of harassment because of the general behaviour of MR before November 2018, it is highly unlikely that he would have introduced himself to MR at the party in November 2018, had a convivial chat with him and described him as a 'good bloke'.

49. In light of the above, if he suggested at all that she should complain it must have been after January 2019. It is unlikely that anyone who in January 2019 regarded his wife as being sexually harassed at work, would that same month ask her to take a pornographic image to the workplace and openly show the image to other employees and we conclude highly unlikely that Mrs O'Brien, had she regarded herself as the victim of sexual harassment at work, would agree to do this. Yet that is what happened. From all of the above we infer that JOB (who got his information from Mrs O'Brien) did not by January 2019 believe his wife to be the victim of harassment by MR at work.

50. In her witness statement (page 4, bottom paragraph) Mrs O'Brien refers for the first time to JOB suggesting that she should make a complaint. This was after she had been upset by AR's email exchange with her on 03 April 2019. That email exchange is at pages **178-179**.

51. It is more likely than not that it was after 03 April 2019 that there was a discussion between JOB and Mrs O'Brien regarding alleged poor treatment of her by AR (in his email exchange with her) and by MR. Mrs O'Brien was tearful at work on 04 April 2019, following AR's email and she went home early. Given the evidence that Mrs O'Brien talked to JOB about her work, we infer that it is more likely than not that in late March 2019 she told JOB of her belief that MR had complained about her and that on 03 or 04 April 2019 Mrs O'Brien told JOB of her upset in receiving AR's email at page **178** and what it was about. It is also likely that, JOB, being supportive of Mrs O'Brien and relying on her account of events, started to interpret MR's and AR's behaviour in a negative light.

52. The Tribunal concludes on the balance of probabilities, however, that it was not until after 07 May 2019, when she was told she was to be made redundant, that Mrs O'Brien started formulating in her mind that she had been sexually harassed and victimised. She had already begun to see MR in a different light from March 2019 when she wrongly believed him to have complained about her. She was upset following the email from AR on 03 April 2019. When she was told, without any warning or consultation, that she was to be made redundant, she started to look back on her time at the respondent organisation and reconstructing in her memory life as it was and seeing matters in a different light.

Wheatsheaf pub – summer 2018

53. Sometime in the summer of 2018 (no-one was any more precise than this) Mrs O'Brien went to a local pub (the Wheatsheaf) for some drinks along with others from work, namely: AR, KL, MR, Steve Cowgill, Brian Johnston. Although apparently there were other occasions when staff went out together, this was the only occasion referred to as being relevant to the proceedings. The event assumes importance because Mrs O'Brien alleges that MR asked her out on a date and 'offered to take her home'. In her oral evidence she identified this as the location and date of allegation number 19 (for which see below at paragraphs 134-136).

54. The event was a normal social event where work colleagues sat in a group talking convivially about matters in and out of work. Mrs O'Brien chatted with MR, as she did with others. Most probably the subject of private lives came up and the Claimant explained (if it was not already known) that she lived separately from her husband, JOB. The Claimant revealed her personal circumstances in normal, social conversation with MR. As she described it in evidence, he was making conversation. However, it is unlikely that it was a one-way discussion. MR offered to give the Claimant a lift home from the pub. He also offered to give others a lift home.

55. In her oral evidence Mrs O'Brien said in relation to the Wheatsheaf pub, that that specific incident may not have been sexual harassment. When asked by Mr Wilkinson what she meant by that, she added that she did not think it was sexual harassment although there were other occasions where she thought it was. However, Mrs O'Brien did not say when or where these other incidents occurred. The Tribunal concludes that (save for offering her and others a lift home) MR did not ask her out for a date at the Wheatsheaf. Nor did he do or say anything that humiliated or offended the Claimant or created an environment of the sort described in section 26 EqA. The Employment Judge finds that MR did not at any time make any sexual or amorous advances towards the Claimant, either at the Wheatsheaf in summer 2018 or at all. Insofar as any particular allegation of harassment falls into category C (as being less favourable treatment because of the Claimant's rejection of unwanted sexual conduct), it follows that such a claim must fail.

56. Mr Morgan, on the other hand, whilst rejecting that MR made any advance in the Wheatsheaf, concludes that MR on a subsequent occasion did make a playful advance in the sense of exploring whether the Claimant might be interested in developing a relationship outside of work (see paragraphs 105-106 below in relation to the 'old man' incident). Mr Morgan concludes that MR's motivation (or hope) was clear to Mrs O'Brien, namely showing her that he was interested if she was and that she did not regard this as unwanted. He concludes that she was happy to 'wait and see' how things might develop and she did not object to his conduct or consider it unwanted (not until much later in the relationship and then for different reasons relating to her perception that he had complained about her – see paragraphs 82-83 below).

57. Before turning to the particular allegations, in her further particulars, Mrs O'Brien says that she '*tried to deal with his hints and advances in a direct manner so that he could not misconstrue my feelings. I tried to make it clear to him that I did not want to engage with this kind of banter as it made me feel uncomfortable but he just kept on and on making inappropriate and suggestive comments*.'

58. The Tribunal rejects this. The Tribunal is acutely conscious that a person need not explicitly or implicitly object to certain conduct before it can be said she has been subjected to harassment, However, the positive case being advanced by the Claimant is that she did tell the Claimant directly and in clear terms but that he went on regardless. This account is not accepted by the Tribunal. Further, the Tribunal finds that in none of his exchanges with Mrs O'Brien was MR's purpose to violate Mrs O'Brien's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for Mrs O'Brien. The Tribunal also concludes, in relation to MR that his conduct did not have for Mrs O'Brien the effect described in section 26 EqA, save in relation to one matter (the shirt, allegation number 25 below). However, we also concluded that it was not reasonable for it to have that effect (see paragraph 139-141 below).

59. We now turn to the particular allegations.

Blue Flames event on 01 November 2018 (allegation 1)

60. The Respondent had arranged an event at the Blue Flames Sporting Club in Newcastle in celebration of its 35th anniversary which was held on the evening of Thursday 01 November 2018. A day or so before the party, MR asked Mrs O'Brien if she and her husband and her son were going. She said she was not sure. She did in fact attend with her husband ('JOB').

61. The essential allegation here is that on the night of the party MR was put out by the fact that Mrs O'Brien was accompanied by JOB and MR therefore ignored her the whole night. She alleges that by so ignoring her this amounted to harassment in categories A and C. Mrs O'Brien claimed that the effect of MR's treatment of her that night was to make her feel humiliated and anxious.

62. MR was responsible for the catering at the party which was attended by fifty to sixty guests and was very busy. Mrs O'Brien was not in fact ignored by MR that night. In cross-examination she said that MR spoke to her briefly and that he and JOB also spoke for what she would say was about 5 minutes. She recalled that JOB introduced himself to MR. This is consistent with paragraph 10 of MR's witness statement, albeit MR estimated they spoke for about 20 minutes. In her grievance Mrs O'Brien makes no reference to JOB and MR talking at all or to her and MR talking at all. She does not say anything about the event in her written witness statement. Nor does JOB.

63. Both Mrs O'Brien and JOB were inconsistent in their evidence. In Mrs O'Brien's case she initially said that she was ignored the whole night yet accepted that MR spoke to her briefly. JOB initially said in evidence that MR was brusque and walked away after he (JOB) introduced himself and remarking that he understood he was a foster parent; yet JOB went on to say that they had a perfectly amicable conversation.

64. We conclude that MR and JOB did talk that evening, for between 5 and 20 minutes. They talked about a thing that they had in common, which was that, in past lives, they had both worked for wealthy individuals from the Middle East: JOB as a high-end chauffeur and MR on board a yacht. The two got on well during the conversation. Although he denied it, we conclude that JOB said to MR during their conversation that his wife had told him that he (MR) was a good bloke to work with.

65. The Claimant never perceived this to be an act of harassment related to sex at the time or at all. However, even if that had been her genuine perception, it would not be reasonable to so regard MR speaking only briefly to her as being an act of harassment. The Claimant gave no evidence at all as to what it was they discussed and she accepted that MR was busy, as he was in charge of the catering function for the party, which may have explained why he did not spend much time talking to her. Even if MR had not spoken to Mrs O'Brien at all that night the Tribunal had difficulty in seeing this as 'unwanted conduct' by him. If, as Mrs O'Brien maintained, she had been the subject of harassment by him it is difficult to understand why she would want him to speak with her that night in any event.

66. However, that is by the way. The allegation was that she was ignored/not spoken to (the implication being she did not wish to be ignored). The agreed facts were that he spoke to Mrs O'Brien and was busy. We find that MR did not engage in the unwanted conduct as alleged, which was not in any event related to sex nor was it less favourable treatment in category C. MR did not ignore her at all and certainly not because Mrs O'Brien had refused his advances. There had been no unwanted advances by him – the Claimant confirmed that she did not regard what had happened in the Wheatsheaf as sexual harassment. Nothing that happened on 01 November 2018 night created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Supervision session 15 January 2019

67. On this day, the Claimant had a supervision session with AR. There is a signed note of that meeting at pages **142-143** which Mrs O'Brien confirmed as being an accurate record. The note records a reference to MR as follows: '*Christine raised that Mark had spoken to her and said she wasn't a manager. This was clearly incorrect and may have been Mark's attempt at humour. Anthony asked what she would like him to do. Christine said just leave it for now.*'

68. The note suggests a possible explanation by AR for the comment but clearly asks what if anything Mrs O'Brien would like him to do. It is not dismissive.

