EMPLOYMENT TRIBUNALS

Claimant: **Miss A Piromalli**

Respondent: **Charles Trent Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton **On:** 3 to 11 March 2025

Before: Employment Judge Gray
AND Members Mr Flanagan and Mr Sleeth

Appearances
For the Claimant: Mr Jones (Solicitor)
For the Respondent: Mr Ludlow (Counsel)

JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's complaints of sexual harassment and harassment related to sex in respect of allegations 2 a, b, d, f g and i succeed and it is just and equitable to extend time for those complaints. The complaints of unfair constructive dismissal, wrongful dismissal, direct sex discrimination, and the remaining allegations of sexual harassment and harassment related to sex, all fail and are dismissed.

The parties then having agreed terms as to remedy, the amount to be paid to the Claimant by the Respondent is to be paid within 14 days.

JUDGMENT having been delivered on the 11 March 2025 (and sent to the parties on the 25 March 2025), and written reasons having been requested by email from the Claimant's representative dated 31 March 2025, in accordance with Rule 60(3) of the Employment Tribunal Procedure Rules 2024, the following reasons are provided:

REASONS

1. THE CLAIM

2. This is a complaint of unfair constructive dismissal and sex discrimination by Miss Piromalli against Charles Trent Ltd.

3. The Claimant was employed by the Respondent between 4 January 2022 and 5 January 2024 most recently as Head of People and Culture.

4. The ACAS certificate is dated from 17 January 2024 to 15 February 2024.

5. By a claim form presented on 20 February 2024 the Claimant brought the following complaints:

    a. Unfair dismissal;

    b. Discrimination on the grounds of disability, race and sex.

6. As recorded in the dismissal Judgment of Employment Judge Bax, dated 8 July 2024, the Claimant has withdrawn her claims of discrimination on the grounds of race and disability.

7. THIS HEARING

8. For reference at this final hearing, we were provided with:

    a. An agreed bundle of 438 pages, to which on day 1 were added pages 439 to 440 at the request of the Respondent with agreement of the Claimant, followed by pages 441 to 453 at the request of the Claimant, with agreement of the Respondent. This was then followed by pages 454 and 455 submitted by the Claimant on day 3, with agreement of the Respondent. Then added on day 4 were pages 456 to 472 and then pages 473 to 476, then page 477 by the Respondent, with agreement of the Claimant.

    b. A Remedies Bundle of 126 pages.

    c. Claimant's Witness Statements:

        i. Claimant

        ii. Sophie Lowton (SL). About this statement the Respondent confirmed it does not require her to give evidence, on the basis it does not challenge the fact that she is telling us what was told to her by the Claimant, but it does not accept what the Claimant told her was accurate. It was therefore agreed we could accept this statement as not disputed by the Respondent in that it records what SL is told by the Claimant.

d. Respondent's Witness Statements:

   i. Neil Joslin (NJ) (the Chief Operating Officer)

   ii. Alison Hopkins (AH) (The Finance Director)

e. The Respondent's chronology, which was agreed by the Claimant up to the point of the Claimant's resignation, save the references to Ian Joliffe's (IJ) redundancy were deleted as at that start of this hearing they had not seen any documents to confirm this. When IJ left was changed to November 2022. The reference to when the Respondent engages with the Society of Motor Manufacturers and Traders changed to "commences communications beginning of December 2023".

9. It was agreed that we would address matters of liability first. The hearing timetable previously agreed with the parties was broadly met with oral closing submissions concluding in the morning of day 5. Oral judgment on matters of liability was then delivered on day 7. The parties then agreed terms as to remedy so no determinations were required by the Tribunal as to that aspect.

10. THE ISSUES

11. At the Case Management Preliminary hearing before Employment Judge Roper on the 15 May 2024 the issues for determination at this final hearing were confirmed and agreed. A copy of those agreed issues is set out below at Annex A.

12. At this hearing it was confirmed that the race and disability issues are no longer relevant.

13. Further, at the start of this hearing the Claimant confirmed that allegations 2 l, m. n. and o were not specific allegations to be determined, although o was an assertion of fact.

14. In respect of the complaint of constructive unfair dismissal the Claimant confirmed that she is not relying upon allegations 2 c, e, h, j, l, m, n, o, p, s, nor ff to kk. The Claimant asserts that those matters before the Claimant's first asserted resignation are revived in support of the last straw that she asserts she then resigned over.

15. During closing submissions, the Claimant's representative confirmed that the Claimant only claims allegations 2 a, b, d, f, w, x, y, z, aa, ll, mm, nn, oo and pp as direct sex discrimination, allegations 2 a, b, d, f, v, w, x, y, z, aa, ll, mm, nn, oo and pp as sexual harassment and allegations 2 a, d, f, g, l (we understand this to be allegation i), v, w, x, y, z, aa, bb, cc, dd, ee, ll, mm, nn, oo and pp as harassment related to sex.

16. As noted in the list of issues as the Claimant's complaints relating to sex are presented as both harassment and/or direct discrimination we will determine these allegations in the following manner:

    a. In the first place the allegations will be considered as allegations of harassment. If any specific factual allegation is not proven, then it will be dismissed as an allegation of both harassment and direct discrimination.

    b. If the factual allegation is proven, then the tribunal will apply the statutory test for harassment under section 26 EqA. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination because under section 212(1) EqA the definition of detriment does not include conduct which amounts to harassment.

    c. If the factual allegation is proven, but the statutory test for harassment is not made out, the tribunal will then consider whether that allegation amounts to direct discrimination under the relevant statutory test.

17. THE FACTS

18. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties.

19. Before the Claimant commenced employment with the Respondent, we are referred to matters in August 2021 concerning Nicola Friend (NF) (a former employee of the Respondent) who raised concerns regarding Ian Joliffe (IJ) (the individual accused of discrimination in this claim).

20. The documents we were referred to record that NF felt she had to resign thinking that she had upset IJ after various emails regarding the recruitment process and the fact he does not always adhere to it (page 67). NF describes finding IJ to be aggressive, huffy, erratic, scary and invading her personal space. There are no specific allegations that something happened on a particular date. As to the invading of personal space AH explained that she believed this related to COVID measures.

21. IJ is asked about the allegations, he is surprised, apologetic, and willing to undertake mediation (page 69).

22. AH addresses these matters in her witness statement and at paragraphs 28 and 29:

    "28. I met with NF to update her following my discussions with SC and IJ on 5 August (70). NF stated that she did not think mediation would work, she felt that IJ would not change and that the Respondent was not accepting her issues with IJ. The meeting concluded by me stating that I hoped the issue could be resolved and that we would like to find a positive way forward for both

employees and the business. IJ was on holiday for a week, and I asked her to reconsider the prospect of mediation and a way forward during that period.

29. I followed up with NF and IJ following IJ's leave. Both stated that they believed they had resolved the issues and although NF had to remind IJ about personal space, they both appeared to be happy working together again (71). I therefore felt that the matter had been resolved."

23. We accept what NF tells us which is consistent with the documents presented to us.

24. It is then on the 4 January 2022 the Claimant commenced employment with the Respondent as Head of Recruitment. We were provided a copy of the Claimant's contract of employment (pages 72 to 79).

25. Chronologically is then the Claimant's first allegation that on 21 January 2022 IJ said to the Claimant "You don't belong here this is a man's world. The only reason people are talking to you is because you are a woman, they are around shit like flies" "Also you wear tight jeans, are you trying to get attention?!" "You know the only reason you got the job is because of the way you look?" Stay in your recruitment lane, I can't emphasise that more" (allegation 2a).

26. This allegation is set out in the Claimant's written grievance attached to her email dated 7 March 2022 (pages 105 to 112, in particular page 106). The Claimant also refers to it in paragraphs 62 to 84 of her witness statement.

27. IJ did not attend this hearing to give evidence, but he did give an account to some of the allegations during the Claimant's grievance (pages 131 to 135). IJ's account where it differed to the Claimant's was put to the Claimant in cross examination, but she did not agree IJ's version.

28. As the Claimant's account is consistent with her grievance and she has confirmed her evidence to us under oath, we accept her account of the matter.

29. It is then alleged that on 2 February 2022 in the main office in Rugby, IJ hit the Claimant on the bottom with a ruler in front of two colleagues, Donna Worrall-Sopergelston (Admin Manager) and Emily Ogden (Administrator). Both gasped and then IJ said "Fuck, that's not on CCTV is it? Whatever you do don't tell Marc [Trent, CEO], fuck me or that really is my job over, hahahah" (allegation 2b). This is again set out in the Claimant's grievance document (page 107) and her witness statement (paragraphs 83 to 88).

30. In his account IJ confirms that he taps Donna and Emma with a ruler, but that he could not recall hitting the Claimant (page 132). Donna and Emma are not asked about this matter during the grievance investigation (see for example page 122). We therefore accept what the Claimant tells us about this allegation. NJ confirmed in cross examination that he agreed that hitting on the bottom with a ruler was sexual assault.

31. Allegation 2c is no longer relied upon as an allegation of discrimination or as a breach of contract, that is on the 3 February 2022 IJ approached the Claimant in the office in Rugby and said “please don’t tell Marc about last week or yesterday, I really don’t want to lose my job and after the Nicola [Friend, previous HR Manager] thing, Marc will fucking kill me”. We accept what the Claimant tells us about this though in paragraph 89 of her witness statement which is consistent with what she writes in her grievance document (page 107).

