Case Number: 3314054/2019(V)

EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

Claimant		**Respondents**
Ms AB	**v**	**1. X Drains Ltd** **2. Mr CD**

Heard at: Watford

On: 12 to16 and 19&20 April 2021 and 17 May 2021 (for deliberations in chambers)

Before: Employment Judge Andrew Clarke QC
Mr D Bean
Mr I Bone

Appearances

For the Claimant: Ms E Banton, Counsel
For the Respondent: Mr D Howsen, Solicitor

JUDGMENT

1. The claim for harassment in respect of the change made by the second respondent to the claimant's computer password succeeds as against both respondents. A further hearing in respect of remedy will take place if requested by the claimant.
2. The first respondent unlawfully deducted the sum of £1,172.92 from the claimant's final payment of wages. That respondent must pay that sum to the claimant.
3. All other claims for unfair dismissal, wrongful dismissal, unlawful discrimination and unlawful deductions from wages are dismissed.

REASONS

Introduction

1. The claimant commenced these proceedings by presenting her claim form on 17 April 2019. The claim was then brought against the first respondent alone. She claimed unfair dismissal (both "ordinary" unfair dismissal and constructive dismissal), wrongful dismissal, sex discrimination (both direct and indirect), harassment on the grounds of sex and/or of a sexual nature, victimisation and an unlawful deduction from wages. At a preliminary hearing on 11 February 2020 before Employment Judge Bloch QC the claim for indirect sex discrimination was dismissed on withdrawal. The issues to be determined at this hearing were identified. There were a very large number of such issues, most of which amounted to, or depended upon, fundamental disputes of fact.

2. In advance of the hearing the claimant had made written applications for an order under Rule 50 of the Tribunal's Rules of Procedure and to add numerous additional respondents. Those applications were left to be determined at the commencement of the hearing and we deal with them below.

3. In addition to the Rule 50 application and the application to add additional respondents, we shall also deal with one further matter before turning to our findings of fact.

4. This is a case where the parties and their respective witnesses disagreed fundamentally on almost every significant issue of fact. Many of those issues concerned alleged instances of sexual harassment (and discrimination in other respects) in the workplace. Ms Banton, on behalf of the claimant, urged us to look at these disputes in the light of various written reports and guidance. We shall deal with those documents and with our approach to the making of our findings of fact more generally, before setting out those findings. We shall also make brief comments on the witnesses called before us.

Rule 50 Application

5. The claimant was employed by the first respondent from 6 February 2017 until either 24 December 2018, early January 2019, or 9 April 2019.

6. As already noted, the factual allegations which are said to give rise to the claims in this case are numerous. Some 58 allegations are identified in the list of issues. One of those (directed principally to the harassment claim) itself identifies 18 examples, or types, of inappropriate behaviour.

7. Some of the allegations refer to the repeated use of sexually explicit language, or innuendo, requests to show her breasts and the rubbing of her shoulders, often accompanied by sexually explicit comments. The respondents contend that the claimant made frequent references (in detail)

to her own sex life. The kind of conduct upon which she relies is said to have taken place almost continuously from September 2017 onwards.

8. Most of the allegations of fact are denied. It is the respondents' case that there was a certain amount of banter in the workplace, some of it sexual in content, and that the claimant was an active participant. Instances of sexually suggestive behaviour on her part are relied upon.

9. While the language used and the overall behaviour relied upon was, were we to accept the claimant's case, grossly offensive and unacceptable, the only allegation of physical contact is that of the rubbing of her shoulders. This is not a case where allegations of rape, or of very serious sexual assault, are made.

10. On 22 March 2021 (ie, some 20 days before the case was to start on Monday 12 April) the claimant's solicitors wrote by email seeking an Order, under Rule 50, that during the hearing and in its judgment and reasons the claimant should be identified as Ms AB.

11. Two justifications were put forward:

    11.1 That the claim involved sexual harassment and discrimination of an overtly sexual nature, with incidents involving serious and explicit details.

    11.2 The claimant is clinically depressed, on medication and a vulnerable witness.

12. It was said that she therefore wished to keep the details of her claim private and out of the public domain given their highly sensitive nature. In oral submissions, Ms Banton relied upon the claimant's mental health and the impact on her of knowing that allegations of conduct relating to her, of the kind described above, might appear in the press, or be available to the public via the database of judgments.

13. We have had regard to the guidance given by Cavanagh J in X v Y (UK EAT/0302/18/RN) and the authorities referred to therein.

14. In her solicitor's written submissions, the claimant asserts that the principle of open justice (and the Article 10 right to freedom of expression) would not be adversely affected by the granting of the order sought. We disagreed. To hide the identity of the maker of such allegations (and the perpetrators of the alleged conduct) does offend against the principle of open justice. To our mind, the question which we must ask is whether it is appropriate to deny open justice in this case because of other matters.

15. We were particularly concerned that for any Rule 50 Order to be effective, the extent of the order would need to be far greater than that suggested by the claimant (which was limited to the substitution of initials for the claimant's name). This was because that given the small size of the first

respondent, identifying it and the principal actors on its behalf would be likely to lead to the identification of the claimant. In those circumstances it appeared to us that if any Rule 50 Order was to be made the identity of the first respondent and its associated businesses, together with the identity of its principal owner/controller and small office staff would need all to be anonymised.

16. We raised this with the parties, noting that this would mean that the identity of all alleged perpetrators of the serious acts relied upon by the claimant would be concealed from the public. Both representatives agreed with our analysis of the situation. We note that such concealment of identities is a highly undesirable state of affairs and requires cogent and careful justification.

17. Looking at the first justification (concerning the nature of the allegations) in isolation and balancing the desire for open justice against the claimant's Article 8 right (a qualified right) to privacy and family life, we would have had grave reservations about making the order sought. Whilst these are not trivial allegations of discrimination, they are not (as noted above) ones which involve allegations of conduct of either extreme depravity or acts of particularly severe physical harm. However, we recognised that this was not the only ground for seeking a Rule 50 Order and, indeed, in her oral submissions Ms Banton laid rather greater stress upon the claimant's state of mental health.

18. The claimant's witness statement refers to her being prescribed medication for depression in 2019 and 2020 and to her still taking it today. She says that the medication helps to alleviate the symptoms of depression, but is not always successful in that regard.

19. The claimant attributes her present mental ill-health to the alleged treatment by the respondents which lies at the heart of this case. Prior to hearing the evidence and making our findings, it is, of course, impossible for us to determine the cause of her mental health issues. Furthermore, we note that the medical evidence we have seen (being a print-out of her doctor's surgery's notes) suggests other problems in her life. However, it seems to us that the link (or lack of one) between her present state of mental health and the allegations in this case is not material in this context. She is presently a woman making such allegations (and against whom such allegations as we have noted above are made) who has the state of mental health described to us.

20. We have heard no expert medical evidence as to the claimant's current state of health. However, we have seen the medical notes referred to above. We have no reason to doubt her assertion that she is being treated for depression and that her condition has persisted since some time in 2019 onwards. We cannot judge its severity, but it is clear that it is serious enough for her to have been prescribed medication over a long period of time.

21. We have no reason to doubt the claimant's assertion that the thought that she might be publicly linked with these allegations itself causes her great distress and that continuing concern and any publicity given to the allegations in the case would be likely to have an adverse impact upon her mental health.

22. The respondent has not disputed what has been said on the claimant's behalf in this regard. Mr Howsen has, in effect, left the matter to the Tribunal. We are, of course, mindful that this is not a matter for the parties to determine. Open justice is a matter of public interest and exceptional circumstances need to be established on the evidence before us in order to displace it.

23. We, therefore, have to balance that potential impact on the claimant's mental health (and Article 8 rights) against the principle of open justice. We have reminded ourselves of what Cavanagh J said in X v Y in paragraph 19, where he endorsed (and cited extensively from) what Simler J (as she then was) had said in BBC v Roden. The principle of open justice is of paramount importance and derogations from it can only be made if strictly necessary to secure the proper administration of justice.

24. Not without some hesitation, we consider that a Rule 50 Order is justified in this case. The risk to the claimant's already fragile mental health seems to us real and substantial and to justify a derogation from the principle of open justice. We were conscious when we made this decision that our views might change as the case progressed. In particular they might be informed by the claimant's own evidence and by the conclusions we reach regarding the allegations both sides make. Hence, we indicated that we would revisit the matter at the end of the case in order to determine how the judgment and reasons were to be set out.

25. We ordered that until the end of the liability hearing the identities of various persons and corporations should be anonymised and that (subject to revisiting as noted above) any documents entered on to the Register or otherwise forming part of the public record should be similarly anonymised. A written order was rapidly prepared and we ordered that any person seeking to enter the hearing via the CVP waiting room should be provided with a copy of that order sent to an appropriate email address and/or would be informed of its contents.

26. Having heard the evidence, deliberated upon it and reached our conclusions, we remain of the view that the Rule 50 Order is appropriate and it will remain in force (subject to any further application on the part of the parties or any third party) as regards any document entered on to the register or otherwise forming part of the public record and for the purposes of any further hearing in this matter. Although we have found against the claimant as regards various allegations of fact, nothing that we have heard or decided causes us to doubt her present state of mental health is as she described it, or the likely impact upon it of these various matters entering the public domain.

27. During the course of the hearing, it became clear to us that the identification of the local authority which contracted with the first respondent for the provision of drainage services in about mid-2018 would probably lead to the identification of the first respondent and, as a consequence, the identification of all other persons (real and corporate) in the case. Hence, we informed the parties that we intended to extend the ambit of the Rule 50 Order to encompass that local authority. The parties made no objection and the order was so varied.

28. We note that the application was made on the basis set out above. No application was made on the basis that anonymity was justified because certain of the matters alleged amounted to sexual offences for the purposes of the Sexual Offences (Amendment) Act 1992. Given our decision we have not considered it necessary to invite submissions on that matter.

Application to add respondents

29. In February 2021 the claimant made an extensive written application to add further respondents. This was said to be motivated by concerns as to the state of the first respondent's finances and business. Unfortunately, this application was not dealt with prior to the first day of the hearing.

30. In order to seek to avoid the need to deal with this application, the claimant indicated that she would like to see a copy of a commercial contract between the first respondent and the local authority.

31. The first respondent was content to provide a copy of the contract if so ordered by the Tribunal. We therefore ordered the respondent to provide to the claimant's solicitors, as soon as reasonably practicable, a copy of that contract with commercially sensitive matters redacted. As the existence of the contract was being relied upon by the first respondent (and others) in resisting the application, we considered its contents to be relevant.

32. In the event, the production of the contract did not alleviate the claimant's concerns and the application was renewed on the fourth day of the hearing. It was now limited to the joinder of the second respondent, the person being said to have been responsible for most of the numerous alleged acts of discrimination and was properly limited to claims under the Equality Act 2010. It is not disputed that the second respondent could be personally liable for such acts under s.110 of the 2010 Act.

33. The parties both accepted that the Tribunal had a discretion whether or not to add the second respondent as a party, which discretion must be exercised judicially and in accordance with the guidance set out by the EAT in the well known Selkent decision.

34. There is no prejudice in our view to the second respondent being added as a party, over and above the exposure to an award. He was the first

respondent's principal witness and was able to (and did) deal with all of the allegations in his witness statement and oral evidence.

35. The application could and arguably should have been made long ago. The facts relied upon to suggest that the first respondent might seek to avoid making any payment to the claimant were she successful were all known to the claimant when she made her original claim. They are said to have come to her attention whilst an employee. However, we considered that no prejudice arose from the delay as the preparation of the case would have been no different.

36. In the circumstances we permitted the addition of the second respondent. We considered that if the claimant was correct (as to which we made no findings at that stage) then there was a risk that any award might be avoided by the second respondent either liquidating the first respondent or moving (or having already moved) its principal assets to another company.

37. We emphasised to the parties that in adding the second respondent we left open to him all and any claim in time defences and that it would be for the parties in their submissions to set out their contentions as to how those which were already raised in respect of claims against the first respondent should be considered as regards the second respondent.

An additional witness and additional documentation

38. The respondents made an application to call an additional witness (for whom a witness statement had been served, albeit "late") and to add additional documents to the bundle which had been referred to in the evidence of the second respondent. We allowed both. Our brief reasons for allowing the additional witness to be called are set out below when we consider the evidence of that witness.

39. So far as the additional documents are concerned, they appeared to us to be of probative value and Ms Banton did not strenuously resist our admitting them. In a case of numerous and fundamental disputes of fact it appeared to us that it would be just to admit further contemporaneous documents which might provide assistance in deciding which version of events was correct where (as here) the other party was well able to deal with those matters in cross-examination.

Our approach to finding facts

40. This is a case in which the claimant and her witness and the respondents' witnesses paint very different pictures of the workplace and of the second respondent's behaviour within it.

41. The claimant's case can be summarised as follows:

41.1 From the start of her employment the claimant was subjected to a certain amount of sexual harassment and acts of discrimination. However, from September 2017 onwards the second respondent's behaviour towards her amounted to a sustained and deliberate campaign of harassment and humiliation.

41.2 He repeatedly called her "cunt", "fucking useless" and a "prat". He said that women were only good for "blow jobs", that they were "only good in the bedroom and the kitchen", that all women "like to talk dirty", that if she was not married, he would "bend her over the desk" to have sex with her and that he wanted her to show him her breasts. He frequently massaged her shoulders making comments such as "Is [her husband] not giving you cock".

41.3 This behaviour was a regular occurrence, for example the massaging of her shoulders took place once or twice a day, the request to see her breasts on more than 100 occasions and the name-calling and other comments were made on an almost constant basis.

41.4 In addition, the second respondent frequently talked over her, screamed and shouted at her and belittled her. He piled additional work on to her such that she was working 16 hours a day.

41.5 The second respondent behaved in a similar way towards Ms ST and, after she left, Ms OP, both of whom left the first respondent's employ. In particular, Ms OP was, like the claimant, periodically reduced to tears by this behaviour and could be seen shaking and shocked by the second respondent's conduct.

41.6 The claimant discussed her abhorrence of the second respondent's conduct with those two women who both witnessed his appalling behaviour towards her.

41.7 She complained to her line manager, Mr GH, but he did nothing. She complained to the second respondent, but he did nothing. She made written complaints by email, but could not provide copies of them, albeit that she said that they ought to have been located within the first respondent's records and disclosed. She says that all of her complaints were ignored.

41.8 Eventually, after a particularly unpleasant encounter on 24 December 2018 she was ordered by the second respondent to leave the premises and did so. Although her husband (without authority from her) indicated that she would not return, she intended to return and made this clear in correspondence, but she was not allowed to return and, eventually, if she had not already been dismissed by the first respondent's conduct, she accepted the repudiatory breach of her contract of employment and brought it to an end in April 2019.

42. The respondents accept that there was a certain amount of banter in the workplace, some of it sexual in nature. They allege that the claimant was at least as much an instigator of this as anyone else and that the second respondent was (at most) an infrequent participant. The allegations of screaming and shouting and other unacceptable instances of behaviour are denied and it is said that the claimant resigned at or after the meeting on 24 December, which they characterise in a very different way to the claimant.

43. Ms Banton urged us, in approaching our fact finding exercise, to take into account various reports and written guidance available to us. She referred us to the Law Society's Workplace Guidance to Employers, to the Equality and Human Rights Commission Study of 2018, entitled Turning the Tables: Ending Sexual Harassment at Work, to the ACAS Guidance on Sexual Harassment, to chapter 7 of the Equality and Human Rights Commission's Code of Practice on Employment, entitled Dealing with Harassment and to the TUC's Report on Sexual Harassment in the Workplace.

44. We have looked carefully at the material which she quoted in her closing submissions. We accept the desirability of having clear policies on bullying and harassment and dignity in the workplace generally, on the desirability of effective training for all managers and the need for appropriate leadership. However, we note that this was a very small company. Its office was staffed by three or four people working closely together, supplemented on occasions by the second respondent and, very occasionally, by others.

45. We were reminded by these documents (but were already all too aware) that what some people might consider as a joke or "banter" might quite properly and understandably be seen in a different light by others. Furthermore, peer pressure might cause someone who resented such a culture of banter to participate in order to be seen to conform.

46. We are aware that surveys show that the vast majority of those subject to workplace harassment do not report it and that where it is reported the perpetrators frequently allege that whatever went on was simply part of the office culture in which the alleged victim was an active and willing participant. This has caused us to scrutinise the respondents' case with particular care.

47. Given the guidance in those documents and the dramatically conflicting oral evidence, we have looked with particular care at the limited amount of contemporaneous documentation to see what light it sheds upon the witness evidence. We were also particularly assisted by the evidence that various witnesses gave with regard to three stress balls apparently presented to the second respondent, Mr GH and the claimant by Ms ST just before Christmas 2017. These were in the shape of breasts (for the men) and a penis (for the claimant) and we shall refer to them as the stress breasts and the stress penis. We have also paid particular attention to the consistency (or lack of it) of evidence given by the various witnesses and

their ability (or lack of it) to paint a convincing and coherent picture of events which they claim to have taken place.

The witnesses

48. Before turning to our detailed findings of fact we set out brief comments with regard to the various witnesses from whom we heard oral evidence.

49. The claimant. The claimant provided a lengthy and detailed witness statement of some 267 paragraphs set out over 46 pages of single-spaced typing. We found some aspects of her oral evidence unsatisfactory. Her evidence on whether and when she complained about the use of sexual innuendos and touching were vague and at times contradictory. Her evidence varied between saying that she regularly challenged the second respondent, to saying that it was rare for her to do so because she felt unable to do so. As we shall explain, her evidence about written complaints and why she had not raised a grievance until early 2019 was confused and unsatisfactory.

