EMPLOYMENT TRIBUNALS

Claimant: Miss K Kirkham

Respondent: Quality Save Limited

Heard at: Manchester (by CVP) **On:** 27-30 September 2021
1 October 2021

Before: Employment Judge Whittaker
Mr Q Colborn
Ms V Worthington

REPRESENTATION:

Claimant: Mr Broomhead
Respondent: Mrs Moolenschot

JUDGMENT

The judgment of the Tribunal is that the claims of the claimant fail and are dismissed.

REASONS

Background

1. The claimant engaged in early conciliation on 19 November 2019. There was no dispute that the date on the claimant's letter of resignation was 19 September 2019, and neither was there any dispute that her employment ended on 26 September 2019. The claimant therefore engaged in Early Conciliation two months after her employment ended.

2. Early Conciliation ended on 2 January 2020 and with the assistance of Mr Broomhead the claimant lodged her claim form against the respondent with the Employment Tribunal on 19 January 2020. This is clearly shown by the certificate shown at the top of page 3 in the bundle. In paragraph 11 of that claim form it is clearly shown that the claimant is represented by Mr Broomhead. A schedule of claims is set out at page 13, and this included an allegation that the claimant had been the victim of sexual harassment at the hands of one Simon Bream on a “daily

basis". That is clearly set out at paragraph 3 of the details of claim set out at page 13. The final straw which prompted the resignation of the claimant is described as being the incident which the Tribunal will henceforth described as the "Oral B" incident". The claimant says in this document that that led to her resigning her employment.

3. On receipt, the Tribunal immediately recognised that the particulars which had been provided by Mr Broomhead on behalf of the claimant were inadequate and incompletely particularised. On 15 January 2020 the Tribunal wrote indicating that and required the claimant to provide the missing information which ought to have been provided at the outset. This was particularly the case bearing in mind that when the claim form was submitted over three months had passed since the claimant's employment ended on 26 September 2019. Furthermore, the Tribunal felt it necessary to say that if the information was not provided by 17 February 2020 that there was the possibility that the claims of the claimant would be struck out.

4. A preliminary hearing by way of case management was then held on 6 April 2020 by telephone, with Employment Judge Shotter. Mr Broomhead represented the claimant and Ms Moolenschot represented the respondent. Both these representatives represented their respective clients before the Tribunal at this hearing. It was clear that the additional information provided by the claimant, through Mr Broomhead, remained inadequate. Indeed at paragraph 10 of the written summary of that preliminary hearing the Judge comments that "the claims are incompletely particularised" and it refers to the requests and warnings which had been sent to Mr Broomhead asking for this information to be provided. Of note is the fact that in paragraph 10 Mr Broomhead, obviously on the instructions of his client, indicated that the "evidence will be that Simon Bream harassed her [claimant] at least 3-4 times a day during her employment".

5. As the particulars had still not been provided it was necessary for Judge Shotter to express in very clear language indeed, at paragraph 11 of her Case Summary, that a final opportunity was now being given to the claimant through Mr Broomhead to provide the information which was still missing and which still indicated that the claims were "incompletely particularised". A deadline was set for 29 May 2020 with Judge Shotter commenting that the claimant would by then have been given 4½ months since she issued her claim form to properly particularise her claim. Taking into account the additional two months which had expired following the termination of her employment, the claimant would in fact by then have been given a total of 6½ months in which to fully particularise her claims.

6. It is to be regretted that in the index to the bundle which was supplied to this hearing that the additional particulars which had been provided by Mr Broomhead on behalf of the claimant on two separate occasions were not dated. Indeed they were shown in the index to be "undated". Nevertheless they appeared at pages 14-15 and then the second set, following the preliminary hearing in April 2020, appeared at pages 16-17.

7. In the additional particulars which were supplied following the preliminary hearing the claimant indicated that the reason, presumably the final straw, why she had terminated her employment was "the respondent's failure to deal with the claimant's complaints concerning Simon Bream's conduct". This is shown at

paragraph 6 on page 17 of the bundle. That final straw is consistent with the additional particulars which had been provided by way of amendment and which appeared at pages 14 and 15. At the foot of page 14, shown as an amendment in red, again the claimant relies on the failure to deal with the claimant's complaints as being the breach which the claimant accepted and which she accepted by terminating her employment. The last straw, therefore, is clearly described in the particulars supplied through her legal representative, Mr Broomhead, on each of these two separate occasions as being the failure by the respondent to deal with complaints which the claimant said that she had raised about Mr Bream which she alleged had been ignored by two managers, her direct line manager, Alex Kelly, and the Area Manager, Mr John Coffey.

8. The Tribunal noted that this change of final straw came following the very clear and obvious instructions which had been given at the preliminary hearing that a final opportunity had been given to the claimant to properly particularise her claims. Again the Tribunal points to the fact that the claimant had been given many months to do this, including with the assistance of her legal representative, Mr Broomhead.

9. A second preliminary hearing by way of case management then took place some 13 months later in May 2021. The summary of that hearing begins at paragraph 1 by saying that it was a preliminary hearing "to identify the issues to be determined by the Tribunal at the final hearing". Clearly there was a detailed discussion with Employment Judge Sharkett because she was able to produce no fewer than five separate pages of claims and issues which were to be determined by the Tribunal at the hearing which this Tribunal held in September 2021. The Tribunal emphasises that some 13 months had passed since the first preliminary hearing. Those claims and issues, which were an Annex to the preliminary hearing summary, are set out as an Annex to these written Reasons and they form the basis of the deliberations of the Tribunal as had been made so clear to the parties, in particular the claimant and her representative, Mr Broomhead, that the preliminary hearing on 27 May 2021 was being held to identify the issues to be determined. At page 9 (of 14), this being the first page of the Annex of Complaints and Issues, again Judge Sharkett indicates that the "last straw" that led to the resignation of the claimant was identified and agreed with Mr Broomhead to be the alleged failure of John Coffey, the Area Manager, to refuse to discuss or deal with the issue of Mr Bream's conduct. Judge Sharkett records the final straw in the following terms:

> "The claimant relies on this failure on the part of Mr Coffey to listen to her complaint or do anything about it as the last straw that led to her resignation."

10. This was therefore the third occasion on which Mr Broomhead had confirmed that the last straw that the claimant was relying upon was the alleged failure of Mr Coffey to discuss with the claimant, or indeed to deal with the claimant, in respect of the alleged misconduct of Mr Bream.

11. The Tribunal pointed out during this hearing that at no time had Mr Broomhead ever written to the Tribunal following receipt of that summary of complaints and issues (which was sent to the parties on 5 June 2021) to say that what had been recorded by Judge Sharkett was inaccurate and that in fact the last straw relied upon by the claimant was not as set out and was not the alleged failure/refusal of Mr Coffey to deal with the conduct of Mr Bream. The Tribunal

therefore, when hearing this case in September 2021, had three written indications from Mr Broomhead that the final straw relied upon by the claimant was the inaction/refusal of Mr Coffey.

12. For the purposes of the hearing before us in September 2021 we were presented with a bundle of documents which was comprised of 199 pages. It began at page 3 because pages 1 and 2 were the two pages of the index.

Evidence

13. During the course of the first three days of evidence it became clear that relevant documents had not been disclosed in order to assist the Tribunal in determining certain of the claims and issues identified at the preliminary hearing in May 2021. The Tribunal therefore received additional documents which related to the date that Mr Bream actually started work at the Prestwich store of the respondent where the claimant was employed. In all the information which was supplied by Mr Broomhead on behalf of the claimant, she had alleged that the Mr Bream had started work at the Prestwich store in or about April 2019. However, Mr Bream indicated when giving his evidence that that was not true, and that in fact the records held by the company showed that he had started work there on 1 February 2019. This seemed of particular importance to the Tribunal because it meant that Mr Bream worked with the claimant for two months longer than had originally been suggested. The Tribunal was therefore provided with documentation which the Tribunal numbered pages 250-259 inclusive. These showed that Mr Bream stopped working at the Piccadilly store and began working at the Prestwich store where the claimant worked with effect from 31 January 2019. We were also supplied with copies of wage slips which indicated that Mr Bream was paid for work which he carried out at Piccadilly up until that date but thereafter was paid for work which he carried out at Prestwich. The Tribunal was also supplied with certain wage timesheets which again indicated work carried out at Piccadilly and work carried out at Prestwich. When Mr Broomhead had had the opportunity to consider this documentation, he readily conceded that the claimant was wrong when she said that Mr Bream had started working wither in or about April, and that in fact he had started with her and alongside her from 1 February 2019. That was an additional period of two months.

14. The Tribunal was also provided with additional documents which consisted of exchanges of Facebook messages between the claimant and various other people, including Mr Bream, who was accused of acts of sexual harassment towards the claimant. These were numbered pages 236-243, and a further six pages were received towards the end of the second day and they were numbered 244-249. These documents were conceded by Mr Broomhead as being relevant to the claims and issues to be determined by the Tribunal, particularly the Facebook exchanges between the claimant and Mr Bream in September 2019, the month the claimant resigned.

15. In summary, therefore, the Tribunal considered the index of documents which ran to page 199 and then additional documents thereafter. The reason why the additional documents began being numbered at page 236 was because the parties had included the witness statements within the bundle and these had been numbered. The Tribunal however considered the witness statements separately to the bundle of documents.

Witnesses

16. The claimant gave evidence and affirmed and was cross examined. She did so by reference to a witness statement.

17. For the respondent, they called four witnesses. The first witness was Simon Bream. He gave evidence on oath and was cross examined by reference to his witness statement. The second witness was Zoe Jones, and again she gave evidence on oath by reference to her written witness statement. The third witness was Alex Kelly, who was the direct line manager of the claimant throughout her employment. The fourth witness was Mr John Coffey, who was the Area Manager immediately above Alex Kelly at all relevant times. Both those witnesses also gave evidence on oath and were cross examined.

18. At all times the Tribunal paid the closest possible attention to the Annex of Complaints and Issues which had been prepared by Employment Judge Sharkett at the preliminary hearing in May 2021, which as we have said is an Annex to this Judgment/Reasons.

Findings of Fact

19. After considering all the documents that were submitted to the Tribunal for consideration, and after hearing the sworn evidence of all the witnesses including cross examination, the Tribunal made the following findings of fact:

(1) At paragraph 5 of her original claim form the claimant stated that her employment with the respondent began on 1 September 2016. She said that it ended on 25 September 2019. There was no dispute that actually her employment ended on 26 September and not 25 September because although 26 September was the last date of the written notice which the claimant gave to the respondent to terminate her employment, it was agreed by everyone the claimant refused to work her final day of her notice and the effective date of termination of her employment was in fact 26 September 2019. However, the start date was not agreed and remained an issue for the Tribunal to determine.

(2) The respondent indicated that the employment of the claimant under a contract of employment, and establishing the claimant as having the status of an employee, began on 14 October 2016, not 1 September. The claimant herself indicated that she was not able to identify 1 September as being the exact date but she said that it was a date in the first week of September because she started work in the week that the children went back to school after the summer holidays. It was never possible to identify therefore the exact date on which the claimant said that her employment began. She was not able to confirm, on oath, that it was definitely 1 September. The respondent at paragraph 4.1 of its response (page 19) indicated again that the employment of the claimant began on 14 October 2016. They produced to the Tribunal at page 40 a contract of employment. This was dated 9 May 2014. It was never explained to the Tribunal how that date had been inserted but it was clearly wrong. It was suggested, for

example, that it should have been 8 May 2016. But that made no sense either. It was just acknowledged as an error. In that contract of employment, it clearly indicated that in the opinion of the respondent the "employment" of the claimant commenced on 14 October 2016. This therefore remained a puzzle for the Tribunal. How was it the case that the respondent and the claimant were in such disagreement? The claimant in her written witness statement at paragraph 2 indicated that prior to joining the respondent that she had not been working for some 15 years. She indicated, however, in paragraph 2 of her statement that she had been in receipt of Income Support and that initially when she went to "work" with the respondent, that this was as a result of being offered work experience with the respondent through the Jobcentre at Prestwich.