Monday 25 February 2019 (allegation 2)

69. On this day, Mrs O'Brien says that during a conversation about an incident regarding a specific service user, MR remarked that she was '*not really a manager'*. In cross-examination she described how MR came to her office and asked if she had heard about an incident with a particular service user. When she said that she had not, MR said that she would probably find out from a senior manager to which the Claimant replied there were no 'senior managers' as that is what AR had told everyone.

70. In her further information at **page 42** Mrs O'Brien described this as harassment in categories A and C. However, in cross-examination the Claimant conceded that, whilst she felt it undermined her position, she never perceived this as being conduct related to her sex or as being sexual harassment at all.

71. We conclude that there was a discussion along the lines described by the Claimant: that is about an incident regarding a service user and that MR probably said something about needing to speak to 'senior' management and that he drew a distinction between 'senior' and other management. What Mrs O'Brien took exception to, as she confirmed in evidence was when MR said 'with all due respect you're not really a manager though are you'.

72. Whatever the precise response by MR was, it was nothing other than a point about the different tiers of management. Mrs O'Brien took it as a slight to her status that MR drew a distinction between her position and that of the others, namely AR and KL, when the message she understood to be put out there by AR was that there was

no such thing as ‘senior’ managers – the implication being that the organisation wants to avoid being considered as a hierarchical organisation. There is, in fact, a distinction between the Claimant’s level of management and that of AR and KL. They are the two most senior managers and only they can deal with incidents regarding service users. In cross examination Mrs O’Brien conceded that this comment or exchange did not relate to sex. It was not conduct of a sexual nature nor was it less favourable treatment of the Claimant because of her reje ction ofany unwanted conduct of a sexual nature by MR.

73. It is notable that this is one of the things which Mrs O’Brien mentioned to both KL and AR and that she did so shortly after the exchange took place. The Tribunal finds that the Claimant was very conscious of her status. We do not mean this as a criticism, simply that status was important to her as it is for many individuals. Status was also an issue in her complaint about Mr Cowgill, in that she regarded his behaviour towards her as undermining of her status as a manager.

Thursday 21 March 2019 (allegation 3)

74. Mrs O’Brien alleges that on this day, MR patted his lap and asked her to sit on it. She says in her further particulars that she found this to be humiliating and offensive and that it created an uncomfortable working environment for her. She says it was harassment in categories A and B (page **43)**. MR denied this, saying that it never happened.

75. On this, again the Tribunal was divided on the incident but not on the overall conclusion. The judicial member did not accept on the balance of probabilities that this event happened. Situations such as this are always difficult to resolve for courts and tribunals alike, as it is a case of one person’s word against another. It is of particular assistance, therefore, to look at any contemporaneous documents or statements. It is not just the presence of a reference to an incident that can help in this task but also the absence of any reference.

76. As it happens, the very day after this alleged incident Mrs O’Brien had a supervision or 1:2:1 session with AR. The signed supervision record has a section headed ‘incidents/issues/concerns’. The supervision record is at page **145-146**. Under that section it can be seen that AR discussed with Mrs O’Brien that some supervisors had raised issues about how she speaks to them. She is recorded as taking this on board but also expressing her concern that she also needs to be treated with respect by staff. However, there is no mention by Mrs O’Brien of any concern regarding MR’s conduct the previous day or at all, for that matter. There is also a section called ‘General wellbeing’. There is no reference to her being treated badly at work by MR such as to affect her well-being.

77. The Employment Judge also considered it significant that, when Mrs O’Brien spoke to KL later (on 03 April 2019) and to AR on that same day, she did not mention anything about MR asking her to sit on her lap but did take the opportunity to mention other things.

78. In cross-examination the Claimant said that she did not mention this example of MR's conduct at the supervision session on 22 March because she felt embarrassed and humiliated by it and did not tell her husband because it was his birthday and she did not want to upset him. The Tribunal rejects this as a genuine explanation by Mrs O'Brien for not telling her husband of the incident and in any event rejects this as an explanation for not mentioning the matter to AR or KL. Not to mention it to JOB is one thing, not to mention it confidentially at work is another, especially when she had the opportunity to do so. Mrs O'Brien felt able to and did in fact express her concerns about MR's reference to her not really being a manager demonstrating that she was not cowed from raising concerns about him when she was offended by what he said.

79. In other respects, when confronted by Mr Cowgill's manner, where Mrs O'Brien described feeling belittled and devalued by him, she felt able to and did raise this as an issue with AR without any hesitation. The Tribunal does not accept that Mrs O'Brien was humiliated or embarrassed. Even if she had been embarrassed to raise the sitting on the lap incident on 22 March 2019, she could have raised it on 27 March 2019 when she sent her WhatsApp message to AR (on **page 183**) but she did not. Mrs O'Brien says that she told both KL and AR about it on 03 April 2019. If that were true, this would suggest that any embarrassment had subsided to such an extent that she felt able to raise it by then. However, the Tribunal concluded that she did not in fact mention it to KL or to AR at any time.

80. Having regard to the fact that Mrs O'Brien had raised concerns regarding the conduct of another supervisor (Mr Cowgill) whom she knew to be the brother of a trustee of the Respondent and that she did so very quickly after the conduct to which she took offence and having regard also to the fact that she quickly raised concerns regarding MR's reference to her not being a manager, and having regard to the finding that Mrs O'Brien was not deterred from raising any issues nor did she feel inhibited in raising concerns and accepting the evidence of KL and AR that the Claimant did not mention the incident to them and having regard to MR's denial, the Employment Judge concludes on the balance of probabilities that MR did not ask the Claimant to sit on his lap. Had he done so, the Employment Judge would have expected to see at least some reference to it around the time.

81. Mr Morgan concludes that MR probably did say, playfully, 'sit on my lap' when he and the Claimant discussed entering the password. However, he concludes that the Claimant did not feel offended by it and did not object to the comment. She did not at the time perceive the playful comment as unwelcome. Mr Morgan concludes that this was inappropriate behaviour in the workplace but that the Claimant did not in fact feel humiliated or embarrassed by the comment. He concludes that the comment by MR was certainly inappropriate and that it could objectively have the effect of creating a humiliating etc.. environment but in actual fact it did not have that effect on the Claimant. Therefore, Mr Morgan concludes that whilst it happened it did not have the purpose or the effect of violating the Claimant's dignity or of creating the environment as described in section 26 EqA. Mr Morgan's further findings as regards the relationship are further set out in paragraph 105-106 below.

Complaints regarding the Claimant's behaviour

82. In March 2019 two members of staff complained informally to KL about the Claimant's manner towards them. They wished to remain anonymous. AR addressed the issue with Mrs O'Brien at the supervision session with her on 22 March 2019 (**page 145**). He did not reveal the identity of the complainants. This marked a turning point in Mrs O'Brien's perception of MR and her relationship with him – albeit he (MR) was unaware of this turning point. Significantly, as she accepted in cross-examination, Mrs O'Brien wrongly believed that MR had complained about her.

83. What the Claimant had hitherto regarded as playful behaviour on the part of MR (even if it had ceased to be humorous) now started to irritate her. She had always believed she had a good relationship with MR but here he was (so she believed) going to management behind her back and complaining about her manner – the action of a hypocrite. Thus, the throwing of the grape and the drawing of the heart (both of which happened after she learned of the complaint about her) and which before would have been regarded and accepted by Mrs O'Brien as MR's playfulness, became irritating and annoying. She felt betrayed by someone with whom she believed she had a reasonably good relationship, whose jokes and mannerisms some may find irritating or boring but which she did not and which she reported back to her husband as light-hearted banter.

Tuesday 26 March 2019 (allegation 4)

84. This allegation concerned a brief exchange between MR and Mrs O'Brien on the phone about the internet and that MR said to her: '*go on say it, for fucks sake you know you want to'*. This was alleged to be harassment in categories A and C. The Tribunal concludes on the balance of probabilities that MR did say this. However, the Tribunal concluded that, at the time, the Claimant did not actually regard this as harassment in the sense that it did not have the effect on her of violating her dignity or of creating the environment described in section 26 EA 2010 and nor did she perceive it to. Mrs O'Brien said in evidence that she did not in fact understand what MR was talking about. It is likely that MR was making some puerile or ribald joke here, consistent with his general propensity towards playfulness and in the belief that Mrs O'Brien was still okay with this. MR's purpose was not to violate Mrs O'Brien's dignity or create the proscribed environment and its effect was no more than to make Mrs O'Brien consider him now to be acting oddly and to feel irritated by him, whether or not the conduct was unwanted.

27 March 2019 (allegation 5)

85. Mrs O'Brien alleges that, in response to her question '*what more do you want*?' MR said '*oh you don't want to hear what I want from yo*u'. This is alleged as harassment in categories A and B. As with our previous finding, we conclude on balance that MR said this but that it did not have the purpose or the effect of creating the environments

in section 26(1)(b) EA. The comment was unwanted at this stage of the relationship (albeit Mrs O'Brien had not expressed any objection to MR) and the comment is probably apt to qualify as conduct of a sexual conduct (with its sexual innuendo). The purpose, however, was not to violate Mrs O'Brien's dignity or to create the proscribed environment. The purpose was to continue with what MR regarded as the reciprocal playful relationship which he had enjoyed with Mrs O'Brien. The effect was not to violate her dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for Mrs O'Brien. As with most of the exchanges, she did not actually feel intimidated, degraded humiliated or offended nor did she feel the working environment was made hostile. What did offend her were comments about her status – thus she was offended by the manager comment but that was not related to sex nor was it conduct of a sexual nature. When it came to the more bawdy comments such as that under allegation 5, whilst unwanted conduct of a sexual nature, Mrs O'Brien was at best irritated by MR and only then after and because she believed him to have complained about her.