50. She told us, when challenged in cross examination, that there was no on-call rota after Ms OP left in about August 2018 and that she dealt with out of hours calls. Yet, when dealing with evidence about the Christmas party in 2018 she told us that it was not her turn to be on call. Her efforts to explain this contradiction were confused and unconvincing.

51. With regard to the incident on 24 December she told us that the second respondent had said she could not do the job she sought (as account manager) because she was a woman, later she said that this was insinuated (but could not recall how) and subsequently she returned to saying that it had been specifically stated to be the case.

52. It was her case that there was no office banter, simply the second respondent behaving in an abhorrently sexist manner. In the light of all of the evidence we heard and saw we did not find this credible. We also considered her evidence with regard to the stress penis and stress breasts to be significantly inaccurate.

53. In summary, we considered much of her evidence to be an exaggeration and significant parts of it to be an invention. However, we are prepared to believe that she has now convinced herself of the truth of much of what she says. At various points in our findings of fact we will set out her case as to a particular meeting or course of behaviour and explain our reasons for rejecting it.

54. Ms ST. She worked in the office with the claimant for about a year up to the end of March 2018. Our rejection of her evidence with regard to the stress penis and stress breasts led us to regard much of her evidence to be exaggerated, or invented, in an effort to support the case of her friend, the claimant.

55. The second respondent. He was and remains the effective owner and controller of the business. Twice in 2013 he underwent invasive neurosurgery. He had been warned that this was likely to affect his memory and we accept that it has done so. He finds it difficult to recall abstract thoughts and his recall of particular events is limited and needs to be prompted by an examination of contemporaneous documents. It is also clear that he has limited recall of that which he had previously been able to recall, such that matters which he had recalled for the purposes of his witness statement he found difficulty in recalling when asked to deal with them in the witness box unless taken to the documents (or other matters) which had originally prompted his recall. This severely impacted upon his usefulness as a witness. We also consider that it led to him downplaying his own involvement in the banter that went on in the workplace. Nevertheless, we considered that he was someone who was doing his best to be truthful and to assist the Tribunal.

56. Mr GH. He was employed at all times during the claimant's employment. He had been engaged to run the first respondent's business due to the second respondent's state of health. He was habitually present in the office (with very occasional trips to sites or clients), whereas the second respondent was only intermittently present and often not for a full day. He was a close friend of the second respondent, who left the employment of the first respondent in January 2020. He claimed a limited recall of salient events as a result of his having departed from the business some time ago. Due to his friendship with the second respondent and the fact that some of his instances of a lack of recollection appeared to us to be "convenient", we treated his evidence with a degree of caution.

57. Mrs CD. She is the second respondent's wife. She was rarely present in the office and, hence, her evidence was of limited value, albeit that the manner in which she gave it did not suggest that she was other than truthful and attempting to be helpful.

58. Mr MN. He was another friend of the second respondent. For nine months, until about the autumn of 2018, he spent almost all of his time in the office acting as (to use his own description) the office junior. Subsequently he has moved to engineering work on behalf of the first respondent. He had the hallmarks of an honest witness. He was careful to say what he could and could not recall and to accept the limits of his recollection. He listened carefully to the questions put to him and reflected upon challenges to his recollection.

59. Mr EF. He is the second respondent's father-in-law. He is retired from senior management work in the City of London in the financial services sector. He was rarely present in the office during the summer months, but would occasionally help out with various tasks during the winter. Hence, he was sometimes in the office during that period. His evidence was clear and credible. He acknowledged his limited involvement with the business and accepted the limits on his recall. We accept that his work in the City had trained him to recall the detail of what he perceived to be significant events,

such as the sort of events of discrimination that the claimant described. We regarded his evidence as reliable.

60. Mr KL. At the material times he was a sub-contractor, albeit that he has since become an employee of the first respondent. He was only occasionally present in the office and his evidence was of limited assistance. However, we accepted that what he told us amounted to his best recollection of events, or behaviour, which appeared of little importance to him at the time.

61. Ms OP. She was present in the office from April to August 2018 when she was dismissed, partially as a result of what the claimant told the second respondent about her trying to poach a customer for a prospective new employer of hers.

62. She had been very close friends with the claimant during her period of employment, but ceased to be friends thereafter due to what she understood to be the claimant's leading role in her dismissal. She has since been re-employed as operations manager, recommencing employment in April 2019. She was approached when the claimant ceased work in January 2019, gave notice as regards her then current job and re-joined the first respondent.

63. She readily acknowledged her dislike of the claimant, given what she believed about the claimant's treatment of her. We found her to be a careful, clear and cogent witness. We reject the claimant's assertion that she was giving untruthful evidence and had been re-employed by the second respondent in order that he could control her evidence to the Tribunal.

64. Mr UV. He was the new witness whose evidence we permitted to be called despite the fact that his witness statement was served late. We did so because we were told that he was able to give evidence with regard to the claimant's use of the stress penis.

65. He was and remains an independent contractor who provides IT services to the first respondent. As such, he makes infrequent visits to the office in order to deal with IT problems or to install new equipment (as he did during the claimant's period of employment).

66. That he was able to assist with regard to the use of the stress penis was something of which the respondents were unaware until a chance conversation on a visit to the office shortly prior to the service of his witness statement. He has no ongoing contract with the first respondent which is but one of a number of customers he works for periodically. The limited amount of work involved means the first respondent is not a client upon whom his business is significantly dependent. We consider that he had no reason to lie to us.

67. Although his witness statement was confined in its ambit, challenges to his evidence in cross-examination led him to provide additional recollections of

the claimant's behaviour in the office. Although clearly nervous, he appeared to us to be an honest and straightforward witness.

68. We should also mention the structure of the respondents' witness statements. They contained many passages which were clearly cut and pasted one to the other; this included the repetition of the occasional error. The passages in question mostly involved statements that the witness had not seen conduct of various kinds alleged by the claimant. They were clearly not in the witnesses' own words and in some instances that which had been cut and pasted from a different statement was inapplicable to the witness in question. We did not consider this to reflect badly on the witnesses themselves. We were much more concerned to hear their oral evidence and how they responded to what they said being tested by cross-examination.

Findings of fact

69. The claimant was employed by the first respondent on 6 February 2017. She had previously been made redundant from other employment. The second respondent was a friend of her husband. Her post was described as that of the Finance and Accounts Director, later the Commercial Director. At no time was she a statutory director of the first respondent or any other company. As we have already noted, the first respondent had a small office staff of some three or four persons with the second respondent attending occasionally. There were also a significant number of engineers out on the road.

70. The office staff took calls, organised jobs and invoiced them. In addition to answering the phone and general organisation, the claimant was responsible for the financial books and records.

71. The first respondent moved offices in July 2017. The claimant complains of being subject to sexual name calling and insults and other inappropriate communications prior to that, but says that matters got worse after this point and significantly worse after September 2017.

72. The claimant and the second respondent frequently exchanged text messages throughout the period of the claimant's employment. In this early period of her employment, prior to the move between offices, only one has been shown to us which is offensive. It is a Facebook post about lesbians which had been labelled (presumably by Facebook itself) as "offensive humour". It was forwarded to the claimant by the second respondent on 12 May 2017. We accept that the claimant and the second respondent exchanged similarly offensive and sexist banter by text message and otherwise at this time and thereafter and that each was from time to time the instigator. Neither was offended by the other's behaviour. Other exchanges of texts which we have seen show a jovial and familiar relationship between the two of them with the second respondent periodically praising the claimant for her hard work. For example, on 2 November 2018 the second

respondent texted her saying that she was “doing a brilliant job” and that he didn’t “tell [her] that enough”.

73. We now turn to the period from the move of premises through to the end of 2017. During this period the claimant and Ms ST both say that the second respondent used vulgar language on a very regular basis. This involved calling the claimant a “cunt”, “fucking useless” and “a prat”, saying that women were only good for “blow jobs”, that they were only good in the bedroom and the kitchen and that all women liked to talk dirty. They say that he talked of wanting to set up a sex chat line at the new premises, regularly asking Ms ST if her sister would be prepared to do this. He regularly asked Ms ST to join him and his wife for “a threesome”. He massaged the claimant’s shoulders on a regular basis in front of Mr GH and Ms ST, often making sexual comments such as “Is [her husband] not giving you cock”. It is said that he would shout and scream at the claimant and Ms ST very frequently and would unjustifiably find fault with their work.

74. They allege that this sort of behaviour was so regular an occurrence that it is impossible to give a date, even an approximate date, for any particular instance. It is also said that he regularly monitored their behaviour on CCTV using both internal and external cameras which he was able to do from his office and that he would angrily remonstrate with them if they did not appear to be working, including if they were taking a legitimate break outside.

75. They say that they were upset and offended by this behaviour, that it made them feel uncomfortable and violated and that they felt intimidated, abused and traumatised by it.

76. Our findings in respect of those allegations were significantly informed by our finding in respect of one particular matter and, hence, we deal with that matter first.

77. As a secret Santa in late 2017 Ms ST gave to each of the second respondent and Mr GH a stress breast and gave to the claimant a stress penis. She wrapped them and they were presented and opened in the presence of the others.

78. We find this behaviour to be incomprehensible if the second respondent was behaving in the manner alleged by the claimant and Ms ST, especially if their reaction to that behaviour was as described. We consider that this behaviour on Ms ST’s part is consistent with the picture of office life painted by the respondents’ witnesses.

79. Ms ST was unable satisfactorily to explain why she had behaved in this way, if the second respondent was consistently behaving in the way described by her. She said that she quickly realised that her behaviour was inappropriate and a mistake, but according to her evidence she and the claimant had never discussed this. Had either of them thought these presents to be inappropriate, we consider that they would have been bound to have discussed it. We also note that she sought to downplay the size of

the stress balls, as well as what the claimant did with them. Ms ST maintained that the stress penis was some 2cms long, whereas the advert in the bundle shows it to have been much larger.

80. Ms ST told us that whilst the claimant laughed when given the stress penis, she immediately put it in her drawer from whence it was never removed and that was the last she had ever seen of it. Reminded in questions from the Tribunal that the claimant had said that she (Ms ST) had taken the stress penis away with her when she left employment at the end of March, Ms ST then agreed with this. Asked to explain what had happened, she said that she had asked to take it as something to remember the claimant by. She said that she recalled it being handed over in the car park outside the office but was unable to give any convincing explanation of the conversations or actions that had led to it being handed over there.

81. We reject Ms ST's evidence in this regard and that of the claimant. Both the claimant and Ms ST thought the gifts of the stress breasts and stress penis highly amusing. The stress penis lived on (not in) the claimant's desk. She frequently stroked it and waved it about. On one occasion she threw it at Mr UV inviting him to catch it. This was (to her) a light hearted attempt to embarrass him. Her actions in relation to the stress penis continued throughout 2018 and were seen by Ms OP, Mr GH and Mr MN.

82. The small team in this office operated in a relaxed and friendly atmosphere. Periodically, the claimant would describe her sex life, often in graphic detail. Usually, the claimant would be present in the office with Mr GH and Ms ST, latterly with Mr MN and, after Ms ST had left, Ms OP. Occasionally the second respondent would join in with what they all considered to be light-hearted and amusing conversation, sometimes about sex. No-one was offended. In short, this was the kind of environment in which Ms ST would be happy to give those stress relievers as secret Santa presents and the claimant to display, squeeze and stroke the stress penis.

83. Against the background of those findings, we turn to consider the allegations which we summarised in paragraphs 73 to 75 above:

    83.1 The claimant was not repeatedly called a "cunt", "fucking useless" or "a prat".

    83.2 However, as we have made clear, there were frequently sex related conversations in the workplace and we have no doubt that sexist comments were made by both the men and women (including the claimant) in the office, believing them to be amusing and the claimant openly discussed her sex life.

    83.3 It seems to us more likely than not that in the course of those exchanges references were made to 'blow jobs', 'threesomes' and sex chat lines and male staff members made reference to the claimant's sex life. There was no serious invitation to Ms ST, or anyone else, to join in such activity. All the participants at the time thought such comments to be amusing.

83.4 There was only one instance of the second respondent massaging the claimant's shoulders and we deal with this later.

83.5 The second respondent did not unnecessarily, or unjustifiably, criticise the work of either the claimant, or Ms ST. He neither shouted, nor screamed, at them. He raised his voice to them (and to the male members of staff) on occasion as one might expect in a small, sometimes noisy, busy, non-hierarchical and friendly office environment.

83.6 The second respondent did not monitor the claimant and Ms ST on CCTV. The claimant's assertion as to the presence of cameras inside the offices is wrong. We accept the evidence of the other witnesses who place the cameras outside in the yard. Occasionally (and in jest) the second respondent would complain when he saw the claimant and Ms ST in the yard smoking during the working day.

83.7 Neither the claimant, nor Ms ST, felt threatened, or intimidated by the second respondent.

84. We now move on to 2018. In due course, Mr MN joined the office staff and Ms OP arrived to replace Ms ST. The ladies overlapped for only one day. The atmosphere in the office remained the same and the claimant continued to behave in the same way.

85. The claimant says that from January 2018 onwards the second respondent continually asked her to show him her breasts, asked for a threesome with her and asked her about her sex life. This continued, she told us, after Ms OP arrived in late March and he made the same request to expose her breasts to Ms OP. The claimant says that on one occasion Ms OP complied and showed her breasts. The claimant complained that the second respondent continued to behave towards her (and now towards Ms OP) as he had done in 2017 towards her and Ms ST. She described Ms OP as often being distraught, shaking and crying because of this conduct.

86. We were struck by Ms OP' rejection of these allegations. She was clearly disturbed that it had been alleged that she had exposed her breasts in the office. We accept that this did not happen, but that the claimant herself did make remarks about the size of Ms OP' breasts. She commented that Ms OP should not bend over Mr MN so as to rest her breasts on his shoulders as he wouldn't be able to take the weight.

87. We accept that whilst conversation in the office continued to contain periodic sexual innuendo and comments about sex, no-one was offended. The second respondent did not behave towards Ms OP in the ways described by the claimant, nor did Ms OP react to what was said and done in the ways described. She told us, and we accept, that had the behaviour towards her in the office been as the claimant describes she would never have agreed to go back. We cannot conceive of a woman subjected to the appalling onslaught described by the claimant giving notice to leave a

current job in order to go back to that environment. We reject the suggestion made to Ms OP that she had been brought back in order that the respondent could control her and her evidence to this Tribunal.

88. We were shown two exchanges of text messages from the claimant's work mobile phone to the second respondent which included the forwarding of two short videos. One showed a young lady removing at least part of her clothing and the other showed a group of women apparently in a changing room. The claimant denies sending these messages. She contended that Ms OP had sent them using her (the claimant's) phone.

89. We consider that the significance of these texts is not whether it was the claimant or Ms OP who sent them, but that they were sent at all. Their being sent by either of those ladies is wholly inconsistent with the situation in the office as described by the claimant and the reaction to it on the part of both Ms OP and herself as the claimant would have it. It appears to us that the sending of these texts is a further contemporary indication that relations in the office were as described by the respondents' witnesses and not as described by the claimant.

90. This is a convenient point in the narrative to deal with (a) the state of the claimant's marriage, upon which we heard some evidence, (b) the allegation regarding the placing of the second respondent's hands on the claimant's shoulders, (c) the taking of lunch breaks, (d) the use of CCTV by the second respondent, (e) the second respondent's alleged comments about bending the claimant over a desk and his miming of a sex act (f) Mr GH's mimicking of Mr CD and a number of other allegations, some touched upon in cross examination and others dealt with in detail only in the claimant's witness statement.

91. Throughout the period of her employment the claimant had periodic problems with her marriage. She believed that her husband was being unfaithful to her (as she later told her GP as is recorded in the notes already referred to) and she told Ms OP of substance abuse by her husband. She reported to the second respondent violence (or a fear of violence) towards her on the part of her husband. On three occasions the second respondent paid for the claimant to spend the night in a hotel when she reported herself as being frightened to go home. The last such incident was in October 2018 and we deal with it in more detail below. The second respondent also offered to the claimant the use of a car on hire to the first respondent and not currently being used. This was because the claimant's car had been taken by her husband.

92. Very occasionally the claimant would appear to be upset whilst at the office and talked variously to the second respondent, Mr GH and Ms OP about her problems at home. On one occasion the second respondent placed his hands on the claimant's shoulders when expressing sympathy and concern. This was something he had also done for male friends and colleagues in the past. Save in those circumstances, the second respondent did not place his

hands on the claimant's shoulders and when he did so on this occasion, he did not make sexist comments to her along the lines she alleges.

93. The first respondent's office is in a relatively remote location. In order to go somewhere to buy lunch a five to ten minute car journey is necessary. As a result, the second respondent regularly bought lunch for the staff. All the office staff tended to eat lunch at their desk. They could have taken time out if they so wished, but frequently they did not do so. However, the staff took periodic breaks, especially cigarette breaks, outside whenever they wanted to. There was an element of peer pressure to conform to this model of working, but that peer pressure applied to all of those in the office. We consider that the claimant was sufficiently self-confident to take a break away from her desk at lunchtime when she wished to do so.

94. The claimant alleges that the respondent periodically said words to the effect that if she was not married, he would like to bend her over the desk and have sex with her. He denies this. We accept that something of the sort was more likely than not to have been said, most probably in the context of the claimant's graphic descriptions of sex with her husband. She was neither concerned nor offended by such comments.