(3) The Tribunal was of the unanimous view that it was distinctly possible that the claimant had been working under a scheme which was well-known to all three members of the Tribunal where people who were on long-term unemployment were offered work experience in order to attempt to get them back into the swing of work and the experience of work. In the experience of the members of the Tribunal, however, this would not have been work as an employee in accordance with the definition under the Employment Rights Act 1996. It would have been work experience and the claimant would have continued to receive benefits during that time. It appeared likely to the Tribunal that what had happened was that the claimant had proved to be a potentially valuable potential employee during work experience and that at the conclusion of this short period of work experience she had been offered employment. The Tribunal therefore expressed the view that it ought to be possible for documentation to be produced to indicate whether or not their view was supported by the records held by the respondent company. The claimant clearly would have been able to produce records relating to her history of receipt of benefits, and indeed perhaps produce copies of her bank statements, but as she was giving evidence it was not possible for that to be provided. Instead the respondent, at the invitation/request of the Tribunal, indicated that its payroll was conducted independently by a third party on behalf of the respondent, and that they ought to be able to provide information.

(4) That indeed proved to be the case. At the request of the Tribunal, therefore, the respondent submitted a letter from Harold Sharp, a firm of Chartered Accountants, dated 28 September 2021, clearly prepared at the request of the Tribunal. This confirmed that in accordance with the payroll records maintained by them that the claimant was only paid by the respondent as from 14 October, and only became an employee as from that date. Furthermore, they supplied timesheets which had been submitted to the accountants for the purpose of preparing a wage to be paid to the claimant from 14 October 2016. The Tribunal accepted these records as indicating that the first time that the respondent had paid the claimant had been from 14 October 2016. That appeared to be the only conclusion to be reasonably drawn from the documentation now provided to the Tribunal.

(5) Mr Broomhead argued on behalf of the claimant that who by and how the claimant was paid was not an issue which could determine the employment status of the claimant. However, the claimant never explained in any way at all the arrangements which she had with the Jobcentre and said nothing at all to the Tribunal about how she was paid for her period of work experience. The respondent clearly indicated that they were not responsible for paying the claimant because she was not their employee. The Tribunal therefore used its own industrial experience of these schemes which were then operated by the Government, and concluded that the claimant had not been an employee under the terms of the Employment Rights Act whilst carrying out a period of work experience under the auspices of the Jobcentre between the beginning of September and 13 October 2016. The Tribunal therefore concluded on the evidence available to it that the claimant became an employee of the respondent company on 14 October 2016 and a not a date, never determined, in the first week of September 2016. The impact of this conclusion by the Tribunal was that the breach of contract claim/damages for non-payment of notice pay, amounted to the value of one week's wages. It was admitted that the claimant had been paid one week's wages and that was the period of written notice which the claimant had given to the respondent, albeit the fact that she did not work the last period of that notice. There was no disagreement about the fact that the claimant had been paid for that one week. The claimant said, however, said that she was entitled to two weeks because she had resigned and had therefore been dismissed, so she alleged, as a result of conduct of the respondent, and that she had therefore been dismissed contrary to section 95(1)(c) of the Employment Rights Act 1996. The claimant therefore argued, and this was agreed by the Tribunal and by the respondent, that she may be entitled to a minimum period of statutory notice of either two weeks or a maximum of three weeks depending the start date of her employment. Having determined that the start date was 14 October 2016 then the value of the claimant's claim for damages for breach of contract was one unpaid week's pay in the sum of £130.

(6) There was also a dispute about the date when Mr Bream began working at the Prestwich store where the claimant was employed at all times. As already indicated, the claimant had alleged that Mr Bream had started in or about April 2019. Indeed in his witness statement Mr Bream indicated that was the case, but immediately on giving his evidence on oath he indicated that checks had been carried out at Head Office and that he had not actually started work in April 2019 at Prestwich but had actually started with effect from 1 February. The Tribunal has already referred to the documents which were subsequently provided during this hearing. The Tribunal therefore found as a fact that Mr Bream began working at the Prestwich store alongside the claimant with effect from 1 February 2019.

(7) The Tribunal was told, and this was not disputed, that Alex Kelly started as the manager at the Prestwich store and therefore became the manager of the claimant in December 2018. She was therefore the

manager of the claimant for nine/ten months before her resignation in September 2019. Before that Ms Kelly had worked as a manager at the Cheadle store operated by the respondent, and prior to that had worked as a Department Manager, not a Store Manager, for Toys 'R' Us for approximately ten years. Mr Coffey when giving evidence indicated in his statement that he had been employed by the respondent for 11 years and had spent seven of those as an Area Manager. This was not disputed by the claimant.

(8) Turning to the Schedule of Claims, the first allegations made by the claimant are at paragraph 1.1.1(a)-(d). The claimant alleged that Mr Bream had told her she looked beautiful, that her eyes were beautiful and that he loved her. The claimant alleged that this took place in April/May 2019. Turning to the claimant's witness statement, however, at paragraph 8 the claimant was very clear in indicating that, "As soon as he started at the Prestwich store, however, the sexual harassment by him began". That was therefore significantly inconsistent with that beginning in April/May 2019 because the Tribunal found as a fact, and indeed it was conceded, that Mr Bream started working in Prestwich at the very beginning of February 2019. The allegation made by the claimant, therefore, and the detail which she gave in her witness statement, again indicating that Mr Bream had started working in or about April 2019, were inconsistent. At no stage did the claimant subsequently indicate through Mr Broomhead that she stood by the start date of April/May 2019 as being when Mr Bream allegedly began a campaign of sexual harassment. The claimant's witness statement therefore at paragraph 8 continued to state, very clearly indeed, that the campaign of harassment had begun "as soon as he started at the Prestwich store". The Tribunal therefore found that the evidence of the claimant must have been that this began at the start of February 2019 and not in April/May 2019 as indicated in the Schedule of Claims. This therefore significantly extended the period over which the claimant was alleging that Mr Bream sexually harassed her, on a daily basis, up until her resignation in September 2019, which was some 7½ months before she resigned on 19 September 2019.

(9) Turning to the allegations that the claimant was told by Mr Bream that she "looked beautiful" and that her "eyes were beautiful", Mr Bream's sworn evidence was that he could not recall ever saying that. Furthermore, in the sworn evidence of Zoe Jones she equally said in paragraph 4 that she could not recall those phrases but she indicated that she had noticed that the claimant had particularly piercing blue eyes and that if comment were to be made about it then she may be able to understand that Mr Bream had made that comment but she could never recall it being made. The claimant by contrast was adamant that it had been made. The comments at paragraph 1.1.1(b), (c) and (d) of the Annex of claims, however, were comments which the claimant indicated had been made generally by Mr Bream openly on the shop floor environment. She never alleged that they were made privately or secretly when only the claimant and Mr Bream were present. As far as the allegation that he had told the claimant that he

loved her, Zoe Jones and Mr Bream indicated that this was never ever said in that way and that it was never ever a comment about genuine love and affection, it was more along the lines of “looking good today” or “don’t you look lovely”. In paragraph 5 of her witness statement Zoe Jones changed the emphasis by instead of indicating that Mr Bream had said love “you” that it was love “ya”, indicating that it was a colloquialism. Furthermore, she and Mr Bream indicated that these exchanges along those lines were common between members of staff and were made openly. The impression gained by the Tribunal from the witnesses was that these types of exchanges were made commonly and between all of them. The Tribunal found that Mr Bream had stock phrases for everyone and that he used standard patter. This would include saying to the claimant, and indeed to others, that he loved “ya”, but the Tribunal did not accept that Mr Bream had made any professions of genuine love for the claimant, either as alleged or at all.

(10) Insofar as comments about alleging saying that the claimant looked beautiful and that her eyes were beautiful, the Tribunal could not find that these comments were made by Mr Bream in the manner alleged. Mr Bream did not present himself to the Tribunal as someone who would have the confidence to make comments such as that, which were direct comments about the claimant's eyes or her generally. The Tribunal instead preferred the evidence that comments made were along the lines set out above, such as “looking good” or “don’t you look lovely”. These were made however in a wide general sense and not made to the claimant as genuine remarks of affection.

(11) The Tribunal carefully considered from all the evidence of what the effect on the claimant was of these allegations. There was no evidence to support any suggestion that the claimant was upset by these or that they caused her anxiety or distress. Indeed the evidence of the witnesses indicated that the claimant joined in this general exchange which took place openly on the shop floor between most if not all of the members of staff. At least three phrases were alleged by the claimant to have been made by Mr Bream which had allegedly upset the claimant and which had caused or contributed to her dismissal, but the finding of the Tribunal was that the claimant was not upset by them, and that they were not directed individually and particularly at the claimant by Mr Bream but that they were part of a general pattern of exchanges between Mr Bream and the claimant, and indeed other members of staff.

(12) In considering the allegations at 1.1.1(b)-(d), the Tribunal also considered additional screenshots which it had been provided with to which we have referred above. These were given pages 244-249. At page 244, there is an exchange with Mr Bream and the claimant which is dated 2 April 2019. The Tribunal has found as a fact that this was almost exactly two months after Mr Bream joined the Prestwich store. The claimant, however, is clearly engaging in friendly exchanges on Facebook with Mr Bream. Indeed on page 244 she describes him as a

"gem". On page 245, again on 2 April, the claimant is inviting Mr Bream to still "come and have a singalong" with the claimant. This is against the background of the claimant indicating on both these pages that she is looking for a different job. At no stage, however, does she indicate that this is because of any conduct of Mr Bream. Indeed on page 245 she says that if she does leave that "Awww I miss yous, Simon".

(13) On page 246, again the claimant engages openly on Facebook with Mr Bream. It appears that Mr Bream has been unwell. The claimant says to Mr Bream that she hopes he gets well soon and ends the message with an "x". The tone and content of these messages was, in the opinion of the Tribunal, extremely persuasive. They are two months after Mr Bream had transferred to the Prestwich store. This was despite the fact in her sworn evidence that the claimant had said to the Tribunal that Mr Bream had immediately begun sexually harassing her. The Tribunal found that allegation to be completely inconsistent with the tone and content of these Facebook messages which were exchanged between the claimant and Mr Bream some two months later. It was obvious that the claimant had not taken any steps at all to block Mr Bream as a "friend" on Facebook. Indeed, quite the opposite. The claimant was talking to Mr Bream in a very friendly and open manner and even adding an "x" to her messages. The Tribunal therefore was unanimous in concluding that even if the remarks made at paragraphs 1.1.1(b)-(d) had been made, that they did not in any way upset the claimant, and she was perfectly happy some two months later to engage in an obviously open and friendly exchange with Mr Bream on Facebook in April 2019.

(14) The Tribunal then moved on to the allegation at paragraph 1.1.1(e). The wording of that allegation is clearly set out and in the opinion of the Tribunal does not need to be repeated in wording in this Judgment. At the same time, the Tribunal also considered the allegations at 1.1.1(f)-(m) inclusive even though these were alleged to have taken place in or about July 2019. They were considered together by the Tribunal because there was a complete disagreement between Mr Bream and the claimant about whether any of these comments had been made at all. The claimant was adamant that they had been made and that by now Mr Bream was taking care to ensure that when he made these comments that he did so in circumstances and in locations in the store where there was nobody else about so that the only two people present were the claimant and Mr Bream. The claimant even went so far as to say that Mr Bream would follow her into the back room/stockroom so that he would be able to find a private place in which to make these comments to the claimant without there being the possibility of any witnesses present. By contrast, Mr Bream was equally adamant that he had never made any of these comments and that he had never made any arrangements or even attempts to speak to the claimant in private locations, either in the way that the claimant alleged or indeed at all.