32. The Claimant then alleges that on 11 February 2022 the Claimant was working in Poole and went into IJ’s office to catch up and update him on Rugby. He appeared agitated and was fiddling with a car part. She asked if he was ok but he didn’t reply. She continued to update him on recruitment and when he heard that one of the candidates was female he got very angry. He stood up and clenched his fists, saying: “I don’t want a woman on the yard, they’re a fucking nightmare. We’ve tried it before and it doesn’t work.” She tried to reason with him pointing out that the business has problems with male employees every day but we still employ them. He then became more aggressive and said “Women are a fucking distraction, the odd conversation here and there adds up through the day. I told you this is a man’s world. You only got the job because of how you look, you don’t fucking know anything.” She replied “I am very insulted by your comments Ian and couldn’t disagree with you more. I have earned my stripes and have just as much right to be here as you. I know what I’m doing, this isn’t my first rodeo and I will not tolerate this behaviour.” He then said “Have you finished? Firstly, I didn’t mean to insult you and it must be so hard being so beautiful!! Look we are going to disagree from time to time and this is one of those times, come on let’s hug it out.” Then he grabbed her and hugged her. She was shocked and intimidated by his actions. (Allegation 2d).

33. This is consistent with the Claimant’s grievance document (pages 107 and 108) and her witness statement (paragraphs 114 to 126). We accept what the Claimant tells us.

34. Allegation 2e is no longer relied upon as an allegation of discrimination or as a breach of contract. It is asserted as a matter of fact, that before the Claimant joined the Respondent, Marc Trent took all the Senior Managers out for a Christmas meal and at that meal he talked about the Claimant joining in January 2022, and said that she was beautiful. Further, it appears that IJ had seized on this comment when he made the comments about the Claimant only getting the job because of how she looks. The Claimant refers to this in paragraph 127 of her witness statement. Marc Trent did not attend this hearing, so we were unable to ask him about what he said.

35. It is then alleged that on 15 February 2022 in Rugby, the Claimant was working in the top office and IJ was next to her. Ionut Popa, Quality Systems Manager, came into the office and started talking to IJ. At one point IJ said: “isn’t that right Angela?” She turned around and said: “Sorry I wasn’t listening.” He then said “I was telling Ionut that you have great massage hands, if he has a bad back you could give him a massage, go into the meeting room and Angela can feel you up.” Ionut looked embarrassed as was the Claimant. She replied that this was absolutely inappropriate, she turned back around and got on with her work. IJ

left the room. She couldn't make out clearly what he said, but she did hear something like "Oh fucking hell." He then returned without Ionut and got really close to her and said "I'm so sorry, I didn't mean to offend you." She replied that his actions had embarrassed her and were very inappropriate and asked him to stop treating her this way. (Allegation 2f).

36. This is consistent with the Claimant's grievance document (page 108) and her witness statement (paragraphs 128 to 138). We accept what the Claimant tells us.

37. It is then alleged that later that evening Sam Haden came in to talk to IJ and began teasing the Claimant about one of the boys having a little crush on her. Luke the security guard was present and Bradley Diston. Sam said "You want to stop talking to Paul, you give him palpitations." IJ immediately swung around in his chair and said "Go on then, I told you, you are a distraction and don't belong here" in front of everybody. (Allegation 2g).

38. This is consistent with the Claimant's grievance document (page 108) and her witness statement (paragraphs 139 to 142). We accept what the Claimant tells us.

39. Allegation 2h is no longer relied upon as an allegation of discrimination or as a breach of contract. That allegation had referred how on the 21 February 2022 IJ was very aggressive during a telephone conversation with the Claimant. He said "no one knows what they're doing, I'm not fucking slowing anything down, you don't know what you are doing" The Claimant interjected and said "what is the matter? Why are you talking to me like this? IJ said "oh I don't know, I've just fucking had enough of Italians today" The Claimant said goodbye and hung up the phone. It is referred to by the Claimant in paragraphs 144 to 154 of her witness statement and in her grievance document (page 109).

40. It is then alleged that on the 24 February 2022 during a telephone call following an email from her, IJ said to the Claimant "Who the fuck do you think you are? You stupid little bitch! Who else is copied into that email? Think you fucking know how to run a site you twat, then be my fucking guest!" He was screaming at the Claimant. She tried to interject to calm him down, and said things like "Ian, I am on your team, I am trying to help you, no one is copied into the email" The Claimant realised that he was in a blind rage and she was very scared, so she let him go on. He continued "How fucking dare you, Matthew Bastow is safer and Owen Bates is safer than Sam Roberts, you are an idiot you fucking crazy stupid bitch" He continued with this level of abuse for two to three minutes and then said "FUCK YOU" and hung up. (Allegation 2i).

41. This is consistent with the Claimant's grievance document (page 110) and her witness statement (paragraphs 155 to 175). We accept what the Claimant tells us.

42. Allegation 2j is no longer relied upon as an allegation of discrimination or as a breach of contract. It is asserted as fact (and referred to in the Claimants witness statement (paragraphs 169 to 171)) that immediately after the

allegation 2i incident IJ called Dave Eyre, (he was Yard Manager in Rugby) and said to him “I have lost it, I’ve never lost it like that before, I'm fucking dead now, I don’t know what to do.” The Claimant was in the kitchen with Dave Eyre at the time and burst into tears. She was shaking and terrified.

43. The Claimant relies upon allegation 2k in support of her complaint of constructive unfair dismissal that on 28 February 2022 IJ cornered the Claimant in the kitchen (in Rugby) and was screaming in her face after a HR Forum she had attended. He was screaming in her face and spitting as he shouted, “you’re a fucking joke, who do you think you are?!, We are very capable of doing recruitment, that’s why Nicola hates you, everyone hates you”. This incident was witnessed by Joe Hunt, Rugby Transport Manager at the time, Donna Worrall – Sopergelston, Admin Manager, and Emily Ogden, Administrator. They shut the doors and stayed in reception.

44. The Claimant refers to this in paragraphs 183 to 186 of her witness statement and her grievance document at page 111. We accept what the Claimant says.

45. We note from the grievance document the Claimant writes (page 112):

“I could feel him escalating quickly, so I said:

"Ian, don't speak to me like this, I have never been spoken to the way you spoke to me last week by anyone, I felt physically assaulted on Thursday and now you're doing it again. I am trying to do a job, you tell me I shouldn't be here because of my gender, then my race and that I need to keep my nose out of things that aren't my business. But then you don't let me recruit, what am I supposed to do?"

Ian started crying, he said:

"I am a terrible person, I don't know what's wrong with me, I have never lost it like that before. You're just like a bullet, I've never worked with anyone like you before, you just get shit done and I am threatened by yau. I am out of my depth, I can't do it all, I can't do Rugby and Poole. This is why my marriage ended because I am a workaholic, but its killing me at the same time."

I then said: "Ian, you are not well and need to get help. I won't be treated like this."

Ian said: "I'll get help from a bottle of whisky or rum."

I replied: "You need to get some help Ian" and walked away.”

46. It was confirmed at the start of this hearing that the Claimant no longer relies upon allegations 2 l, m, n and o, although allegation 2o is referred to as an assertion of fact. That is the Claimant was frightened of IJ. She spoke to her manager, Neil Joslin, about his behaviour after every event that happened, often in tears and shaken. Neil Joslin suggested that the Claimant should raise a grievance (rather than resign) so that this behaviour would not only end for

the Claimant but so that no one else had to suffer at the hands of IJ either. Paragraphs 190 to 192 of the Claimant's witness statement refers to this.

47. We were presented with copies of WhatsApp messages between the Claimant and NJ that are set up to start on the 25 February 2022 (page 87). They do refer to NJ checking in with the Claimant and the Claimant then informing NJ on the 28th February that … "I would still certainly appreciate a conversation about the events last week and subsequent events today. I am a professional and have not let this affect either of our work, but something needs to happen, I am actually concerned for Ian's welfare being totally honest. I'm not sure what your week looks like, but let me know what works for you and I'll make sure I'm available!".

48. The concern about IJ's welfare as expressed by the Claimant is consistent with what she writes in her grievance document (page 112).

49. Allegation 2p is no longer relied upon as an allegation of discrimination or as a breach of contract. It is not in dispute that the Claimant raised a grievance and met with Neil Joslin and Marc Trent (Chief Executive) on 4 March 2022 to give an overview of her grievance as well as giving them the formal written details of her complaint.

50. Then as confirmed in the agreed chronology on the 7 March 2022 the Claimant raises a grievance regarding the alleged conduct of IJ (pages 105 to 115).

51. On the 7 March 2022, IJ is informally suspended.

52. Then on the 11 March 2022, IJ is officially suspended. There is an investigatory meeting with IJ on the 11 March 2022 (pages 129 to 130). IJ then provides comments on the allegations (pages 131 to 135).

53. On the 15 March 2022, there is a disciplinary hearing with IJ, and he is issued a 24-month final written warning with line management responsibilities removed (pages 136 to 142).

54. Allegation 2q is relied upon by the Claimant in support of her complaint of constructive unfair dismissal. It is not in dispute that the Respondent suspended IJ and AH investigated the grievance. It is also not in dispute that AH did not meet with the Claimant to discuss the grievance after receipt of the written account (page 105), nor did AH ask the Claimant to provide any further information, before a decision was made.

55. It is also not in dispute as relied upon by the Claimant in support of her complaint of constructive unfair dismissal (allegation 2r) that NJ, to whom the Claimant had spoken about the incidents she raised in her grievance, was not interviewed in connection with the grievance.

56. It is then asserted (allegation 2s) that Neil Joslin made the decision as to what, if any, disciplinary action should be taken against IJ. This is no longer relied

upon by the Claimant as an allegation of discrimination or as a breach of contract. This maybe because it was asserted to NJ in cross examination that Marc Trent had told him what to decide. NJ did not accept this, stating it was his decision. We accept what NJ tells us, which is consistent with the documentation we have been presented on this matter.