95. The claimant also describes an occasion when she was bending over a desk and the second respondent stood behind her miming a sex act. She agrees that Mr GH and Mr MN found this funny and that she laughed as well. We consider that her laughter was genuine and that her suggestion that she was uncomfortable does not reflect how she felt at the time.

96. The first respondent had CCTV cameras and two monitors at its offices. No cameras were installed within the building. The cameras were used to monitor activity in the yard, this was particularly important given the remote location. The second respondent did not use the CCTV cameras to monitor the activities of the claimant in particular. We accept that as part of the good-natured exchanges in the office occasional reference continued to be made to the taking of cigarette breaks in the yard (and their frequency). As before, such comments were made in jest and were regarded as such by the claimant and others.

97. The claimant refers to an incident in about June 2018 when Mr GH berated her about her time of arrival, mimicking the second respondent. We accept that Mr GH periodically did mimic the second respondent. On occasion this involved him adversely commenting upon the claimant's time of arrival. The criticism was intended to be humorous and understood by the claimant to be such. The mimicking was part of the light hearted banter in the office.

98. The claimant also complains that Mr GH threatened to get rid of her, that she was ordered to sever all ties with Ms ST after she left, that the second respondent visited her home and later made derogatory remarks about it and that the second respondent threatened to dismiss Ms OP and any other female friends that the claimant might have. It is possible that in their regular humorous (to them) exchanges, comments such as these may have

been made in jest. If so, they would have been understood by the claimant as such. At no time was any serious statement made to these effects and at no time during her employment did the claimant believe that to be the case.

99. We now turn to the period of time after the departure of Ms OP in August 2018.

100. By October 2018 the claimant was working hard and for long hours. This was causing additional strain to her marriage. We accept that her husband was unhappy about this. We consider that the second respondent was also unhappy at the fact that the core financial work, which she had done so well previously, appeared to be done less well and he criticised aspects of her performance from time to time. The claimant was undertaking additional work in part to cover for the absence of Ms OP and in part because of a new local authority contract which the first respondent had won.

101. On 5 October the second respondent paid for the claimant to stay in a hotel for the night. This was because of her concerns at returning home, a point which we have referred to previously.

102. The claimant provided a different explanation for this stay in the hotel. She alleged that she told the second respondent of the strain that her work was placing on her marriage (something we accept). She says that he told her that she had to make a decision about whether her marriage was more important than her job. She says that he told her that he wanted her to do a management buyout within five years and, for that reason, she had to keep working the hours she was currently working. She says that he told her to take some time to consider whether her job or her marriage was more important and that the night's stay in the hotel was supposed to give her the time to consider this question.

103. That explanation appeared to us incredible. It appeared to us not to be sensible to conceive of the second respondent offering the claimant that choice of her marriage or her work in those circumstances, never mind suggesting that she should spend the night in a hotel to make up her mind. We note that there is no reference to that choice or the management buyout in the subsequent correspondence to which we shall refer below.

104. On 9 October the claimant and the second respondent exchanged texts which we consider show the then state of play in their relationship. The claimant was apparently on holiday with her husband. The exchange was as follows:

Second respondent: "Hope you're not stressing raq. Enjoy your break [while] you can"

Claimant: "I'm not but I am worried about how things are going as don't want u to think I'm crap at what I'm doing… missing ya and your rants!!! xx"

Second respondent: "You're the best stop stressing and get pissed. Enjoy and send [nickname for her husband] my love x"

Claimant: "Cool and will do he send his back x"

105. Relations were still amicable, but problems were arising with the claimant's financial work due to her doing too many other tasks. We consider that the reference to "rants" was light hearted, but shows that the second respondent was raising concerns about how the claimant was doing her work.

106. By 22 October 2018 matters had got somewhat worse. The claimant sent a text to Mr GH as follows:

> "Can you please still talk to Steve in regards to what has happened today. I'm trying everything I can and honestly do feel like I've turned his business around since [Ms OP] left and with his comments about the fact I've not chased it grates on me that he has to get to that level by saying for the past six weeks I've done crap at my accounts job but at no point has he offered me someone to help, I've had [Ms OP], I've had [Mr MNs] and where has he been in helping me out even when I was away… if he doesn't change I can't see me having a future there, I don't need him talking to me that way and putting me down, I work all day there and every evening and weekends. I would appreciate it if you can chat to him"

107. As we have noted, the second respondent had been complaining of issues with the accountancy side of the claimant's work. Having told him on 9 October that she did not want him to think that she was "crap" at what she was doing, he had complained about her performance.

108. We note that there is no reference here to the repeated and unpleasant name calling or to any of the other overtly sexual comments and actions. The claimant suggests that she had been periodically complaining about these matters (her evidence as to the frequency of those complaints varied, as we have noted) and that the second respondent had not responded. She maintains that several of those complaints were in writing, but none have been produced to us. Looking at the way in which she texted both the second respondent and Mr GH with regard to concerns at this stage and in relation to criticisms of her work, we are satisfied that had she made complaints about those other matters at least some of them would have been by way of text message which she would have been able to produce.

109. In the event, the claimant discussed her concerns with Mr GH who told her that the problem was that she was taking on too much work. We consider that the reason for this was that the claimant was doing as much work as she could on the local authority contract. She found this work interesting and more challenging than her routine financial work. As a result, the routine work was suffering and the second respondent was complaining about this.

110. The claimant complains that Mr GH's failure to use the new IT system added to her workload. Given his admitted lack of IT skills, we are satisfied that this was the case.

111. There were problems at this time with the first respondent's telecoms supplier and with the design of a new website. These were also matters which added to the claimant's workload. She was not blamed for these problems and failures.

112. At some point in this period the claimant was asked to collect a van. This was a two-person job and she asked her husband to help, which he did. She did not complain about this at the time, nor did she resent being asked save to the extent that she (and the others in the office) were very busy and this added to her workload.

113. We now turn to the email of 30 October 2018. Whether this email was ever sent to the second respondent and to what it related are both hotly disputed. The email is headed "Subject: Phone call" and reads, so far as material, as follows:

> "You seem like you [have] a personal issue with me, always moaning and shouting at me in how the business is run when all I have is you and your business at my interest.
>
> From Day 1 since I've been at this company I've given this business more than 110% day in and day out, working 16 hour days to help achieve how you want your business to be run, all by myself and not asked for one persons help or additional overtime.
>
> I personally believe I have helped transform this business, yet not once do I get a well done or thank you for your effort, just a load of abuse and moaning every day.
>
> I will be honest this is for your business the hours I am putting in, people would assume the amount of work and time spent it is my business. On another note I don't have any spare time for my family and friends and I don't think your being fair in what I have done, by telling me that you can do all with without me in this organisation.
>
> After what you said this morning and numerous times before, about you can do this by yourself, then making me feel I have to offer my resignation, this has made me feel upset and angry because of what I mention in the above of what I'm trying to achieve, I will be honest no job is worth getting stress and ill over and losing my family in the meantime."

114. The claimant says that this email was triggered by a very unpleasant conversation in which the respondent accused her of stealing £250,000 from the business. She says that the email was intended, by the use of the word "abuse", to refer to the name calling and other foul behaviour to which she had been subject. We reject both contentions. Had there have been such an accusation of theft we consider that the claimant would have referred to it in the email. Had the claimant meant to refer to behaviour of the kind she now alleges she would have referred specifically to it.

115. We believe that the email was provoked by the second respondent continuing to criticise the claimant's work in relation to what was the core of

her job. That part of her job was not being done as efficiently as in the past and the second respondent did moan about this and raise his voice. He would have done that regardless of the sex or identity of the post holder. This included complaining about engineers going out late on occasion.

116. This email related to the period of time since Ms OP left. The reference to doing the work "all by myself" and not having help would not be appropriate to the earlier period. In fact, the claimant did have some assistance from temporary staff during the period after Ms OP left, but none of them proved satisfactory to the claimant and none were retained for any significant period.

117. The claimant did send this email on the day in question, forwarding a copy to herself. We accept that the second respondent has no recollection of its receipt. He did not directly respond to it. We consider that the email exaggerated the claimant's concerns to a certain extent, but this is understandable given the long hours that she was working, the impact on her home life and her frustration that the second respondent did not appear to be as appreciative of her efforts as she had hoped.

118. As well as experiencing the problems at work we have referred to, the claimant was again experiencing problems at home. We have no doubt that her long working hours were contributing to this. With some regularity she was starting work at 6am and often taking work home. She again discussed these problems with Mr GH and on 31 October sent him a text which read as follows:

> "After yesterday I'm not in a good place… been up til 5 this morning crying and can't sleep. I am so low at the moment with all the stuff going. My blood pressure is bad and I am [breathing] fast, all this results in my depression coming on… can I ask [Mr MN] to bring my laptop with some paperwork to my house as I can't face that place and need to sort myself out by working from home."

119. It is unclear whether the reference to "yesterday" is a reference only to the matters referred to above in relation to her work, but the reference to "all the stuff going [on]" is a reference also to her problems at home.

120. Mr GH did speak to the second respondent who himself texted the claimant on 2 November saying:

> "Hi Raq just want you to know I think you're doing a brilliant job and I don't think I tell you that enough. I wouldn't change it for anything. Keep doing what you're doing things are starting to move the right way and you are the main reason for that. Enjoy your weekend x"

121. She responded to this:

> "Ah bless you and thank u for saying that, I appreciate it… its great that the way we are driving forward… have a good weekend too x"

122. The claimant's response is consistent with our view that her concerns about the situation at work have been greatly exaggerated by the claimant in her evidence. She was indeed worried about what the second respondent thought of her performance as she said on 9 October and she wanted reassurance. This was particularly so in the context of her desire to change from the work that she was doing to running the local authority contract.

123. We now turn to the period from early November 2018 to 24 December of that year. We need to consider (a) the locking of the ladies' toilets, (b) an alleged altercation with the second respondent said to have been witnessed by Mr EF, (c) the Christmas party and the alleged criticism of the claimant, (d) cleaning the offices, (e) the changing of the claimant's computer password and (f) the claimant's workload and the progress of the local authority contract.

124. The premises occupied by the first respondent are also used (as tenant or sub-tenant) by a workshop. There is a single male and a single female toilet for the use of the office staff, the mechanics working in the workshop and their clients. It was frequently the case that the mechanics would use the ladies' toilet either because the mens' toilet was occupied or was dirty. The ladies' toilet was then left in a poor state. As a result, a lock was fitted to the ladies' toilet in late November or early December 2018. A key was available in the office. When necessary, the claimant used that key to enter the toilet. Very occasionally the second respondent (and others) used the ladies' toilet when the mens' toilet was occupied.

125. By this time the second respondent's mother was coming in to clean the premises from time to time. She borrowed the key and failed to return it. The claimant asserts that thereafter she would have to ask the second respondent for the key whenever she wished to use the toilet. We reject that. We are satisfied that had that been the case there would have been an exchange of text messages on the subject. We are satisfied that if the key was unavailable for a period of time, this was inadvertent and the period short.

126. We note that the claimant also complains of the locking of the finance cupboard at this time. She was told that she was told by the second respondent that this was because confidential materials were stored in it. In the absence of any evidence to suggest otherwise, this appeared to us to be a sensible and plausible justification.

127. We now turn to the alleged altercation between the claimant and the second respondent said to have been witnessed by Mr EF. The claimant says that the second respondent was raging and screaming at her with regard to a lack of financial information. She says that Mr EF tried to calm him down and, somewhat later, the second respondent told Mr GH and her that he did not want Mr EF to come into the office any more.

128. Mr EF recalls no such incident. We are satisfied that if it had occurred as described by the claimant then Mr EF would have recalled it. The claimant

was perceived by him to be "up against it" at this time, in late 2018. He considered that she was struggling and we have accepted that at around this time there were instances of the second respondent complaining to the claimant about her financial work. We consider it likely that Mr EF witnessed one or more such occasions, but the claimant has chosen to exaggerate what occurred. Mr EF continued to attend the office periodically after this time, just as before and was never instructed not to attend.

129. The claimant was not criticised for leaving the Christmas party early. There was a discussion, most probably shortly after her arrival on the following Monday morning, which dealt with two matters. Firstly, why she was dealing with out of hours calls at the party and, secondly, the quality of the venue. The second respondent believed that he had given instructions for the out of hours calls to be diverted to him, but he had either failed to do so or his instruction had been misunderstood. He accepted then (and during his evidence to us) that even though the number of calls was likely to be very limited, being the person who was to receive them would have significantly diminished the enjoyment of the party. However, both were agreed that the venue had been poor and the party far from successful. The second respondent was annoyed by this. He was not annoyed with the claimant.

130. The claimant was not left to clean the offices. Nor did she do more cleaning than others. All of those in the office did a certain amount of cleaning up after themselves, but latterly the second respondent's mother came in periodically to clean.

131. In December 2018 the first respondent had its computer system hacked. As a result, all passwords were changed. The second respondent created a new password for the claimant which was "raqlovesanal". We accept that the second respondent meant this to be humorous and that the wording was derived from comments that the claimant had made about her sex life.

132. At the time the claimant was the sole woman in the office and she was concerned about the password that the second respondent had chosen. We believe that she saw this in a different light from the sort of spur of the moment "jokes" and conversations about sex which had periodically taken place and we bear in mind that her relationship with the second respondent was more strained than it had been in the past for the reasons set out above.

133. The second respondent readily accepted in evidence that in so changing the password he had gone beyond the boundaries of acceptable office banter and he apologised.

134. The claimant could have changed this new password herself to something more acceptable to her. She claims that she did not do so because the second respondent forbade this saying that he needed to have a password that he could remember. We reject that. Either she did change it, or she left it because she was not as concerned about it as she now suggests. We

are of the view that if she had been as concerned as she now alleges, she would certainly have changed the password and would be likely to have complained in writing, most probably by text message.

135. The claimant's workload and her attitude to the local authority contract are, we believe, fundamental to understanding this period of her employment and the events on and after 24 December 2018. We have already noted a number of matters which added to the claimant's workload. We reject the claimant's contention that she was instructed to cancel a holiday at this time. There is no contemporary evidence of that and we are satisfied that if this had taken place there would have been evidence of this in text messages.

136. The claimant was still overworked and doing all that she could to work on the local authority contract. She was not in charge of that contract (that fell to Mr GH) but he was allowing her to do as much as she could, because (like her) his workload had significantly increased due to that contract and the absence of someone to do the work previously done by Ms OP. The situation was made more acute by the fact that Mr MN was now spending some proportion of his time learning to be an engineer. That meant that he was out of the office part of the time.

137. Mr GH had discussed with the claimant his desire to bring in an account manager to do almost all of the work on the local authority contract. She, however, hoped that if she showed that she was doing well in relation to the work on that contract, but generally overworked, the second respondent would allow her to manage the account and bring in someone else to do her other work, being the financial work she had originally been engaged to perform.

138. In fact, the second respondent and Mr GH considered that the claimant did not have the skills and experience necessary to manage the local authority contract. This was not because they thought that a woman could not do such work. The current Head of Drainage for the first respondent is a female engineer and Mr GH had worked with excellent female account managers in the drainage business before.

139. Because of her lack of experience, the second respondent and Mr GH were disinclined to have the claimant work on the local authority contract for any longer than was necessary prior to the arrival of an account manager. They were reinforced in this view by the fact that the claimant had proved herself to be very good at the job she was engaged to do and they wanted her to go back to doing it.

140. Matters came to a head on 24 December. On the day before the claimant and Mr GH had met with the local authority. The contract was progressing well. The claimant was processing new work generated by the contract, but with Mr GH providing the technical expertise.

141. On 24 December, the claimant met with Mr GH and the second respondent in the upstairs office to review financial matters generally and the progress of the local authority contract in particular. The claimant was told that they hoped shortly to engage an individual known to Mr GH as contract manager and that he would need to have the car which had hitherto been loaned to her. She told them that she could do the job and wanted to do it. She said that she should be allowed to relinquish her other duties and that somebody else could be engaged to undertake them. Both the second respondent and Mr GH sought to explain to the claimant why they considered that this would not work. In particular, they explained their view that an account manager for this contract would need to have significant drainage industry experience, which she lacked. They did not tell her, or in any way suggest, that she was not being considered for the job because she was a woman.

142. The claimant was extremely upset. She felt let down, believing that all her hard work of recent times had been for nothing. She put her feet on the desk in front of her, stared at the ceiling, rolled her eyes and said words to the effect that she could not be bothered any more. She would not engage with any further discussion of the business of the first respondent.

143. We have no doubt that the mood in the meeting was, by this time, tense and strained. However, there was no shouting, or screaming, or physical pushing by anyone.

144. As he could not get her to engage any further in business related discussions, the second respondent instructed the claimant to leave and come back when she could be bothered to engage. He did not tell her that he did not want her to work for the first respondent any more and she did not understand that to be the case.

145. She went down the stairs, followed by the second respondent. He asked her to leave the keys for the car and asked Mr MN to call her a taxi. She collected a few belongings, including her handbag, left the company telephone (and the car keys) on a desk and left the building. She did not wait for the taxi, but subsequently called her husband who picked her up.

146. The second respondent did not intend to dismiss the claimant and she did not understand that he was doing so. What is less clear to us is what was her state of mind at this time. She was very upset and disappointed about not being given the account manager job. On balance, we do not believe that when she left on that day she intended never to return, but we do consider that she was already wondering whether she would ever want to.