(15) In view of the explicit nature and very clear nature of the individual allegations raised by the claimant against Mr Bream, the view of the Tribunal was that this was not a case where it might be suggested that the claimant had in any way misinterpreted what had been said or misheard what had been said, or indeed misunderstood what had been said. The allegations against Mr Bream were expressed very clearly in explicit and very clear terms. In the opinion of the Tribunal, therefore, there was no possibility other than that the Tribunal had to conclude whether or not these comments had or had not been made. That drove the Tribunal to conclude that either Mr Bream or the claimant was not being honest, and as both had given evidence on oath that one of them was prepared to tell lies to the Tribunal on oath about allegations (e)-(m) inclusive. With some degree of reluctance, the Tribunal acknowledged that this was the task which the Tribunal was now responsible to determine. In carrying out that task the Tribunal considered the following information and observations from the evidence which was given, the documents which were submitted and the conduct and demeanour of the witnesses when giving evidence, and in particular when they were being cross examined:

(a) The Tribunal observed in their unanimous opinion that the claimant was a combative, assertive and highly confident person. She was never at any stage afraid to openly argue, sometimes in a raised voice when she was cross examined. She presented herself as a forthright individual.

(b) Witnesses for the respondent equally gave evidence that in their dealings with the claimant that they gained a very similar if not identical impression of the claimant. None of the respondent's witnesses indicated that the claimant was in any way unpleasant. Indeed, quite the contrary. They indicated that she was a valued member of staff. Nevertheless they expressed the view that the claimant was someone who was, to use a colloquialism, never slow to express an opinion.

(c) The Tribunal was particularly taken by the example of the claimant complaining that Zoe Jones appeared to enjoy more favourable childcare arrangements than the claimant. This was despite the fact that Zoe Jones had enjoyed those arrangements for a considerable period of time. However, when the claimant realised that her childcare arrangements were in her view less generous, she had no hesitation whatsoever in approaching the Area Manager, Mr Coffey, to raise this and to say that if in effect the company could accommodate Zoe Jones by allowing her to work two fixed days, that she wanted exactly the same arrangement. The Tribunal particularly took into account that the claimant did not go to her manager but went direct to the Area Manager, Mr Coffey. Discussions were then held with Zoe Jones and arrangements were made to change her hours in favour of a pattern which the claimant was required to work. The claimant therefore got her own way. She did this without any hesitation

and without any fear of upsetting Zoe Jones. She bypassed her immediate manager. Furthermore, she had the confidence, without hesitation, to approach the Area Manager, John Coffey, about this, and at the end of the day she got what she wanted. This was not an example of someone who was disgruntled and held those views in. The claimant had no hesitation whatsoever in raising them at the level of an Area Manager and arguing her case to effectively get what she wanted. In the opinion of the Tribunal, this was entirely in keeping with what the Tribunal observed of the personality of the claimant.

(d) The Tribunal found the information and documentation at page 80 in the bundle to be of particular relevance and importance. It was agreed between the claimant and her line manager, Alex Kelly, that there had been an issue with a customer by the name of Roy. Alex Kelly in her witness statement at paragraph 16 refers to this. It was not disputed that Roy was a regular customer. It was also noted that he seemed to have mental health issues, but it was equally clear that the claimant had developed a relationship with him in the store which had led to him buying some gifts for her including, for example, chocolates. This unfortunately had clearly emboldened the customer and at page 80 the claimant posts openly on Facebook on 4 June at 15:48. The claimant posts photographs of gifts which Roy had delivered to the store for her, but she also posts the full text of a letter which Roy had also left for the claimant at the same time. The content of the message was a little difficult to read, but when enlarged the Tribunal found the wording to be of importance. Roy talked about:

- Can’t wait to hold your curvaceous body;
- Kissing and caressing;
- Fondling your pert boobs;
- Red hot sexy big boobs.

(e) The reason why the Tribunal found the content of this letter to be important was because of the nature of the behaviour which Roy suggested he wanted to engage in with the claimant. On any examination or interpretation, these words and suggestions were at a significantly lower level of sexual conduct and sexual insinuation than the comments which the claimant says by then Mr Bream had begun to openly engage in with the claimant on a very regular basis secretly within the workplace. Roy was not a work colleague. He did not make these comments to the claimant face to face, and neither did he make these comments to the claimant on a regular basis. Nevertheless, the response of the claimant was to publish the whole letter on Facebook in order to bring it to the attention of all her friends on Facebook. The tone of her post on Facebook has a clear jokey tone to it. However,

the claimant responds by saying that when she read the letter her response was, “FFS”, which the Tribunal clearly is aware is shorthand for “for fucks sake”. The claimant goes on to comment in her post that “enough is enough, Roy”, and she goes on to say that she believes that he has now overstepped the line. She goes on to say that “words are gonna be had” with him, and she says that those words are “gonna be fuck off”. Indeed, the claimant goes on to emphasise in the following sentence that she knows that those are the words that she is going to use to this customer.

(f) The Tribunal found it to be particularly noteworthy that the claimant was prepared to post what had been said to her openly online to her friends on Facebook, and she had equally made it clear what she was going to say and how forcefully she was going to speak to Roy when she next encountered him in the store, even though he was a customer. The Tribunal equally found it particularly important to note that this was posted on 4 June, and the claimant made it very clear indeed that in her opinion by then she had been sexually harassed on a regular basis by Mr Bream for many months. The Tribunal found it unbelievable that if the claimant responded to this note from the customer by the name of Roy in the way that she did, and clearly indicated quite openly on Facebook the language that she was going to use towards Roy, that she had not in equally forceful terms approached Mr Bream on the repeated occasions that by then the claimant alleged that she had been sexually harassed by him, using words and phrases which in a sexual context were obviously much more serious than the words used by the customer.

(g) In the claim form the claimant was clearly suggesting that by now Mr Bream had gone on to suggest to the claimant what a great lover he was and informed her that he had a big penis and that he knew how to use it. The Tribunal believed, therefore, that if the claimant was quite openly on Facebook posting that she was going to speak to Roy by telling him to “fuck off” because of one single letter he had sent to her that if Mr Bream had allegedly spoken to the claimant in a much more serious sexual manner, and bearing in mind she worked with him, that she would have spoken to Mr Bream in an equally forceful way, and if he had repeated the allegations the Tribunal had no hesitation at all in coming to the conclusion that the reaction of the claimant to repeated assertions by Mr Bream would have led to an increasingly vocal and very clear reaction on the part of the claimant.

(h) The Tribunal also believed that that would be the case bearing in mind the obvious disparity between the character of the claimant, as demonstrated in the manner in which she gave evidence and as demonstrated in her comments and language on page 80, in comparison to the character of Mr Bream when he gave his evidence. Witnesses had attested to what they understood to be

the personality of Mr Bream, having worked alongside him day by day, week by week. They told the Tribunal very clearly that he was a quiet, shy and slightly withdrawn individual. They described him as lacking in self-confidence. The Tribunal believes that had the claimant spoken to Mr Bream about the alleged sexual comments that he was supposed to be making to her, in the tone and language that she was perfectly prepared to suggest she would use towards the customer, Roy, that Mr Bream would have been genuinely shocked. Furthermore, if despite speaking to Mr Bream in that way Mr Bream had then continued, then the Tribunal had no hesitation whatsoever in believing that the claimant would, without a shadow of a doubt, have shared her views with her work colleagues with whom she was particularly close. The Tribunal found it incredible that the claimant would not have shared her views and observations with her colleagues and would not have done so in similar terms to the words expressed at page 80. The Tribunal believed that she would have described to her colleagues what had been said to her by Mr Bream, and her exasperation and astonishment that despite having forcefully spoken to Mr Bream that Mr Bream was continuing to behave in that way on a daily basis, and doing so deliberately by seeking out the claimant in parts of the shop and the warehouse where no-one else was present apart from the claimant and Mr Bream. This would have required detailed planning on a daily basis by Mr Bream, and indeed it was suggested that Mr Bream engaged in this activity on more than one occasion each day, every day. This would have therefore indicated an intense level of fixation on the part of Mr Bream. Not only was it suggested that the level of sexual comment increased, but it was also indicated to the Tribunal that Mr Bream began to be focussed on a daily basis by finding opportunities where, in a relatively small store, both he and the claimant were the only people together in order to allow Mr Bream to have the opportunity to make these comments to the claimant without any witnesses being present. The Tribunal quite frankly found this to be unbelievable.

(i) The Tribunal also noted that immediately on receiving the document and presents which are shown at page 80 from the customer Roy, the claimant raised this with management. The Store Manager, Alex Kelly, deals with this at paragraph 16 of her witness statement, and the Tribunal accepted what she said. In the first line of paragraph 16 she says that when the conduct of Roy as shown at page 80 was raised with her, Roy was banned from the store. The manager says that she recognised that Roy had behaved in a way which required him to be immediately banned. There was therefore evidence that when a matter of this nature was raised with Alex Kelly that she did not ignore it. She recognised how serious it was. She says that she "stepped in". Action was taken. The Tribunal found this to be particularly significant because it was alleged by the claimant that Alex Kelly repeatedly, over a period of weeks and months, ignored

complaints which were allegedly made to her by the claimant about the sexual harassment which she was receiving at the hands of Mr Bream. Of course, Mr Bream denied making the allegations, and Alex Kelly equally forcefully denied that any complaint or issue had ever been raised with her about the conduct of Mr Bream. The evidence in front of the Tribunal as a result of page 80 was that if issues were raised which Alex Kelly recognised as being unacceptable, that she was well able to recognise what was right and wrong and that she was perfectly prepared to take the steps which were necessary and appropriate, and in this case that led to the customer being banned from the store.

(j) During the course of the hearing, but not as part of the disclosure exercise which the parties, including the claimant, were obliged to engage in, the Tribunal was provided with further copies of Facebook posts from the account of the claimant. They were provided during the Tribunal hearing. The Tribunal received six pages and added them to the bundle with pages numbered 244-249 inclusive. The Tribunal also found these documents to be of particular significance. At page 244, dated 2 April 2019, there is shown an exchange between the claimant and Mr Bream. It begins with Mr Bream asking the claimant whether she is ok, and the response from the claimant is, “not really, mate”. Even as at the date of this posting, 2 April 2019, the claimant says in reply that she is looking for a new job. She goes on to say that she “can’t be arsed in there anymore”. She concludes the message by thanking Mr Bream “very much for asking though - - - you’re a gem”. She ends the text with an “x”. Mr Bream replies by asking the claimant not to let a little thing like today make up her mind, but he goes on to say, “but I can’t let it get to you my little muffin who I will miss - - - if you go x”. The Tribunal found the content, and in particular the tone, of this exchange between the claimant and Mr Bream to be of particular significance. It was suggested by the claimant that Mr Bream had only just started work at the beginning of April and yet she was by 2 April exchanging messages with the claimant in this way. Of course, the Tribunal discovered that that was not the case, and that Mr Bream had by now been working at the Prestwich store for two months, not two days as the claimant had suggested in her witness statement. The claimant had given evidence to the Tribunal to say that the inappropriate comments from Mr Bream relating to her appearance had begun as soon as Mr Bream had started working at the store in Prestwich. That clearly must have been in February. The claimant had said that those comments made to her by Mr Bream amounted to sexual harassment, and to do so clearly would have to meet the definition of harassment under section 26 of the Equality Act 2010. However some weeks later, by the beginning of April 2019, Mr Bream is perfectly prepared on Facebook to engage in this type of exchange with this type of friendly note to it with the claimant. The evidence of Mr Bream

and the other witnesses was that the exchanges with the claimant about her appearance and about comments such as “love you/ya” were of a friendly nature and not in any way specifically directed at the claimant. This exchange between the claimant and Mr Bream, in the opinion of the Tribunal, was significant because it clearly indicated that some two months after Mr Bream began working at the store that this was the tone of the exchanges which the claimant was perfectly happy to engage in with Mr Bream on Facebook. There was no hint whatsoever of any disagreement between the claimant and Mr Bream, in fact quite the opposite, and the tone and content of those messages at page 244 was, in the very opinion of the Tribunal, very clear and obvious.