57. It is not in dispute, as relied upon by the Claimant in support of her complaint of constructive unfair dismissal (allegation 2t), that the Respondent did not provide her with a written outcome in relation to her grievance, nor was she given a right to appeal. It was put to the Claimant in cross examination that she knew about a right of appeal with reference to the Respondent's non contractual grievance procedure (pages 78 (contract of employment) and 64 (the grievance policy)). However, no outcome was given to the Claimant in writing confirming her right of appeal.

58. The agreed chronology records that from the 21 to 25 March 2022 the Claimant was on annual leave, returning on 28 March 2022.

59. Allegation 2u is relied upon by the Claimant in support of her complaint of constructive unfair dismissal. The Claimant alleges that on the 25 March 2022 Neil Joslin telephoned the Claimant and told her that he looked into IJ's eyes and could see he was sorry. He told her IJ would not be back in Rugby (where the Claimant had been based when the majority of the events took place) and would not work "with people" again, however she would have to work with him for the BH1 project, when she returned from Rugby to Poole and that she would need to make sure she wasn't alone with him at any point.

60. The Claimant refers to this in paragraphs 219 to 223 of her witness statement.

61. The Claimant accepted in cross examination that the date she refers to for the phone call is probably wrong if she were on holiday and it may have been the 28 March 2022 when she returned to work.

62. NJ denied there was such a call, telling us that he had informed the Claimant of matters in person on the 5 April 2022 in Rugby (paragraph 11 of his witness statement and as confirmed by oral supplemental evidence). Paragraph 11 … "I met with C to communicate the outcome of the grievance process after the disciplinary hearing with IJ. I offered to arrange for mediation to take place between the parties to help repair their professional relationship which C declined, stating she wanted to put it all behind her, would continue to behave professionally and did not require mediation support to enable her to do that.".

63. The Claimant accepts she was offered mediation but did not accept it as she did not consider it was appropriate.

64. NJ tells us at paragraphs 12 and 13 of his witness statement … "12. C is experienced in HR matters as detailed by AH. I am therefore confident that C could have requested an appeal against the outcome of her grievance or challenged the outcome verbally with me, but she did not do so. C did not inform me she was unhappy with the grievance outcome or disciplinary sanction

imposed." … "13. I did not tell C that she would have to continue working with IJ. I genuinely believed that she was satisfied with the outcome of the process. I do not recall stating that I had looked IJ in the eyes and could see that he was sorry and that this was the only reason that he was not dismissed; the reasons he was not dismissed are detailed above. I did not state that C would need to make sure that she wasn't alone with him.".

65. The WhatsApp messages refer to a call between NJ and the Claimant on the 28 March 2022 (page 88) and also to a meeting between them on the 5 April 2022 (page 89). The messages though are consistent with what NJ tells us. Particularly the message timed at 12:54:54 … "Neil Joslin: Hey Angela, super to see you today, totally groovy enjoyed our catch up & we'll work on helping getting you back from the stretch you're feeling right now Ash will catch up with you re. the support needed there & you'll be in Poole next week to work on the key vacancies, prep for Dylan joining & BH1.".

66. Based on the contemporaneous documents we have been presented we accept that NJ's account of this matter is proven to us on the balance of probability.

67. The Claimant alleges as an act of discrimination and a breach of contract that the Respondent did not dismiss Mr Joliffe (Allegation 2v). It is not in dispute that NJ did not dismiss IJ. NJ tells us why he decided this at paragraph 9 of his witness statement … "I decided not to dismiss for many reasons, including: IJ accepted full responsibility for his actions and was deeply apologetic; there were mitigating factors including work pressures and his personal issues; and IJ had 2.5 years' service and a clean disciplinary record, with previous good performance and conduct.".

68. We accept what NJ tells us which is consistent with the Claimant's own view at the time as expressed in her grievance document (page 112) and in her WhatsApp message on the 28 February 2022 (page 87).

69. The Claimant alleges as an act of discrimination and a breach of contract that the Respondent required the Claimant to continue to work with Mr Joliffe (Allegation 2w). It is not in dispute that the Claimant does continue to work with IJ, what is in dispute is the reason for this. The Claimant asserts it was on the grounds of her sex, or related to her sex or of a sexual nature. To assert this the Claimant alleges that she complained about the outcome and ongoing issues to NJ. This links to Allegation 2x that on a number of occasions the Claimant informed NJ that she was unhappy with the grievance outcome, that IJ was still employed, and that she would have to continue working with him. Also, Allegation 2y that NJ's response was always to tell her to avoid IJ.

70. NJ denies this happened, in particular paragraph 14 of his witness statement … "14. I believe C was happy to continue to work with IJ going forward. Despite C having ample opportunities to raise any further issues with me, she did not do so. In fact, she gave positive feedback regarding her relationship with IJ; by way of example, on 22 April 2022 I text C whilst I was on holiday, following a meeting she was having with IJ, to check the meeting with IJ went well and to

ensure she was ok. She replied “Morning Neil, no problem, thanks for calling and checking in, especially on your holiday! The meeting went well, Ian bought the “situation” up but we’ve drawn a line in the sand and are moving forward. He also was really helpful with the development programme and I have to thank him for that” (90).”.

71. What NJ tells us is consistent with the copies of the messages and emails we were presented. It was also consistent with all of the 1:1 notes we were presented.

72. It is also consistent with the evidence of the Claimant’s supporting witness which only refers to the actions of IJ post the Claimant’s grievance in paragraph 13 … “Paragraph 255b. I remember Angela saying she was going to a meeting with Ian and she would be alone. We discussed the fact that she didn't have to do that or go alone and should really have someone else with her. Angela said something like she just wanted to 'get it over with' and that she didn't want to create any drama but that she would make sure Neil Joslin knew about the meeting and the timings so he could call her and make sure she's ok.”.

73. This is also consistent with the copy messages we have been presented at page 90:

“[22/04/2022, 14:56:20] Angela Piromalli: Hey Neil, thank you so much for coming back to me, I was hoping you would like it and appreciate your feedback too, I’ll spend more time on it on Monday too I hope you have a safe trip and enjoy your weekend, I’m going into a BH1 meeting with Ian (but feel good about it) and then have a lovely weekend at the beach planned thank you again!”

“[22/04/2022, 18:25:22] Neil Joslin: Sorry I missed your call back - was just a quick call to see how your meeting with Ian went & how you are. Have a fab evening & weekend at home/on the beach!”

“[23/04/2022, 08:50:54] Angela Piromalli: Morning Neil, no problem, thanks for calling and checking in, especially on your holiday! The meeting went well, Ian bought the “situation” up but we’ve drawn a line in the sand and are moving forward. He also was really helpful with the development programme and I have to thank him for that. I hope you have a lovely weekend too, see you next week”.

74. The Claimant told us in her oral evidence that although she had lost trust in NJ in his dealing with IJ after the grievance outcome he was the only person she asserts she told of ongoing matters at the Respondent. The Claimant also confirmed that she did not want to put anything in writing as that may result in her losing her job. We do not accept the Claimant’s explanation about this. It is inconsistent with the contemporaneous documentation of recorded communications between the Claimant and Respondent that we have been presented and with the account of the Claimant’s supporting witness. We therefore accept what NJ tells us.

75. With this finding of fact, we also do not accept the matters the Claimant alleges as Allegation 2z.

76. The Claimant asserts in Allegation 2z that…

> "From 4 April 2022, the Claimant was based at the Poole site permanently and there were multiple occasions when Mr Joliffe was threatening and discriminatory, all of which she raised with Neil Joslin, during 1:1's, by telephone or by email. Neil Joslin would merely reply "noted" or he would say "did he, are you sure?" or "it's hard when you are not in the room to hear the tone or meaning behind it" implying that she may not have been telling the truth or that it was just "banter". No investigations were carried out and he repeated that she should avoid Mr Joliffe. The Claimant can recall the following incidents involving Mr Joliffe from 4 April 2022.
>
> (1) On many occasions he would make snide or inappropriate comments as she walked past him, or to other people (Alistair Munroe, Yard Manager. Matt Wiggett, Workshop Manager. Greg Colls, Quality Control Manager. Staff working in the Yard, such as Liam Hyde, Connor Farley, James McMillan, and new staff joining the business working on the lines) who would then tell her about them. His comments included "she only got the job because of her looks, let's see her fall flat on her face now". He would refer to the Claimant as a "dumb vacant bitch". He said some really bad sexual things about her such as I was "lining the boys up, that's the only reason why anyone was talking to her" she would "give out massages" or "favours to get people to help her or attend interviews".
>
> (2) In May 2022 the Claimant had to meet with Mr Joliffe alone at the Holton Heath site. She had no key fob to get in or out and it was just him and her. Neil Joslin knew about it, that she was terrified, but did not ensure she was not required to meet him alone. Mr Joliffe said to the Claimant, in a very passive aggressive way "thank you for raising the complaint about me, I didn't realise I swore so much, my family was shocked, that's definitely something I need to work on" he then said "whilst most of it was true, I'm really glad you raised it" The Claimant then said "look we have to work together, so we just have to move forward". She did everything to just pacify the situation and got out of there as quickly as she could. Mr Joliffe had to let her out of the building. As soon as the Claimant returned to her car Neil Joslin called her and she told him what had happened and that she didn't have a key fob to get in and out, and that it was really scary. Neil said he would note this, but never followed it up with her or Mr Joliffe.
>
> (3) In June 2022, before the BH1 open evenings, Mr Joliffe went round to some of the people helping the Claimant with it saying, that she didn't have a clue what she was doing and that she was going to fail, no one will turn up, that she was useless and wearing tight jeans wasn't going to get her out of this one...
>
> (4) In August 2022 during the recruitment process for A Change Programme Manager, which the Claimant worked on closely with Neil Joslin, they had shortlisted to a final stage two candidates, one being a female, Verity Pitman. Neil Joslin and the Claimant discussed the fact that it wouldn't be fair/safe for

Verity as she is a young, attractive female and she would have to work closely with Ian Joliffe.".