86. Allegations 6 and 7 consisted of three allegations in all, so we have numbered them (a) to (c) and (a) to (b) respectively to differentiate between them.

27 March 2019 (allegation 6a)

87. This allegation was that MR drew a 'love heart' while smiling at the Claimant; that she asked him to stop on several occasions; that she told him it was inappropriate that he passed the drawing to her but she gave it back whereupon he screwed it up and threw it in the bin. MR denied this. The allegation is one of harassment in categories A and C.

88. We find on the balance of probabilities that MR quickly sketched a heart shape on a piece of paper using a biro. We conclude that he drew the heart, showed it to Mrs O'Brien. It is likely that she said 'stop it' albeit only once given the time involved in drawing it (Mrs O'Brien described it in evidence) and that he then screwed it up and threw it in the bin. However, we do not accept that Mrs O'Brien asked him to stop 3 times. She may have found his behaviour irritating but it was no more than irritating to her, because by this time, Mrs O'Brien had come to believe that MR had complained about her manner behind her back. She told him to stop and he threw it in the bin. What would ordinarily have been seen and accepted by her to be no more than a display of MR's playful affection towards her was now seen by her in a different light, and more that of a hypocrite. It was unwelcome conduct. However, it was not conduct of a sexual nature (nor was it said to be). On balance we find that it was conduct related to sex (in the sense that it is a sign of affection between two people of opposite sex which MR would not have been evinced in the same way to a male colleague). However, Mrs O'Brien did not regard his conduct as being harassing in the sense in which we have described it above even though it was conduct which she did not welcome, bearing in mind her belief that MR had complained about her. The effect never rose below a level of irritation, not because she felt violated by the act of drawing the heart but she felt betrayed by MR going to management and complaining about her. It is significant that when she spoke to KL

on 03 April 2019 (below), Mrs O'Brien unprompted raises what she believed to be MR's complaint against her.

27 March 2019 (allegation 6b)

89. Mrs O'Brien complains that she felt harassed by MR when she came across him and AR in the corridor talking. However, she did not hear what they were talking about. It was only when AR sent her a WhatsApp message later in the day (**page 183**) that she learned of the subject matter of their conversation, which was the masturbation habits of a particular service user. In her further particulars she described this as harassment in category A. However, the evidence is clear and undisputed: MR stopped talking when Mrs O'Brien arrived in the corridor and she had no idea what the conversation was about. It was because AR was concerned that Mrs O'Brien might have thought they were talking about her that he sent her the WhatsApp message. That is understandable. If a person comes upon two others in conversation yet they stop speaking, that person might feel that he/she is being talked about. Whatever prompted MR to speak to AR about this in the corridor, MR's conduct had neither the purpose nor the effect of violating Mrs O'Brien's dignity or of creating for her the proscribed environment.

90. Mrs O'Brien was not given any details of the conversation by AR, only the headlines of the subject matter. Mrs O'Brien did not profess to be offended or humiliated by learning of the subject matter at the time. Her point was simply that it was inappropriate to discuss such matters in the corridor. To the extent that she maintains in these proceedings that this event amounted to an act of harassment this is rejected. It is not without significance that the only reference to any sexually explicit conduct within the workplace throughout this period was conduct engaged in by the Claimant herself.

91. In January 2019 The Claimant showed a pornographic image to Paul Robinson and Brian Johnson. Mr Robinson said that, unsolicited, Mrs O'Brien showed him and Mr Johnson two images on her phone: one being a flaccid penis inside a high heeled shoe and the other of a tall naked black man who was very well-endowed. He said that she told them that she got the photos from Jim (JOB). Mrs O'Brien disputed that there were two images, maintaining there was only the former. She said JOB sent her the image and asked her to take it to work and show it to Mr Johnson and Mr Robinson. However, whether there was one or two is not to the point. Mr Robinson said that a service user approached them while Mrs O'Brien was showing the picture and that she quickly put her phone away. The Claimant did not dispute that she brought a pornographic image into the workplace and openly showed it to staff and that she did so at the request of her husband. She did not acknowledge that there was anything wrong with this.

92. The Tribunal found it difficult to reconcile this evidence with the Claimant's account that she regarded her dignity to be violated by learning from AR about the subject of the conversation between him and MR in the corridor. Even less could it reconcile it with the contention by the Claimant that it was MR who harassed her (when he had

stopped talking when the Claimant approached). It was AR who drew the subject matter to her attention, yet there was no complaint against him. The Tribunal acknowledges that a person may legitimately take no offence from a remark by 'A' but take offence at the same remark by 'B' because of B's motivation. However, that is not the situation we have here. Mrs O'Brien makes no allegation of harassment against AR and accepts that she did not hear MR say anything at all. In light of that and of her own conduct in bringing a graphically sexual picture to the workplace the Tribunal simply does not accept that the Claimant's dignity was in any way violated or humiliated or that she was offended by the events of 27 March 2019.

27 March 2019 (Allegation 6c)

93. We arrive at the same conclusion in relation to the comment 'you're my favourite' (during a discussion about saving files in a 'favourites' folder). This is put as an allegation of harassment in categories A and B. We find on balance that MR said this. However, it was not related to sex nor was it conduct of a sexual nature (looked at by stepping back and looking at the overall picture and relationships). MR accepted he used the phrase regularly to men. However, in using the phrase he did not intend to create the environment referred to in section 26(1)(b) EA 2010. This was so even on Mr Morgan's assessment that Mrs O'Brien probably was his favourite, something which she did not regard as objectionable. His purpose was not, however, to violate her dignity or create the proscribed environment. KL also confirmed in evidence, which we accept, that she had heard MR use this phrase to others, men, openly in the office. We conclude that it did not have for Mrs O'Brien the effect described in section 26 EqA. She did not personally take exception to it at the time nor did she explicitly or implicitly object to his use of this phrase. With hindsight – and in the belief that he had complained about her – the use of the phrase 'you are my favourite' took on a distasteful, hypocritical flavour. But it was no more than that to her.

27 March 2019 – WhatsApp message

94. On this day, the Claimant sent a WhatsApp message to AR in which she said *'Mark is acting rather inappropriately at the minute!*'. That message was not sent to AR as a complaint. It was in response to AR's message to her that MR had told him of a service user's masturbation habits (the matter discussed above under allegation 6b). Therefore, Mrs O' Brien was not raising this because she was concerned by MR's behaviour towards her. It was a response in an exchange initiated by AR. AR in turn responded to her message by saying: '*Well tell him. I'll back you if necessary*.' However, Mrs O'Brien did not tell MR, nor did she complain to AR about him.

95. In her further particulars on **page 44** Mrs O'Brien says that she told AR in her message that MR had been acting inappropriately 'towards me'. However, that is not in fact what the message says. In cross-examination, Mrs O'Brien agreed that at no point did she allege to AR that MR had 'sexually harassed' her, nor did she say in this particular message that he acted inappropriately towards her. At its highest, the

message says that MR had been behaving 'inappropriately' – which could be a reference to anything. Further, it is qualified with the words 'at the minute!'. The Tribunal has difficulty in understating the temporal reference in the message against the overall picture which Mrs O'Brien paints in these proceedings, which is one of her having been harassed for many months by MR by this date. Her case was that she had been harassed by MR from about summer 2018 and that the harassment had got worse since November 2018.

96. Why then say 'at the minute'? Taken at face value it suggests that acting inappropriately is not something that MR had been doing previously but only fairly recently. Of course, tribunals should be alert not to take things at face value, conscious that there may be good reason for a person not saying things as they truly were. But we did not find any evidence or reason to suspect that Mrs O'Brien was precluded from raising concerns or that she felt inhibited – on the contrary, she was willing to and did in fact raise concerns about matters to which she took exception and when she did they were addressed.

97. When asked in cross-examination about this message, Mrs O'Brien agreed that she had not mentioned that she had been harassed or that MR had behaved inappropriately towards her or that it had been ongoing. She said that the 'grammar' was not great by referring to 'at the minute' but that she later tried to explain the harassment to KL on 03 April 2019. However, the Tribunal does not accept this. She did not expand on anything to KL

98. While acknowledging that AR said '*well tell him and I'll back you'*, Mrs O'Brien said in her further particulars that the following day AR did not approach her to discuss 'the incident' and that he did nothing to protect her from ongoing sexual harassment by MR - that as a consequence she had no confidence in him (AR) due to this lack of concern. She said that it seemed that any worries she had were ignored, that AR did not speak to MR about her complaints and did not instigate any form of managerial intervention or disciplinary action. She said that this failure to instigate internal policies was a detriment and that R1 could have prevented her from being subject to a campaign of harassment by MR.

99. The Tribunal has great difficulty in accepting this account provided in the further particulars. There was in fact no complaint to AR for him to ignore and no failure to instigate policies or procedures. Mrs O'Brien was not ignored at all. On the contrary, AR expressed positive support in his message to her. This was not the first time he had done so: the Cowgill investigation, and the supervision session in January regarding the comment about her status as a manager (page **144**)). Further, there was no campaign of harassment by MR.