147. The following two days were bank holidays and the office traditionally closed until 2 January. Both the second respondent and Mr GH tried to contact the claimant by telephone from some time after the meeting on 24 December up to and including Boxing Day 26 December in the evening. The claimant did not answer their calls.

148. At 19:39 on the evening of 26 December Mr GH sent a text to the claimant's husband enquiring whether they had had a good Christmas and "is [the claimant's first name] ok?" His response was to say that they had had a lovely Christmas and "[Name] is fine thank you now she is not going back there". Mr GH's response was to say that he was "sorry to hear that she is not coming back" and asked "Has she thought it through. Would it help if I spoke to [the second respondent]".

149. The claimant's husband responded by saying "Mate me and [name] have spoke about it, working at that place is affecting our marriage and making [name] ill and I am not having that, I have been [name] husband for 16 years and have never spoken to her the way he does." In a subsequent text he added that she could earn the same as "a checkout girl in Tesco without all the shit and stress he gives her". Mr GH asked him to keep in touch and call him if there was anything he could do. The claimant's husband replied that he would do so.

150. In subsequent correspondence, which we shall deal with below, the claimant asserted that her husband's messages should not be taken as her resignation and stated that they were "not sent on my behalf nor with my instruction". We do not accept that assertion. We consider it to be inconsistent with an exchange of texts between the claimant and the second respondent on 2 January 2019.

151. That exchange began with a text from the second respondent in which he stated: "I have received your txt from [your husband] advising you have left and not coming back. Pls would you give me a call so we can sort out arrangements to collect any belongings you may have here." The response from the claimant stated: "It was a text due to the fact of you throwing me out of the office 15 minutes before leaving, when you told Paul Monk to get me a cab…". She went on to say that she had nothing of value that she wished to collect.

152. There was then a text discussion about the claimant paying for the cost of repairs to the car. She disputed that she was to blame for the damage. The second respondent had caused the cost of repair to be deducted from her final wages and that is the subject of the unlawful deductions claim. The second respondent now accepts that there was no provision in the claimant's contract of employment to permit such a deduction.

153. We note that the claimant had a telephone discussion with one of the engineers between Christmas and New Year in which she was told by the engineer that the second respondent had told him that she was off sick. We do not see the exchange as significant. We understand why the second respondent would have said that. He was hardly likely to explain to the engineer the circumstances of the claimant leaving the office on 24 December.

154. As a result of the exchange of texts with the claimant's husband, Mr GH sought legal advice from an organisation known as ELAS. That company

drafted a letter for him to send to the claimant. It was dated 28 December 2018, but it was not posted until 4 January. We see nothing sinister in this. It appears to us most likely that the original draft bore the date on which it had been composed and this was not changed when it was sent to the first respondent. It summarised the attempts to contact the claimant and the exchange of texts with the claimant's husband. It culminated with expressing regret, but accepting that the claimant would not be returning to work and asking that this be put in writing.

155. We need to say a little more about what was happening to the claimant in the period up to early January. We consider that she discussed matters with her husband after he collected her on 24 December. She explained to him what she saw as the unfair behaviour of the second respondent, laying emphasis upon the failure to give her the account manager's job, against the background of her hard work and long hours. She undoubtedly also referred to (and most probably exaggerated) the way that the second respondent had behaved towards her, in particular criticising her work. After those discussions she avoided speaking to the second respondent and Mr GH, but had decided, in discussion with her husband, that she would not return to the first respondent's employ.

156. We consider that her reason for resigning was that she had been denied the opportunity to become the account manager for the local authority contract. She believed that she could do the job and that her hard work since (in particular) August 2018 entitled her to be given it. She did not want to return to doing the financial work for which she had been employed.

157. The text that her husband sent in response to Mr GH's enquiry was sent with her knowledge and reflected the decision which they had jointly arrived at. It is for that reason that the claimant did not respond to the second respondent to say that the text from her husband (to which the second respondent expressly referred) did not reflect her view and/or that she wished to return. On 2 January the claimant saw her GP who recorded the following:

> "With partner very stressed runs finance and pt now has to do three people's jobs for six/twelve not sleeping more than two hours a night for several weeks. Diagnosis: stress at work."

158. She was given a fit note for six weeks. For completeness, she saw her doctor again in February and was issued with a further fit note for two weeks with a diagnosis of "work related stress". She next saw her doctor on 22 July 2019. This was an urgent appointment and within the history recorded by the doctor appears the follows:

> "Seen alone: very tearful, anxious and agitated, lives with husband, discovered he has been cheating on her, awaiting a tribunal for a case since Christmas, got sacked, low mood, anxious…"

159. For the first time she was then prescribed medication for "anxiety/depression".

160. The text message exchange between the claimant and the second respondent (referred to above) took place commencing at 10:17 on 2 January. The claimant was seen by her doctor at 21:14 on that same day. We have asked ourselves why the claimant would have sought a fit note if she considered that she had left her employment. We consider it most likely that either this represents the point in time at which she began to take advice, and/or that having reflected further on the matter she decided that she should not resign.

161. There is a dispute as to when the respondents first learnt of the existence of the fit note. It is referred to in a letter of 7 January from Mr GH as having been received "this morning". The claimant says that she hand delivered the fit note on 2 January, leaving it in the place where the first respondent's post was usually left, there being no letterbox. Whether it was left in that place late on the evening of 2 January or at some time thereafter, it did not come to the attention of the respondents until shortly prior to the sending of the letter dated 7 January. As with the letter dated 28 December, this was drafted by the first respondent's representative, as were all subsequent communications.

162. The claimant was by now receiving legal advice and she wrote her email of 8 January in response to the letter dated the previous day with the benefit of that advice. This is the letter which emphatically denied that the claimant had resigned by way of text messages from her husband. It asserted that she remained an employee of the first respondent and asked the first respondent to confirm this.

163. By a letter of 8 January, the first respondent reasserted that the claimant had resigned. However, the letter asserted that the resignation was by leaving her phone, office keys and vehicle keys on her desk after leaving a meeting on 24 December. It was said that her resignation had been accepted after she did not respond to efforts to contact her in December and January.

164. On 28 January 2019 the claimant received a letter from the National Employment Savings Trust informing her that the contributions previously made towards her pension by the first respondent had ceased as she was no longer an employee. The first respondent had stopped the contributions because it believed that to be the case.

165. On 30 January 2019 the claimant submitted a 10 page grievance. It included allegations under the heading "Sexism, Verbal Abuse and Harassment by [the second respondent]". Many, but not all, the allegations now said to amount to harassment and sex discrimination are included. There is also a detailed analysis of the events from 24 December 2018 onwards, including the various exchanges of texts and letters. We note that whilst the grievance does refer to the claimant having complained to the second respondent and Mr GH "on numerous occasions", no details are given of these alleged complaints. It is not said that written complaints had

been made and not answered. We consider that the lack of particularity is because there had been no written complaints of the kind the claimant now alleges. The only ones had been those with which we have dealt above and which do not refer to the allegations of discrimination which she now makes.

166. The claimant was cross examined about why she had not raised a grievance much earlier on in time, if the situation was as bad as she has now described. She claimed to have been unaware of the existence of a grievance procedure until sent a copy of it after 24 December 2018. She struggled to explain when and in what context she was sent a copy of the grievance procedure and the contemporaneous correspondence reveals neither a request for, nor the sending of, such a document. We consider that she was always aware of its existence, it being referred to in her signed contract of employment. Her evidence as to these matters was confused and unsatisfactory.

167. The first respondent was advised to commission an independent person to examine the grievance. It did so. It located, on the internet, an apparently suitable person who held herself out as undertaking such work. She sent a series of questions to the claimant and interviewed the second respondent, Mr GH and Mr MN.

168. As the claimant had not responded to her questions and had declined to make herself available for interview, suggesting that her grievance set out matters in sufficient detail, a grievance outcome was promulgated in a six page letter dated 20 February 2019. The claimant objected to this course, claiming that she had not been given the opportunity to respond to the questions sent to her. She made various comments on the grievance outcome letter and provided answers to the questions posed, but declined to be interviewed face to face or by telephone.

169. The claimant contended that she had not received the questions as they had gone into her ‘spam’ folder. We doubt that this was the case, in the light of her receipt of other communications and what she said at the time, but this is of little relevance. She was given further time to respond and did so, as we have noted above.

170. As a result of the claimant’s comments and answers to questions, the independent person further interviewed Mr GH and the second respondent and interviewed Mr KL and Ms OP. A revised outcome letter was then sent on 30 March 2019. It found against the claimant as regards most of her complaints. It recommended that the first respondent should create a Dignity at Work policy and a Code of Conduct and should provide workplace behaviour training for staff. It also recommended that the claimant be provided with a detailed breakdown of her final salary payment.

171. On 9 April 2019 the claimant wrote asserting that she had been constructively dismissed on the basis that the first respondent had persistently failed to pay her salary since early January 2019.

The Law and the Parties Submissions

172. The parties provided written submissions and each spoke to them. There was substantial agreement as to the relevant law. The controversial elements in these submissions related, in the main, to issues of fact and how these should be approached. Hence, we make some observations on the parties' submissions when dealing with the law, but deal with most disputes when considering the application of the law to the facts.

Unfair Dismissal

173. If we were to find that there was a direct (as distinct from a constructive) dismissal at some point in time, it is not contended that it would be a fair dismissal. As no arguments were advanced to us in this regard, we need not summarise the law as to the reason for dismissal, or as to reasonableness.

174. It was also accepted that if the claimant had not resigned (or been dismissed) in January 2019, then the failure to pay wages from then until early April 2019 would amount to a breach of a fundamental term of her contract such that she would be entitled to accept the first respondent's repudiation of it by resigning on 9 April 2019.

175. It was also not disputed that if the claimant's allegations regarding the respondents' conduct in the lead up to any resignation in January 2019 were to be substantially made out, then that conduct was repudiatory of her contract of employment and her claim for constructive unfair dismissal would be bound to succeed.

176. If only parts of the allegations were made out then we would have to ask ourselves whether those matters, taken as whole, amounted to a repudiatory breach of contract and whether the claimant resigned promptly and in response to that breach (see, eg, Western Excavating ECC Ltd v. Sharp [1978] IRLR 27).

177. The term of the claimant's contract of employment here relied upon is that of trust and confidence. Such a term is implied into all contracts of employment. An employer must not, without reasonable and proper cause, act in a manner calculated or likely to destroy, or seriously damage, the necessary trust and confidence between employer and employee. Because a breach of such a term would be destructive of trust and confidence (or would seriously damage it) it is accepted that any such breach is necessarily repudiatory.

178. We were reminded of the correct approach to a series of matters said cumulatively to amount to a repudiatory breach of that implied term as to trust and confidence. We were referred to Lewis v. Motorworld Garages Ltd [1986] ICR 157 and Omilaju v. Waltham Forest LBC [2005] ICR 481. From those cases the following propositions can be derived:

178.1 We should look at the cumulative impact of the various events relied upon. It is not necessary that, taken individually, each should amount to a repudiatory breach, or even a breach, of contract. It is the cumulative impact on trust and confidence that matters.

178.2 We should look at the impact on the employee rather than the subjective intention of the employer. That subjective intention may be of some relevance to help establish the objective intention of the employer.

178.3 The breach of contract need not be the sole cause of the employee's leaving. The proper approach is to ask whether the employee's leaving was in response to the repudiatory breach, it need not be the main, or effective, cause of the departure.

179. A failure properly to investigate allegations of sexual harassment, or to treat alleged incidents with sufficient gravity may constitute a breach of the implied term as to trust and confidence (see Bracebridge Engineering Ltd v Darby [1990] IRLR 3).

180. It is not disputed that a resignation cannot be unilaterally withdrawn. Hence, an individual who has resigned, but changes their mind, is dependent upon the employer agreeing to the continuation of their employment. In the absence of such agreement, the resignation stands and the contract will terminate at the expiry of any notice period, or remains terminated if the resignation was to take effect immediately.

181. If a claimant utters words amounting to a resignation that is not necessarily conclusive to show that the claimant resigned. We need to ask ourselves whether those words were spoken in the heat of the moment and, if so, this may constitute "special circumstances" such that it would be unreasonable for an employer to rely upon the resignation (see, for example, Kwikfit (GB) Ltd v Lineham [1992] ICR 183). Where it would be unreasonable for an employer to assume that words amounting to a resignation should be taken at face value, a reasonable period of time should be allowed to elapse and if circumstances arise during that period which put the employer on notice that further enquiry is desirable to see whether resignation was really intended and can properly be relied upon, then an employer who does not carry out further enquiries runs the risk that evidence may ultimately be forthcoming which indicates that in the "special circumstances" of the case in question, on an objective view of the facts, it was not appropriate to interpret the words used as amounting to a resignation.

Wrongful dismissal

182. The submissions made to us in this regard were entirely submissions of fact. They proceeded from the proposition that the law in this area was trite. For completeness we summarise the law. It is here a matter for us to decide whether or not the employer was in breach of contract. In practice,

this often becomes an enquiry as to whether or not the employee had been in repudiatory breach of contract when dismissed. In this case it is not disputed that if the claimant can establish the facts to be broadly along the lines she contends for, that would amount to a repudiatory breach of contract on the part of the employer. No repudiatory breach of contract on her part is relied upon. Hence, if she was dismissed, there is no question but that she ought to have been dismissed on notice.

Sex discrimination - direct discrimination and harassment

Direct discrimination

183. The claimant brings claims of both direct discrimination and harassment relying upon the same list of allegations of misbehaviour on the part of the second respondent and, in a few instances, Mr GH.

184. The direct discrimination claim is brought under s.13 of the Equality Act 2010. Unlike in the case of harassment, the exercise here required is a comparative one. What needs to be established is that the claimant has been treated less favourably than the alleged discriminator treated or would have treated others in a materially similar situation, but where those comparators lack the protected characteristic. The comparator relied upon here is a hypothetical male comparator. It must be shown that any differential treatment was because of the protected characteristic of sex.

185. If the claimant shows such less favourable treatment and a difference in sex, then the burden may shift to the respondent to provide an adequate explanation for this conduct, otherwise an inference of discrimination can be drawn by reason of s.136 of the Equality Act. We have reminded ourselves that it is not enough simply to show unfavourable treatment and the presence of the protected characteristic. The section provides that if there are facts from which we could conclude, in the absence of any other explanation, that the respondents had directly discriminated against the claimant (or harassed her) then we must hold that this had occurred unless the respondents show that they did not discriminate against or harass the claimant. As the Court of Appeal noted in Madarassy v Nomura International plc [2007] IRLR 246, the words "could conclude, in this context mean that a reasonable Tribunal could properly conclude that from the evidence before it".

186. We have sought to follow the advice given by (for example) Underhill LJ in Amnesty International v Ahmed [2009] IRLR 884 to avoid looking at each incident relied upon by the claimant in isolation and seeking to form a view incident by incident as to what happened and, at the same time, whether this amounted to an act of unlawful discrimination. Instead, before considering whether or not particular acts amounted to acts of discrimination, we have sought to make our findings of fact on all of the acts relied upon so as to enable us to consider each allegation of an act of

discrimination in its context and against the background of all of the other acts relied upon.

187. We accept that just because behaviour can be described as "banter" does not mean that it cannot (or does not) constitute sex discrimination. The obvious inequalities in the relationship between an employer and an employee, or between senior and junior employees, may lead to unwilling participation in such "banter" and a failure to complain. We accept that this may be particularly so in the case of a small employer where the alleged perpetrator is, in effect, the owner of the business and there is no obvious way of complaining to an independent person about his conduct. In this context we have looked at the case of Munchkins Restaurant v Karmazyn (UK EAT 0359/09).

188. Although the claimant here relies upon a chronicle of allegations, it is important for the Tribunal also to consider each individually. A single act can amount to unlawful discrimination and may do so even if the respondent has satisfied the Tribunal either that other acts relied upon did not take place or can be explained in a non-discriminatory way.

189. It is no defence to a finding of less favourable treatment on the grounds of sex that the discriminator had a benign motive, or did not intend to discriminate (see Amnesty International).

190. With regard to the application of the "but for" test to the issue of direct discrimination and its limitations, we were referred to paragraphs 26-30 of the judgment in Amnesty International. There the learned judge set out the key passages from the leading authorities commenting upon the appropriate approach to the key question of why the complainant received the less favourable treatment relied upon. Was it, to put the matter in terms of this case, because of her sex, or for some other reason? That question has to be distinguished from the very different question of why the claimant was treated less favourably because of her sex. We recognise that we need to be careful to address ourselves to the correct question.

191. We also note the importance of distinguishing between treatment which is different and that which is 'less favourable'. As was stressed by the House of Lords in West Yorkshire Police v. Khan [2001] ICR 1065, the statutory requirement is for 'less favourable' treatment to be established. Uniform or dress policies which treat men and women differently do not necessarily treat the women (or men) less favourably than a comparator of the opposite sex would be treated. As Lord Scott said, there must be a quality in the treatment that enables the complainant reasonably to complain about it. We were not addressed on this by the parties' representatives. It seemed to us implicit in their approaches to the law that both accepted that it would not be sufficient, without more, to establish less favourable treatment on the ground of sex that the claimant was the subject of humorous comments which were referrable to her status as a woman.

Harassment

192. S.40 of the Equality Act provides that an employer must not harass its employees. S.110 of the Act provides for an employee (in this case Mr CD) to be personally liable for acts for which his employer (the first respondent) would be liable by virtue of s.109 of the Act.