77. About this allegation we would observe that the date cannot be correct for the Claimant's return to Poole as it had not happened by the 5 April 2022 based on the evidence of NJ which we have accepted.

78. The allegation also relies upon all of what is alleged as having been raised with NJ, during 1:1's, by telephone or by email. That though is not what we have found to have happened, it not being raised with NJ at the 1:1s, by telephone or email. The allegations are also not supported by the Claimant's supporting witness. We also note that specific issues with IJ are not detailed in the Claimant's resignation letter dated 5 January 2024 (page 215). For these reasons we do not find the Claimant has proven what she alleges in allegation 2z.

79. It is also alleged by the Claimant (Allegation 2aa) that on or around 25 May 2022 the Claimant sent an email to Neil Joslin complaining about the continued misconduct of IJ and asking the business to take some action to help her. No such action was taken by the Respondent. We have not been presented documentary evidence to show that such an email was sent to NJ or received by him, and NJ denies receiving such an email. We accept what NJ tells us which is consistent with the documentation presented to us.

80. It is not in dispute as noted in the agreed chronology that in July 2022 the Claimant received a salary increase.

81. Then in August 2022, Nicola Friend left the business.

82. It had been recorded in the Respondent's chronology that on the 29 September 2022, IJ's role was placed at risk of redundancy. It was not accepted by the Claimant. This factual dispute was resolved however following the late disclosure by the Respondent which consisted of a letter dated 29 September 2022 to IJ from NJ informing IJ of his provisional selection for redundancy (pages 456 to 458).

83. Then on 6 October 2022 there was a meeting between NJ and IJ about the redundancy (email dated 7 October 2022, page 459).

84. There is then a senior management meeting on the 12 October 2022 which the Respondent says the Claimant attended and at which they were informed that IJ was to be made redundant. We were given a copy of an email from NJ to the senior managers including the Claimant dated 12 October 2022 and timed at 20:52 (pages 473 to 475). The notes do not record IJ being made redundant, but NJ says it shows the Claimant was in attendance at that meeting as there is a section of the notes dealing with recruitment which would have been the update from the Claimant and then a record of actions she is to take. We accept

what NJ says as to the attendance of the Claimant which is consistent with the document.

85. Based on the evidence presented to us we accept as submitted by Respondent's Counsel that the Claimant is likely to have been present at the senior managers meeting on 12 October 2022 at which the meeting was informed of IJ going through a redundancy process. As Mr Joslin said during his evidence, the information in the 'Recruitment' section was provided by the Claimant (page 475) and in the column headed 'Actions' next to that row it is stated 'AP to work with HR to assess, understand & report upon staff turnover 2022'. The Claimant was also on the email list of senior managers to which Mr Joslin sent that table of information (page 473). Also, each of Mr Joslin (at page 361), Ms Hopkins (at page 242), Mr Trent (at page 228) and Mr Groves (at page 229) state that the Claimant was at the meeting / aware that IJ's role was at risk of redundancy.

86. It was recorded in the Respondent's chronology that on the 12 October 2022 IJ was informed his role was redundant. This was also not accepted by the Claimant. This dispute was also resolved by the late disclosure by the Respondent of the letter dated 12 October 2022 to IJ from NJ giving notice of termination of employment for reason of redundancy with a termination date of 12 January 2023. There is then an email dated 12 October 2022 (timed at 17:02) from NJ to the BH1 managers confirming IJ has been informed his role is redundant with a leaving date of 12 January 2023 (page 464 to 465).

87. By email dated 18 October 2022 from IJ to NJ, IJ proposes he leaves by the end of October and is paid in lieu of notice (page 468).

88. By email dated 19 October 2022 from NJ to IJ, NJ confirms they would be prepared to release IJ earlier once all desired work has been completed (page 467). This is then confirmed again by email dated 24 October 2022 from NJ to IJ (page 466).

89. It is no longer disputed that IJ was dismissed for reason of redundancy, and his leaving date is recorded as the 18 November 2022 (page 471) because he requested to leave early and be paid in lieu of notice once he had completed his work, and we accept this based on the evidence presented to us.

90. Allegations 2bb to 2ee are asserted by the Claimant to be allegations of harassment related to sex and in support of her complaint of constructive unfair dismissal. They relate to the dismissal of Inga Harris (IH), that:

    a. 2bb) On 24 October 2022, Inga Harris, HR Advisor in Rugby, was dismissed because Ashley Harrod, the Rugby site Manager, felt uncomfortable around her as Inga allegedly touched his chest and messaged him on his day off.

b. 2cc) The treatment of Inga Harris and IJ was completely inconsistent and disturbed the Claimant.

c. 2dd) Both the Claimant and Nicola Friend, HR Manager, had raised grievances against Mr Joliffe, with clear evidence of discrimination and harassment. Nicola Friend raised her grievance in October 2021. A number of other employees (including Matt Wiggett, Workshop Manager, and Liam Hyde) complained about his behaviour towards them including screaming at them and calling them cunts. His offences were prolonged and proven. Yet the Respondent made the decision that IJ (a male) should remain as an employee and Inga Harris (a female) should be removed.

d. 2ee) The Claimant considered that this difference in treatment demonstrated that the Respondent had not taken and was not taking IJ's behaviour seriously and that he was allowed to continue in the business whereas a female employee had been dismissed for a much less serious offence.

91. We were presented copies of the documents relating to the dismissal of IH being a file note of a meeting on the 24 October 2022 (pages 191 to 192) and the letter of dismissal dated 27 October 2022 (page 193).

92. The file note records that there is conflict / miscommunication from IH to the Claimant as well as other poor conduct.

93. The letter of dismissal records … "As you are aware, at the meeting we discussed aspects of your inappropriate behaviour and conduct at work including miscommunication with colleagues on two occasions, texting me outside of work with non-work-related concerns, and saying you miss me.".

94. It is clear from the documentation we have been presented that IH was not dismissed just because Ashley Harrod, the Rugby site Manager, felt uncomfortable around her as Inga allegedly touched his chest and messaged him on his day off.

95. It is not in dispute that IH had short service with the Respondent, understood to be a few weeks. IH circumstances are materially different to those of IJ.

96. The agreed chronology records that on 1 November 2022 the Claimant alleges she sent a resignation letter to the Respondent (pages 195 to 196). The Claimant says that she handed the letter to NJ and resigned verbally at the same time (paragraph 272).

97. This is not accepted by the Respondent. NJ says at paragraph 31 … "C states that she resigned on 1 November 2022. C indicated she might resign as she felt unsupported and unrecognised in the business. At the time, there had been significant pressure in the business with the opening of our BH1 facility. C

stated to me that she felt increasingly invisible to MT, which prompted me to facilitate a direct conversation between MT and C. However, I do not recall C referring to IJ as being a factor in her potential resignation. C stated that she felt disillusioned by a perceived lack of support that she believed was necessary for implementing a more people focused cultural change.". Further, at paragraph 32 … "C did not categorically confirm her resignation whether orally or in writing.".

98. It appeared to then be accepted by the Claimant and NJ that there was a meeting between them on 7 November 2022, where the "resignation" was discussed. The Claimant saying that is when she rescinded her resignation. NJ saying that the Claimant confirming she had decided not to resign.

99. Allegations 2ff to kk refer to this "resignation". They are no longer relied upon as complaints of discrimination, nor breaches of contract in support of the complaint of constructive unfair dismissal. The allegations were:

    a. 2ff) The Claimant decided that she could not continue in her employment and resigned, on 1 November 2022.

    b. 2gg) On 3 November she met with Marc Trent. He personally apologised to her and said he and the business had made a mistake. The business thought they needed Mr Joliffe for the construction of BH1 and that is why he wasn't fired for gross misconduct. Marc Trent said that he had let her down and this is why the business needed her, to make a change to the culture and that the business would never put her in a situation like this again. Marc stated that if she gave the company another chance and if things didn't change, then he would absolutely pay her – as she had requested in her resignation letter.

    c. 2hh) Marc Trent also said that they would never tolerate this kind of behaviour again and that if it had been his daughter, wife, or mother that Mr Joliffe had spoken to in that way, him and his brothers would have given him what for.

    d. 2ii) Marc Trent promised the Claimant and gave her his word that the business would never tolerate harassment and discrimination again and recognised the stress and anxiety it must have caused her and the impact it had on her health (being Type 1 Diabetic, the impact of the stress and anxiety was having an adverse effect on her blood sugars and physical health as well as her mental wellbeing). He stated that IJ was to be removed from the business and again reinforced what a mistake the business had made.

    e. 2jj) The Respondent decided to terminate the employment of Mr Joliffe on 4 November 2022. With effect from 12 November 2022 IJ left the business.

f. 2kk) Based on the assurances made by Marc Trent on 3 November 2022, and learning that Mr Joliffe was leaving the business, she rescinded her resignation on 7 November 2022 and continued in her role. She was promoted to Head of People in March 2023.

100. Marc Trent (MT) did not attend this hearing to give evidence. He was interviewed on the 12 January 2024 as part of the Claimant's second grievance, and we have a copy of his interview notes (page 228). Those record him saying:

"AH – Do you recall AP resigning in November 2022?