100. In any event, if there was any basis for not opening up to AR about the alleged campaign of harassment, the Tribunal could see none in the case of KL. The Claimant and KL got on well. They had in the past approached the chairman of the First Respondent together to raise their concerns regarding AR's absence from the

organisation. KL was someone, the Tribunal concludes, to whom Mrs O'Brien could turn and Mrs O'Brien understood this to be the case.

101. The Claimant's reference to 'at the minute' is difficult to understand when looked at in the context of the Claimant's allegations of a long-standing campaign of harassment. However, it is much easier to understand when looked at in the context of our finding that the Claimant's perception of MR changed once she wrongly believed him to have complained about her. What was accepted behaviour before now became 'inappropriate' behaviour. When she spoke with KL on 03 April 2019 she mentioned only two matters, which the Tribunal concludes was what she meant by MR's 'inappropriate behaviour', as alluded to in her WhatsApp message of 27 March, namely: the drawing of the love heart and the throwing of a grape, to which we now turn.

28 March 2019 (allegation 7a)

102. On this day, MR accepts that he threw a grape towards the Claimant. This is alleged to be harassment in category A. At the time he had been sitting outside having lunch with some service users. As Mrs O'Brien arrived in the area she saw that MR was throwing grapes for others to catch in their mouths. This was MR's idea of entertainment. As she entered he threw one at her. This is an example of MR's behaviour, which he put down to light-hearted fun and which Mrs O'Brien on occasion found as irritating behaviour and on this occasion certainly found irritating, coming as it did on the back of her belief that he had complained about her. We conclude that she told MR to stop what he was doing. However, we conclude that she saw it as no more than irritating and annoying and that it did not have the purpose or the effect as required in section 26(1)(b) EA. Further, although categorised as harassment in category A this conduct was not related to sex.

Thursday 28 March 2019 (allegation 7b)

103. The Claimant alleges that MR asked her whether she and her old man were still separated and when they were going on a date. In evidence she said that MR said this a number of times over the months leading up to this. This was an allegation of harassment in category A.

104. The Employment Judge does not accept that MR asked Mrs O'Brien out on a date, whether once or on several occasions. The Employment Judge concludes that Mrs O'Brien told MR that she was separated early after she joined the Respondent and accepts MR's evidence on this. It was certainly mentioned at the Wheatsheaf in the summer of 2018. It was not a secret and the subject may well have cropped up on occasion after that. In any working environment conversation may and usually does stray into private territory and by asking a person who openly acknowledged her separation from her partner whether she was still living apart in and of itself is not reasonably to be regarded as an act of harassment. The Tribunal would expect to be given more context to enable it to conclude that it was harassment. Of course, it may be that taken alongside other conduct that it reveals a pattern or course of

conduct which has the proscribed purpose or effect and the Tribunal was conscious of this. However, the Tribunal did not find that to be the case. That Mrs O'Brien did not mention this to KL or to AR is of significance in the overall context of this case.

105. Mr Morgan takes a different view on this matter. Fundamentally, Mr Morgan concludes that Mrs O'Brien did not regard any of MR's attention as unwanted until late in the relationship. Mr Morgan concludes that, while MR may not have been so direct as to ask Mrs O'Brien out, he was in his view making it clear to her that he was interested in developing a relationship if she wanted to. Mr Morgan concludes that there was a comment such as the 'old man' not taking her out and that MR probably added playfully and testing the water (so to speak) 'when are we going out'. Mr Morgan was exercised by MR's blanket denials of this as well as the denial of the drawing of the heart. He concludes that such comments were made and that MR's denials were out of a fear that the Tribunal would regard his behaviour as sexual harassment. However, Mr Morgan concludes that in all his exchanges with Mrs O'Brien, including this, he did not harass her. His conduct was not unwanted.

106. Mr Morgan was exercised by the fact that Mrs O'Brien, a mature individual, capable of speaking up and taking issue when appropriate, never did despite numerous opportunities. Mr Morgan has considered the allegations carefully and has stepped back to look at their relationship as a whole, He concludes that MR was on the balance of probabilities 'coming on' to Mrs O'Brien but that the Claimant was content to receive his gestures and implicit advances. In essence, MR was exploring through playful advances whether there was any potential to develop a relationship outside work and she was prepared to wait and see. Mrs O'Brien did not regard the conduct as unwanted. This is reflected by her reporting positively to JOB of her time at work. It was not until later, when she believed MR to have complained about her that she started to look differently upon MR. Matters were compounded still when she was told that she was redundant, at which point Mrs O'Brien started to recast, if not all of the events, her reaction to those events

03 April 2019 (8)

107. This is less an allegation and more a statement of what happened on this day. However, it is important that the Tribunal resolve the dispute between the parties as to what in fact happened.

108. On 03 April Mrs O'Brien mentioned to KL that MR had drawn a 'love heart' on 27 March 2019 (allegation 6a).

109. KL had just returned from holiday so popped her head in to Mrs O'Brien's office for a catch up. The Tribunal accepts KL's evidence in paragraphs 8-10 of her witness statement as to what Mrs O'Brien told her and accepts KL's oral evidence of the events of the day. Mrs O'Brien said to KL that MR had been behaving 'strangely' when KL had been on holiday and described what he had done. She said that he had doodled a love heart on a piece of paper when they were talking. However, she said nothing about the paper being passed to her or about MR saying 'why getting

excited'? The second thing she described was that he had thrown a grape (at the time, KL recollected it to be a nut, but there is no dispute it was a grape).

110. The Tribunal rejects the evidence that Mrs O'Brien told KL more than KL has recorded on 03 April or that she tried to explain more about the harassment to KL on that day (as Mrs O'Brien contended). If she had tried, the Tribunal is of no doubt that KL would not have stopped her.

111. What is of significance is that Mrs O'Brien, without prompting, said to KL that she did not regard MR's behaviour as sexual harassment but that others might. She told KL that she had asked MR to stop and she was happy the issue had been resolved. We conclude this to be a reference to the love heart and the grape incidents. Also of significance is that Mrs O'Brien added, without prompting, that the reason she was raising this was nothing to do with MR making a complaint against her. That was a reference to Mrs O'Brien's mistaken belief that MR had in fact complained about her, which he had not. The Tribunal concludes that MR's perceived complaint about her was clearly on her mind and it was in fact the significant influence on her reporting to KL about MR's behaviour.

112. When KL asked her if she wanted her to speak to MR, Mrs O'Brien said no. KL asked her if she wanted her to log the incident formally. Again, Mrs O'Brien said no, that it had been dealt with. KL asked Mrs O'Brien to let her know if she changes her mind or if anything else happens. The Tribunal accepts KL's evidence on this. Of all those in the organisation she was well placed to assist Mrs O'Brien. They were the only two women in the organisation (aside from trustees). They started at the same time. They had a good relationship. We considered whether KL was simply toeing the line, so as to support the Respondent in this litigation. However, we concluded that she was a truthful witness giving a truthful, and importantly, accurate and reliable account of what had happened.

113. We expressly reject the suggestion by the Claimant that she told KL that MR had 'asked her to sit on his lap while patting it along with other examples' (as asserted by Mrs O'Brien in her further particulars on **page 45**). Mrs O'Brien put to KL that she had told her about this. KL denied this. She said if Mrs O'Brien had raised this she would have investigated it whether she (Mrs O'Brien) would have wanted her to or not as it would have been inappropriate and of concern to KL. Of note in her further particulars on page **45**, Mrs O'Brien says that she asked KL '*was it Mark that made the complaint against me?*' In cross examination, she accepted that she believed wrongly at the time that MR had complained about her. The Tribunal concludes that Mrs O'Brien was simply laying the groundwork for a potential future conflict by mentioning these things to KL. It is of significance that she raises what she believed to be a complaint by MR at the very time she raises the two incidents of 'strange' behaviour yet says she does not want action to be taken.

114. Mrs O'Brien also mentioned to KL that she had come across AR and MR in the corridor on 27 March 2019 engaging in an inappropriate conversation. This is a reference to the matters set out above, where MR was talking to AR about the

masturbation habits of a service user (albeit Mrs O'Brien had not heard them speak of this in the corridor). KL understood Mrs O'Brien to be saying that MR was acting inappropriately in having this conversation with AR. Mrs O'Brien did not tell KL that she had not, in fact heard the conversation. Nor did she say that she had learned of the subject matter in a WhatsApp exchange with AR later that day (**page 183**). She gave KL only the barest of information: the subject matter and that it was in her view inappropriate for it to be discussed in the corridor.

115. KL, on learning of this, went to speak to AR. She did so because she felt it important to let him know that Mrs O'Brien regarded the conversation he had with MR in the corridor as being inappropriate. That was a proper thing for KL to do and reflects what the Tribunal generally concluded about her which is that if Mrs O'Brien were to report a concern to her she would at the very least have let AR know about it. However, it is at this point where things got lost in translation, so to speak. AR on hearing from KL that Mrs O'Brien regarded the conversation as inappropriate, took this as an insinuation against him: that **he** had acted inappropriately by engaging in the conversation. Fuelled by his knowledge that in fact he did not welcome MR telling him about the incident and that he (AR) had conveyed this to Mrs O'Brien in his WhatsApp message, he took offence at Mrs O'Brien telling KL that he (AR) had acted inappropriately. He sent an email to Mrs O'Brien (page **178**) the tone of which he subsequently regretted.