193. Harassment itself is defined in s.26 of the Act as follows:

> "Harassment
>
> (1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if –
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b)
>
> (3) A also harasses B if –
>
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex.
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
>
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect."

194. We must first consider whether the respondents have engaged in unwanted conduct related to the characteristic of sex or in unwanted conduct of a sexual nature. If that is established then we need to proceed to consider the purpose (a subjective test), and the effect (an objective test, with the subjective elements referred to below) of that conduct. If the conduct has

the forbidden purpose or effect set out in sub-section (1)(b) then harassment is made out. In deciding whether the conduct has the effect referred to then we must look at the claimant's perception of that conduct, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

195. As already noted, unlike direct discrimination, no comparator is needed in the case of a harassment claim. However, much of the guidance in the authorities (summarised above) in relation to whether single acts are sufficient, how to examine the conduct relied upon in context, how to approach assertions that the behaviour was mere "banter" and the fact that benign motive is not a defence are all relevant here just as they were in relation to direct discrimination.

196. Once again, the fundamental issue in this case concerns the facts. To what extent do we accept that they are as alleged by the claimant (or the respondents)? Did the behaviour, insofar as established, have the effect on the claimant which she describes, having regard to the matters set out in sub-section (4)?

Victimisation

197. Victimisation is defined in s.27 of the Equality Act. In essence, the question in this particular case is whether the respondents subjected the claimant to a detriment because she had done something for the purposes of or in connection with the Equality Act. We are not here concerned with the bringing of proceedings or giving evidence for the purposes of or in connection with the Act. It would be enough that the claimant had made an allegation (whether express or not) that the respondents had contravened the act.

198. To succeed the claimant has to show that the second respondent and/or Mr GH (for whom the first respondent is vicariously liable) had been influenced in the unfavourable (detrimental) treatment of her by her doing a protected act. It is clear from Aziz v Trinity Taxis Ltd [1988] ICR 534 that the doing of the protected act need not be the sole motivation for the detriment and conscious motivation does not have to be established (see Nagarajan v London Regional Transport [1999] IRLR 572).

199. Again, the guidance given by the higher courts (eg, the EAT in Qureshi v Victoria University of Manchester [2001] ICR 863) as regards the proper approach to the various allegations taken as a whole, as well as individually, is equally applicable here.

200. As protected acts, the claimant relies upon the various complaints that she says that she made about her treatment, including her grievance.

Unlawful deduction from wages

201. The first respondent accepts that it made an unlawful deduction from the claimant's final (as it claims) payment of wages in respect of the damage to the car which had been loaned to her. As the claimant had not signified in writing her agreement to the making of the deduction, and nor did her contract of employment contain a relevant provision, then the deduction of the sum in question was necessarily an unlawful deduction under Part 2 of the Employment Rights Act 1996. As regards that deduction, we need to consider the claim in time point (see below).

202. When the issues were identified at the preliminary hearing two other alleged unlawful deductions were identified. The first related to the non-payment of wages between 2 January 2019 and the purported resignation on 9 April 2019. The second related to statutory sick pay said to be payable during that period. No submissions were presented to us (orally or in writing) in respect of either such alleged deduction. Of course, so far as the evidence was concerned it was clear that the claimant was paid neither wages nor statutory sick pay over the period in question. Non-payment of wages can amount to a deduction (see s.13(3) of the 1996 Act) and the definition of wages includes statutory sick pay (see s.27(1)(b) of the 1996 Act).

Claim in time issues

203. It is necessary here to distinguish between the two different statutory regimes applicable to the various claims. So far as the claim for unfair dismissal is concerned (and the claims for unlawful deductions from wages) the statutory regime permits a claim to be presented after the primary limitation period only if it was not reasonably practicable to present the claim within that period. If that is established by a claimant, then the claimant has to persuade the Tribunal that the claim was presented within a reasonable period after the primary limitation period expired.

204. The claimant was in receipt of legal advice from an early point in time after 24 December 2018. No submissions were advanced to us with regard to this issue in respect of these two types of claim. We bear in mind that the claimant's primary case is that her employment ended either by dismissal in December/early January 2019 or by resignation in circumstances amounting to constructive dismissal in early April 2019. We also bear in mind that her unfair dismissal claim is, in effect, duplicated by her discrimination claim based upon identical facts where (see below) the statutory regime dealing with time limits is different and likely to be more favourable to her. The burden of proof is on the clamant and in the absence of submissions and, indeed, of evidence specifically directed to this point, we propose not to deal with the law in any greater detail than as set out above.

205. So far as the discrimination claims are concerned the statutory provisions on time limits are set out in s.123 of the 2010 Act. The primary limitation period is three months starting with the date of the act to which the complaint relates. The secondary limitation period is "such other period as

the Employment Tribunal thinks just and equitable". We also note that where conduct extends over a period of time it is to be treated as done at the end of the period.

206. The respondents sensibly accepted that if the claimant's contentions of fact were found to be substantially correct, the conduct of which she complains would be conduct extending over a period. It was also accepted that if that was the case, but that the claimant was found to have been dismissed (directly or constructively) in December/January 2019 then the Tribunal would be likely to find it just and equitable to extend time (if necessary) given the lack of prejudice to the respondents, especially given that many of the matters now complained of were the subject of the grievance raised shortly after her employment would then have been found to have ended.

207. In the circumstances we do not think it necessary to set out the law in this area in any great detail. The discretion we have is a wide one, albeit that the starting point for its exercise must always be that Parliament has prescribed a period (three months) within which claims ought to be made. We have in mind the guidance given by higher courts in the context of extending time in personal injury litigation and the guidance of the higher courts in relation to this particular kind of extension of time in an employment context, namely that we should not treat earlier guidance as a kind of check list.

Conclusions – the application of the law to the facts as found

208. We shall begin by considering the discrimination claims. As the same matters of fact are relied upon in respect of both the direct discrimination and the harassment claims, we shall deal with those two types of claim together allegation by allegation. We shall then turn to the victimisation claim. Following that we will deal with the unfair dismissal and wrongful dismissal claims and that for the unlawful deductions from wages. We shall not deal with the claim in time issues on an issue by issue basis, but deal with them all cumulatively at the end of our reasons.

209. As regards each allegation in the list of issues, we shall begin by setting out the issue. Where appropriate we have paraphrased certain passages as they appeared in the list and corrected obvious errors in formulation, or language.

210. "From about September 2017 onwards Mr CD subjecting the claimant to sexual innuendo."

    210.1 From prior to September 2017 and thereafter Mr CD (and others) directed comments containing sexual innuendo to the claimant and others and she did likewise to them.

    210.2 Mr CD did not treat the claimant less favourably in this regard than he treated others, both male and female. The sexual innuendos were not directed towards the claimant because of her sex, albeit

that some related specifically to women and others to the claimant herself. The conduct was not unwanted conduct and it did not have either the purpose or the effect set out in s.26(1)(b) of the 2010 Act.

211. "From about September 2017 onwards Mr CD losing his temper and subjecting the claimant to verbal abuse, discriminatory comments and petty malicious comments."

    211.1 From time to time Mr CD would raise his voice towards the claimant as he would towards others. This was more prevalent (particularly towards the claimant) from about August 2018 onwards when the claimant had taken on more work, particularly in relation to the local authority contract and was being significantly less efficient in undertaking her financial work.

    211.2 Mr CD did not subject the claimant to verbal abuse.

    211.3 The claimant did not receive discriminatory comments from Mr CD, nor petty malicious comments. Comments containing sexual innuendo were directed to her, but we have dealt with this above.

    211.4 In those circumstances, the factual basis for the claims of direct discrimination and harassment in this regard is not made out.

212. "From about January 2018 onwards, Mr CD rubbing the claimant's shoulders."

    212.1 Mr CD did not rub the claimant's shoulders with the frequency complained of. There was a single instance of his doing this as a response to her obvious distress.

    212.2 In this regard Mr CD did not treat the claimant less favourably than he would have treated others. He would have so behaved towards any member of staff in similar circumstances and had put his hands on the shoulders of males in a similar manner and for similar reasons in the past. His treatment of the claimant was not because of her sex.

    212.3 The conduct was not unwanted conduct, even though it had not been requested. It had neither the purpose nor the effect referred to in s.26(1)(b) of the 2010 Act.

213. "From about January 2018 onwards, Mr CD speaking to the claimant in aggressive and/or misogynistic manner."

    213.1 We regard this allegation as being an alternative summary of the allegations already dealt with and we dismiss it for the same reason.

214. "From about January 2018 onwards, Mr CD, in front of colleagues, asking the claimant to show him her breasts."

214.1 This did not happen. Hence, the factual basis for the allegations is not made out.

215. "From about January 2018 onwards, Mr CD remarking that if the claimant was not married to her husband, he would bend her over the desk."

215.1 In this regard the claimant was certainly treated differently when Mr CD made comments along these lines, but establishing a difference in treatment is not the same as establishing less favourable treatment for the purposes of direct discrimination. The claimant was treated differently from a hypothetical man because the comment was specific to her as a woman. However, other similarly jovial comments about sex were made by Mr CD to others, including male members of staff and by the female members of staff (including the claimant) to and in the presence of the men.

215.2 Comments such as that complained of were made by Mr CD, and others, in the context of the claimant giving graphic descriptions of her sex life and were obviously of a sexual nature.

215.3 The conduct of which she now complains was not unwanted and had neither the purpose nor the effect required by s.26(1)(b) of the 2010 Act.

216. "Leaving the claimant alone in the office from January 2018."

216.1 Save on the odd occasion the claimant was not left alone in the office from that date onwards. Until August 2018 the claimant was almost always in the office together with one or other of Ms ST and Ms OP (and, usually, Mr GH). From time to time thereafter she was accompanied in the office by one of the female temporary staff. In addition, there were other male members of staff regularly present.

216.2 Hence, the factual substratum underpinning this allegation is not made out.

216.3 Insofar as the claimant was alone in the office (whether completely alone or with only Mr CD in attendance) this was very occasional and had nothing whatsoever to do with her sex.

217. "From about January 2018 Mr CD expecting the claimant to work through her lunch breaks."

217.1 We have found that there was no requirement or expectation that the claimant worked through her lunch breaks. However, as we have found, the isolation of the offices, the fact that Mr CD frequently paid for food to be brought in for everyone and the fact that office staff regularly did eat lunch at their desks whilst

sometimes still carrying on some work, led to peer pressure to continue to adopt that approach to lunch breaks.

217.2 In this regard the claimant was treated in exactly the same way as all other members of staff. She was not treated less favourably and such treatment as we have identified was unrelated to her sex. Furthermore, this practice was not unwanted by the claimant, in the sense that had she wished to take a lunch break away from her desk she could have done.

217.3 We consider that the conduct involved (which we emphasise was principally a result of the claimant's choice despite the presence of peer pressure) was not expected by Mr CD (in the sense of his requiring it).

217.4 Furthermore, the purpose or effect required by s.26(1)(b) of the 2010 Act is absent. The claimant was quite happy regularly to eat her lunch at her desk with her colleagues.

218. "From about January 2018 onwards Mr CD directing out of hours calls to the claimant without her knowledge or consent."

218.1 Out of hours calls were not directed to the claimant from this point in time or, indeed, from any particular point in time. There was a rota for taking out of office calls and she was one person on that rota. Hence, the factual substratum upon which this claim for discrimination relies is not made out.

218.2 There was one particular occasion on which calls were directed to the claimant, namely during the evening of the Christmas party in December 2018. The direction of the calls to the claimant on that occasion had nothing to do with her sex. Furthermore, whilst this was certainly "unwanted" it had neither the purpose nor the effect referred to in paragraph 26(1)(b) of the 2010 Act. It impacted adversely on her enjoyment of the evening, but the poor quality of the venue (and what it provided) had a far greater impact.

219. "From about January 2018 onwards Mr CD calling the claimant's personal mobile when she was on annual leave and on occasion calling the claimant's husband when he could not get hold of her."

219.1 Such evidence as we have seen of the exchanges of text messages between the claimant and Mr CD whilst she was away on holiday suggests that far from resenting this conduct, she was a willing participant in it. We consider that unsurprising given the nature of the relationships between those working in the office and the fact that the claimant's husband was also a friend of Mr CD.

219.2 Insofar as the claimant did receive calls or texts from Mr CD whilst on holiday, we are satisfied that this had nothing whatsoever to do

with her sex, was not unwanted and, indeed, concerned her not at all.

219.3 There was one particular occasion on which both Mr CD and Mr GH sought to contact the claimant's husband. This relates to the immediate aftermath of the events of 24 December 2018. Mr GH contacted the claimant's husband because he could not get hold of her. We are quite satisfied that in the circumstances this was simply an alternative method of establishing the claimant's wellbeing. It was unrelated to her sex.

219.4 This was unwanted conduct in the sense that she wished to avoid contact with either Mr CD or Mr GH, but that unwanted conduct had neither the purpose nor the effect required by s.26(1)(b) of the 2010 Act.

220. "From about January 2018 Mr CD failing to offer the claimant an increase in salary despite the claimant's responsibilities increasing."

220.1 Mr CD was not cross-examined about the failure to increase the claimant's pay from January 2018 onwards, albeit the fact of there having been only one increase during her employment was briefly referred to.

220.2 We do not consider that the mere fact of a failure to increase pay would be something from which we could conclude, in the absence of any other explanation, that there had been an act of sex discrimination. The significant increase in work was only from August 2018 onwards and was temporary. Therefore, we do not think that there arose a burden on the first respondent to explain why the claimant's pay was not increased.

220.3 In those circumstances, the claims of direct discrimination and harassment in this regard cannot succeed.

221. "In approximately May 2018 Mr CD standing directly behind the claimant in a sexually suggestive manner as she was bent over a computer to show Mr MN something on the screen."

221.1 We found that something of that kind was likely to have occurred. However, we reject the claim for discrimination based upon it, our reasoning being the same as that in respect of the remark made with regard to bending her over the desk.

222. "In approximately June 2018, Mr GH mimicking Mr CD by shouting at the claimant and asking her "who the fuck was [she] to think she could roll into work whenever she wanted."

222.1 Mr GH did periodically mimic Mr CD. We have found that it is more likely than not that there was an occasion when the claimant was

late and Mr GH (mimicking the voice of Mr CD) said something along the lines alleged. He was shouting only for effect and not because he was cross with the claimant, nor suggesting that Mr CD would be. Nor did the claimant think that either was the case.

222.2 In treating the claimant in this way Mr GH was not treating her less favourably than he would have treated a hypothetical male in similar circumstances. This was a further example of office humour. Hence, the claimant was not treated less favourably than a hypothetical male would have been treated and the treatment was unrelated to her sex.

222.3 Furthermore, we are satisfied that this was not unwanted conduct and it lacked the purpose or effect referred to in s.26(1)(b) of the 2010 Act.

223. "In approximately June 2018, Mr GH stating he could get rid of the claimant if he wanted. The claimant burst into tears at this and told Mr GH that she felt treated differently at the respondent because she was a woman."

223.1 This event did not happen. Hence, no claim for direct discrimination or harassment can be based upon it.

224. "On or around 1 October 2018, Mr CD losing his temper with the claimant because he decided to find a new supplier of telecoms and blamed the claimant for this."

224.1 There were discussions about telecoms suppliers and Mr CD did express concern about the current supplier. However, no blame in this regard was attributed to the claimant. Hence, the factual substratum required for these allegations of discrimination is not made out.

225. "In approximately May or June 2018 Mr CD blaming the claimant for the website design firm not being able to design the website within the respondent's desired timeframe."

225.1 Mr CD did express concern about the lack of activity on the part of the website designers, but no blame was attributed to the claimant. Hence, once again, the factual substratum for this allegation is not made out.

226. "From approximately July 2018 onwards Mr CD having a habit of constantly talking over the claimant, losing his temper and becoming verbally abusive if the claimant tried to continue to voice her opinion."

226.1 Mr CD did periodically talk over the claimant and other members of staff (male and female). Much of the first respondent's business was conducted by telephone and if Mr CD heard the claimant (or anyone else) giving what he thought could be incorrect information

to a potential client, he would interrupt them. He did not lose his temper, although he might periodically raise his voice. The claimant was able to and, indeed, encouraged to voice her opinion.

226.2 In those circumstances the factual substratum for the various elements of this allegation is not made out.

227. "Around August 2018, Mr CD informing the claimant that he would dismiss Ms OP and any other female friends the claimant made at the respondent."

227.1 The claimant was not so informed by Mr CD. Indeed, the dismissal of Ms OP was in part occasioned by the information which the claimant gave to Mr CD about her.

227.2 Once again, the factual substratum for the allegation is not made out.

228. "In September 2018 Mr CD dismissing Ms OP and making the claimant cover Ms OP' roles and responsibilities with no corresponding increase in the claimant's pay to reflect these additional responsibilities."

228.1 We have already dealt with the general allegation that the claimant's pay was not increased when her role and responsibilities increased.

228.2 The claimant was not made to cover for Ms OP. She volunteered to do so on a temporary basis. Temporary employees were brought in to assist her, but in each case she determined that their performance was not good enough.

228.3 Once again, the factual substratum for the allegations of discrimination is not made out.

229. "Mr CD telling the claimant to sever ties with Ms ST. The claimant was forced to sever all ties with her, including connections over social media, Mr CD expressing his displeasure that the claimant was still in contact with Mr Jones."

229.1 The claimant was not instructed to sever ties with Ms ST, hence the factual substratum for this allegation is also not made out.