MT – Yes AP offered her resignation to NJ as she felt unsupported and unrecognized in the business. There had been a lot of pressure in the business with the opening of the new facility at BH1. AP had done a great job in recruiting the employees for a facility that was a first for us – we were all under pressure to perform and sometimes the recognition needed wasn't being given

AH – Was her resignation due to IJ 's behaviour?

MT- I don't recollect that being the case but she was feeling unsupported and I did my best to reassure her that myself and NJ would give her more support in her role over the coming months. This is why I understand that she rescinded her resignation"

101. It would appear from these notes that MT had understood the Claimant had resigned and then rescinded that resignation.

102. The Claimant details what she recalls of her meeting with MT on 3 November 2022 (paragraphs 276 to 282 of her witness statement):

"276. On 3 November I met with Marc Trent. Marc had contacted me and asked to meet me following my meeting with Neil. We met in the meeting room at Trent House, it was just Marc and I and no one else was present.

277. He personally apologised to me and said he and the business had made a mistake.

278. The business thought they needed Mr Joliffe for the construction of BH1 and that is why he wasn't fired for gross misconduct back in March 2022.

279. Marc said that he had let me down and this is why the business needed me, to make a change to the culture, and that the business would never put me in a situation like this again. Marc stated that if I gave the company another chance and if things didn't change, then he would absolutely pay me – as I had requested in my resignation letter.

280. Marc also said that they would never tolerate this kind of behaviour again and that if it had been his daughter, wife, or mother that Mr Joliffe had spoken to in that way, him and his brothers would have beaten the crap out of him.

281. Marc promised me and gave me his word that the business would never tolerate harassment and discrimination again and recognised the stress and anxiety it must have caused me and the impact it had on my health – he knows I am a Type 1 Diabetic.

282. He stated that IJ was to be removed from the business and again emphasised what a mistake the business had made."

103. MT is recorded when asked about what he said when interviewed on the 12 January 2024 that he did not recall making those comments and that IJ was not retained purely to finish the BH1 project; the decision was taken to issue a final written warning for the reasons he explains at the interview.

104. We note from contemporaneous messages between the Claimant and SL on the 3 November 2022 (page 197), that there is no reference to IJ being the issue and what is written is consistent with what NJ recalls and MT is recorded as saying in his interview on the 12 January 2024:

"Hello honey, what a day! So they have begged me to stay, the owner came in to talk to me, have given me free run, whatever I think we need to do to make cultural change they support, they have apologised personally and have said if they don't change they will pay me... they said this is the wake-up call that they don't have any more time to change and they can't do it without me... there's loads more to it including shares... I've said I'll think about it.,. I just think if they do let me do it it will change the lives of lots of people??? Xxx"

105. Also, the message on the 12 November 2022 between the Claimant and SL (page 199):

"Hello honey, happy Saturday! I hope you've had a great week, how was cypress? I had my meeting on Thursday, feeling a lot better and they made Ian leave yesterday., will tell you all about it., going to give it 6 months I think ' I would absolutely love to see you, let me know when you're around and lunch is on me".

106. The leaving date of IJ is recorded as the 18 November 2022 (page 471) so what the Claimant refers to in her message on the 12 November 2022 is incorrect. The Respondent did not make IJ leave on the 11 November 2022. IJ was made redundant and then sought to leave once he had completed his work and be paid in lieu of notice. This appears to have happened on the 18 November 2022.

107. From this we accept that on the balance of probability the Claimant did communicate she was resigning but then rescinded it. We accept the reasons were as understood by NJ, MT and as reflected in the text messages from the Claimant to SL. We also note that what the Claimant does not tell us from her recall of the discussion with MT on the 3 November 2022 is that the Respondent, through MT, promised they would not engage IJ again.

108. The agreed chronology notes that in March 2023 the Claimant is promoted to the role of Head of People.

109. Then in July 2023 the Claimant received a salary increase.

110. The Respondent commences communications beginning of December 2023 with the Society of Motor Manufacturers and Traders Ltd (SMMT) to assist the Respondent with a particular project. IJ works for SMMT (page 201 to 212).

111. NJ was questioned during cross examination about the decision to utilise IJ. NJ was asked if he thought about the way IJ behaved with the Claimant or NF when thinking about contacting IJ and he confirmed that he did not. As to whose idea it was to contact IJ he confirmed that it was a discussion between him and MT, but he cannot recall who suggested it. He then explained that it had come about because they had been contacted by a Canadian Company, looking to recycle the rare metals in magnets. They didn't know where they were in the cars, or which magnets, so they had a lot to learn but believed there to be a commercial upside, so wanted to find out. NJ confirmed that he and MT spoke about needing data about which cars, and where the magnets and rare metals are, for example the car speaker magnets do not have rare earth metals. They spoke about the SMMT and that was where the link was with IJ. They considered he was the right person to do the job because he was connected to SMMT and knew the Respondent's business. He was the first choice as they couldn't see anyone else who could do the work and provide the data.

112. On the 21 December 2023 there is a 1:1 between NJ and the Claimant. Reference is made to the engagement of SMMT (page 213):

"10. I gave Angela a courtesy heads-up that Ian Joliffe, through his employer SMMT, would be completing a short, distinct piece of consultancy project work for us. Essentially a desk-top study, maybe with a site visit to review the dismantling process, working only with Greg & Matt W to look at how we can extract precious metals e.g. magnets from vehicles in our dismantling process. We have agreed the project work will be completed by January 12th, albeit if there is a business case then it may involve a follow-up piece to write a funding application. I made clear I did not expect Angela would have to work with Ian in any way, we spoke about her being off on holiday the first week in January and that she would most likely not even be on-site whilst Ian was here for the project."

113. Also, page 477 which is a copy of the calendar invite for a 1:1 with NJ's had written notes on, which includes … "IJ/SMMT & magnets project 1/2024".

114. All the handwritten notes on the document are brief and have then been expanded upon in the typed version. NJ explained that he would normally type the notes into the calendar invite for the next meeting, but he writes these up due to the Christmas break after the Claimant has resigned and that is why they (at page 213) look different to the other 1:1s.

115. The Claimant accepted in cross-examination that points 1 to 9 were accurately recorded in the typed notes at page 213. NJ maintained that he had informed the Claimant about IJ so that she didn't just find out about it through discussions in the yard. He maintained it was to be courteous. We accept what NJ says.

116. We also note paragraph 304 of the Claimant's witness statement which confirms that Vicki Griffin was aware of IJ's interaction with the business prior to that but does not appear to be concerned by it based on what the Claimant says in her statement.

117. Allegations 2ll to 2oo are asserted as discrimination and all in support of the unfair constructive dismissal claim. They relate to the communication of IJs return:

a. 2ll) On 21 December 2023, during a 1:1, Neil Joslin stated that due to a Canadian company being interested in buying magnets from the Respondent, a work scope would need to be conducted to see how they would remove them from a vehicle and whether it would be cost efficient to do so, therefore on 8 January 2024 IJ would be returning to the business to manage this project.

b. 2mm) Neil Joslin stated that the Claimant "hopefully wouldn't see Ian Joliffe and whilst we know what Ian Joliffe isn't good at, we know he is good at process".

c. 2nn) The Claimant was enormously upset by this news. She just couldn't believe that the Respondent was inviting IJ back into the business and thereby reneging on all its promises, but most importantly exposing her and other females once again to the threat of assault, harassment and abuse.

d. 2oo) There had been no consultation with the Claimant before engaging Mr Joliffe and the Respondent took no measures to ensure that he would have no contact with the Claimant or any other female members of staff.

118. Having considered the allegations against the evidence presented, we accept NJ's account of this matter as to what is said and the reasons for it.

119. We, also note as submitted by Respondent's Counsel (paragraph 55.17) that the Claimant … "… accepted in cross-examination that Mr Joslin didn't discriminate against or harass her because of her sex, yet there are a number of allegations she relies on in relation to her sexual harassment claim which directly name Mr Joslin: (u), (x), (y), (aa), (ll) and (mm).". The Claimant's own evidence does not therefore support such allegations.

120. As recorded in the agreed chronology on the 22 December 2023 the Claimant attends work. Then from the 23 December 2023 to 7 January 2024 the Claimant is on annual leave.

121. We were referred in cross examination to the fact that on the 4 January 2024 Calabrese Ltd was incorporated on Companies House (Remedies Bundle, page 35).

122. It is also submitted by Respondent's Counsel in his written closing submissions that this was the reason for the Claimant's resignation (paragraph 55.14) … "It is beyond coincidental that Calabrese Ltd was incorporated on 4th January 2024 [RB/35] and C's resignation was tendered the day after and also the day after she accrued sufficiently continuity of service to qualify for protection from unfair dismissal. Rather it is likely that C resigned to pursue her dream of opening an Italian deli and she took the opportunity to resign in the hope that R would pay her some money by way of an exit payment (Joslin w/s para.47). This shows clear premeditation to leave R.".

123. And further (paragraph 55.15) … "When the Daily Echo article about 'Calabrese' was put to C and accepting that almost the entirety of the article was accurately reported, the only part of it that she said was incorrect was where it says that she and Mr Eyre had worked since February to prepare the shop [427-432]. Indeed if that aspect of the report is right, it seems highly likely that in order to lease or buy the premises to be able to start preparing the shop in February, discussions / negotiations about the same would have been going on long before February – a point seemingly supported by the fact that they had looked at other areas to set up shop. C said during the course of cross-examination that "Unfortunately can't tell the truth in marketing", which demonstrates that she changes her position to suit the situation and paint the picture that she wants to paint.".