116. The Tribunal has rejected the Claimant's evidence that she told KL of the 'sitting on lap' incident. It also rejects her evidence that she told AR about it. Mrs O'Brien's evidence was inconsistent. First of all, she said that she told AR of instances of sexual harassment by MR after which he emailed her to say that he would not tolerate sexual harassment in the workplace. This was a reference to the email at page **178** from AR to Mrs O'Brien. As we have found, that email was largely about the 'incident referred to in allegation 6b above (paragraph 89 above). However, when taken to the email, Mrs O'Brien accepted that it did not mention anything about not tolerating sexual harassment and did not refer at all to the Claimant reporting any allegations. The Claimant then changed her position and said that she told AR about being harassed after he had sent the email.

117. There was indeed a conversation between AR and Mrs O'Brien after he had sent the email on **page 178**. However, the Tribunal concludes that Mrs O'Brien did not mention anything other than the corridor conversation (which is the subject of the allegation 6b above). She went to speak to AR because she was upset by the tone of his email. The conversation which ensued was entirely about AR's reaction to what he understood the Claimant to have told KL i.e. that he (AR) had behaved inappropriately by discussing the service user in the corridor.

118. Much as Mrs O'Brien got the wrong end of the stick in believing that MR had complained about her, AR got the wrong end of the stick in thinking that Mrs O'Brien considered his (AR's) behaviour to be inappropriate. His email can be described at worst as intemperate and firm but no more than that. He refers back to his message on 27 March 2020 at **page 183** but also says that he expects to be challenged if she

feels he does not uphold the principles he hopes he stands for. In essence, he was saying if Mrs O'Brien has a problem with him she should tell him directly, rather than through others.

119. The email had upset Mrs O'Brien and reduced her to tears. She went to speak to AR about it. She told him that in fact she told KL of the conversation in the corridor not because she saw it as AR behaving inappropriately but as MR behaving inappropriately. Mrs O'Brien did not describe to AR or to KL any other conduct by MR as being inappropriate.

120. AR reflected on the tone of his email and the effect it had on Mrs O'Brien and sent her another email on the same day (**page 179**) in which he apologised for upsetting her by the tone of his message. He agreed that in future he would do his best to talk to her ahead of sending an email if he wished to speak to her.

Tuesday 07 May 2019 (allegation 9)

121. On the day Mrs O'Brien was told of her redundancy, MR hugged Mrs O'Brien and said to her 'you have lovely hair.' This allegation is put as harassment in categories A and B. The comment was not whispered in her ear nor does the Tribunal conclude it was said with any sexual or sexualised intent or purpose. It was not uncommon for MR to refer to Mrs O'Brien's hair in complimentary terms, perhaps in a way that many men might not and may shy away from. There is nothing inherently wrong or inappropriate in a person giving another a compliment, whether male or female. Context is important. MR's partner is a hairdresser, as Mrs O'Brien was aware. The topic of women's hair as a topic of discussion was less an issue for him than it might be for other men and it was not unusual for him to comment on Mrs O'Brien's hair in a complimentary way. MR and Mrs O'Brien had largely got on well together. She had never taken exception to this.

122. His comment on this occasion was an attempt to lift the mood on a serious event by injecting a light-hearted compliment. He felt able to make the comment because of the relationship which he perceived them <u>still</u> to have – he was unaware that Mrs O'Brien had wrongly suspected him of complaining about her. It may have been misjudged on his part but that does not detract from its purpose, which was not to violate her dignity or create the proscribed environment, but the opposite. It was his attempt to lift her spirits albeit momentarily. As to the effect (which is a very different thing), the Tribunal rejects the Claimant's evidence that it violated her dignity or created an environment in any of the ways described in section 26(1)(b). The Tribunal does not accept that the Claimant actually perceived or regarded it as a comment which violated her dignity or created the proscribed environment and in any event does not consider it reasonable so to conclude even if she did so perceive it. The same can be said of the hug. There is no evidence of MR hugging the Claimant on any occasion other than the day on which she was told of her redundancy. KL gave evidence which was not challenged of Mrs O'Brien hugging her and also hugging Paul Robinson and Brian Johnston on the day she was leaving. While there is of course a material difference between a person hugging others and

being hugged by a harasser, the Tribunal has concluded on the overall picture and in relation to the particular allegations that MR was not harassing the Claimant as alleged and in that respect there is nothing sinister in the hug on the day she was given the bad news in relation to her employment. MR initiated the hug and, to the extent that Mrs O'Brien still believed him to have complained about her, that hug was more likely than not unwanted but it was not related to sex and did not have the effect of creating the proscribed environment.

Tuesday 14 May 2019 (allegation 10)

123. Mrs O'Brien says that on this occasion, MR said 'did you get the phone call?' She puts this in harassment category A. The Tribunal find that on balance of probabilities MR did say something like this. This was a common phrase for him – it was one of those running jokes that he repeated almost like a 'broken record'. The joke is along the following lines: Mrs O'Brien turns up at work wearing a black leather jacket and MR says 'did you get the phone call?' She is supposed to answer 'what phone call?' to which he says 'Suzi Quattro – she wants her jacket back'. This 'joke' is repeated, varying only according to the subject matter. Thus 'did you get the phone call – Whitley Bay (a local beach) wants their deckchair (a stripy shirt) back'. This is the sort of 'banter' or day to day exchanges which MR would engage in and which, we have no doubt, is the sort of stuff that JOB used to look forward to hearing about and the sort of stuff that Mrs O'Brien used to enjoy reporting back to JOB but grew tired of after frequent over use – albeit she did not ever express any objection.

124. Contrary to her evidence, the Tribunal concludes that it was only after she perceived MR to be the anonymous complainant that she began to find these jokes particularly annoying. If the joke had never been particularly funny in the first place, it will certainly lose any of its humour if the person making it is believed to have gone behind your back and secretly complained about your manner and attitude. This would affect anyone – and it certainly affected Mrs O'Brien's outlook and willingness to 'tolerate' the jokes. However, she never expressed this to MR or to anyone else – and we conclude that, albeit unwanted at this stage in the relationship, the effect never rose beyond a level where she found them irritating. Wanted or unwanted, they certainly never created an offensive or humiliating (or any other proscribed) environment for her, and they were entirely unrelated to sex.

Tuesday 04 June 2019 (allegation 11)

125. This allegation is put as harassment in categories A and B. Mrs O'Brien was in KL's office. MR arrived in the office and asked about a credit card. KL and Mrs O'Brien left to go downstairs. As they were leaving, MR said 'do you want a piggy back downstairs?'. Mrs O'Brien said no thank you. In her further particulars at page **47**, Mrs O'Brien says that she was made to feel humiliated by this comment. MR accepted that he said this. It is something he says a lot to people at work. It is not a sexual comment nor is it related to sex. It was MR's turn of phrase for asking someone (male or female) if they wanted help. We can understand how the phrase, particularly if repeated, can be seen as mildly annoying to those whom it is

addressed, and that is how we conclude Mrs O'Brien, and possibly even KL, regarded it. Although by this time the comment was unwanted, we find the comment was not related to sex and did not have the purpose or the effect of creating one or other of the environments in section 26 EqA. We do not accept that Mrs O'Brien felt humiliated by this comment: a little irritated, yes, humiliated or offended, no. The conduct was not of a sexual nature. We do not accept her evidence that she believed MR actually expected her to climb on to his back so that he could touch her. That was entirely fanciful evidence. KL was present when MR said this – she has heard him say it to others including male service users. When he said it on this occasion, in her presence, we accept KL's evidence that both she and Mrs O'Brien paid no attention to it and simply went about their business.

126. However, if what Mrs O'Brien says is right, that she had been subjected to an escalating campaign of harassment by MR and that this remark made her feel humiliated at the time, believing that MR wanted to touch her, here was a perfect opportunity to mention this to KL, to say something to her that this was an example of his harassment (or on Mrs O'Brien's account yet another example of his harassment of her). It was an opportunity to go into some detail, any detail about his behaviour being a pattern. However, all that Mrs O'Brien said in response to the rather irritating comment was 'no thanks'. That is entirely consistent with KL's evidence that she and Mrs O'Brien paid no attention to it. They brushed the comment aside.

127. In her grievance document (as further set out in her further particulars) Mrs O'Brien lists further allegations numbered 12 to 25 which are undated. There is a number 26 but this is not in fact an allegation, merely a statement that the comments she has referred to were made by MR in her office or in reception or in the canteen. We now turn to those further allegations.

Allegations numbered 12,13,15,16,18,21,22,23

128. In the grievance (and in the further particulars) these are undated allegations. The particulars categorises them variously as A, B and C, being examples of an ongoing campaign of harassment. Some of the allegations repeat earlier ones (such as number 12 'did you get the phone call' relating to Suzi Quatro). In broad terms, MR accepts that he engaged in the ways described in numbers 12, 13, 15, 16, 18, 21, 22, 23, albeit with certain qualifications. For example, in relation to number 16 he says he said 'stormtrooper' and not 'Hitler'. However, the differences between him and the Claimant on the facts are not of significance. We conclude that all of these things, taken individually and cumulatively did not relate to sex nor were they acts of sexual harassment or retaliation in the form of less favourable treatment of Mrs O'Brien for refusing R3's advances by creating a hostile or humiliating environment. Nor did they have the purpose or effect of violating Mrs O'Brien's dignity or of creating the proscribed environment in section 26(1)(b) EA. The purpose was humour (albeit poor humour in many respects) and the effect was – eventually – to lead to a feeling of mild irritation on the Claimant's part, a feeling which was engendered by Mrs O'Brien's changed perception of MR following her mistaken

belief that he had complained about her and further fuelled by the news that her position was to be made redundant.