(k) At page 245 the exchange continues. The claimant again relates very clearly to her thinking of leaving and finding alternative employment. She says that “today has just swayed me a bit more”, but not in any way does she say that that is behaviour which relates to Mr Bream. That is clear and obvious from the tone of the continuing exchanges. The claimant goes on to say that if she goes to find alternative work it will still probably be in Prestwich, and she ends by saying, “so I’ll still come and have a singalong with ya Simon x”. Mr Bream replies by asking the claimant to seriously think about leaving because nobody wants her to leave because she is the life and soul of the shop, and that if she did leave “we will all miss you x”. The claimant continues the exchanges by saying, “Awww I’ll miss yous Simon but I’m just getting fed up. You’ll make up for me Simon ha ha x”. The tone of this exchange with Mr Bream is perfectly clear.

(l) Four days later on 8 April 2019 the claimant has observed from some Facebook posts that Mr Bream is not well and she specifically reaches out to him to hope that he is better soon and adds an “x” to the message. She responds to the reply of Mr Bream again to hope that he gets well soon, and again she adds an “x” to that message. The Tribunal concluded that the content and tone of these messages genuinely and properly indicated the nature of the relationship between the claimant and Mr Bream at the beginning of April 2019, and they were in direct contrast to the nature of the relationship which the claimant suggested to the Tribunal was the case as a result of what she alleged was a pattern of repeated sexual harassment of her by Mr Bream from the moment that he started working at the Prestwich store, which by then was a period of two months bearing in mind that he had started work at the beginning of February and not the beginning of April as the claimant had alleged.

(m) The final three pages of the six additional pages to which the Tribunal has referred are pages 247, 248 and 249. Again, the Tribunal considered these to be of particular significance bearing in mind the complete disagreement between Mr Bream and the claimant about how Mr Bream had allegedly behaved. On that

basis, bearing in mind that quite understandably there were no witnesses to the alleged exchanges which the claimant alleged, the Facebook entries posted by the claimant were, in the opinion of the Tribunal, of particular significance. At page 247 the Tribunal was now presented with an exchange between the claimant and Mr Bream dated 5 September, some five months later than the pages referred to above. The exchanges at page 247 begin with Mr Bream commenting that, "Ha ha ha aww, I love working with you Kim it's a right laugh x". The claimant responds by saying, "snap Si x". Mr Bream responds by saying that "love it, we're both off our heads ha ha ha. A few people have said they miss me being supervisor as well x". This was a reference to a set of facts which Mr Bream openly acknowledged. He had been given a final written warning for presenting timesheets which entitled him to payment but that was in relation to periods of time, approximately 45 minutes on more than one day, when Mr Bream had left work early and yet had still on his timesheets claimed for payment. He had also been denoted as a supervisor as well as receiving a final written warning. He goes on to comment that "a few people have said that they miss me being supervisor as well". Again he adds an "x" to that message. Exchanges go on by Mr Bream saying that he is in until 6.30, and the claimant replies by saying that she is equally in until 6.30 "see you in a bit x".

(n) On the following page, 248, the exchange continues. There is a further exchange which begins at 10.11am on 5 September. Mr Bream asks the claimant in a clearly jokey manner, "what time you in today boss? x". The claimant replies by saying that she in at half two "to boss you all over ha ha ha x".

(o) The final page (page 249) is out of the date sequence, but nevertheless the Tribunal was presented with it in this way. It is dated a few days earlier, 29 August, at 9:19. This is clearly an indication that this exchange is taking place outside the working hours and is taking place at 9:19 in the evening. Mr Bream suggests to the claimant that it would be amusing for the claimant to be a supervisor and he posts to the claimant "yes supervisor Kimberlyyyyyyyyyy x". The claimant responds by saying, "ha ha ha, one night only Simon ha ha ha". The exchange continues by Mr Bream suggesting that the claimant would be a one night wonder as a supervisor, and the claimant replies by saying, "definitely ha ha ha". Mr Bream goes on by saying that apart from the time issue which had led to his final written warning he goes on then to suggest to the claimant that he was not a bad supervisor. The claimant responds by saying, "not at all - - if you'd of sticked to the time thing you'd still be at it but you're better off not, Simon, life's easier".

(p) It was clear to the Tribunal that pages 248 and 249 were presented to the Tribunal in the wrong order. Page 249 should have been page 248, and page 248 should have been page 249.

It was clear to the Tribunal that they both represented an exchange between the claimant and Mr Bream which took place in the evening on 29 August.

20. Having made the above observations, the Tribunal then considered its view of Mr Bream. The Tribunal found him to be a truthful and persuasive witness. He did not prevaricate. At no stage did he present as anything other than as he had been described by the other witnesses for the respondent. He is clearly a quiet and reserved individual. Never once did he raise his voice and when giving evidence, even when being vigorously cross examined by Mr Broomhead, he never once raised his voice and there was never at any stage any change in his personality and demeanour when he was giving evidence to the Tribunal. The picture of Mr Bream painted by the claimant was that he had repeatedly, almost on a daily basis, planned and schemed to find opportunities where just he and the claimant were together in the premises at the Prestwich store and then on those individual occasions that he had found he then made comments to the claimant which were, in the unanimous opinion of the Tribunal, at the extreme end of any sexual comments which may be made, especially comments between work colleagues.

21. The wording of those allegations is set out very clearly in the Schedule of Complaints and Issues. The Tribunal finds no need to repeat those words. The words are clear, and the meaning is very obvious for all to see. The Tribunal therefore was being asked to accept that those words and phrases were repeatedly used by Mr Bream when set against his personality and the manner in which he presented himself throughout his testimony at the Tribunal. In the opinion of the Tribunal, it would take a significant degree of scheming and planning, and indeed a significant degree of confidence, for someone to approach the claimant, with her personality which the Tribunal has already commented on, to make these remarks over and over and over again, if not on a daily basis then certainly regularly, week after week, month after month. The Tribunal was also asked by the claimant to accept that she had repeatedly told Mr Bream that when he made these remarks he had to stop.

22. The Tribunal was repeatedly reminded of the words and phrases used at page 80 by the claimant in response to the letter which she had received from the customer by the name of Roy. Observing the claimant, as the Tribunal did then, they were unanimously satisfied that if these words and phrases had been used towards her by Mr Bream that the response of the claimant would have been strong, unreserved and unwavering, and the claimant would have used words and phrases towards Mr Bream which it would have been impossible for Mr Bream to recognise as anything other than an expression by the claimant in the clearest possible language that what he was saying was unacceptable, and yet the claimant asked the Tribunal to accept that despite repeatedly and regularly indicating to Mr Bream that what was he was saying to her was unacceptable, the tribunal was asked to accept that Mr Bream had continued, week after week, month after month, to engage in a campaign of repeated harassment. The Tribunal was also asked to believe that despite having made it clear to Mr Bream that his comments were unacceptable, and despite on the evidence of the claimant repeatedly ignoring complaints from the claimant, that the claimant did not then mention any of this to any of her work colleagues, although she asked the Tribunal to accept that she had repeatedly and regularly complained to management. It is clear from the Facebook pages, which

the Tribunal examined that the claimant had a good working relationship with her colleagues. She was popular. If she was becoming upset on such a regular basis by such overt sexual comments being made to her by Mr Bream, despite allegedly repeatedly telling him in clear terms how she felt about those comments, the Tribunal found itself quite unable to believe that the claimant had never spoken to her work colleagues about this at any time whatsoever. There was no evidence at all, even from the claimant, to say that she had shared this with her work colleagues. The Tribunal could not accept, having read the Facebook messages and observed the claimant herself giving evidence, that the claimant would in any way have been embarrassed by discussing the words with her colleagues. The Tribunal reflected on the tone of the Facebook post about the customer Roy. In any event, the claimant would not have needed to use the exact words and phrases which she alleges Mr Bream used. She could simply have explained to them that he was sexually harassing her, that he was planning and scheming to get her on her own on a regular basis within the store in order to make these remarks, and that she had repeatedly told him to stop and that he had not. The Tribunal simply cannot find that the evidence given by the claimant that she would not have shared this information with her colleagues to be credible. The Tribunal unanimously and very clearly finds that the claimant would, if what she says was true, have definitely shared it with her colleagues and definitely have made her views known, particularly when she showed no hesitation in doing so in response to the letter which she received from the customer, which she not only shared with colleagues but which she openly posted on Facebook with the language and comments to which the Tribunal has already referred.

23. Returning to its requirement to make findings of fact, the Tribunal therefore considered the comments which were set out within the Schedule of Complaints and Issues at 1.1.1(e)-(m) inclusive. They alleged a repeated pattern of serious sexual harassment at the top end of any scale, between May and July 2019. The conclusion of the Tribunal was that these comments were not made by Mr Bream. In doing so the Tribunal considered the different personalities of Mr Bream and the claimant as they presented to the Tribunal, but also took into account the documents to which the Tribunal has referred above and the lack of any complaint or suggested discussion between the claimant and her work colleagues, other than allegedly Alex Kelly. The conclusion of the Tribunal therefore was that these incidents did not happen, and on that basis if they did not happen, then there was no question of them amounting to sexual harassment.

24. The Tribunal then moved on to the allegation at paragraph 1.1.1(n) which the Tribunal has already indicated that it will refer to as the “Oral B” incident. Having considered the evidence and considered the performance of the witnesses in cross examination, and having referred to the documents to which the Tribunal; has referred above, the Tribunal made the following findings of fact in respect of that incident:

(a) Mr Bream openly accepted that on the shop floor in the presence of customers (but without any evidence to suggest that it was overheard by the customers), he referred to the title on the box of a tube of toothpaste which read “Oral B”. It was agreed that Mr Bream then made a comment to the claimant by reference to the word “oral” on the side of the toothpaste and indicated that that is what he wanted to do to

the claimant. The claimant alleged that Mr Bream had also said that he wanted to do this to her "all night". Mr Bream specifically took issue with that and steadfastly denied that he had added those words. There was therefore a dispute about the fact that the comment had been made by Mr Bream. As the Tribunal has already indicated, they have preferred the evidence of Mr Bream to the evidence of the claimant and on that basis the Tribunal found that the words "all night" had not been used by Mr Bream. Nevertheless, the view of the Tribunal was that those words added little, if indeed anything, to the tone of the comment which was made by Mr Bream.

(b) What was of significant disagreement between the witnesses, however, was the reaction of the claimant to that comment being made. The evidence of the claimant was that she had taken significant offence to the remark which had been made and that she had immediately gone to complain to the store manager, Alex Kelly. Mr Bream and Alex Kelly equally steadfastly denied that the claimant had taken any offence and equally denied that it was the claimant who had had to take steps to take the box to the manager. The sworn evidence of both Alex Kelly, the store manager, and Mr Bream was that the claimant had found the remark amusing and had openly laughed about it. Their evidence was that the claimant had not been upset in any way by the comment which had been made. Indeed, the evidence of Alex Kelly was that it was the laughter which was being exchanged by the claimant and Mr Bream which had initially alerted her. She had gone to investigate why two colleagues on the shop floor were laughing in that way instead of getting on with their work. The Tribunal therefore had the sworn evidence of Ms Kelly and the sworn evidence of Mr Bream about the reaction of the claimant to this comment. There is complete disagreement therefore on the evidence about this. The Tribunal has already set out its reasons for preferring the evidence of Mr Bream to that of the claimant and in respect of this dispute of fact the claimant was supported by the evidence of Ms Kelly. The Tribunal preferred the evidence of Mr Bream and Ms Kelly to the evidence of the claimant and concluded, unanimously, that the reaction of the claimant to this comment was indeed laughter and that there was no evidence to suggest that the claimant had been upset by it. Indeed the reaction of the claimant was quite the opposite.