124. What Respondent's Counsel submits is a reasonable interpretation of the evidence presented to us and the facts we have found proven.

125. On the 5 January 2024 the Claimant submits a grievance and resignation to the Respondent (pages 214 to 217) (timed at 9:09AM (page 214)). The Claimant refers to resigning with immediate effect due to the impact of IJ's return (page 214). Referred to as allegation 2qq, as a result of the Respondent's actions the Claimant resigned on 5 January 2024, although this is not referred to as an allegation of discrimination.

126. The last allegation of discrimination is Allegation 2pp that Mr Joliffe was present in the Respondent's business from 9 to 12 January 2024.

127. The Claimant was not in the workplace on those dates, and it is a matter that arises after the Claimant's resignation. We also note what MT says to the Claimant by email on 5 January 2024 timed at 09:57 (page 218) … "Before I respond formally I just want to highlight that IJ is not returning to the business. We have contracted the SMMT whom IJ works for to do a one off piece of work for CTL. I believe IJ needed to visit BH1 as a one off as the work is a desk top study. … Not sure what else I can say so please advise me how you want to proceed from here.".

128. The claim form was presented on 20 February 2024. The Claimant commenced the Early Conciliation process with ACAS on 17 January 2024 (Day A). The Early Conciliation Certificate was issued on 15 February 2024 (Day B). Accordingly, any act or omission which took place before 18 October 2023 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

129. The Claimant's solicitor submitted in his written closing submissions that the reason why the Claimant did not submit her complaints in time was because she was unrepresented until after she filed her claim, and she was still employed by the Respondent when the events occurred. Further, that the Claimant feared for her job had she lodged a formal complaint let alone a tribunal claim. This is a combination of fact and submission rather than all fact in our view. In cross examination the Claimant confirmed when asked about the content of her 1 November 2022 resignation letter (page 196) where it refers to seeking external advice that it was the advice of SL. The Claimant confirmed that she was not aware of her ET rights and that SL had added the legal bits. This does support in part what is submitted by the Claimant's solicitor. However, as to fear of making a claim, or raising a grievance, the Claimant did tell us she was in fear of making notes after the March 2022 disciplinary outcome and of being seen as a pain, but she did not confirm to us that she was in fear of submitting a further grievance or a tribunal claim.

130. It is submitted by Respondent's Counsel in his written closing submissions about time limits that (at paragraph 60) … "As has been said in Miller (see paragraph 46 above), time limits in employment tribunals are to be observed strictly, and it is submitted they should be in this case particularly in circumstances where Mr Joliffe has left R's employment and there is clearly forensic prejudice to R in having to defend such allegations which could and should have been brought a long time ago.". We were not presented evidence to say that IJ was unable or unwilling to attend this Tribunal. Accepting the Respondent's evidence IJ was interacting with the Respondent again in December 2023 to January 2024. As to forensic prejudice, the Claimant raised a grievance about matters in early 2022. It was investigated and a disciplinary sanction issued against IJ. It is clearly unfortunate that AH did not provide an

outcome letter to the Claimant addressing each allegation in the first grievance, but at no time did AH tell us that she could not recall the grievance matters.

131. THE LAW

132. We were assisted in this claim by a helpful summary of the law produced by Respondent's Counsel in his closing written submissions. The Claimant's Solicitor did not take any issue with the Respondent's summary, which he acknowledged was a fair summary. We therefore include a copy of that summary as Annex B to this full written reasons Judgment as it was relied upon by us in reaching our decision as well as the following matters of law:

133. Discrimination

134. The Claimant is alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA").

135. The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct discrimination and harassment related to sex. The legal tests for the two different heads of claim are slightly different and, notably, if treatment is found to be harassment under s26 EqA it cannot also be found to be direct discrimination because the two claims are mutually exclusive (due to the application of s212(1) EqA and its definition of "detriment").

136. The protected characteristics relied upon are sex as set out in sections 4 and 11 of the EqA.

137. The Burden of proof

138. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

139. In respect of the burden of proof, there is a two-stage process for analysing the complaint. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a prima facie case of discrimination following an assessment of all the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons (***Igen -v- Wong [2005] EWCA Civ 142*** as affirmed in ***Ayodele -v- CityLink Ltd [2018] ICR 748***).

140. We also note the recent decision of ***Efobi v Royal Mail Group Ltd (2021) ICR 1263*** which confirmed that the reverse burden of proof remains good law under the EqA.

141. Also, considering ***Madarassy v Nomura International Plc [2007] ICR 867***, Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination".

142. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the Respondent had committed an unlawful act of discrimination (***Madarassy***). "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

143. In ***Igen*** the Court of Appeal cautioned tribunals 'against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground' but made it clear that a finding of 'unexplained unreasonable conduct' is a primary fact from which an inference can properly be drawn to shift the burden.

144. Direct discrimination – section 13 Equality Act 2010

145. For a claim for direct discrimination, under section 13(1) of the EqA 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.

146. Direct discrimination claims require a comparison as between the treatment of different individuals i.e., individuals who do not share the protected characteristic in issue. In doing so there must be no material difference between the circumstances relating to each individual (section 23 EqA). The Tribunal therefore must compare 'like with like'.

147. Harassment – section 26 Equality Act 2010

148. Section 26 provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if —

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

… (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

149. The Claimant needs to establish, under section 26 EqA, unwanted conduct relating to her sexual orientation or sex ((1)(a)), which had the effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her ((1)(b)).

150. In deciding whether the conduct had the effect set out in (1)(b), the Tribunal must take into account the Claimant's perception, other circumstances, and whether it was reasonable for the conduct to have that effect ((4)). The section (1)(b) test, as a result of section (4), has an objective element.

151. <u>Time Limits</u>

152. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.

153. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

154. Section 123(3)(b) of the EqA, failure to do something, is to be treated as occurring when the person in question decided upon it. Where there is no evidence to the contrary, s.123(4) of the EqA 2010 provides a default means

by which the date of the 'decision' can be identified, either when there is an inconsistent act or alternatively the expiry of the period in which the employer might reasonably have been expected to do it.

155. An ongoing situation or continuing state of affairs amounting to discrimination was considered in ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96***. It is not sufficient to rely on an alleged overarching or floating discriminatory state of affairs without that state of affairs being anchored by discrete acts of discrimination.

156. We note the principals from the cases of ***British Coal v Keeble [1997] IRLR 336***; ***Robertson v Bexley Community Service [2003] IRLR 434 CA***; and ***London Borough of Southwark v Afolabi [2003] IRLR 220***;

157. We note the factors from section 33 of the Limitation Act 1980 which are referred to in the ***Keeble*** decision:

a. The length of and the reasons for the delay.

b. The extent to which the cogency of the evidence is likely to be affected by the delay.

c. The extent to which the parties co-operated with any request for information.

d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.

e. The steps taken by the claimant to obtain appropriate professional advice.

158. We note that the Court of Appeal in the ***Afolabi*** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

159. It is also clear from the comments of Auld LJ in ***Robertson*** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard … "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

160. Both parties referred us to the decision of ***Concentrix CVG Intelligent Contact Ltd v Obi 2023 ICR 1***. In that case, the employment tribunal had exercised its discretion to hear O's claim of sexual harassment, which was presented a day late. On appeal, CCVGIC Ltd argued that, as no explanation had been given by O for the delay, the tribunal was bound to reach the conclusion that time could not be extended. The EAT rejected this argument, noting that it would cut across tribunals' wide discretion. The EAT on reviewing relevant authorities considered that the absence of an explanation does not, as a matter of law, mean that a just and equitable extension must automatically be refused. Failure to consider the length of, and reasons for, the delay would be an error of law, but that is not the same as saying that if, upon consideration, no reason is apparent at all from the evidence, then in every case the extension must, as a matter of law, be refused.

161. Constructive Unfair Dismissal and Wrongful Dismissal

162. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he 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.

163. If the Claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

164. With regard to trust and confidence cases, Dyson LJ summarised the position in ***Omilaju v Waltham Forest London Borough Council***: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls

said in Malik at page 35C, the conduct relied on as constituting the breach must: "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".

165. The judgment of Dyson LJ in Omilaju has been endorsed by Underhill LJ in ***Kaur v Leeds Teaching Hospital NHS Trust [2018] 4 All ER 238***. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.

166. The Court in Kaur offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? If so, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign. (5) Did the employee resign in response (or partly in response) to that breach?

167. The Claimant's claim for breach of contract (wrongful dismissal) is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

168. THE DECISION

169. We remind ourselves of the burden of proof in discrimination claims and the need to consider whether something is harassment before then considering if it is direct sex discrimination if it is not harassment.

170. Also as confirmed during closing submissions, the Claimant's representative confirmed that the Claimant only claims allegations 2 a, b, d, f, w, x, y, z, aa, ll, mm, nn, oo and pp as direct sex discrimination, allegations 2 a, b, d, f, v, w, x, y, z, aa, ll, mm, nn, oo and pp as sexual harassment and allegations 2 a, d, f, g, I (we understand this to be allegation i not l), v, w, x, y, z, aa, bb, cc, dd, ee, ll, mm, nn, oo and pp as harassment related to sex.

171. We find that allegation 2a is proven as alleged. It is unwanted conduct that relates to sex and is of a sexual nature.

172. Allegation 2b is also proven as alleged. IJ is recorded as only hitting or tapping women with a ruler, so we find this is unwanted conduct of a sexual nature.

173. We also find allegation 2d proven as alleged which is unwanted conduct related to sex and that the hug is of a sexual nature.