230. "In approximately September 2018 Mr CD shouting at the claimant about engineers not being out of the office early enough (at 10am)."

230.1 September 2018 is just after Ms OP left the first respondent's employment and the claimant had taken over parts of her role, which had included dispatching engineers. We think it more likely than not that there had been a conversation about the fact that engineers needed to leave earlier than they were doing and we accept that Mr CD may well have showed his annoyance by raising his voice.

230.2 That he discussed this with the claimant was because she had taken on aspects of Ms OP' role and the showing of annoyance by raising his voice had nothing whatsoever to do with her sex, it was to do with the fact that this was now part of her job. Mr CD would have behaved in precisely the same manner regardless of the sex of the person undertaking that work.

230.3 In the circumstances, the claim for direct discrimination cannot be made out.

230.4 That Mr CD became annoyed with the claimant would amount to unwanted conduct, but it had neither the purpose nor the effect described in s.26(1)(b). We accept that the claimant did not welcome Mr CD's reaction, but we consider this to be some considerable way away from violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

231. "In about September 2018, Mr CD coming into the claimant's office and screaming about what was Mr GH doing in the office as he should be out getting new business. This is said to have taken place after Mr CD had agreed that Mr GH could assist the claimant."

231.1 Mr GH's role was not to assist the claimant. He was the person in charge of the business. However, we accept that from time to time he did assist the claimant, as he would assist anyone else working within the office.

231.2 At no stage did Mr CD complain (whether by screaming or otherwise) about Mr GH's presence in the office. As we have found, Mr GH spent most of his time in the office, albeit that he would occasionally go to visit sites, or clients and prospective clients.

231.3 In the circumstances, the factual substratum for this allegation is not made out.

232. "In about September 2018 Mr CD ignoring her complaint that Mr GH was failing to utilise the new IT systems, thereby causing an increase in the claimant's work."

232.1 Mr GH made no secret when giving evidence of his lack of IT skills. We have no doubt that the claimant did complain about this both to Mr GH and to Mr CD and that his lack of skills did have an adverse impact on her work. This was of particular significance because, as we have found, the claimant was increasingly busy at this time both because of the additional work taken from Ms OP and, in particular, her desire to do as much work as possible in relation to the local authority contract.

232.2 We have no doubt that Mr CD did (indeed, probably could) do nothing about Mr GH's lack of IT skills. This had nothing to do with the claimant's sex and his failure to address the matter would have been the same whoever occupied her position and whatever their sex.

232.3 In the circumstances, the claimant was not treated less favourably in this regard because of her sex.

232.4 Furthermore, although the failure to address Mr GH's lack of IT skills might be said to amount to unwanted conduct, in addition to this having nothing to do with her sex, it did not have the purpose or effect required by s.26(1)(b) of the 2010 Act.

233. "In November 2018, Mr CD refusing to renew a licence for an IT package which further hampered the claimant's ability to work efficiently."

233.1 This issue was not explored in cross-examination. We do not consider that the failure to renew an IT licence (if it took place) would justify reversing the burden of proof. Therefore, in the circumstances, the complaints based upon this allegation cannot succeed.

234. "From around September 2018 onwards, Mr CD oscillating between praising the claimant for her hard work and directing upsetting verbal abuse at the claimant, claiming she was "not pulling her weight".

234.1 We accept that from after the departure of Ms OP, Mr CD both praised the claimant periodically and also criticised her periodically. We have found the criticism to be justified, because it related to failures adequately or timeously to perform the financial aspects of her role.

234.2 The criticisms of the claimant had nothing to do with her sex. A post holder of either sex performing in the way that she was would have been treated in the same way by Mr CD.

234.3 We have no doubt that the criticisms of the claimant did amount to unwanted conduct. However, as we have already stated, they had nothing to do with the claimant's sex.

234.4 Furthermore, although she found the criticisms upsetting, they had neither the purpose nor the effect of violating her dignity, or creating the kind of environment at work described in s.26(1)(b) of the 2010 Act. Also, it would have been unreasonable for them to have that effect given that the criticisms were justified and the claimant's high work load was in significant part a consequence of her taking on as much of the local authority contract work as she could and prioritising it over her more routine work. She was told that she was taking on too much, but did not seek to address this.

235. "In July/August 2018 upon the claimant winning a new account, Mr CD disparaging her efforts publicly in front of Mr GH, Ms OP and Mr MN."

    235.1 This alleged disparagement did not happen, hence the factual substratum for this allegation is not made out.

236. "In approximately October 2018 the claimant was upset following an incident with Mr CD and cried to Mr GH about the way in which Mr CD spoke to her and complained that he never spoke to men in this manner."

    236.1 We take this to be a reference to the alleged incident on 30 October which led to the writing of the email letter sent at 12:56 on that day and the exchange of texts on the following day.

    236.2 As we have found, there was no such incident as described by the claimant in her evidence (relating to an alleged theft of £250,000). However, we have also found that Mr CD did raise complaints and concerns regarding the claimant's performance of her core financial duties at around this time, which coincided with some problems relating to her marriage. She and Mr GH did discuss how much work she was doing and Mr GH told her that she was taking on too much. At no time did she complain that the second respondent never spoke to men in the manner in which he spoke to her.

    236.3 It follows from the above that the factual substratum for this allegation is also not made out. However, it is appropriate for us to summarise the findings that we have made with regard to Mr CD's behaviour towards the claimant at this time, asking ourselves whether they evidence either direct discrimination or harassment.

    236.4 We do not consider either to be the case. We are satisfied that Mr CD's behaviour towards the claimant in these regards was unrelated to her sex and that he would have behaved in a similar manner towards anyone performing their work in the way in which she was.

    236.5 Undoubtedly, as we have already noted, the criticisms of her work were unwanted. However, they had neither the purpose nor the effect specified in s.26(1)(b) of the 2010 Act. We also note that we consider that it would not have been reasonable for the conduct in question to have that effect, given that we are satisfied that the criticisms made of the claimant's performance were justified.

237. "In or about October 2018 Mr CD directing the claimant to leave her desk and to collect vans. The claimant had to ask her husband who does not work for the respondent to come with her as the job required two people. The claimant had to direct calls and emails to her work mobile so that she could deal with them along the journey."

237.1 At some point in time Mr CD did ask the claimant to collect a van. This was a two-person job. Ordinarily, another member of staff would have been involved. We accept that on this occasion the claimant asked her husband to assist. We have no doubt that she dealt with calls and emails at appropriate times during the exercise of collecting the van and returning to the office.

237.2 We do not accept that in making the request Mr CD treated the claimant less favourably than he would have treated a male member of staff. The making of this request to the claimant had nothing whatsoever to do with her sex.

237.3 In those circumstances the claim for direct discrimination cannot succeed.

237.4 As to the claim for harassment, it cannot succeed because even if the conduct was unwanted, it had nothing whatsoever to do with the claimant's sex.

237.5 We have grave doubts as to whether the conduct can properly be described as "unwanted". Certainly, we have no doubt that the claimant would rather have continued to do her work in the office, but it is clear that helping out in such ways with the running of the business fell within the ambit of her role and we consider that the concept of "unwanted conduct" requires something more than being asked (or even required) to do something which falls within the scope of one's role, without more. In any event, the conduct lacked the purpose or effect required by s.26(1)(b) of the 2010 Act.

238. "On or around 2 October 2018, in relation to a temporary member of staff leaving the respondent, Mr CD telling the claimant that she (the claimant) should not have got behind on her work, despite knowing that the claimant had a significant and unrealistically high workload, and suggested she should have cancelled her recent, pre-arranged, holiday to catch up with work."

238.1 We have already referred to our findings in relation to criticisms made by Mr CD at about this time in relation to the claimant's work and we have considered whether or not those comments could amount to direct discrimination or harassment.

238.2 We accept that the claimant had a high workload, but we refer to our findings in respect of the reasons for that high workload and, in particular, the claimant's determination to do as much work as possible on the local authority contract.

238.3 Mr CD did make comments about the claimant having got behind on her work, but our analysis of comments of those kinds in this context is as set out above. They amount neither to direct discrimination, nor harassment.

238.4 Mr CD did not suggest that the claimant should have cancelled a holiday in order to catch up with her work. Hence, the factual substratum for that part of the allegation is not made out.

239. "From December 2018 onwards Mr CD keeping hold of the keys to the finance cupboard and female toilets." This issue also refers to the alleged failure to provide a contemporaneous explanation as to why she was not given keys (or why they were not returned to her) and that on occasion when she could not find Mr CD (who had a key) she had no choice but to use the male toilets.

239.1 As we have found, the female toilets did have a lock installed at about this time. The claimant had access to a key. It may well be that on one occasion the key was taken by the second respondent's mother who failed to return it immediately. This would have caused inconvenience to the claimant for a very short period of time.

239.2 We are satisfied that the reason for installing a lock on the ladies' toilet was an understandable and legitimate one. The claimant was not denied access. Any unavailability of the key for a short period of time was entirely inadvertent.

239.3 It follows from the above that the factual substratum required to establish this allegation is not made out. The lack of a key for a short period of time was unrelated to the claimant's sex. Hence, neither the claim for direct discrimination, nor the claim for harassment can succeed.

239.4 Furthermore, although the deprivation of the key for even a short period of time could amount to unwanted conduct, we do not consider it had the forbidden purpose or effect.

239.5 There was no cross-examination of Mr CD with regard to the locking of the finance cupboard. As the claimant records in her statement, a contemporaneous explanation for this was provided in terms of limiting access to sensitive information.

239.6 We do not consider that the placing of a lock on a finance cupboard could reverse the burden of proof by reference to s.136 of the 2010 Act. The locking of a cupboard where an apparently reasonable explanation was given contemporaneously is not material from which we could reach a conclusion of unlawful discrimination.

239.7 Hence, there is no sufficient evidence to make out a claim of direct discrimination or harassment in respect of this matter.

240. "From around November 2018 onwards, the claimant would often mention to Mr CD that her workload was excessive. Mr CD briefly assisted the claimant and then did not assist the claimant in the office again."

240.1 We consider that the raising of the issue of excessive work was more with Mr GH than with Mr CD. However, as we have found, it was the claimant who was seeking to take on as much of the local authority work as possible (and priorities it) and who undertook significant parts of what had been the work of Ms OP.

240.2 The respondents sought to provide assistance by way of temporary staff, but these the claimant found to be inadequate and their services were terminated. All other members of staff who worked in the office sought to undertake work to assist the claimant.

240.3 It appears to us that the allegation here is that Mr CD only assisted the claimant briefly and then ceased to assist her. In fact, we find this to be but one aspect of the wider issue of her taking on too much work, which we have already dealt with. As regards Mr CD's assistance we accept that it was episodic, in the sense that he was not always present in the office and had other work to do.

240.4 In the circumstances, we consider that the factual substratum for this allegation is not made out.

241. "In about week commencing 3 December 2018, changing the claimant's password to "raqlovesanal". The passwords of male members of staff were changed to something related to the company's name or some other word which was not sexual."

241.1 As we have found, the password was so changed. All passwords were changed at the same time because of the hacking of the first respondent's system. It is correct that only the claimant was given this kind of sexually explicit password. The choice of the sexually explicit password was made by the second respondent because it reflected what the claimant had said about her sex life.

241.2 Certainly, the claimant was treated differently from the other employees, all of whom were male. However, we consider that if a male employee had made similar comments about their own sex life, the second respondent would be likely to have reflected that in their chosen password as an attempt at humour just as he did in the case of the claimant. Hence, although the choice of password related to the claimant's sex, we do not consider that it amounted to less favourable treatment for the purposes of direct discrimination.

241.3 We do consider that this amounted to unwanted conduct for the purposes of the harassment claim. It related to the relevant protected characteristic of sex and was conduct of a sexual nature. The question, therefore, that remains is whether the conduct had the purpose or effect set out in paragraph 26(1)(b).

241.4 We do not consider that the second respondent intended to violate the claimant's dignity or to create the kind of environment

characterised in sub-sub paragraph (ii). However, that leaves the question of whether the conduct had that effect.

241.5 In reaching our decision in this regard we have kept in mind the fact that the claimant was, by this stage, the only female member of the office staff. Furthermore, although we are satisfied that the previous sexual banter in the office continued to take place, it now took place against a background of a somewhat more difficult relationship between the claimant and (in particular) Mr CD, because of problems with her work.

241.6 We also consider that this was (and was reasonably seen by the claimant to be) different from the spontaneous sexual banter which had been (and continued to be) prevalent in the office. It was not part of a conversation, nor was it transient. The claimant would have to use it to access her computer until it was changed.

241.7 We consider that this did create, for the claimant, an offensive environment, albeit for a limited period of time. Our view is that either the claimant did change the password soon thereafter, or she chose not to do so in circumstances where she could have done.

241.8 We consider that this allegation of sexual harassment is made out.

242. "On 10 December 2018, Mr CD screaming in front of Mr EF and Mr GH at the claimant stating that he could not find the financial information he required from the claimant leaving the claimant distraught."

242.1 There was no screaming by Mr CD. There was complaint by him at around this time of the claimant's performance, but that we have already dealt with.

242.2 Neither on an occasion where Mr EF was present, nor generally, did the complaints by Mr CD leave the claimant "distraught".

242.3 Hence, the factual substratum for this allegation has not been made out and we have already considered whether Mr CD's conduct in complaining of her performance at around this time could amount to direct discrimination or harassment.

243. "During approximately the week commencing 10 December 2018 Mr CD coming up to the claimant's desk and asking the claimant "What the hell does [she] do all day. The claimant was deeply upset and began to cry in front of Mr CD who put his hands on her shoulders and massaged them. Mr CD had tried to do this on several occasions previously when the claimant was upset, being conduct which was entirely unwanted."

243.1 Neither at that time, nor at any other time, did Mr CD make a comment along the lines alleged. As we have already noted and dealt with, he did make complaints at about this time concerning her work. She was not deeply upset and she did not cry in relation to

this alleged comment (which we find was not made) or other comments.

243.2 We have already dealt with the allegation relating to hands being put shoulders.

243.3 In the circumstances, the claimant has failed to make out the factual substratum for this allegation.

244. "On Friday 14 December 2018, the date of the respondent's Christmas party, directing the out-of-hours telephone to the claimant so that she was effectively on call the entire evening." [We have reformulated this allegation slightly so that it both makes sense and accords with the case as put in evidence]

244.1 The telephone was redirected and the claimant was, as a consequence, on call for the entire evening. Mr CD had intended to be on call himself but, as we have found, this did not happen.

244.2 We do not consider that this amounts to less favourable treatment (as distinct from unfavourable): the claimant was certainly treated differently in that on the evening in question she was on call when others were not. Furthermore, we do not think that her being put on call had anything to do with her sex. Someone had to be on call. She was not chosen because she was a woman, rather the phone and emails were directed to her in error.

244.3 Hence, the claims for direct discrimination and harassment cannot succeed. Furthermore, as we have already found, although being on call clearly put a damper on the claimant's enjoyment of the evening, we do not consider that her being on call had the purpose or effect set out in s.26(1)(b) of the 2010 Act.

245. "On Monday 17 December 2018, following the party, Mr CD coming into the office in the morning and screaming at the claimant in front of Mr GH, that she had left early and had embarrassed him in front of his ex-client who was also in attendance. The claimant stated that two male engineers had left early and they had not been shouted at."

245.1 The claimant did leave the party early, as did two engineers. The claimant was not criticised for so doing (whether in the manner suggested, or otherwise). On the following Monday morning Mr CD expressed annoyance at the quality of the venue and his annoyance was echoed by the claimant and others.

245.2 It follows that the factual substratum underlying this allegation is not made out.

246. The next issue is introduced by the words "Mr CD would further create a hostile, intimidating and humiliating working environment for the claimant

related to her sex by" and there follows a series of allegations lettered (a) to (s). Some are reformulations of, or are very closely related to, allegations already dealt with or yet to be dealt with. We shall deal with each of these matters individually. Although the introductory words might suggest that these allegations are made referable to the harassment claim alone, it is later suggested in the list of issues that they are also instances of direct sex discrimination. Therefore, we shall deal with them as being both.

247. "Continuously from around September 2017 directing verbal abuse at the claimant both in private and in front of colleagues."

    247.1 This repeats the allegations in relation to verbal abuse which we have already dealt with.

248. "Mr CD would try to massage the claimant's shoulders whenever she was upset." There then follows an assertion as to the frequency of this.

    248.1 We have already dealt with this allegation.

249. "Continuously from around September 2018 interrupting the claimant during telephone calls with clients."

    249.1 We have already dealt with the more general allegation of talking over the claimant. We regard this as a reformulation of that allegation.

250. "On the occasion that the claimant arrived at work early, around 6am or 7am, Mr CD would often accuse the claimant of having done no work since getting in early. When challenged, Mr CD slammed doors, giving the claimant intimidating looks, shouting at the claimant and ignoring the claimant if she tried to speak to him."

    250.1 We have already dealt with an allegation that in about September 2018 Mr CD shouted at the claimant about engineers not being out of the office early enough and with alleged complaints as to lack of work or poor work.

    250.2 We reject the assertion that the claimant was repeatedly accused of having done no work since getting in early. We also reject the assertion that Mr CD slammed doors, gave intimidating looks, or shouted at and/or ignored the claimant when challenged about complaints as to lack of (or quality of) work on her part.