25. The Tribunal accepted that the claimant had indeed brought the wording on the toothpaste box to the attention of Ms Kelly, and had indeed reported to her what Mr Bream had said, but the Tribunal found that the reason that she did that was in order to explain to Ms Kelly why her and Mr Bream were laughing in the way that they were which had alerted Ms Kelly and persuaded her to go and find out just what was going on. There was therefore an element of consistency between Mr Bream and Ms Kelly about the fact that the comment and the wording on the toothpaste box had been brought to her attention but it had not, in the opinion of the Tribunal, been brought to the attention of Ms Kelly, the store manager, as some form of complaint, and neither did the claimant have to take any steps to leave the area and go to a separate area to speak to Ms Kelly. The explanation requested by Ms Kelly effectively as to what was going on was immediately offered by reference to the

wording on the toothpaste box and the wording which had been used by the claimant. What the Tribunal specifically focussed on was the reaction of the claimant and the "effect" on the claimant of the comment being made to her by Mr Bream. The unanimous conclusion of the Tribunal was that the claimant found it amusing, laughed along with Mr Bream and was not upset or offended by it in the manner which she suggested.

26. When Ms Kelly herself gave evidence on oath and was cross examined she was perfectly happy to reveal that she was gay. During cross examination Ms Kelly also gave what the Tribunal found to be persuasive and important evidence. She explained that she herself had regularly been the victim of harassment because she is a lesbian. She said that she regularly received remarks in her personal and professional life about looking like a lesbian. She said that this occurred even during the time that she worked at Toys 'R' Us which was prior to her employment with the respondent. She said that men would make comments to her about how she must love it with her girlfriend. She said that she also regularly received unpleasant sexual comments when she had the need to approach shoplifters in the course of her employment. She said that she therefore had substantial first-hand experience of how sexual harassment affects people, and she equally understood first-hand how hurtful that was. The Tribunal found this to be important evidence.

27. The evidence of the claimant was that she had repeatedly (indeed in a text she said "a million times") complained about the overt sexual harassment by Mr Bream. She alleged that despite repeatedly raising this with Ms Kelly that she had ignored the complaints and done absolutely nothing about it. Ms Kelly steadfastly and adamantly denied that that was the case and said that the first incident which had ever been brought to her attention was the Oral B incident. There is therefore a significant disagreement, once again, between the evidence of the claimant and the evidence of a witness for the respondent, in this case Ms Kelly.

28. Ms Kelly and Mr Bream gave evidence to the effect that having heard what was causing Mr Bream and the claimant to be laughing to the extent that it brought it to the attention of Ms Kelly that despite the reaction of the claimant, who the Tribunal found had been amused by the Oral B comment, Ms Kelly was not prepared to just let that lie. She immediately recognised the comment was inappropriate, whether the claimant and Mr Bream found it amusing or not. Ms Kelly therefore took Mr Bream into the back office and clearly reprimanded Mr Bream, telling him that such comments were inappropriate and that they should not be repeated. Mr Bream also gave evidence to the effect that that step had been taken by Alex Kelly and that he had clearly understood what she was saying, and that although at the time he had felt that it was something which he could openly joke about with the claimant, that nevertheless Ms Kelly was making it clear that in her opinion the joke was inappropriate and that it should not be repeated. That message was effectively and clearly communicated to Mr Bream by Ms Kelly in the unanimous opinion of the Tribunal.

29. The Tribunal found this evidence to be particularly significant. This was the only time when there was agreement between the witnesses about a sexual comment having been made by Mr Bream towards the claimant. The evidence therefore was, in the opinion of the Tribunal, that Ms Kelly had recognised it as being inappropriate despite the reaction of the claimant and Mr Bream, and had taken

steps to reprimand Mr Bream and remind him that what he had said was wrong and should not be repeated again. In the opinion of the Tribunal, it was inconceivable therefore that if, as the claimant suggested, she had repeatedly, over and over again, gone to Ms Kelly to complain about repeated and regular and scheming sexual harassment of her by Mr Bream, that Ms Kelly would just have ignored that. That was the clear evidence of the claimant. She was saying that repeatedly she had complained, and that Ms Kelly had simply ignored it. The Tribunal found that evidence to be unbelievable. The Tribunal took into account the demeanour of Ms Kelly when she gave evidence. The Tribunal found her to be a persuasive and truthful witness. A great deal of her evidence in cross examination was given with her openly facing the camera and not referring to documents but quickly and confidently being able to answer questions and, where appropriate, to disagree politely and yet persuasively with questions which were put to her by Mr Broomhead. The evidence was that she had reprimanded Mr Bream for what he had said in connection with the Oral B incident. The evidence of her being a victim of sexual harassment herself, unfortunately on a regular basis, was equally persuasive. The Tribunal found it quite unbelievable to think that someone who experienced that sexual harassment themselves regularly during their professional and personal life would then show no sympathy or understanding whatsoever to the claimant when she herself allegedly went to Ms Kelly to complain about overt and frankly disturbing levels of sexual harassment which allegedly Mr Bream was directing towards the claimant. Even allowing for the obvious exaggeration the claimant alleged that she had complained to Ms Kelly "millions" of times.

30. Furthermore, not only was he allegedly directing it towards the claimant over and over again, but he was doing it on a scheming and planned basis (on the evidence of the claimant) to ensure that when those comments were made that they were made when only the claimant and Mr Bream were present. That therefore suggested a repeated scheme of planning and sophistication on the part of Mr Bream in order to ensure that there were no witnesses available. The Tribunal, having heard and observed Mr Bream, found that suggestion to be unbelievable and equally found it unbelievable to suggest that if, as the claimant suggested, there had been repeated complaints to Ms Kelly that, as the claimant suggested, Ms Kelly had simply ignored that over and over and over again. The Tribunal therefore unanimously rejected that evidence and the suggestion which was made by the claimant.

31. Having made those findings of fact, therefore, when turning to allegation 1.1.1(o), which read "Alex Kelly failed to take any action when she told her of Mr Bream's conduct", the conclusion of the Tribunal was that that was untrue and that Ms Kelly had not received regular complaints from the claimant at all, and that she had not therefore failed to take action. Indeed the only evidence available to the Tribunal was that when she was aware of the Oral B incident that she had reprimanded Mr Bream.

32. It was suggested, often in forceful terms, by Mr Broomhead that the decision to simply reprimand Mr Bream was inappropriate and that Ms Kelly should have taken much more serious steps under the disciplinary procedures and anti-harassment procedures of the respondent to which the Tribunal was referred in detail and which were included in the bundle. The opinion of the Tribunal was that it was clear from the evidence given by Ms Kelly that she was very considerably

swayed by the reaction of the claimant to what had occurred. From what she heard and observed from the claimant she understandably concluded that the claimant had not been upset by it but in fact had been amused by it. Notwithstanding that, Ms Kelly had nevertheless herself recognised that what Mr Bream had said was inappropriate, and in all the circumstances had taken the decision that a clear reprimand was appropriate. In the view of the Tribunal, this was one of the reasonable responses of a reasonable employer to what Ms Kelly had seen and heard. Whilst it accepted that another manager may have taken a more serious view, the Tribunal could understand why in the circumstances Ms Kelly had taken the decision that she did.

33. The Tribunal then moved on to the final allegation, which was at 1.1.1(p). This was a single allegation against Mr John Coffey, who was the most senior manager who gave evidence for the respondent. He was clearly an experienced manager and was, at the time of the allegations in question, the Area Manager. It was alleged that Mr Coffey "refused to discuss or deal with the issue of Mr Bream's conduct when the claimant tried to talk to him about it and instead told her that she should speak to her manager", who would have been Ms Kelly. The evidence about this from the perspective of the claimant was presented in her witness statement at paragraphs 26, 27 and 28. Mr Coffey did not deal with the individual details specified in the claimant's witness statement in his own witness statement but that was quite understandable because that detail had never previously been provided by the claimant before witness statements were exchanged and prepared. Nevertheless, Mr Coffey dealt with the content of the claimant's witness statement in cross examination because quite understandably that was put to him by Mr Broomhead. There was a considerable degree of disagreement between the sworn evidence of the claimant in her witness statement and the sworn evidence of Mr Coffey when he was cross examined.

34. Looking at paragraph 26 of the claimant's witness statement, first of all Mr Coffey denied that the telephone call had been received by him in an evening. The claimant was not at work and the following day would have been the claimant's last day of work, having given one week's notice in writing on 19 September. Mr Coffey said he remembered receiving the telephone call very clearly and that he had been at the Middleton store. When it was put to him that Mr Coffey was incorrect, Mr Coffey was very clear in answering that he had a clear recollection that the telephone call had been received late in the afternoon when he was at the Middleton store.

35. In paragraph 26 of her witness statement the claimant says that she told Mr Coffey, in reply to being asked why she was resigning, that a member of staff had been sexually harassing her at work and saying that she had told Alex Kelly loads of times and she had done nothing about it. Mr Coffey specifically agreed that that was what he had been told. He said that he could remember the claimant saying that she had been harassed at work, but he did not deny that the claimant may well have also said that she was being sexually harassed. Mr Coffey said that he asked who the claimant had reported it to, and he had been told by the claimant that she had regularly and repeatedly reported it to Alex Kelly.

36. The specific allegation against Mr Coffey in paragraph 1.1.1(p) was that he had refused to discuss or deal with the issue when the claimant had spoken to him.

In the opinion of the Tribunal, this allegation was unfounded and indicated an ignorance on the part of the claimant of the steps which Mr Coffey had immediately taken to investigate what he had been told. The claimant was off work on 25 September. Her last day of work was the following day and she had made it clear to Mr Coffey that she did not intend to turn up for work the following day. It was clear therefore that the claimant's employment was on the verge of closure with the respondent at this stage. There was no need or indeed obligation on the part of Mr Coffey to explain to the claimant what steps he was taking in order to investigate the matter, but unbeknown to the claimant Mr Coffey did take immediate steps to go to the Prestwich store, which was some 25 minutes away.

37. It is important however for the Tribunal to record that there was disagreement between the claimant and Mr Coffey about the date upon which this telephone call took place. Although the Tribunal has referred above to the fact that the claimant alleged it took place on 25 September, Mr Coffey was equally adamant that the telephone call took place the following day. He alleged that the claimant had told him at around 3.30pm that she was not in work and that she was not intending to go to work because it was her last day of her notice. He denied that it was the day before. Mr Coffey told the Tribunal that he was very confident that the telephone call took place on 26 September and not 25 September because his evidence was that having received that telephone call at the Middleton store, which was 25 minutes from the Prestwich store, that he had immediately gone to the Prestwich store in order to investigate. He referred the Tribunal to notes of an investigation meeting with Simon Bream which appeared at pages 88 onwards in the bundle. That document is headed “Investigation Meeting”. Mr Broomhead suggested to Mr Coffey that it was suspicious that he was so promptly able to present and use such formal documentation, such as a precedent for an investigation meeting. However, Mr Coffey told the Tribunal that he at all times had all the company’s formal documentation on his laptop and that whenever he carried out an investigation or a disciplinary he then took his laptop to the store and printed off the documentation. This was then not disputed by Mr Broomhead, perhaps understandably.