174. Allegation 2f is proven as alleged and we find that it is unwanted conduct of a sexual nature.

175. Allegation 2g is proven as alleged and we find that it is unwanted conduct related to sex.

176. Allegation 2i is proven as alleged and we find that it is unwanted conduct related to sex.

177. As to allegation 2v, the Respondent didn't dismiss IJ. However, the Claimant did not seek the dismissal of IJ based on what she was communicating to the Respondent at the time, so his non dismissal does not appear to be unwanted conduct. However, taking it as such, it does not relate to sex and is not of a sexual nature accepting the explanation of NJ. There is no evidence to show in our view that it is because of sex. The material circumstances of IH are different.

178. As to allegation 2w, the Respondent did require the Claimant to continue to work with IJ, but we accept the explanation of NJ based on the facts we have found. It does not relate to sex, is not of a sexual nature or on the grounds of the Claimant's sex.

179. Allegation 2x is not proven as alleged.

180. Allegation 2y is not proven as alleged. The documentation we were presented supports the Claimant and IJ working professionally together having drawn a line in the sand after IJ's disciplinary.

181. Allegation 2z is not proven as alleged as we accept the evidence of NJ which is consistent with the documentation presented to us. The matters alleged were not reported to NJ as alleged. It did not make sense when the Claimant told us she didn't trust NJ to deal with IJ after the disciplinary, but he be the only person at the Respondent she tells of ongoing problems. The events alleged are not noted in the same way as those pre the disciplinary in writing with the Respondent at the time or with the Claimant's supporting witness SL. As the Claimant has linked these allegations to all being raised with NJ and they were not, we cannot accept her account on these matters.

182. Allegation 2aa is not proven as alleged. The exact date is not known, and the email being sent is not evidenced. We accept what NJ says about this matter.

183. Allegation 2bb is not proven as alleged. The reason for dismissal of IH was inappropriate behaviour and conduct at work including miscommunication with colleagues on two occasions, texting her manager outside of work with non-work-related concerns, and saying she misses him.

184. Allegations 2cc, 2dd and 2ee are not proven as alleged. There were material differences between IJ and IH other than sex. Also, IJ was disciplined and given a 24-month final written warning.

185. As to allegation 2ll we accept the account of NJ as to what was said at the 1:1 on the 21 December 2023. The Claimant was not told that IJ was returning to the business to manage the project. It is therefore not proven as alleged, and we accept the explanation of NJ, it does not relate to sex, is not of a sexual nature, nor on the grounds of the Claimant's sex.

186. Allegation 2 mm is not proven as alleged, as we accept the evidence of NJ on this matter.

187. As to allegation 2nn the Claimant asserts she was upset by the news, but as to the communication of the message that causes the upset, we have not been presented evidence to support it was related to sex, or of a sexual nature or because of the Claimant's sex. We accept that NJ communicated it as a matter of courtesy, particularly in the context of how he understood the working relationship of the Claimant and IJ to be post the disciplinary.

188. As to allegations 2oo, there was no consultation prior to engaging IJ, but it was not expected the Claimant would have contact with him. Also, the project was of a short-term nature. We do not find evidence to support that such action relates to sex or is of a sexual nature accepting the explanation of NJ. There is no evidence to show that it is because of sex.

189. Allegation 2pp, if IJ were engaged in such a way the Claimant had resigned on the 5 January 2024 and had not returned to the workplace after the 22 December 2023. We do not find evidence to support that such action relates to sex or is of a sexual nature accepting the explanation of NJ. There is no evidence to show that it is because of sex.

190. As to the allegations of direct sex discrimination not also pleaded as harassment we find as follows:

191. In relation to allegation 5.1.2 … "Permitting an individual who had committed acts of sexual assault and unlawful harassment and bullying to remain employed and requiring the Claimant to continue to work with him". This was a decision by NJ as a consequence of his determination of the disciplinary of IJ. It wasn't put to NJ that he did this because of the Claimant's sex, and we accept his reasons.

192. Then allegation 5.1.3 … "Failing to monitor the individual's behaviour and dismiss him when his behaviour continued". The Claimant has not proven this as alleged.

193. Allegation 5.1.4 … "Following the termination of his employment, re-engaging that individual to work within the business". IJ wasn't re-engaged to work in the business, he was engaged to provide consultation services on a specific project for a limited period, so this is not proven as alleged.

194. Allegation 5.1.5 … "When re-engaging him not taking any or any adequate action to prevent harm to its employees". What was done by NJ and communicated by MT was in our view adequate in view of what the Claimant had communicated to the Respondent about matters post the disciplinary of IJ. Further IJ was dismissed for reason of redundancy and not because of his conduct. The Claimant has not proven that no action was taken or what was done was inadequate.

195. Allegation 5.1.6 … "Before re-engaging him not consulting with the Claimant about the proposal to re-engage him and the implications for her and her health.". For the same reasons as set out above we find what was done was adequate and this matter has not been proven as alleged.

196. Based on the findings we have made it is necessary for us to consider time limits and whether it is just and equitable to extend time. The last of the allegations we have found proven is on the 24 February 2022, which means it is out of time by the 23 May 2022, so over a year and half late.

197. Considering then the relevant factors, in particular the length of, and reasons for, the delay; and whether the delay has prejudiced the Respondent.

198. The Claimant's solicitor submitted in his written closing submissions that the reason why the Claimant did not submit her complaints in time was because she was unrepresented until after she filed her claim, and she was still employed by the Respondent when the events occurred. Further, that the Claimant feared for her job had she lodged a formal complaint let alone a tribunal claim. This is a combination of fact and submission rather than all fact in our view. In cross examination the Claimant confirmed when asked about the content of her 1 November 2022 resignation letter (page 196) where it refers to seeking external advice that it was the advice of SL. The Claimant confirmed that she was not aware of her ET rights and that SL had added the legal bits. This does support in part what is submitted by the Claimant's solicitor. However as to fear of making a claim, or raising a grievance, the Claimant did tell us she was in fear of making notes after the March 2022 disciplinary outcome and of being seen as a pain, but she did not confirm to us that she was in fear of submitting a further grievance or a tribunal claim.

199. It is submitted by Respondent's Counsel in his written closing submissions about time limits that (at paragraph 60) … "As has been said in Miller (see paragraph 46 above), time limits in employment tribunals are to be observed strictly, and it is submitted they should be in this case particularly in circumstances where Mr Joliffe has left R's employment and there is clearly forensic prejudice to R in having to defend such allegations which could and should have been brought a long time ago.". We were not presented evidence to say that IJ was unable or unwilling to attend this Tribunal. Accepting the Respondent's evidence IJ was interacting with the Respondent again in December 2023 to January 2024. As to forensic prejudice, the Claimant raised a grievance about matters in early 2022. It was investigated and a disciplinary sanction issued against IJ. It is clearly unfortunate that AH did not provide an

outcome letter to the Claimant addressing each allegation in the first grievance, but at no time did AH tell us that she could not recall the grievance matters.

200. In our view when weighing these matters against the prejudice to the respective parties, being the Claimant losing the right of remedy and the demonstrated evidential prejudice to the Respondent, as well as the authority of ***Concentrix***, we find that it is just and equitable to extend time for the complaints we have found proven.

201. Considering then the complaints of constructive and wrongful dismissal. The Claimant confirmed that she no longer relies upon allegations 2 c, e, h, j, l, m, n, o, p, s, and ff to kk.

202. As we have already determined allegations 2 a, b, d, f g and i succeed as allegations of harassment as set out above. In respect of allegation 2k that … "On 28 February 2022 Mr Joliffe cornered the Claimant in the kitchen (in Rugby) and was screaming in her face after a HR Forum she had attended. He was screaming in her face and spitting as he shouted, "you're a fucking joke, who do you think you are?!, We are very capable of doing recruitment, that's why Nicola hates you, everyone hates you". This incident was witnessed by Joe Hunt, Rugby Transport Manager at the time, Donna Worrall – Sopergelston, Admin Manager, and Emily Ogden, Administrator. They shut the doors and stayed in reception.". We accept this has been proven as part of the Claimant's evidenced grievance.

203. We accept that each of the allegations of proven harassment would be a fundamental breach of the employment contract.

204. As to the other allegations:

205. 2q … "The Respondent suspended Mr Joliffe. Alison Hopkins, Finance Director, investigated the grievance. Alison Hopkins did not meet with the Claimant to discuss the grievance, nor did she ask her to provide any further information, before a decision was made." We find that this is poor practice by AH but does not amount to a fundamental breach in our view. The Claimant did not resign in response to this grievance process or outcome.

206. 2r … "Neil Joslin, to whom the Claimant had spoken about the incidents she raised in her grievance, was not interviewed in connection with the grievance." Again, this could be viewed as the Respondent not conducting as full a grievance investigation as it could have done, but this does not amount to a fundamental breach in our view.

207. 2t … "The Respondent did not provide the Claimant with a written outcome in relation to her grievance, nor was she given a right to appeal." The Claimant was not given a written outcome. This is in our view is poor practice; however, it is not a fundamental breach of the employment contract. AH did find in the Claimant's favour. We accept that an outcome was communicated, albeit not in writing. We also note that the Respondent's grievance process (page 64) is not contractual (page 78).

208. 2u … “On 25 March 2022 Neil Joslin telephoned the Claimant and told her that he looked into Mr Joliffe’s eyes and could see he was sorry. He told her Mr Joliffe would not be back in Rugby (where the Claimant had been based when the majority of the events took place) and would not work “with people” again, however she would have to work with him for the BH1 project, when she returned from Rugby to Poole and that she would need to make sure she wasn’t alone with him at any point.”. This matter has not been proven as alleged.