129. The one open disagreement that MR and Mrs O'Brien did have was in relation to an issue surrounding a vending machine. This is identified as unwanted conduct related to sex by Mrs O'Brien in allegation number 21 (page **190**). All that Mrs O'Brien says about this is that MR accused her of having a 'strop' about the services users using the tuck shop and not the vending machine. This disagreement had nothing to do with sex. Mrs O'Brien expressed irritation about the way the service users did not have the right amount of change to spend in the tuck shop and MR expressed irritation about Mrs O'Brien referring to the service users as 'these people'. In cross examination Mrs O'Brien accepted that this was not related to sex and was not sexual harassment. When MR gave evidence, the Employment Judge asked MR to explain what the dispute was about. Mrs O'Brien was then asked whether she wished to challenge him on what he had said and she said that she did not. When asked whether she was suggesting the exchange was related to sex or was sexual harassment, she said only that she was intimidated. However, the Tribunal rejects that she was intimidated. It was a minor disagreement of the sort that must happen at workplaces on a regular basis and Mrs O'Brien was able to and did make her view point clear as did MR, consistent with our conclusion that this was a relationship of equals.

130. However, it is notable that this was the only occasion when either of the two gave an account of what might be called an argument or a harsh exchange of words in the whole of the time they worked together.

Allegations numbered 14, 17, 19, 20, 24, 25

131. There are certain allegations between items 12 and 26 that MR denies outright. In relation to number 14 he denies asking Mrs O'Brien if she would like a cuddle. He says that the only time he gave her a cuddle was on 07 May when she was told of the redundancy situation. He does not accept that he asked her on other occasions if she would like a cuddle. Mrs O'Brien gave no evidence of any specific occasion – or any approximate date – when MR is said to have asked her this. No context or location was provided. She did not challenge MR on this. Her allegation in this respect, was rather vague and she had not satisfied us on the balance of probabilities that this had happened other than on the one occasion on 07 May 2019. Mrs O'Brien also said that MR told her she smelled nice, something which he did not accept. She did not say how many times he said this or when. She said that she never complained about MR telling her this. She said that she liked to smell nice and added that AR also once told her that she smelled nice but that she did not mind this because he was not a threat to her.

132. The Tribunal rejects the Claimant's evidence that she saw MR as a threat to her (other than in relation to her perception that he had complained about her) and concludes that while it is probable that he once remarked that she smelled nice this did not have the purpose of violating her dignity nor did the Claimant perceive it as

having the effect of creating the proscribed environment in section 26. Further, the Tribunal concludes that the compliment that the Claimant smelled nice was not an unwanted comment in the sense that it was not unwelcomed.

133. MR does not accept number 17: the allegation here is that he stood close behind Mrs O'Brien in the kitchen, breathing down her neck and in harassment categories A and B. The allegation is phrased as though it happened more than once and no dates are given. In oral evidence, Mrs O'Brien said it happened once in about February or March 2019 and that she did not mention it to KL, or anyone else for that matter, because it was 'a one-off incident'. We cannot and do not accept that explanation. We conclude that this simply did not happen. Indeed we do not understand how it is described as a 'one off incident', if it is said to be part and parcel of a campaign of harassment of her, as she describes. It is put as a deliberate act on MR's part, yet Mrs O'Brien says nothing more about the alleged incident. She does not describe even turning around to confront or to see MR, just that she felt his presence. It may well be that MR was on occasion in the kitchen at the same time as the Claimant. That would be unsurprising. However, it is portrayed as an act of predation (in the sense that he is a predator standing closely behind her) which the Tribunal rejects.

134. MR does not accept allegation number 19: that allegation was that there were times when MR would say that she needed a life away from her husband and that he 'would' ask her out on a date or say how he would love to put his arms around her. This is put on paper as having happened on a number of occasions. In cross examination, Mrs O'Brien said that in about March or April 2019 MR asked how was it going with the 'old man' and 'when are we going out on a date'. She said that he asked her on another 3, 4 or 5 occasions, one being at the Wheatsheaf pub in summer 2018.

135. More specifically, in evidence, Mrs O'Brien said of the Wheatsheaf pub that when in the pub, MR had asked what kind of social life she had and whether her husband took her out. In her oral evidence she said that he was 'making conversation'. She regarded this as MR asking her out on a date. When it came to offering her a lift home, she took this as him wanting to 'take her home' (the implication that it would be just the two of them in the car). However, when it was put to Mrs O'Brien that MR took other people home, she said he may well have done. We refer to our findings in paragraphs 53-58 above.

136. Mrs O'Brien gave no account of what MR said on any of these other 3, 4 or 5 occasions or when they happened, leaving the Tribunal to consider only the specific occasion of the visit to the Wheatsheaf pub in summer 2018 and allegation 7b (paragraph 103 above). Mrs O'Brien explained the absence of specifics on the basis that she could not keep a note of everything. If what Mrs O'Brien says is correct, she had been repeatedly asked out for dates by MR, the last occasion being in March or April 2019, and had experienced MR standing closely behind her predator-like in the kitchen. We would have expected Mrs O'Brien to have mentioned these things at the very least to KL if not AR, yet we have concluded that she did not, even though she

mentioned other things (the grape and the love-heart). Standing back, therefore, and looking at the evidence as a whole, the Employment Judge concludes that MR did not ask the Claimant out on a date, not only at the Wheatsheaf pub but on any other occasion. Mr Morgan disagrees only to the extent of his finding in relation to allegation 7b above when MR playfully asked if she was still with the 'old man' and when they were going out. However, he found as a fact that Mrs O'Brien did not find this objectionable as it was in keeping with the relationship she had with MR at the time.

137. MR does not accept allegation number 20: this allegation is that he would say that they should have a kiss and a cuddle. In cross examination Mrs O'Brien could not say when this had happened. Again she said she did not record everything. That may be so but it is an unsatisfactory answer in the circumstances and given the seriousness of the allegations against R3. As we have concluded above, when she came to recount to KL the 'inappropriate' conduct of MR she gave two examples neither of which is explicitly sexual in nature (the love heart may be affectionate but is not explicitly sexual). It is not easy to understand how or why Mrs O'Brien would have limited herself to describing only those two incidents or for that matter how she could have said to KL that some women might regard those two things as sexual harassment but not her, yet leave out of her account any reference to MR repeatedly asking her out on a date, asking her for a kiss and a cuddle, asking when she is going to leave her husband and asking her to sit on her lap and standing behind her in the kitchen breathing down her neck. The Claimant has not satisfied the Tribunal on the balance of probabilities that MR said to her that they should kiss and cuddle. In all other respects, she has not satisfied it that MR either did the things complained of and/or that they were unwanted or created the proscribed environment.

138. MR does not accept allegation number 24: once again, the allegation is written as if to suggest that there was more than one occasion when MR said to the Claimant "I'll be taking you home then". However, in evidence Mrs O'Brien said that this relates back to the occasion in the Wheatsheaf pub in the summer of 2018 when MR offered to give her a lift home from the pub. We have already set out our findings in relation to the Wheatsheaf pub.

139. MR does not entirely accept what is said under allegation 25: this is an allegation that he made Mrs O'Brien feel so uncomfortable about what she was wearing that she went home to change her shirt. It is put as an allegation of harassment in categories A and B. Mrs O'Brien said in her grievance that MR said 'I suggest you don't wear that top again because I can see everything and you'll have an effect on the service users."

140. MR recalled Mrs O'Brien wearing a very thin shirt and that when she removed her coat he saw that the service users were 'ogling' her as he described it. He went to speak to her and told her that the service users were staring at her and that she should cover up or change. That is not in dispute. The comment was unwanted and it related to sex. However, we do not accept that MR's purpose in doing this was to violate Mrs O'Brien's dignity or to create an offensive or humiliating environment or

any of the other situations described in section 26(1)(b) EA. On the contrary – whether or not the shirt was suitable – his purpose was to avoid a situation where such an environment might be created, in light of the presence of service users with mental health issues some of whom have sexual predilections.

141. We do accept, however, that this comment had the effect on Mrs O'Brien of violating her dignity and that she genuinely perceived it to do so at the time. She did not believe her shirt to be unsuitable. We must look at the other circumstances. We have regard to the fact that AR (to whom Mrs O'Brien spoke about the matter at the time) did not consider the shirt to be so thin as to create any issues and said that in his opinion it was fine. We have regard to the other circumstances namely the disabilities and backgrounds of some of the service users, some of whom had documented sexualised fixations and were sexual offenders and the room for reasonable disagreement as to what might or might not be suitable in those circumstances. Overall, taking into account Mrs O'Brien's genuine perception as well as all those other circumstances we conclude that it was not reasonable for the comment to have the proscribed effect in section 26 EqA.