38. The evidence was therefore that Mr Coffey promptly went to the Prestwich store in response to what he was told by the claimant. The Tribunal preferred the evidence of Mr Coffey to that of the claimant, because the claimant produced no evidence at all to justify the fact that the call had allegedly taken place on 25 September. There were a significant number of other inaccuracies in the claimant's statement about dates, including for example the date when Mr Bream had started work, which was 1 February and not the beginning of April. The Tribunal did not therefore find that the claimant was at all reliable about dates, and the Tribunal took into account that it had taken a number of months for the claimant to finally provide full particulars of her claim, and the Tribunal has already referred to what was said and the words which were used in the course of two separate preliminary hearings by way of case management.

39. The Tribunal therefore preferred the evidence of Mr Coffey. They therefore found that in response to what he was told by the claimant that he immediately left the store in Middleton and travelled the 25 minutes to the Prestwich store. He downloaded and printed off a formal investigation precedent (page 88). He began that interview with Mr Bream at 16:08 and it concluded at 16:22. This was again consistent with Mr Coffey telling the Tribunal that the telephone call he received from

the claimant was not in an evening as she had suggested. The claimant had had the opportunity to produce records of her telephone account to be able to justify the time and date, but no such evidence was available. The Tribunal therefore, in the absence of that evidence, relied upon and was persuaded to accept the evidence of Mr Coffey and the evidence which was shown on page 88 of the time and date of the interview with Mr Bream.

40. From the nature of the questions which are then shown in the investigation meeting it was clear, as Mr Coffey asserted, that the claimant had only given him the broadest of descriptions of what allegedly had happened. She had simply asserted that sexual comments had been made. That was agreed between Mr Coffey and the claimant in any event, and therefore was not in dispute. Mr Coffey therefore at that stage could do no more than ask the broadest of questions of Mr Bream, and it is clear from the note of that investigation meeting that that is exactly what he did.

41. At paragraph 27 of her witness statement the claimant had, however, told Mr Coffey about an incident relating to a tube of toothpaste, and again Mr Coffey agreed that that had been said to him. Again that was consistent with Mr Coffey knowing nothing other than that there had been an incident with Oral B toothpaste and indeed he uses just that language on page 90 when he is questioning Mr Bream. He says, "Do you recall an incident with Oral B toothpaste?". At that stage Mr Coffey had no more than that extremely broad outline, because that was the limit of the information which he had been given by the claimant.

42. Mr Bream denied making sexual comments towards the claimant. When questioned about Oral B toothpaste he agreed that the comment had been made and of course, as the tribunal has already recorded, that was never in dispute. Mr Bream acknowledged that having thought about it that he now accepted that it was inappropriate but equally, now being questioned for the very first time by Mr Coffey, he told him that "Kim was laughing about it". This was consistent with all subsequent evidence from Mr Bream and Ms Kelly. Mr Bream denied making any other comments "like this". Mr Coffey also asked Mr Bream why he thought the claimant would be ok with the Oral B comment, and he replied to say that "she has that sense of humour". He denied having participated in similar jokes with the claimant at any other time.

43. Mr Coffey therefore had nothing more than the broadest of outlines and information from the claimant about what she meant when she said that she had been sexually harassment by Mr Bream. Against the background of that limited information Mr Coffey had immediately taken steps to interview Mr Bream, who had denied anything other than the Oral B incident and again, consistent with his evidence, he had promptly told Mr Coffey that in his opinion it had been a joke and that it was a joke which the claimant had laughed about, which was consistent with the evidence of Alex Kelly to which the Tribunal has already referred.

44. Having made those findings of fact, therefore, it was not possible for the Tribunal to reach any other conclusion but that Mr Coffey **had** indeed dealt with what was said to him by the claimant in the telephone call. He had been given the broadest of information, he had immediately reacted to that, recognising that it was serious, and he had immediately interviewed Mr Bream, who had given him

assurances that this was a one-off incident and that the claimant had found it amusing.

45. The second part of allegation 1.1.1(p) was that in addition to alleging that Mr Coffey had refused to discuss or deal with the issues that Mr Coffey had brushed off what the claimant had said and instead simply told her that she should speak to her manager, Alex Kelly. Mr Coffey steadfastly denied that that is what he had said to the claimant. The evidence was that Mr Coffey had reacted immediately by going to interview Mr Bream. That was obviously completely inconsistent with the evidence of the claimant, and in view of the documentary evidence produced of the interview with Mr Bream on 26 September the Tribunal unanimously preferred the evidence of Mr Coffey to that of the claimant, and therefore rejected the suggestion that Mr Coffey had attempted to brush of the claimant by telling her that she should speak to her manager and that he was not getting involved. Indeed the only evidence available to the Tribunal was that Mr Coffey **had** done exactly the opposite, namely respond immediately to what he was told, go from the Middleton store to Prestwich and immediately interview Mr Bream and make a note of it on the formal documentation of the company as an Investigation Meeting. The Tribunal found, therefore, that Mr Coffey did not brush off the claimant and tell her that he was not interested and that she should speak to her manager.

46. The claimant's letter of resignation appeared in the bundle at page 83. There was no dispute that the claimant had dated the letter 19 September, and there was no dispute that the final day under the claimant's notice period was therefore 26 September. 19 September and 26 September were both Thursdays. The claimant had alleged that the Oral B incident occurred on 19 September, which was the date on which she says she then wrote her letter of resignation. However, when the Tribunal was referred to the timesheets it was very clear that the incident could not have occurred on the Thursday because that was a day of the week when Alex Kelly, the store manager, was never in work. She gave evidence, which was not disputed, that her two days off each week were Thursday and Sunday. The incident simply could never have occurred therefore on 19 September as the claimant suggested. The claimant then sought to suggest that it must have occurred therefore the previous day, 18 September, but that was not possible either because, in accordance with the timesheets, Mr Bream was not in work on that date either. The evidence of the claimant therefore was completely inconsistent and unbelievable in connection with the date on which the Oral B incident occurred. It seemed to the Tribunal that when her first suggested date was impossible that her response was to select the previous day without realising that that date as equally impossible. The rota was included in the bundle at page 198.

47. This the Tribunal found to be of particular importance. The reason for this was the date which the claimant gave in paragraph 17 of her witness statement. She said that on the day on which the Oral B incident occurred that she had gone home “that night”, which was obviously 19 September on the basis of her sworn evidence. She says in paragraph 17 of her statement that it was that evening that she “decided I could not take it anymore so I decided I would leave”. It is therefore very clear that in her sworn evidence she was saying to the Tribunal that the “last straw” and the last of the incidents on which she relied which persuaded her that she could no longer work for the respondent and had no alternative but to resign was the Oral B incident. However, as the Tribunal has indicated earlier in this Judgment, that

is entirely inconsistent with the information which was given to the Tribunal at the case management hearings by Mr Broomhead, who at all times acted on behalf of the claimant. The incident did not and could not have happened on the 19th for reasons just explained.

48. The Tribunal has already indicated that the Tribunal has recorded in its Annex of Complaints and Issues that the last straw was the alleged failure by Mr Coffey to discuss or deal with the issues relating to Mr Bream following the telephone call which the Tribunal found, as a fact, took place on 26 September and not 25 September. However, the claimant resigned on 19 September, a week before, and therefore the Tribunal had to focus in connection with the "last straw" on what had happened up to and including 19 September. Clearly the actions or inactions of Mr Coffey on or about 25 or 26 September could not have in any way influenced the decision of the claimant to resign on 19 September, a week earlier.

49. Nevertheless, repeated assertions had been made, presumably on the clear instructions of the claimant, to the Tribunal at the preliminary hearings that the last straw was indeed the conduct of Mr Coffey. Furthermore, at paragraph 5 of the final version of particulars which the claimant provided in accordance with the Case Management Orders which were issued indicated in relation to the Oral B incident that the claimant had contacted Mr Coffey who refused to deal with the matter. Most importantly, however, the final paragraph (paragraph 6 at the bottom of page 17 of the bundle) indicates that "**as a result of the respondent's failure to deal with the claimant's complaints concerning Mr Bream's conduct the claimant terminated her employment with them".** This was a document which had been ordered, with some sense of exasperation by the Tribunal, to order the claimant to be clear and specific about what her allegations were and how she was putting her case. The claimant had failed to do so when she issued her claim form, even though it is reasonable for the Tribunal to assume that at that stage the issues which had persuaded the claimant to resign must have been very clear in her own mind. After all, she was the person who resigned and therefore she was the person who could tell Mr Broomhead what was in her mind at the time, and one can only assume therefore that what she told Mr Broomhead is reflected in paragraph 5 and paragraph 6 on page 17. However, of course it now transpires that the alleged failure to deal with the complaints postdates the date of resignation by one week. Relying on paragraph 6 on page 17 then the Annex of Complaints and Issues which is attached to this Judgment clearly shows that on the instructions of Mr Broomhead the claimant is putting her case at that stage, for the third time, on the basis that the last straw was the alleged inaction of Mr Coffey. However, once witness statements and documentation have been exchanged and examined by the Tribunal it is perfectly clear that that could never have been the last straw, simply because of the date of the telephone call, which even on the claimant's own evidence was 25 September but which the Tribunal has found as a fact actually took place on 26 September. Neither telephone call, on whatever date, can in any way have influenced the decision of the claimant to terminate her employment by submitting a resignation letter dated 19 September at page 83.

50. This was therefore a further and, in the opinion of the Tribunal, very significant inconsistency in the evidence of the claimant. The Tribunal, from its own considerable experience, would have expected someone who was resigning from a job that they allegedly loved to be very clearly and promptly able to explain the

reasons why she resigned. This is particularly the case bearing in mind the nature of the significant acts of sexual harassment which the claimant had made against Mr Bream. None of those, despite how serious they were, had persuaded the claimant that she must resign. On her evidence she had "put up with it" week after week, month after month, and yet something had then triggered her decision to terminate her employment. In the opinion of the Tribunal it was inconceivable that the claimant would not promptly and easily be able to explain that reason to her legal representative, particularly when early conciliation began in the middle of November 2019, which was two months after her resignation.

51. Despite, in the opinion of the Tribunal, it being obvious that the claimant could not rely on something which allegedly happened seven days after her date of resignation, the Tribunal was somewhat surprised to read in the written submissions which were submitted at the close of the evidence on behalf of the claimant by Mr Broomhead to read, on page 2 at paragraph 1.1.1(p), that the claimant was, in his own words, still relying upon the alleged inaction of Mr Coffey as being the last straw which justified the claimant's resignation. The Tribunal has already indicated that that simply cannot be the case bearing in mind the date of the letter of resignation, and yet in his submissions Mr Broomhead still seeks to rely upon that, somewhat confusingly in the view of the Tribunal. However, Mr Broomhead then goes on in his closing submissions at page 7 (paragraph 16) to say that in his opinion, on behalf of the claimant, that the Oral B incident would on its own be sufficient to amount to a last straw. With all due respect to Mr Broomhead, it is for the claimant to assert what was her last straw, and for the claimant to say what was in her mind at the time that she resigned. The claimant, assisted by Mr Broomhead, appears at the very best to be attempting to ride two horses. That simply cannot be the case. The question for the Tribunal is: what was in the mind of the claimant at the time that she resigned, and what was, in her mind, the reason for her resignation? What was the thing that tipped her over the edge? What was the last straw?

52. In any event, in the unanimous opinion of the Tribunal, neither the alleged inaction of Mr Coffey nor the Oral B incident amounted to the last straw. Insofar as Mr Coffey is concerned, the Tribunal has already set out its clear conclusion, which was that Mr Coffey did act promptly and responsibly in connection with what he was told by the claimant, although the claimant would obviously until she saw the documentation have been unaware of that. It was however nevertheless obviously clear from the point of disclosure of the relevant documents in accordance with the relevant Case Management Orders. Insofar as the Oral B incident is concerned, the Tribunal has found as a fact that the reaction of the claimant to that incident did not justify her resignation. It could not, therefore, as a result of the findings of fact of the Tribunal, have happened as the claimant alleged.