    250.3 We have dealt with various specific allegations of shouting by the second respondent. Looking at the issue of shouting in more general terms, we are certain that everyone in the office (including the claimant) raised their voices at times, because they were annoyed, because they were calling to someone some distance away, or because they were seeking to make themselves heard over others who were already speaking. The claimant was not

treated differently than any other person (male, or female) in this regard.

250.4 As we have already noted, we have found that the quality of the claimant's work did diminish after Ms OP left, this was in the context of her taking on some of that lady's work and as much of the local authority work as she could. We have already noted our acceptance that Mr CD did criticise the claimant in those circumstances. He did not behave in the manners here alleged.

250.5 We have already set out our findings as to whether or not his mode of behaviour in those circumstances could have amounted to either direct sex discrimination or harassment.

251. "Monitoring the claimant's movements around the offices on CCTV."

251.1 Mr CD did not monitor the claimant's movements within the office, as there were no cameras. He did occasionally notice that staff (including the claimant) had gone outside for a cigarette break, but this was not as a result of any monitoring of her (or their) movements. Hence, the factual substratum for this allegation is not made out.

252. "Mr CD would regularly use the women's toilets."

252.1 From time-to-time Mr CD did indeed use the women's toilets when the men's toilet was occupied. It is not clear to us how this would be framed as an allegation of direct sex discrimination. The reason for the treatment was the temporary unavailability of the male toilet, not the claimant's sex.

252.2 As regards harassment, we accept that because it would from time to time mean that the ladies' toilet was unavailable for the use of female members of staff, this would amount to unwanted conduct. It might even be said that this related to the claimant's sex because a toilet designated for women was being used by a man.

252.3 However, the conduct had neither the purpose nor the effect required by s.26(1)(b) of the 2010 Act. We are certain that the claimant would have preferred that he did not do so, but such a view falls short of constituting the kind of environment to which sub-sub section (ii) refers. In all of the circumstances we do not consider that this conduct had that effect on the claimant and it certainly would not have been reasonable in all the circumstances of the case for the conduct to have that effect.

253. "Mr CD belittling and undermining the claimant whenever she tried to express an idea, opinion or otherwise attempt to have some input into the running of the business. Mr CD would often then discuss these ideas with Mr GH, enact them and then claim it was his idea."

253.1 We consider that this allegation needs to be divided into two. We deal first with the alleged belittling and undermining and then with the claiming of the claimant's ideas as his own.

253.2 The first may relate to the more specific allegation that in July/August 2018 upon the claimant winning a new account he disparaged her efforts publicly. We have already dealt with that.

253.3 We reject the general assertion that Mr CD belittled and undermined her when she tried to express an idea or opinion. On the contrary, we have found that he welcomed her input into the business.

253.4 We reject the assertion that Mr CD would "steal" the claimant's ideas.

253.5 In the circumstances, the factual substratum for these two allegations is not made out.

254. "The respondent stating that the claimant could do her high work load because women could multitask."

254.1 We have no doubt that Mr CD appreciated that the claimant was undertaking a heavy workload. He did not make the comment attributed to him. Hence, the factual substratum for this allegation is not made out.

255. "If the claimant could not immediately answer Mr CD's request for financial information, as soon as the claimant "walked through the door", he would scream at the claimant and tell her that she was useless and that she had 24 hours to get the figures to him that he had requested."

255.1 No timescale is put on this allegation. We consider that it is a further example of an exaggerated account of Mr CD's concerns and complaints to the claimant from the departure of Ms OP onwards to the effect that she was no longer providing financial information (the core of her job) with the accuracy and efficiency that she previously displayed. We have dealt with that allegation previously.

256. "From approximately September 2017 onwards if a client did not pay Mr CD he would instruct the claimant to commence legal proceedings. Mr CD would then contact the client to inform them of this. Mr CD had a habit of back-pedalling and informing the claimant that she should never have commenced legal proceedings. Mr CD would apologise to the client and inform them that it would not happen again. When a bill was received from the debt collectors Mr CD would scream and shout at the claimant."

256.1 The general allegation of screaming and shouting at the claimant has already been dealt with and we have also dealt with the raising of voices.

256.2 Some evidence as to Mr CD's behaviour in relation to clients who failed to pay does appear in her witness statement. However, there was no cross-examination directly aimed at this topic. It is unclear to us how any allegation of direct discrimination is framed based upon that allegation. Certainly, we do not think that those facts would give rise to a reversal of the burden of proof by reason of the provisions of s.136 of the 2010 Act. The evidence before us suggests a dubious business practice, but could not establish unlawful discrimination.

256.3 In particular, there is no suggestion that Mr CD's behaviour in this regard related to the claimant's sex. In all of the circumstances, we reject the assertion that this conduct could give rise to a claim for either direct discrimination or harassment.

257. "Mr CD would regularly blame the claimant for his own mistakes. In particular, Mr CD would not provide the claimant with authority to pay supplier invoices."

257.1 In the absence of any submissions directed to this particular allegation, it is unclear to us how the two sentences are said to relate one to the other. Furthermore, neither appear to relate to the claimant's sex.

257.2 No specific example of the claimant's being blamed for a mistake by Mr CD was put to him. In that regard, we note that the allegation is that this was done as a matter of regularity.

257.3 Furthermore, the assertion that the claimant was not provided with authority to pay supplier invoices was not explored in cross-examination.

257.4 In those circumstances, especially given that we do not believe that either very general assertion could give rise to any reversal of the burden of proof, we do not consider that these allegations can give rise to a claim for either direct discrimination or harassment.

258. "Providing the claimant with arbitrary instructions and deadlines and having unreasonable expectations. By way of example, Mr CD decreed that all engineer reports should be sent to clients by 8am."

258.1 The issue contains one example. Neither that example, nor any other instance of this alleged conduct was explored in cross-examination.

258.2 That engineers were required to leave the premises by a certain time in the morning (and that the claimant had a role to play in ensuring that this happened) was explored in cross-examination, but it appeared to us that this had a perfectly sensible commercial justification and does not provide an example of the kind of conduct here alleged.

258.3 In the circumstances we do not consider that this can amount to a case of direct discrimination or harassment. We repeat our comments above with regard to the lack of any apparent link to the claimant's sex and the burden of proof.

259. "Mr CD would publicly suggest that the claimant was not working hard or at all."

259.1 We have already dealt with similar allegations. Mr CD made no such public pronouncements. Hence the factual substratum for this allegation is not made out.

260. "From around 10 December 2018 onwards Mr CD would constantly tell the claimant that she did not have her "finger in the business" and how the running of the business was rubbish implying it was the claimant's fault."

260.1 We have already dealt with the criticisms of the claimant's work being made by Mr CD at around this time. We think it likely that he may have said something along the lines of her no longer having her finger on the business and he would certainly have implied (and may on occasion have expressly stated) that errors or problems were the claimant's fault.

260.2 Mr CD would have treated any post holder in the position of the claimant in exactly the same way, irrespective of sex. Hence, there can be no claim for direct discrimination arising from these sorts of matters.

260.3 Furthermore, as we have already indicated when previously dealing with similar allegations, whilst the conduct was certainly unwanted, it neither related to the protected characteristic of sex, nor did it have the purpose or effect identified in s.26(1)(b).

261. "Mr CD would often take a belittling and hurtful tone in text messages to the claimant. In particular his messages from late December 2018 and early January 2019 deeply upset the claimant."

261.1 We were taken to a number of text message exchanges. We found none of them belittling and hurtful in tone. The late December exchange was with Mr GH, not Mr CD. The early January exchange commenced with a reference to the claimant's husband and what he had said on her behalf, it continued to deal with alleged damage to the car which had been loaned to her. None of those

exchanges (whether involving Mr CD or Mr GH) were belittling and hurtful. We accept that the claimant challenged the contention that she had damaged the car. However, we reject the assertion that she was "deeply upset" by that assertion being made.

261.2 As regards the exchanges of texts to which we were referred, we consider that Mr CD (and Mr GH) would have treated any person in her situation in the same way, regardless of their sex. Furthermore, as regards the allegation of harassment, the texts did not have the purpose or effect required by s.26(1)(b) of the 2010 Act.

262. "Mr CD expected the claimant to tidy up and would shout at her if she didn't." [The list of issues elaborates on this allegation explaining that she would have to wash and dry up cups and if the kitchen area was not tidy Mr CD would throw away items from the kitchen and the claimant would have to purchase them again]

262.1 The claimant was not expected to do more than her fair share of the cleaning and tidying. Hence, she was not treated less favourably than a man would have been (and, indeed, than the male members of the office staff were).

262.2 She was not shouted at by Mr CD in respect of cleaning and tidying, or any lack of it.

262.3 The allegation that Mr CD would throw away items when the kitchen had not been tidied was not explored in cross-examination and it is unclear how this allegation is framed either as one of direct sex discrimination or as one of harassment.

263. "Mr CD losing his temper and directing his anger towards the claimant in abusive language, shouting or in petty and malicious conduct. By way of example, Mr CD would regularly call the claimant vulgar expletives, most of which were inferentially related to the claimant's sex (calling the claimant a "cunt", "fucking useless", and "prat" and saying that women – including the claimant – are only good for "blow jobs" and saying that he could do a better job than the claimant as he is a man."

263.1 We have already dealt with the general allegations of the use of abusive language and shouting (including screaming). In particular we have dealt with the allegation that the claimant was regularly called the various names referred to and we have found that the claimant was not told that women were only good for "blow jobs".

263.2 Unless the phrase "petty and malicious conduct" was intended to refer to matters already dealt with, no such matters were explored in cross-examination and it is unclear to us how the claim is put in this regard.

263.3 In the absence of a clear statement of what were the general words referred to and their consideration in cross-examination, this claim must fail. There is no sufficient material here to reverse the burden of proof, not least because where this allegation was particularised and explored in evidence, we have rejected it.

263.4 The claimant was not told by Mr CD that he could do a better job as he was a man. Hence, viewing that allegation in isolation, the factual substratum for any claim for direct discrimination or harassment is not made out.

264. "On a Sunday in May 2018 Mr CD attended the claimant's home to collect the office keys. On the following Monday he made personal and derogatory remarks about the claimant's home."

264.1 Mr CD did attend the claimant's home. He did not make personal and derogatory remarks about it at any subsequent time. Hence, the factual substratum for this allegation is not made out.

264.2 In any event, without more, we find it difficult to understand how this allegation is of a matter relating to the claimant's sex in any way.

265. "Mr CD would often claim that he would never employ a female plumber as women "could not do that type of job"."

265.1 In evidence this allegation was attributed to the conversation on 24 December 2018 and it was suggested that these words (or similar words) were used by Mr CD to justify why the claimant should not be allowed to take on the role of account manager for the local authority contract.

265.2 In fact, Mr CD neither said, nor inferred, anything of the sort on that occasion or otherwise. Hence, the factual substratum for this allegation is not made out.

266. We now return to the list of alleged instances of direct discrimination and harassment found in the list of issues.

267. "On the morning of 24 December 2018 Mr CD and Mr GH failing to provide the claimant with information on how to work out the schedule of rates for the [local authority contract]".

267.1 The allegation as put and explored in evidence was not of a failure to provide the information, but of an assertion that, as a woman, the claimant lacked the necessary industry experience and familiarity with the schedules of rates.

267.2 We have accepted that both Mr CD and Mr GH told the claimant that they considered that she did not have sufficient industry experience and knowledge to undertake the work of account

manager for the local authority contract. At no time did they state (or imply) that she could not do the work because she was a woman. Hence, the factual substratum underlying this allegation is not made out.

267.3 For the avoidance of doubt, we have found that the claimant was believed by those two gentlemen to lack the relevant experience, which experience they believed would be necessary satisfactorily to undertake the role in question. This had nothing whatsoever to do with the claimant's sex. Her only experience within the industry was whilst working for the first respondent. They would have treated any individual occupying the position which the claimant held and who had her level of experience in the same way, regardless of sex.

267.4 In those circumstances, their attitude (and statements to the claimant in this regard) cannot establish the claim of direct discrimination, or the claim of harassment.

267.5 In any event, whilst comments to that effect were unwanted, they did have the required purpose, or effect, for a claim of harassment and would not have been reasonable for them to have that effect as they were reasonable comments.

268. "Mr GH informing the claimant on 24 December 2018 that the respondent was going to employ an individual to deal with the local authority account and she would have to give up her company car. Mr CD and Mr GH told the claimant that she could not manage the local authority account as she "did not have a clue and would never understand." Mr CD and Mr GH implied that this was because the claimant is a woman."

268.1 Save for having to give up the company car, we have dealt with the substance of this allegation already.

268.2 With regard to the company car, this had been loaned to the claimant in circumstances of her car having been taken by her husband. We are satisfied that in similar circumstances of a loan to a male employee, that loan would have been brought to an end so as to enable the car to be given to the proposed new account manager.

268.3 In all of those circumstances, the factual substratum for most aspects of this claim is not established.

268.4 As regards the removal of the company car, neither a claim for direct discrimination, nor one for harassment, can succeed there being no less favourable treatment made out and there being no link to the relevant protected characteristic.

268.5 We have no doubt that the claimant was disappointed both by her inability to persuade Mr CD and Mr GH to allow her to become the account manager and also by the removal of the car. However,

neither had the purpose or effect required by s.26(1)(b) of the 2010 Act.

269. "On 24 December 2018 Mr CD stating that the claimant had an "attitude problem". Mr CD then stood up and told the claimant to leave the office. Mr CD stood directly in front of the claimant in an intimidating manner. Mr CD followed the claimant down the stairs while Mr GH remained upstairs. Mr CD was shouting at the claimant and telling her to get out of the office entirely. Mr CD informed a colleague to call the claimant a cab. Mr CD calling the claimant's husband an hour after the claimant left to say that the claimant had left her company mobile."

269.1 We have set out in our findings of fact our findings in respect of the events on 24 December. The description of the event set out above (as amplified by the claimant's written and oral evidence) is not accepted by us as accurate.

269.2 It may be that there was a call between MR CD and the claimant's husband at some point on 24 December, or an exchange of texts, dealing with her work phone. However, this was not explored in evidence and we understood both sides to proceed on the basis that there were unsuccessful attempts to contact the claimant on and after 24 December, with the claimant's husband first contacted on 26 December. Be that as it may, we do not understand how a call to her husband against the background, dealing with her work phone, could amount to, or evidence direct sex discrimination, or harassment.

269.3 We have considered whether the conduct of Mr CD and Mr GH on that day as we have found it to have been would constitute either direct discrimination or harassment. We have concluded that it would not. We are satisfied that they would have treated a male member of staff in the same way in similar circumstances:

269.3.1 What they said about her lack of experience was reasonable and accurate and we have dealt with that above.

269.3.2 Mr CD's response to her refusing to engage with the discussion of the business, starring at the ceiling with her feet on the desk and indicating that she could not be bothered was to ask her to leave until she was prepared to engage. He would have reacted in the same way to such behaviour on the part of a male employee.

269.4 As their treatment of the claimant had nothing whatsoever to do with her sex neither claim can succeed.

269.5 Furthermore, their conduct had neither the purpose nor the effect required by s.26(1)(b) of the 2010 Act. In any event, any deterioration in the relationship of the claimant and the respondents

was caused by her own conduct and it would not be reasonable for her response to their conduct to have had the effect referred to in s.26.

270. "Mr CD had given the claimant some time off in lieu of the additional hours she had worked in recent times the period between Christmas and 2 January. The claimant was therefore not due in the office during this time in any event."

270.1 The claimant's absence from work between Christmas and New Year was explored in evidence. Our conclusions, set out in our findings of fact, are that the office was closed during this period.

270.2 Whilst we understand the role that these matters are said by the claimant to play in an understanding of communications between the parties after 2 January, we do not understand this to amount to a separate allegation of treatment amounting either to direct discrimination or harassment. As we have found the office to be closed in that period, her alleged agreement with the second respondent to take this time off was not made and her absence in the context of the office being closed sheds no light on the salient events.

271. "The respondent causing the claimant to sign off work as unfit to work from 2 January for six weeks for stress at work. The claimant went off sick as a result of the discriminatory treatment. The claimant delivered her fit note on 2 January."

271.1 We regard this as being a summary allegation based upon the various contentions as to discriminatory conduct with which we have already dealt. Save for the allegation in respect of the change of the password, we have found none of the allegations to be substantiated.

271.2 For the avoidance of doubt, we accept that the claimant was signed off work for six weeks and that her GP had diagnosed that she was suffering from stress. We have concluded (see our findings) that the claimant was working extremely hard and that she was extremely disappointed at the failure to give her the account manager's job and that she had domestic problems. As we have explained, that failure and the various events leading up to it do not amount to instances of direct discrimination or harassment

272. "Mr CD failing to pay the claimant and rendering her more ill."

230.1 The first respondent, at the instigation of Mr CD and Mr GH, did not pay the claimant after they believed that she had resigned in January 2019. They would have so behaved towards anyone who they believed to have resigned, regardless of their sex. Furthermore, the non-payment of wages was a normal

consequence of the termination of the contract of employment. Hence, the claims of direct discrimination and harassment in this regard cannot succeed.

273. "On 5 January 2019 the claimant received a letter from the respondent dated 28 December 2018 asserting that the respondent accepted that the claimant would not be returning to work as they had not heard from her and requested the claimant to put this in writing."

    273.1 The allegation contains a partial summary of the content of the letter in question. It was composed by and sent on the advice of the first respondent's then advisors, ELAS. Such a letter would have been sent to anyone who had behaved as the claimant had behaved and neither the fact of such a letter being sent, nor its contents, had anything to do with her sex. Again, for that reason, the claims for direct discrimination and harassment cannot succeed.