142. That completes the findings on the particular allegations of harassment.

Grievance by the Claimant against MR

143. On 11 June 2019 – after the appeal against the decision to terminate her employment - Mrs O'Brien submitted a complaint of sexual harassment against MR. She set out her complaint into the 26 incidents or events (**pages 186 – 190**) as described above. The vast majority of those incidents were mentioned for the first time in that document of 11 June 2019.

144. AR interviewed Mrs O'Brien (**page 197-198**) and MR (**page 193-195**). He also interviewed BJ and PR (**page 191**). He rejected the grievance and communicated this to Mrs O'Brien on 18 June 2019 (**page 214**). MW also heard the Claimant's appeal against AR's grievance decision on 21 June 2019. She rejected the appeal (**page 215**),

Relevant law

Harassment

145. Under section 26 Equality Act 2010 ('EqA'), there are three 'types' of harassment which, by virtue of section 40(1)(a) are made unlawful in the case of employees. They are by way of shorthand as follows:

145.1. Harassment related to sex;
145.2. Sexual harassment;
145.3. Less favourable treatment because the employee has rejected or submitted to sexual harassment

146. Common to all three forms of statutory harassment is that a person, 'A', must have engaged in unwanted conduct. Furthermore, A's conduct must have the purpose or the effect of violating the complainant, B's, dignity or of creating the proscribed environment referred to in section 26(1)(b)(ii). The second and third form of harassment involves conduct of a sexual nature, whereas for the first type, the conduct must be related to sex. Only the third form of harassment requires a 'comparative' approach. In the third type, the exercise involves comparing how B would have been treated had she not rejected or submitted to the sexual harassment.

147. It is helpful to consider cases involving harassment allegations by looking at the separate components of section 26, referring to the complainant as 'B' and the alleged harasser as 'A'; and ask:

147.1. If the Tribunal finds that A conducted himself as alleged, was the conduct unwanted conduct?

147.2. Did the conduct have the proscribed purpose or effect?

147.3. Did the conduct relate to sex (type 1 harassment) or was it conduct of a sexual nature?

148. Sometimes, it may be necessary to consider points 1 and 2 together because the question whether conduct had the proscribed effect may be best looked at when considering whether it was unwanted and vice versa.

149. Unwanted conduct is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant (see ECHR Code of Practice on Employment, paragraph 7.8). This does not mean that express objection must be made to the conduct before it can be said to be unwanted. It does not follow that because A's conduct has been going on for some time without any apparent objection from B that B condones it or accepts it. The Tribunal must be alive to the very real possibility that a person's circumstances may be such that they feel constrained by certain pressures whether in their personal life or in work which explains a failure to object (expressly or impliedly) to what they now say in the course of litigation was objectionable and unwanted conduct. Equally however, B is not required to expressly approve of A's conduct before a Tribunal may find that A's conduct was not unwanted. Clearly, conduct by A which is by any standards, or self-evidently, offensive will almost automatically be regarded as unwanted and in the vast majority of cases there is nothing to be gained by considering whether B objected to the conduct.

150. The unwanted conduct must be related to the protected characteristic. This is wider than the phrase 'because of' used elsewhere in the legislation and requires a broader inquiry. Conduct of a sexual nature (in harassment types 2 and 3) can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature (see

ECHR Code, paragraph 7.13). That is not an exhaustive assessment of what amounts to conduct of a sexual nature but provides any tribunal with a firm base on which to carry out the assessment in any given case.

151. Sometimes, the unwanted conduct can take the form of teasing, flippancy, ribaldry or flirting. It may be that A is unaware that he has overstepped the mark or boundary and that B was agreeable to what he always regarded as harmless 'banter' or general light-hearted workplace behaviour. In cases where the conduct is less obviously related to sex, it is possible that B may privately perceive A's conduct to be unwanted or unwelcome yet may 'put up with it' or even sometimes openly give the impression that she does not object to it. In considering whether A's conduct had the effect in section 26(1)(b) (as opposed to the 'purpose') the Tribunal must consider B's perception and the other circumstances of the case. Those circumstances could, in a given case, include the fact that B had not objected to the conduct. That assessment is fact-sensitive. Finally, section 26(4) requires the Tribunal to consider whether it is reasonable for A's conduct to have the effect referred to in section 26(1)(b).

152. Section 26(4) is an objective test. It is possible that in a given case conduct may be unwanted, may relate to sex may genuinely be perceived by B to violate her dignity, or to create an intimidating, hostile, degrading, humiliating or offensive environment for her but be such that, considered objectively it is not of sufficient seriousness to consider the conduct to have that effect. Whether a single act of unwanted conduct amounts to harassment is a matter of fact and degree. Unwanted conduct may consist of conduct which takes place over a period of time. It may be difficult to say that one particular act or event amounts to unwanted conduct related to sex (or conduct of a sexual nature) but when that particular conduct is taken together with other conduct it may indeed be found to be unwanted conduct related to a characteristic or conduct of a sexual nature. This requires the tribunal to stand back and look at the overall picture and determine the issue objectively, exercising its judgement.

Victimisation – section 27 EqA

153. Victimisation is unlawful by virtue of section 39(4) EqA. A person 'A' victimises 'B' if A subjects B to a detriment because A knows that B did or may do a protected act. A 'protected act' is defined in section 27(2) EqA. There must be a causal link between B doing the actual or believed protected act and the detriment. In the seminal speech of Lord Nicholls in **Nagarajan v London Regional Transport** [1999] UKHL 36, [2001] 1 AC 501 [2000] 1 AC 501, it was established that the Tribunal must examine "the mental processes" of the putative discriminator.

154. By reference to the example of 'A' and 'B' therefore, the tribunal is required to consider A's motivation conscious and unconscious. An act will be done 'because of' the protected act if the protected act had a significant influence on the outcome (**Nagarajan** at 513B).

Burden of proof

155. Section 136 EqA, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. For example, if a tribunal accepts as genuine an explanation for treatment of an individual, which has nothing to do with the particular protected characteristic in question, then that is the end of the matter, even if it amounts to bad treatment of the complainant: **Hewage v Gampian Health Board** [2012] I.C.R. 1054.

156. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision.

157. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA

Submissions

158. On behalf of the Respondent, Mr Wilkinson prepared written submissions. He referred the Tribunal to the case of **Chief Constable of Greater Manchester v Bailey** [2017] EWCA Civ 425 and in particular paragraph 12 where the Court of Appeal reminds tribunals of the causation approach in victimisation cases, confirming the approach laid down in **Nagarajan** in relation to predecessor legislation to be the same under the Equality Act 2010.

159. In relation to the victimisation claim, Mr Wilkinson submitted that there was no prima facie case of victimisation and that the failure to consult the Claimant was insufficient to raise one given that she had less than two years' continuous employment. This was a genuine redundancy situation and there were sound business reasons for terminating Mrs O'Brien's employment.

160. As to the allegations of harassment, Mr Wilkinson referred to the case of **Pemberton v Inwood** [2018] I.C.R.1291 as to the approach to be taken to harassment cases, that in considering the question of 'effect' in section 26(1)(b) one

is required to take into account the circumstances of the case and whether it is reasonable for the conduct to have had that effect.

161. On subject of 'effect', Mr Wilkinson submitted that Mrs O'Brien did not complain of MR's conduct until after her redundancy decision. He acknowledged that the lack of complaint was not conclusive but it is an important feature in the context of this case because the Claimant's case is that the things complained of are said to have started shortly after she started yet there was no complaint of any sort until January 2019. He referred to the Claimant's complaint regarding Mr Cowgill and described the Claimant in evidence as being firm, able quite properly to stop him when interrupting her, able and willing to raise issues in the workplace; for example about MR saying she was not a manager. Mrs O'Brien was, in Mr Wilkinson's submission not a wallflower; that if she felt harassed for months or over a year, in all likelihood that would have been mentioned at the time. If raising one complaint why not, he asked rhetorically say he had been harassing her for 8 months or so. Mr Wilkinson made submissions on the particular allegations which we do not propose to set out here but with respect to which we have had regard.

162. Mrs O'Brien in her closing remarks said that she still feels as though she had been victimised and unfairly selected for redundancy. She submitted that the respondents and witnesses were lying and protecting their jobs and asked why would she make this up and go through a stressful process if she were lying. She referred to her written references and that she has been honest throughout. She said that she had been beaten throughout and was not confident about disclosing everything other than on 03 April 2019.

163. She submitted that the whole process was a conspiracy by the Respondents, that win or lose she was happy to be heard.

Discussion and conclusions

164. It is in the nature of litigation that one side succeeds and the other loses. The function of the Tribunal is to make findings of fact and set out its judgment with reasons. It can be difficult for a party to accept those findings and conclusions but tribunals and courts can only make decisions based on the evidence. While the Tribunal has found against Mrs O'Brien on the evidence before it, nevertheless it makes no criticism of the way in which she has presented her case, which she did with good grace and courtesy in difficult circumstances. It also recognises that the unsatisfactory way in which her redundancy was communicated contributed to her perception of events, which we touch on below.

Victimisation

165. The complaint is that Mrs O'Brien was dismissed because she did a protected act. Therefore, the first issue is to ask whether Mrs O'Brien did a protected act. She says that she complained to AR and KL about sexual harassment or harassment related to sex on 27 March and 03 April 2019.

166. However, we conclude that on 27 March 2019 the WhatsApp message was not a protected act. From the message one could not reasonably regard it as an allegation (however widely interpreted) that MR had contravened the Equality Act.