53. The Tribunal therefore, having dismissed these two incidents for the reasons which it has described, nevertheless went on to consider what, on the basis of the evidence that had been presented to it, was in fact the last straw which persuaded the claimant to write her letter of resignation and submit it on 19 September.

54. The Tribunal heard scant but, in its opinion, highly relevant evidence about a dispute which occurred on 18 September. The claimant apparently made some sort of announcement about perfume over the store tannoy and one of the supervisors, a person who is younger than the claimant by the name of Scott, took exception to the

tone and content of the announcement. The Tribunal was not given any details of what she said or why it was thought to be inappropriate. However, the Tribunal believed on the evidence that that was the reason why the claimant resigned, because it clearly could not have been the Oral B incident because Mr Bream was not at work on 18 September.

55. The Tribunal came to this conclusion on the basis of a number of pieces of evidence. At paragraph 21 of the claimant's witness statement the claimant makes reference to saying that she could not take any more because it was “like being back at school”. When the claimant was questioned about this she sought to justify that remark as being that when she had been at school that the type of things which had allegedly been said to her by Mr Bream were the sort of things which people said as schoolchildren. The Tribunal was easily able to dismiss that as unreliable evidence. The Tribunal did not believe for one moment that the type of comments which were alleged against Mr Bream were the type of comments which were made by schoolchildren when they were at school. That evidence by the claimant made no sense whatsoever. However, in the opinion of the Tribunal it made much more sense for that comment to relate to children being told off by their teachers and not necessarily liking it. That was therefore akin to the incident which related to the tannoy announcement and the claimant allegedly being taken to task by Scott.

56. The Tribunal also went back to pages 84, 85 and 86 which were exchanges again of Facebook messages. The Tribunal found these messages to be instructive and of significance. At page 84 there is a Facebook entry which is on 20 September at 5:18. This is the day after the claimant had resigned. The claimant is responding to an enquiry made by one of her colleagues as to whether or not she had resigned because she had got another job. The claimant replies by saying that she has not got another job, but she says that she would “rather be skint than feel like I’m back at school”. She goes on to say, “Scott and that Lou have got on my last nerve an enough of people on big power trips in fucking Quality Save?”. This is the day after the claimant resigned. She is making a clear reference to what had happened the day before in connection with the tannoy incident. The Tribunal was not told of any other reason why the claimant may have specifically referred to Scott in this Facebook exchange which, as the Tribunal has just said, occurred the day after the claimant submitted her letter of resignation.

57. On page 85 appeared another exchange on Facebook with Michelle. This was actually slightly sooner than the one to which the Tribunal has referred, but again it was on 20 September and this time was at 15:39 in the afternoon. The claimant concludes that exchange by saying that so far as resigning she is satisfied that she has made the right decision, but she then concludes that by saying, “I’m not being treated like a three year old off anyone on a power trip”. The message is shown more clearly on page 86. The claimant goes on to say that “would of been common courtesy to send out a memo of all these new things we can’t do - - - cos I’m not a mind reader - - - and neither is anyone else”. Of particular relevance however, in the opinion of the Tribunal, was that the claimant again goes on to say, in this message the day after her resignation “wasn’t treated like that in school”. This is a further reference therefore to how the claimant believes she is being treated. She goes to say that she has put a lot into the store and that she would rather go now before she starts hating people. She does not however, in any shape or form,

make any reference whatsoever to the sexual harassment allegations which she has since particularised and made against Mr Bream.

58. In the opinion of the Tribunal, therefore, this evidence indicates the genuine and real reason why the claimant resigned. She did not resign in response to the Oral B incident and neither did she resign in connection with the alleged inaction of Mr Coffey, which of course is impossible because that did not even occur until a week later. These Facebook messages are the very day after the claimant has resigned. It is quite obvious to the Tribunal that the resignation of the claimant came out of the blue. What therefore prompted the claimant to resign? In the opinion of the Tribunal, the claimant herself in her own words gives the accurate reason for that. She was not being treated any more like a three year old or being treated like being in school. She responded, in the opinion of the Tribunal, to the previous incident relating to the tannoy and Scott by resigning and indicating that she was not putting up with that anymore. The fact that she referred to a suggestion that it would have been common courtesy to send out a memo of all these things also, in the opinion of the Tribunal, emphasises that the claimant is referring back to that incident and indicating that if she had done something wrong that she should have been educated better as to what to do and what not to do. That is a further clear indication, in the opinion of the Tribunal, as to what was the genuine reason for the claimant resigning.

59. The Tribunal also took into account the content of the claimant's resignation letter at page 88. That letter makes absolutely no reference to the repeated pattern of significant sexual harassment which she now alleges against Mr Bream. The Tribunal finds that if the Oral B incident had been the last straw, and that that had been against the repeated pattern of schemed sexual harassment, that it is unbelievable that the claimant would not have mentioned that in some detail in her letter of resignation. Actually she makes no reference to it whatsoever, and the Tribunal finds that to be a significant factor in its conclusions.

The Law

Constructive Dismissal

60. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

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

61. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

62. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1998] AC 20** the House of Lords considered the scope of that implied term and Lord Nicholls expressed it as being that the employer would not:

> **"…without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

63. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

64. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

65. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

66. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case,**

> **but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

67. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.** Even if the last straw turns out to be innocuous or trivial, there might still have been a constructive dismissal if previous conduct amounted to a fundamental breach which has not been affirmed: **Williams v Alderman Davies Church in Wales Primary School UKEAT/0108/19/LA**

68. There is also an implied term that an employer will reasonably and promptly give employees an opportunity to seek redress for any grievance: **Goold WA (Pearmak) Ltd v McConnell [1995] IRLR 516.** Alternatively failure to handle a grievance properly might amount to breach of the implied term as to trust and confidence if serious enough to be repudiatory.

69. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in **Nottingham County Council v Meikle [2005] ICR 1**. At paragraph 20 of **Wright** Langstaff P summarised it by saying

> "**Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."**

70. The position as to affirmation once a fundamental breach has occurred was recently considered by the EAT (Langstaff P presiding) in **Chindove v William Morrisons Supermarket PLC** UKEAT/0201/13/BA (26 March 2014). In considering whether the passage of time alone could indicate affirmation, the EAT said this in paragraphs 25-27:

> **"25 ….We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need**

not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force…."

71. PS **Lochuak v London Borough of Sutton EAT Nov/Dec 2014:**

1. Because this case will be remitted to the Tribunal, I should say something about it. Mr Dutton submits that the expression "last straw" may be appropriate in one of two situations. One is that it is the additional piece of the picture which makes all the difference, taken cumulatively with what has gone before, a usage which derives from the expression "the straw which broke the camel's back". But, he submitted, it may also be used in another sense. Thus he referred to Logan v Commissioners of Customs and Excise [2004] IRLR 63 in which at paragraph 30 the last straw doctrine had been stated in terms of a series of actions on the part of the employer cumulatively amounting to a breach of the term, although each individual incident might itself not do so, but in which the judgment at paragraph 31 went on to say:

> ***"That case also established another important issue of principle stated by Glidewell LJ at p.469 in these terms:***
>
> ***'If the employer is in breach of an express term of a contract, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, but the employee does not leave and accepts the altered terms of employment; and if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence; is the employee then entitled to treat the original action by the employer which was a breach of the express terms of the contract as a … start … of a series of actions which, taken together with the employer's other actions, might cumulatively amount to a breach of the implied terms? In my judgment the answer to this question is clearly "yes".' "***

In other words the effect there is to resuscitate the effect of previous actions so that, taken together with the latest action, it can be said that there has been a breach of contract.

> **2. I do not think it necessary to resolve a case of constructive dismissal by analysing what is meant by "last straw". The issue which needs to be addressed is whether there has been a repudiatory breach. That may be obvious even if only one incident has occurred. It may only be clear when a number of incidents are taken together, where it is the effect of those incidents taken together that amounts to a breach. If some of the alleged incidents are found not to have occurred, a Tribunal must have regard to those which it has found did occur and ask objectively whether, in the particular context of the case, they amounted to a breach of contract and whether, in the particular context of the case, that breach was so serious as to be repudiatory. It may be that an employee puts up with a breach of contract which is, properly analysed, repudiatory because he would prefer to retain his employment rather than be cast adrift on the labour market. In such a case he might very well spend a period of time without taking any action, or actually take positive steps which would indicate that he wished the contract to continue notwithstanding the breaches which had occurred. But they would remain breaches. A failure to elect to treat a contract as repudiated does not waive such breaches. It merely declines to make the choice. If a later incident then occurs which adds something to the totality of what has gone before, and in effect resuscitates the past, then the Tribunal may assess, having regard to all that has happened in the meantime - both favourable to the employer and unfavourable to him - whether there is or has been a repudiatory breach which the employee is now entitled to accept. If so, and if the employee resigns at least partly for that reason, it will find in that case that there has been a constructive dismissal.**

Direct Discrimination/Harassment

72. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

> **"An employer (A) must not discriminate against an employee of A's (B) –**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment."**

73. Harassment during employment is prohibited by section 40(1)(a).

74. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins.

Direct Discrimination

75. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".**

76. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

77. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

Harassment

78. The definition of harassment appears in section 26 which so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are …race".**

79. We were mindful of the Code of Practice on Employment issued by the Equality and Human Rights Commission which came into force on 6 April 2011, particularly chapter 7 which deals with harassment. …….

Burden of Proof

80. The burden of proof provision appears in section 136 and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

81. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that "could conclude", in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of

the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a prima facie case of unlawful discrimination. Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.** It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race would have been treated reasonably. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

Conclusions/Judgment

82. Whilst the Tribunal has set out in some detail above the relevant legal principles relating to the claims of the claimant, the Tribunal, as a result of its findings of fact, does not believe that in order to come to its conclusions that there is any necessity for any detailed application of the law at all. At the outset of this hearing on the very first day the Tribunal indicated to the parties that this was a relatively straightforward case so far as the law is concerned. It was in effect a factfinding exercise. It was obvious, having read the witness statements and the other documentation including the claim form and the response form, that there were very, very significant differences and disagreements between the claimant and the respondent. It is as a result of making the findings of fact that the decision/judgment of the Tribunal is that the claims of the claimant are dismissed. Referring back to the schedule of complaints and issues, the judgment of the Tribunal is as follows:

Allegation 1.1.1(b)-(c)

(1) Mr Bream did not, as a profession of love or affection, say to the claimant that he “loved her”. Using the word “her” instead of the more colloquial language which would have accurately reflected the manner in which such comments were made, the claimant has in the opinion of the Tribunal, misrepresented the evidence. As the Tribunal has found, there were friendly exchanges between members of staff, including the claimant and Mr Bream, but they were nor professions of genuine love and affection. They are more accurately expressed by the use of the word “ya” than “you”. The Tribunal accepted the evidence of the witnesses that this phrase was regularly exchanged between them as a friendly gesture, and the judgment of the Tribunal is that this included exchanges between the claimant and Mr Bream, and that there was no element of sexual harassment in it and that in any event when the comments were made to the claimant they neither had the purpose nor effect of causing consequences listed and set out in section 26 of the Equality Act 2010.

(2) Equally, insofar as the allegation that the claimant was told that she looked beautiful or that her eyes were beautiful. Mr Bream denied making the comment about the claimant's eyes, but again even if that

comment was made it was not made as a profession of love or affection or in any manner which could reasonably be interpreted as sexual harassment and which most importantly was not interpreted herself, personally, by the claimant as an act of sexual harassment. It was part and parcel of the general exchanges which took place between the members of staff at the store and it was not simply a pattern of exchange between the claimant and Mr Bream. It was a pattern of exchanges which involved other members of staff. The claimant was not picked on. The claimant was not individually selected by Mr Bream for these comments. The way in which those three allegations are set out in black and white in the schedule of Complaints and Issues does not, in the opinion of the Tribunal, accurately reflect the way in which they were said or indeed accurately reflect the circumstances in which they were said.