274. "By letter dated 7 January 2019, the letter stated that the respondent had received the claimant's fit note dated 2 January and asserted that they considered the claimant was not returning to work."

    274.1 The circumstances in which this letter was sent are set out in our findings of fact. Neither the fact of its being sent, nor its contents, were influenced by the claimant's sex. The letter was sent on the advice of and having been composed by the first respondent's then advisors. A similar letter would have been sent to any person of whatever sex in similar circumstances. The sending of that letter does not, in the circumstances, amount to an act of direct discrimination or of harassment.

275. "The respondent's letter dated 8 January 2019 seeking to characterise the events of 24 December 2018 as amounting to a "verbal resignation" by the claimant, on the basis she said she was "not interested anymore" and the respondent accepted the claimant's "immediate resignation"."

    275.1 As with the two letters of 28 December 2018 and 7 January 2019 dealt with above, this letter was composed and sent on the advice of the first respondent's then advisers. Mr CD and Mr GH (the operating minds of the first respondent for these purposes) believed that the claimant had resigned. The analysis of the material facts contained in the letters emanated from the advisors. They were, of course, dependent upon the account of the material facts given to them by Mr GH.

    275.2 We are satisfied that the account given and the subsequent analysis of it as expressed in the letters was unrelated to the claimant's sex. Whatever the sex of the claimant might have been, Mr GH would have provided the same account of the facts and the letter would have been in materially identical terms.

275.3 Hence, neither the claim for direct discrimination, nor that for harassment can succeed.

276. "On 28 January the claimant received a letter from NEST, the claimant's workplace pension provider, confirming that the claimant was no longer contributing to the scheme."

276.1 Such a letter was sent and received. Contributions had ceased because the first respondent considered that the claimant had resigned.

276.2 Its belief and the actions that it took consequent thereupon had nothing to do with the claimant's sex. The first respondent would have so acted had the claimant been male. In the circumstances, neither of the discrimination claims can succeed.

277. "Underpaying the claimant for December 2018 by £1,172.92 and as per the claimant's contract of employment, she was entitled to SSP going forward."

277.1 This issue contains two separate allegations said, we assume, to amount to direct discrimination and harassment. We deal with them separately.

277.2 The sum in question was deducted. It related to the alleged damage to the car loaned to her for which it was said she was responsible. We are satisfied that the sum would have been deducted whatever the sex of the claimant. Given the lack of any link to the protected characteristic of sex, neither discrimination claim can succeed.

277.3 The claimant would have been entitled to statutory sick pay if her employment had continued. The first respondent believed that she had resigned. It is for that reason that statutory sick pay was not paid. It had nothing whatsoever to do with her sex and, hence, the discrimination claims in this regard cannot succeed.

278. "The respondent's failure and/or delay in complying with the claimant's data subject access request."

278.1 In her witness statement the claimant refers to the submission of a data subject access request on 30 January 2019 at the same time as submitting her grievance. She refers to chasing Mr GH for a response to this on 6 February. The history of the consideration of the grievance is dealt with in our findings of fact. In her witness statement the claimant notes that she had received various email exchanges consequent upon her data subject access request and to chasing that request and to receiving documents. She also refers to a dispute in correspondence as to whether or not the request had been fully complied with.

278.2 That dispute was still extant in early March 2019. A further data subject access request was made on 25 September 2020 and documents were provided on 22 October 2020. Albeit, the claimant complains in her witness statement that the documentation provided was incomplete.

278.3 These data subject access requests were only briefly touched upon in oral evidence. The point in dispute was whether documents generated in the course of the operation of the first respondent's business by the claimant ought to have been disclosed in response to those requests. The first respondent had sought advice (including from the ICO) and had been told that such commercial documentation, of which there would have been a very large volume, did not need to be disclosed.

278.4 No submissions were addressed to us on the issue of whether or not there had been a failure properly to comply with the requests and, if so, how this was said to amount to direct discrimination and/or harassment.

278.5 We note that the requests themselves and the disputes in correspondence as to whether or not full disclosure had been given, took place in the context of the ongoing grievance and, thereafter, these proceedings and debates as to appropriate disclosure for the purposes of these proceedings.

278.6 On the material before us it is impossible for us to conclude that there had been a failure and/or delay (of any significance) in complying with the requests. In those circumstances, the claims for discrimination cannot succeed. We note, that given the limited evidence before us on these matters, we do not consider that the burden of proof can be said to have been reversed by s.136 of the 2010 Act.

279. "The respondent's failure and/or delay in providing a response to her Grievance and Data Subject Access Request on 6 February 2019."

279.1 So far as this issue relates to the first in time of the Data Subject Access Requests, our findings are as above.

279.2 We do not consider that there was a delay in responding to the grievance. The first respondent sought advice. Following that advice it engaged the services of an independent person to consider the grievance and that person then considered it. If it could be said that there was some delay, this was because the claimant failed to answer questions put to her. The grievance outcome was announced, the claimant complained and was then given a further opportunity to answer the questions, whereupon further investigations took place and a revised outcome letter promulgated.

279.3 That delay in the final grievance outcome being promulgated had nothing whatsoever to do with the claimant's sex. It was related to her own failure to engage with the questions asked of her. Hence, it cannot found a claim for direct discrimination or harassment.

280. "In about January/February 2019 the respondent's advertising for the claimant's job on LinkedIn."

280.1 The job was advertised because the first respondent believed the claimant to have resigned. That belief and the consequent decision to advertise had nothing whatsoever to do with the claimant's sex. Hence, the discrimination claims in this regard cannot succeed.

281. "The respondent causing the claimant to be signed off as unfit to work for two weeks from 12 February 2019 for work related stress."

281.1 This is, in effect, a repeat of the allegation made in respect of the fit note for six weeks from 2 January. Our views on this claim, based upon the subsequent fit note, are the same. Hence, the claim cannot succeed.

282. "On 15 February the respondent asserting to the claimant to confirm that although the claimant's grievance was being dealt with by an independent consultant, the respondent maintained that the claimant had resigned her position on 24 December."

282.1 We do not consider that this allegation adds anything to the allegations that we have previously dealt with. The first respondent continued to maintain that the claimant had resigned because, after taking legal advice, that is what it believed had happened. That continuing belief (and its assertion) had nothing whatsoever to do with the claimant's sex and this allegation cannot support a claim for direct discrimination or harassment.

283. "On 20 February the respondent's unfair and flawed dismissal of the claimant's grievance of 30 January 2019."

283.1 We are satisfied that the respondents left the conduct of the grievance to the independent person who was dealing with it. We assume that the complaint implicit in the characterisation of the dismissal of the grievance as "unfair and flawed" is that the respondents had hitherto discriminated against the claimant during the course of her employment in the ways complained of and now sought to deny that.

283.2 In fact, it follows from our various findings that we consider that they had not so discriminated (save as regards the change of password). Hence, we do not consider that this allegation is made out. The

grievance would have been so dealt with whatever the sex of the claimant.

284. "The respondent accusing the claimant of engaging in inappropriate sexual behaviour in the workplace; that the claimant has not repaid an overpayment in salary, something not connected with the claimant's grievance."

284.1 It appears to us that this issue contains two distinct allegations which we will deal with separately.

284.2 With regard to the inappropriate sexual behaviour in the workplace, we assume that this relates to the suggestion that the claimant herself used sexual innuendo, described her sex life and played with the stress breasts and stress penis. Those allegations are made by the respondents and were the subject of much of the evidence before us. They were accurate. Hence, their being relied upon in these circumstances (of the claimant making the allegations against the respondents the subject of her grievance and this claim) cannot amount to direct discrimination or harassment.

284.3 There was some evidence in the claimant's witness statement concerning an overpayment of salary. It was not explored in oral evidence and not the subject of any submissions to us. Especially when viewed against the background of the numerous other disputes between the parties (and, in particular the dispute as to who damaged the vehicle loaned to the claimant) we do not consider that the limited evidence we have on the alleged overpayment would enable us to conclude, in the absence of any other explanation, that unlawful discrimination had occurred. Hence, the burden of proof remains on the claimant and she has not discharged it.

285. "On 28 February the respondent asserting in its letter that they would have dismissed the claimant without a fair and reasonable investigation or procedure due to what the respondent termed as being the claimant being "AWOL and uncontactable" for two days between Christmas and New Year (the time when the claimant was on annual leave in lieu of the additional hours she had worked)."

285.1 This is another letter composed by and sent on the advice of the first respondent's then advisors. That section of the letter partially summarised in the allegation appears to be advancing an alternative case, namely that the claimant could have been fairly dismissed because of her absence between Christmas and New Year.

285.2 We are satisfied that this letter represented the advisor's attempt to construct an alternative case out of the facts described to them. We doubt that the case would have had legal merit, especially when the

absence is viewed in the context of the surrounding circumstances. However, we are satisfied that the writing of the letter and the advancing of this dubious alternative case had nothing whatsoever to do with the sex of the claimant. Hence, it cannot found a claim for direct discrimination or harassment.

286. "By dismissing or constructively dismissing the claimant on 9 April 2019"

286.1 There is no question of a direct dismissal on 9 April. The case is put (and can only be put) on the basis of constructive dismissal. The constructive dismissal is advanced on the basis that wages and statutory sick pay had not been paid in the period from early January onwards.

286.2 The reason for the non-payment was that the respondents believed that the claimant had resigned. The non-payment and, hence, any constructive dismissal reliant upon it, had nothing whatsoever to do with the claimant's sex. In those circumstances, this act of constructive dismissal (if it took place) cannot be an act of direct discrimination or harassment.

287. We now turn to the claim of victimisation. We can deal with this claim quite shortly, having regard to the findings we have already made. It is certainly the case that the claimant's grievance of 30 January 2019 would constitute a protected act. It expressly alleges that there had been relevant contraventions of the 2010 Act. Of course, the only relevant detriments in respect of that protected act would be matters which took place after the grievance had been raised. A number of the matters upon which the claimant relies as acts of direct discrimination and/or harassment did take place after that date. However, having regard to the findings that we have made we have grave doubts as to whether any of the matters of fact upon which those claims were based could properly be described as a detriment for the purposes of s.27 of the 2010 Act. In any event, we are completely satisfied that even if that was possible, neither the first nor the second respondent subjected the claimant to any such detriment because of the protected act.

288. There are earlier protected acts relied upon. Firstly, the claimant relies upon various complaints that she says that she made orally to the second respondent and Mr GH. We do not believe that in any conversation with either of those two gentlemen did the claimant make an allegation (expressly or implicitly) that either respondent had contravened the 2010 Act. Secondly, the claimant relies upon the letter of 30 October 2018 and/or the text message to Mr GH of 31 October 2018. We do not consider that either makes an allegation (express or implicit) that either respondent had contravened the Equality Act. Hence, neither can amount to a protected act. In any event, even if any of the conduct on the part of any material person which we have found to have taken place could amount to a detriment (and the change of password certainly would) we are satisfied that no such detriment was consequent upon either the writing of the letter or the

sending of the text. In those circumstances, the claim for victimisation cannot succeed.

289. We now turn to the claim for unfair dismissal.

290. The claim for constructive unfair dismissal based upon an alleged repudiatory breach of contract on the part of the first respondent resulting from the conduct of the second respondent and Mr GH relied upon to found the claim for discrimination cannot succeed. This is because we have rejected all but one aspect of that claim. The facts as we have found them do not, in our view, constitute a repudiatory breach of the implied term as to trust and confidence, being the term relied upon:

    290.1 We do not consider that the change of password amounted to a breach of that implied term. Trust and confidence were not destroyed, nor were they seriously damaged by Mr CD's behaviour in that regard.

    290.2 The second respondent's various criticisms of the claimant's work from August 2018 onwards were justified. Neither the content of those criticisms, nor the way in which they were delivered, destroyed or seriously damaged the necessary trust and confidence. In any event, the criticisms had a reasonable and proper cause, namely the claimant's poor performance of key aspects of her work.

291. In any event, the claimant's resignation was motivated neither by the change of password, nor the criticisms of her work, but by the refusal to allow her to change jobs.

292. It might be argued that the change of password amounted to a breach of some other term of the contract, eg an implied term to treat the claimant with respect, or not to act in a manner amounting to unlawful harassment. That was not argued before us. Furthermore, we do not consider any such breach as might have been established to be repudiatory and any such breach played no significant part in the claimant's decision to resign.

293. We have found that the claimant did resign her employment. Having left the first respondent's premises on 24 December in the circumstances described in our findings of fact, she then made a decision not to return (ie, to resign) which decision was communicated to the first respondent on her behalf by her husband. This was at a time when she was avoiding contact with the respondents.

294. The decision to resign was made at some time between her leaving the premises on 24 December and her husband setting out her intentions in a text to Mr GH in the evening of 26 December.

295. We have considered whether this is one of those situations where the claimant should be allowed to change her mind, because of the circumstances in which she resigned. The most obvious example of such

"special circumstances" is where the words of resignation were uttered in the heat of the moment.

296. We consider that here the claimant had had time to reflect on what she wanted to do and to discuss this with her family, in particular her husband. Without more, we would have been inclined on balance to find that there were no special circumstances in this case. However, we have also considered the events after the exchange of texts with Mr GH on 26 December. At no time in the immediate aftermath did the claimant revert to either Mr GH or Mr CD saying that she considered that she was still an employee, or that she wished still to be an employee. Between 26 December and 2 January there were no communications from the claimant and she continued to avoid speaking to either Mr GH or Mr CD. Furthermore, on 2 January Mr CD texted her (having failed to speak to her) and specifically referred to her husband's text saying that she was not coming back. He asked her to call him in order to arrange to collect her belongings. Her responsive text also referred to her husband's text to Mr GH, but did not seek to suggest that she had not approved it, or that she had changed her mind. By this time she had had a considerable period in which to reflect. Hence, this confirms us in our view that there are no "special circumstances" in this case and that her resignation must be taken at face value.

297. In those circumstances, the claim for constructive unfair dismissal cannot succeed.

298. Similarly, the claim for wrongful dismissal cannot succeed. There was no dismissal (direct or constructive) by the first respondent for the reasons set out above.

299. We next turn to the claim for an unlawful deduction from wages. The claims in this regard relating to wages and statutory sick pay for periods after she had resigned cannot succeed as she had no entitlement to pay, or sick pay, thereafter. Subject to the limitation issue which we shall consider below, the remainder of this claim (relating to the monies deducted in respect of car repairs) is conceded.

300. Finally, we turn to the claim in time issues. Having regard to the findings we have already made, there are two such issues. The first relates to the claim for discrimination in respect of the change of password in early December 2018 and the second to the claim for unlawful deduction from wages made in early January 2019. As the statutory regime differs between the two, we deal with each separately.

301. We turn first to the claim in respect of the change of password. As regards this claim for discrimination it is said that the change of the password took place "in about week commencing 3 December 2018". We have not been provided with any more precise date.

302. Because of the provisions relating to the extension of time following the application for an ACAS Early Conciliation Certificate, the precise date of the incident is here crucial. If it took place on or prior to 1 December 2018 then the claim would be presented out of time, because there could be no extension to the three month primary limitation period by reference to the ACAS Early Conciliation Certificate which in this case was sought on 1 March 2019. This is because the application for the Certificate would have taken place outside the primary limitation period. If the incident took place on 2 December or thereafter, then with the Certificate issued on 18 March 2019 the last day for presenting the claim would have been 18 April 2019, such that the claim would be in time.

303. On the evidence before us, it is impossible to ascertain precisely when this change of password took place. Rather than embark upon a consideration of such evidence as we have in the context of the appropriate burden and standard of proof, we have turned instead to consider whether it would be just and equitable to extend time if the incident took place on or prior to 1 December 2018. This is because, as will appear below, we consider that it would be just and equitable so to do.

304. The period of any delay is inevitably short. There is no prejudice to the respondents in their being able to prepare for this case and the claim is meritorious. Even though the claimant was being legally advised at a time when she could have made a claim in time, we consider it just and equitable in those circumstances to extend time, if necessary.

305. We next turn to the claim in respect of the unlawful deduction from wages. The evidence of the claimant (not challenged) was that she received payment of her December salary on 3 January 2019. Hence, we regard the deduction as having been made on that date. That being so, the claim had to be presented by 2 April 2019 in order to have been made within the primary limitation period, unless within that period an application was made for an early conciliation certificate.

306. In fact, ACAS received the appropriate notification on 1 March 2019 and the date of issue of the certificate was 18 March 2019. Hence, the last day upon which the claim could be issued is 19 April 2019. It follows, that a claim issued in this regard on 17 April was presented in time. Hence, we do not need to consider a possible extension of time into the secondary limitation period.

307. It follows that the claim for harassment based on the change of password and the claim for unlawful deduction from wages both succeed. As regards the latter, the sum in question is not in dispute, it is £1,172.92. As regards the former, unless the parties are able to reach agreement as to an appropriate sum (and they are urged to do so, keeping in mind our findings of fact) there will need to be a remedies hearing. We will allow the parties a period of 28 days after the date upon which this judgment and reasons is sent to them in order to seek to reach agreement. If no agreement is reached in that time, the claimant should write to the Tribunal asking that

the case be re-listed for a three-hour hearing to take place before the present panel.

_____
Employment Judge Andrew Clarke QC

Date: 18 May 2021

Sent to the parties on: 7 July 2021

S. Bhudia

For the Tribunal Office