167. Nor do we find that there was a protected act on 03 April 2019. On that occasion, Mrs O'Brien said she did not regard what happened as being harassment although some might. She repeated this to MW at her redundancy appeal. It is difficult to equate the express statement that she did not believe MR's conduct to amount to harassment with a subsequent argument that she in fact made an allegation (express or implied) of a contravention of the act (i.e. that she had been harassed). We have rejected that Mrs O'Brien actually said to KL anything other than the love heart and grape incidents and refer to our findings of fact set out above.

168. On balance we conclude that the Claimant did not do a protected act in the sense that she did not allege a contravention of the Equality Act, expressly or even by implication. We recognise that she does not have to use anywhere near that sort of language in order to allege a contravention and that we must give a broad interpretation to the statutory language. However, looking at what we have found her to have said to KL and to AR there was nothing that could be said, either on 03 April or at any time prior to 07 May 2019, that could on a wide interpretation fall within section 27(2)(c) or (d). Mrs O'Brien had expressly disavowed the suggestion that she was being harassed.

169. More significantly, we turn to causation. It matters not whether Mrs O'Brien did a protected act within the meaning of section 27 on 03 April, on 27 March 2019 or on any other occasion because we are entirely satisfied that the decision to make her redundant had nothing whatsoever to do with any complaint. We refer to our findings of fact in paragraphs 35 to 43 above. We have carefully considered the question of causation lest we be wrong about our conclusion on the protected act.

170. We have concluded that the reason Mrs O'Brien was dismissed was genuinely because of the restructuring of her role. We have also concluded that the reason there was no consultation was because R1 and R2 were advised that it was unnecessary. We would, however, add that any employer who does not warn or consult an employee on a redundancy without question acts unreasonably. It is of course correct that an employee with less than two years' continuous employment does not have the right to receive a redundancy payment and does not have the right not to be unfairly dismissed (other than in those exceptional cases under section 108 Employment Rights Act 1996). However, employees have other rights which they possess from day one.

171. In addition to acting unreasonably an employer who does not consult an employee in such circumstances also opens itself to allegations of a lack of transparency and to the possibility that a tribunal may consider there to be ulterior reasons or motivations (discriminatory ones) for the dismissal. The burden of proof provisions may operate to shift the burden on to an employer to explain that it had a

non-discriminatory reason for treating the employee as it did. We have been alive to the argument that the redundancy was merely a ruse of AR to rid himself of an employee who had complained of harassment. The judicial member asked Mr Wilkinson during his closing submissions whether the failure to consult might result in the burden shifting to the Respondent. His submission was that it would not.

172. Whether Mr Wilkinson is right or not (and proceeding on the hypothesis that we might be wrong about the 'protected act') we were able to conclude positively that AR was not motivated by any complaint made by Mrs O'Brien – despite the lack of warning and absence of consultation. We are satisfied from the evidence that we have heard that this was a genuine redundancy situation motivated only by business considerations but which was handled poorly. We are entirely satisfied and find as a fact that Mrs O'Brien's dismissal had nothing whatsoever to do with any complaint by the Claimant, whether any such complaint amounted to a protected act or not. The 'reason why' her employment was terminated was not that she had done a protected act. Neither AR nor MW or anyone else was at all influenced by any concern which Mrs O'Brien had raised about her treatment.

173. For the above reasons the claim of victimisation must be dismissed.

174. The Tribunal would add, however, that the unreasonable way in which the Respondent went about terminating Mrs O'Brien's employment, in our judgement, played a significant, albeit not exclusive role in her coming to describe matters as she did in her grievance and in these proceedings. The other factor for her was her incorrect perception or belief that R3 had complained about her.

Harassment

175. Much of our reasoning is bound up in our findings of fact – in the sense that we have concluded on the facts that some of the things complained of did not happen as alleged or that they did not relate to sex or that Mrs O'Brien did not perceive them to be harassment at the time: they were not unwanted, nor did she perceive the effect to be to create an offensive etc… environment. Relatively little remains to be said, therefore, on the reasoning other than to capture in broader terms how we have applied the law to our findings.

176. The law requires us to look at whether the conduct alleged happened; if it did whether it was 'unwanted' and whether it related to sex or was of a sexual nature and to look at its 'purpose' and 'effect'. We have done that as we have gone through our findings.

177. We have already set out how we accepted the evidence of KL that, on 03 April 2019, in describing the two events (the grape and the love heart) to KL, the Claimant said without prompting that **she** did not see MR's behaviour as sexual harassment but that some might. This encapsulates an important aspect of harassment: that the perception of the individual has an important role to play. Taking this remark along with all the other evidence, we are satisfied that the Claimant herself did not at the

time perceive MR's purpose as being to violate her dignity or to create an intimidating etc… environment. We are also satisfied (irrespective of her perception as stated in these proceedings) that this was not MR's purpose – not only in respect of those two incidents but in all his exchanges with Mrs O'Brien.

178. We also accept that the Claimant said to MW at the redundancy appeal that she did not regard MR's conduct at the time as harassment. Save in one respect we are satisfied that Mrs O'Brien did not actually perceive or regard any of MR's conduct at the time as actually having the effects described in section 26 EqA 2010. That one exception was in relation to allegation 25. However, we have concluded that, despite Mrs O'Brien's genuine perception on that occasion it is not reasonable to conclude the comment as having that effect. We have had particular regard to the nature of the service being provided, the sexualised tendencies and mental health issues of service users, the room for reasonable disagreement as to the suitability of clothing in such an environment and that MR's motivation was that the service users do not stare at Mrs O'Brien which would might her uncomfortable.

179. Contrary to Mrs O'Brien's evidence, we conclude that she did not object to MR's 'banter' (which was not inherently sexualised banter) or to his behaviour. She did not repeatedly or at all ask him to stop his jokes or innuendo. As stated above, on the balance of probabilities, over time she may have found some of his behaviour somewhat tiresome, such as his repeated references to 'Suzi Quattro', or 'phone calls' or to 'deck chairs'. At worst, to her he became something of a broken record and an occasional minor irritant – as with most jokes, if they were ever funny to begin with, they lose their humour with repetition. We have taken into account that it is not necessary to spell out that certain behaviour is unacceptable. However, a person's willingness to engage with light-hearted 'banter' may indicate that it is not unwanted, particularly in an environment where the 'banter' is not sexualised. It is a case of fact and degree taking account of all matters such as the status of the individuals (are they on an equal footing) and the degree of participation in the relationship. Having regard to how Mrs O'Brien positively reported back on the workplace banter, the absence of any protestation by her to anyone, the equality in status and in their relationship and the unsolicited display by Mrs O'Brien of a graphically sexual image in the workplace, we conclude that the conduct of MR as described by Mrs O'Brien was not offensive etc…. It did not become 'unwanted' until we get to the drawing of the heart and the throwing of the grape, and it became unwanted because of Mrs O'Brien's belief that he had gone behind her back and complained about her.

180. Furthermore, whether wanted or unwanted with the exception of allegation 25 nothing that MR did or said came near to making Mrs O'Brien feel that her dignity at work was violated. Nor did she in fact feel that the working environment was intimidating, hostile, degrading, humiliating or offensive. Even if she did, and even having regard to her perception as she expressed them in her further particulars, looked at objectively and in light of our findings as set out above we are unable to conclude that MR's broken record joking – even if some of it was occasional ribaldry and all of it irritating – had the effect of creating the proscribed environment under section 26.

181. In all his exchanges with Mrs O'Brien, the Employment Judge concludes that MR's purpose was not to violate her dignity or create the proscribed environment, but was to engage a person with whom he got on well in what he regarded as humorous, playful exchanges (whatever one might think of his version of humour). Mr Morgan agrees with that but additionally concludes that MR's purpose was also, in some of his exchanges as described in the above findings, to explore, playfully, whether that good relationship might develop further and that the Claimant did not take exception to this but was willing to wait and see. It was only after she perceived him to have complained about her that she was not prepared to do that.

182. Of course, a person whose purpose is not to violate dignity or create the offensive environment runs the risk that the other person may perceive it to be something different. Purpose and effect are two different beasts and we have not lost sight of that. However, on a careful consideration of the evidence, the Tribunal is satisfied that neither the proscribed purpose or effect was in fact present in any of these exchanges. We have looked at the allegations individually but also stepped back to assess the whole picture.

183. It is only in looking back, through the lens of litigation, that the Claimant has come to elevate all of MR's comments and/or behaviour as harassment. It fits with how she now sees events looking back and in particular how she came to regard MR after she learned of an informal complaint against her and more so after she had been told of her redundancy. This is a case where the Claimant asserts retrospectively that MR's behaviour amounted to harassment of her (whereas she genuinely did not see it as such at the time) and where MR denies some of the exchanges out of a fear that the Tribunal might regard his comments as harassment. However, her assessment of matters has been clouded to an extent that it is how she now sees things even if, as we have concluded, she did not see events in those terms as it was happening. We do not conclude that Mrs O'Brien has set out to deceive the Tribunal. If anything, she has deceived herself – and on Mr Morgan's assessment, MR has also to an extent deceived himself.

184. Finally, although the Tribunal has not upheld Mrs O'Brien's allegations it is grateful to her for the way in which she presented her case which was with courtesy and good grace.

185. For the reasons set out, we must dismiss the claims.

Employment Judge Sweeney

9 June 2020