(3) There is a requirement on a Tribunal to look at all the circumstances of the case, and when all the circumstances in which these comments were exchanged, not only between the claimant and Mr Bream, are considered the Tribunal is unanimously satisfied that they were not allegations which either were interpreted by the claimant as sexual harassment or which any reasonable person in all the circumstances and against all the evidence which the Tribunal has heard could reasonably have interpreted as being acts of sexual harassment either. These allegations therefore are dismissed as allegations of sexual harassment.

(4) Equally, for the same reasoning, the Tribunal does not accept that they were or contributed to any breaches of the implied term of trust and confidence which could in any way have contribute to a justified decision on the part of the claimant to resign her employment.

Allegation 1.1.1(e)-(m)

(5) The Tribunal cumulatively makes its decision in connection with paragraph 1.1.1(e)-(m).

(6) As explained and set out above, the Tribunal finds that these allegations did not happen. On that basis if they did not happen then clearly they cannot either amount to acts of sexual harassment and neither can they in any way have caused or contributed to the decision of the claimant to resign her employment as a result of alleged breaches of the implied term of trust and confidence.

Allegation 1.1.1(n)

(7) The Tribunal has, as is set out above, concluded that the claimant found this amusing. She was not upset by it. There is certainly no evidence whatsoever to suggest that the purpose of the remark made by Mr Bream was anything other than as a joke, and it certainly did not meet the “purpose” test set out in section 26. The Tribunal carefully considered whether or not the comment had the “effect” of causing the potential consequences as set out in section 26.

(8) The unanimous conclusion of the Tribunal was that it did not. The claimant found it amusing. She laughed along with Mr Bream. On that basis the comment did not have the purpose or effect of any of the consequences set out in section 26, and on that basis the incident did not amount to an allegation of sexual harassment. Furthermore, it did not cause or contribute in any way to any potential breach of the implied term of trust and confidence. It was said as a joke, albeit an inappropriate joke by Mr Bream, and it was accepted by the claimant in that way.

(9) It is important for the Tribunal to concentrate on the individuals in question and not to substitute its own view for what the members of the Tribunal might have thought of a comment of that nature. It was important for the Tribunal to concentrate on the individuals in question and most importantly the claimant.

(10) For all the reasons set out above, the Tribunal is satisfied that the claimant found it amusing and that that it neither had the purpose nor effect of meeting the test set out in section 26 of the Equality Act 2010. Neither therefore did it cause or contribute to any breach of the implied term of trust and confidence.

Oral B incident/Inaction of Mr Coffey

(11) Somewhat confusingly, as the Tribunal has said above, the identity of the last straw is apparently either the Oral B incident or the alleged inaction of Mr Coffey. The Tribunal has commented on that already. The Tribunal does not, for reasons which it has set out above, accept that the Oral B incident could in any way be interpreted as the last straw because it did not amount to a breach, in any way, of the implied term of trust and confidence. It did not, either on its own or cumulatively, entitle the claimant to resign her employment for breaches of that implied term.

Allegation 1.1.1(o)

(12) The tribunal has already dealt with this very clearly. It does not accept that the claimant complained to Alex Kelly, and the only incident which she was aware of was the Oral B incident, and the Tribunal has already indicated that it believes the response to that on the part of Ms Kelly to be a reasonable response of a reasonable employer. It neither therefore amounted to an act of sexual harassment and nor did it cause or contribute to any breach of the implied term of trust and confidence.

Allegation 1.1.1(p)

(13) Again the Tribunal has clearly set out its findings of fact above. Mr Coffey did not refuse to discuss or deal with the issue, and neither did he tell the claimant that she should simply speak to her manager and effectively ignore her. The Tribunal has set out its findings of fact above.

(14) On the basis of those findings of fact, the allegation is dismissed. Mr Bream did not act in the way that is alleged at all. Those allegations therefore clearly do not amount to an act of sexual harassment and neither did they in any way cause or contribute to a breach of the implied term of trust and confidence which led allegedly to the claimant's resignation of her employment.

Direct Sex Discrimination

(15) These allegations were also raised quite separately as allegations of direct sex discrimination contrary to section 13 of the Equality Act 2010. During the case management hearings, no steps had been taken to discuss with Mr Broomhead who the appropriate comparator was. When this discussion took place, it was agreed that the comparator would be a hypothetical comparator who had raised allegations of sexual harassment but who instead of being a woman was a man.

(16) Nevertheless, for all the findings of fact which the Tribunal has already set out in detail above, its conclusions are clear. On the basis that the allegations did not occur, the allegations set out at paragraphs 4.1-4.10 cannot amount to allegations of direct sex discrimination. In each case the claimant would have been required to prove that the incidents occurred “because of her sex” in accordance with the wording of section 13. The Tribunal has, in the majority, found that the allegations simply did not occur, or that alternatively they arose for reasons which were not because of the sex of the claimant but, for example, in connection with the earliest allegations, were comments which arose as a result of a pattern of friendly exchanges which took place openly between the members of staff. The allegations of direct sex discrimination are therefore dismissed.

Wrongful Dismissal

(17) That leaves the allegation at paragraph 2 of the Annex, of wrongful dismissal/notice pay. The claimant was paid one week’s notice pay for the period of notice that she gave in her letter of resignation.

(18) It was accepted that the claimant would, if she succeeded in her claim of constructive dismissal, be entitled to notice pay reflecting the minimum statutory notice to which she would have been entitled. However, the claimant’s claim of constructive dismissal has failed. On that basis the claimant is not entitled to any more notice than the notice which she gave and which she was paid for. That allegation is dismissed.

(19) Even if the Tribunal is wrong about that then the Tribunal has made a finding of fact that the claimant was not employed for three continuous years but only for two continuous years. The Tribunal found as a fact that the claimant’s employment began on 14 October 2016. The value of the claim would therefore have been only one week’s pay and not two weeks’ pay. However, as there was no breach of the implied or

any express terms of the contract of employment which justified the claimant resigning and claiming that she was dismissed pursuant to section 95(1)(c) of the Employment Rights Act 1996, this claim must fail because the claimant has received pay for the notice which she gave in her letter of resignation.

Summary

83. The claims of the claimant fail and are dismissed.

Employment Judge Whittaker
Date 3rd November 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
8 November 2021

FOR THE TRIBUNAL OFFICE

Annex
Complaints and Issues

1. Unfair dismissal

Dismissal

1.1 Can the claimant prove that there was a dismissal?

1.1.1 Did the respondent do the following things:

a. In or around April/May 2019 Mr Bream told the claimant:

b. that she looked beautiful;

c. that her eyes were beautiful;

d. that he loved her.

e. In or around May/June 2019 Mr Bream suggested to the claimant that she should give him a chance to spend the night with her so that he could show her what a great lover he was and informed her that he has a big penis and knew how to use it.

f. In or around July 2019, Mr Bream told the claimant that:

g. He would love the opportunity to get his hands on her;

h. He could come all over her body;

i. She made him horny just looking at her;

j. She had no idea what he could do to her and that he could go all night;

k. In or around July/August 2019 Mr Bream told the claimant he would;

l. Love to stick his penis up her bottom all night;

m. Have her all nice and wet.

n. In September 2019 and in the presence of customers Mr Bream pointed to the word oral on the side of a toothbrush box and said that that is what he would like to give the claimant all night.

o. Alex Kelly failed to take any action when she told her of Mr Bream's conduct.

p. John Coffey refused to discuss or deal with the issue of Mr Bream's conduct when she tried to talk to him about it and instead told her she should speak to her manager. The claimant relies on this failure on the part of Mr Coffey to listen to do her complain or do anything about it, as the last straw that led to her resignation.

1.1.2 Did those actions breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous

paragraph, individually and cumulatively, the Tribunal will need to decide:

(a) whether the respondent had reasonable and proper cause for those actions or omissions, and if not

(b) whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

1.1.3 Was the fundamental breach of contract/last straw, a reason for the claimant's resignation?

1.1.4 Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Reason

1.2 Has the respondent shown the reason or principal reason for dismissal?

1.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

1.4 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

Remedy

1.5 What basic award is payable to the claimant, if any?

1.6 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

1.7 If there is a compensatory award, how much should it be? The Tribunal will decide:

1.7.1 What financial losses has the dismissal caused the claimant?

1.7.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

1.7.3 If not, for what period of loss should the claimant be compensated?

1.7.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

1.7.5 If so, should the claimant's compensation be reduced? By how much?

1.7.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

1.7.7 Did the respondent or the claimant unreasonably fail to comply with it

1.7.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

1.7.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

1.7.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

1.7.11 Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

1.8 What basic award is payable to the claimant, if any?

1.9 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

2. Wrongful dismissal / Notice pay

2.1 What was the claimant's notice period?

2.2 Was the claimant paid for that notice period?

3. Harassment related to sex (Equality Act 2010 section 26)

3.1 Did the respondent do the following alleged things:

3.1.1 In or around April/May 2019 Mr Bream told the claimant:

(a) that she looked beautiful;

(b) that her eyes were beautiful;

(c) that he loved her.

3.1.2 In or around May/June 2019 Mr Bream suggested to the claimant that she should give him a chance to spend the night with her so that he could show her what a great lover he was and informed her that he had a big penis and knew how to use it

3.1.3 In or around July 2019, Mr Bream told the claimant that:

(a) He would love the opportunity to get his hands on her;

(b) He could come all over her body;

(c) She made him horny just looking at her;

(d) She had no idea what he could do to her and that he could go all night.

3.1.4 In or around July/August 2019 Mr Bream told the claimant he would;

(e) Love to stick his penis up her bottom all night;

(f) Have her all nice and wet.

3.1.5 In September 2019 and in the presence of customers Mr Bream pointed to the word oral on the side of a toothbrush box and said that that is what he would like to give the claimant all night

3.2 If so, was that unwanted conduct?

3.3 Was it related to the claimant's sex?

3.4 Alternatively, was it of a sexual nature?

3.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Direct sex discrimination (Equality Act 2010 section 13)

4.1 What are the facts in relation to the following allegations:

4.1.1 Alex Kelly failed to take any action when she told her of Mr Bream's conduct;

4.1.2 John Coffey refused to discuss or deal with the issue of Mr Bream's conduct when she tried to talk to him about it and instead told her she should speak to her manager.

And in the alternative to s26:

4.2 In or around April/May 2019 Mr Bream told the claimant:

4.2.1 that she looked beautiful;

4.2.2 that her eyes were beautiful;

4.2.3 that he loved her.

4.3 In or around May/June 2019 Mr Bream suggested to the claimant that she should give him a chance to spend the night with her so that he could show her what a great lover he was and informed her that he has a big penis and knew how to use it

4.4 In or around July 2019, Mr Bream told the claimant that:

4.4.1 He would love the opportunity to get his hands on her;

4.4.2 He could come all over her body;

4.4.3 She made him horny just looking at her;

4.4.4 She had no idea what he could do to her and that he could go all night.

4.5 In or around July/August 2019 Mr Bream told the claimant he would:

4.5.1 Love to stick his penis up her bottom all night;

4.5.2 Have her all nice and wet.

4.6 In September 2019 and in the presence of customers Mr Bream pointed to the word oral on the side of a toothbrush box and said that that is what he would like to give the claimant all night

4.7 Did the claimant reasonably see the treatment as a detriment?

4.8 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different sex was or would have been treated? The claimant relies on a hypothetical comparison.

4.9 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of her sex

4.10 If so, has the respondent shown that there was no less favourable treatment because of sex?

5. Remedy for discrimination

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.9 Did the respondent or the claimant unreasonably fail to comply with it

5.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?

Failure to provide written statement of employment particulars
Schedule 5 Employment Act 2002 cases

5.13 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

5.14 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

5.15 Would it be just and equitable to award four weeks' pay?