209. 2v … “The Respondent did not dismiss Mr Joliffe.”. It is right that the Respondent did not dismiss IJ at this time, but we accept the Respondent’s reasons for doing so as being reasonable and it was also not something the Claimant sought at the time.

210. 2w … “The Respondent required the Claimant to continue to work with Mr Joliffe.”. This is correct, but based on the facts found, it is a reasonable course for the Respondent to have taken.

211. 2x … “On a number of occasions the Claimant informed Neil Joslin that she was unhappy with the grievance outcome, that Mr Joliffe was still employed, and that she would have to continue working with him.”. This matter has not been proven as alleged.

212. 2y … “His response was always to tell her to avoid Mr Joliffe.”. This matter has not been proven as alleged.

213. As we have set out above, allegation 2z is not proven as alleged as we accept the evidence of NJ which is consistent with the documentation presented to us. The matters alleged were not reported to NJ as alleged. It did not make sense when the Claimant told us she didn’t trust NJ to deal with IJ after the disciplinary, but he be the only person at the Respondent she tells of ongoing problems. The events alleged are not noted in the same way as those pre the disciplinary in writing with the Respondent at the time or with the Claimant’s supporting witness SL. As the Claimant has linked these allegations to all being raised with NJ and they were not, we cannot accept her account on these matters.

214. 2aa … “On or around 25 May 2022 the Claimant sent an email to Neil Joslin complaining about the continued misconduct of Mr Joliffe and asking the business to take some action to help her. No such action was taken by the Respondent.”. This matter has not been proven as alleged.

215. 2bb … “On 24 October 2022, Inga Harris, HR Advisor in Rugby, was dismissed because Ashley Harrod, the Rugby site Manager, felt uncomfortable around her as Inga allegedly touched his chest and messaged him on his day off.” This matter has not been proven as alleged.

216. 2cc … “The treatment of Inga Harris and IJ was completely inconsistent and disturbed the Claimant.”. This matter has not been proven as alleged.

217. 2dd … “Both the Claimant and Nicola Friend, HR Manager, had raised grievances against Mr Joliffe, with clear evidence of discrimination and harassment. Nicola Friend raised her grievance in October 2021. A number of other employees (including Matt Wiggett, Workshop Manager, and Liam Hyde) complained about his behaviour towards them including screaming at them and calling them cunts. His offences were prolonged and proven. Yet the Respondent made the decision that IJ (a male) should remain as an employee and Inga Harris (a female) should be removed.”. This matter has not been proven as alleged.

218. 2ee … “The Claimant considered that this difference in treatment demonstrated that the Respondent had not taken and was not taking IJ’s behaviour seriously and that he was allowed to continue in the business whereas a female employee had been dismissed for a much less serious offence.”. This matter has not been proven as alleged. Further, IJ was subject to a disciplinary sanction.

219. 2ll … “On 21 December 2023, during a 1:1, Neil Joslin stated that due to a Canadian company being interested in buying magnets from the Respondent, a work scope would need to be conducted to see how they would remove them from a vehicle and whether it would be cost efficient to do so, therefore on 8 January 2024 IJ would be returning to the business to manage this project.”. This matter has not been proven as alleged.

220. 2mm … “Neil Joslin stated that the Claimant “hopefully wouldn’t see Ian Joliffe and whilst we know what Ian Joliffe isn’t good at, we know he is good at process.”. This matter has not been proven as alleged.

221. 2nn … “The Claimant was enormously upset by this news. She just couldn’t believe that the Respondent was inviting IJ back into the business and thereby reneging on all its promises, but most importantly exposing her and other females once again to the threat of assault, harassment and abuse.”. This matter has not been proven as alleged.

222. 2oo … “There had been no consultation with the Claimant before engaging Mr Joliffe and the Respondent took no measures to ensure that he would have no contact with the Claimant or any other female members of staff.”. This matter has not been proven as alleged.

223. 2pp … “IJ was present in the Respondent’s business from 9 to 12 January 2024.”. This is after the Claimant’s resignation.

224. 2qq … “As a result of the Respondent’s actions the Claimant resigned on 5 January 2024.” This is not of itself an allegation of fundamental breach.

225. We do not find therefore that the allegations as proven, other than the proven harassment, would amount to fundamental breaches.

226. Based on our findings of fact we accept that on the balance of probability the Claimant did communicate she was resigning in November 2022 but then

rescinded it. We accept the reasons were as understood by NJ, MT and as reflected in the text messages from the Claimant to SL. We also note that what the Claimant does not tell us from her recall of the discussion with MT on the 3 November 2022 is that the Respondent, through MT, promised they would not engage IJ again. We also note that IJ's employment with the Respondent was terminated for reason of redundancy and not because of his conduct.

227. The Claimant's rescinding of that resignation we find to be her affirmation of the employment contract for matters complained about up to that point. When the Claimant resigns again on the 5 January 2024 with immediate effect, she confirms it is because of IJ's return (page 214). We have found that what the Respondent did at that time based on its understanding of matters is appropriate and not in breach of the employment contract.

228. It has not been proven that the Respondent acted in a way that was calculated to destroy or seriously damage the trust and confidence with the Claimant. As to being likely to do so, we accept that the Respondent had reasonable and proper cause for doing what it did, based on its understanding of matters at that time. The Claimant had raised a grievance which resulted in IJ being disciplined. There is then no communication from the Claimant to the Respondent to suggest there was anything other than a professional working relationship in place between her and IJ. The documentation we were presented supports the Claimant and IJ working professionally together having drawn a line in the sand after IJ's disciplinary. The Claimant rescinds her resignation in November 2022, affirming the contract. The Respondent had identified a business reason to engage IJ at the end of 2023 and had sought to inform the Claimant about that as a matter of courtesy. The Claimant then resigns proximate to the creation of a new business venture she embarks on with her partner.

229. Considering the questions raised in ***Kaur***:

a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? This is the communication about the return of IJ.

b. Has she affirmed the contract since that act? We do not find that the Claimant did as she resigns proximate to that communication.

c. If not, was that act (or omission) by itself a repudiatory breach of contract? We do not find that it was for all the reasons set out above,

d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? We do not find that it was. There is no such course of conduct based on the facts we have found. As of the 23 April 2022 (page 90) the Claimant had drawn a line in the sand with IJ and was moving forward and has not proven the subsequent matters as alleged. IJ is then made redundant and not dismissed because of his conduct.

e. Did the employee resign in response (or partly in response) to that breach? Although not relevant based on the determinations we have already made, we accept what is submitted by Respondent's Counsel. The resignation is to undertake a new business venture with her partner.

230. The complaints of constructive and wrongful dismissal therefore fail and are dismissed.

231. We therefore find in our unanimous judgment that the Claimant's complaints of sexual harassment and harassment related to sex in respect of allegations 2 a, b, d, f g and i succeed and it is just and equitable to extend time for those complaints. The complaints of unfair constructive dismissal, wrongful dismissal, direct sex discrimination, and the remaining allegations of sexual harassment and harassment related to sex, all fail and are dismissed.

232. After the liability judgment was given, the parties then agreed terms as to remedy.

Approved by:

Employment Judge Gray
Dated 22 April 2025

Sent to the parties on
07 May 2025
By Mr J McCormick

For the Tribunal Office

ANNEX A - THE ISSUES

1. Time limits

1.1 The claim form was presented on 20 February 2024. The claimant commenced the Early Conciliation process with ACAS on 17 January 2024 (Day A). The Early Conciliation Certificate was issued on 15 February 2024 (Day B). Accordingly, any act or omission which took place before 18 October 2023 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. The Claimant's Allegations

Was the Claimant subjected to any or all of the following by Mr Ian Joliffe, Site Operations Manager, and/or the Respondent?

a) On 21 January 2022 Mr Joliffe said to the Claimant "You don't belong here this is a man's world. The only reason people are talking to you is because you are a woman, they are around shit like flies" "Also you wear tight jeans, are you trying to get attention?!" "You know the only reason you got the job is because of the way you look?" Stay in your recruitment lane, I can't emphasise that more".

b) On 2 February 2022 in the main office in Rugby, Mr Joliffe hit the Claimant on the bottom with a ruler in front of two colleagues, Donna Worrall-Sopergelston (Admin Manager) and Emily Ogden (Administrator). Both gasped and then Mr Joliffe said "Fuck, that's not on CCTV is it? Whatever you do don't tell Marc [Trent, CEO], fuck me or that really is my job over, hahahah".

c) On 3 February 2022 he approached the Claimant in the office in Rugby and said "please don't tell Marc about last week or yesterday, I really don't want to lose my job and after the Nicola [Friend, previous HR Manager] thing, Marc will fucking kill me".

d) On 11 February 2022 the Claimant was working in Poole and went into Mr Joliffe's office to catch up and update him on Rugby. He appeared agitated and was fiddling with a car part. She asked if he was ok but he didn't reply. She continued to update him on recruitment and when he heard that one of the candidates was female he got very angry. He stood up and clenched his fists, saying: "I don't want a woman on the yard, they're a fucking nightmare. We've tried it before and it doesn't work." She tried to reason with him pointing out that the business has problems with male employees every day but we still employ them. He then became more aggressive and said "Women are a fucking distraction, the odd conversation here and there adds up through the day. I told you this is a man's world. You only got the job because of how you look, you don't fucking know anything." She replied "I am very insulted by your comments Ian and couldn't disagree with you more. I have earned my stripes and have just as much right to be here as you. I know what I'm doing, this isn't my first rodeo and I will not tolerate this behaviour." He then said "Have you finished? Firstly, I didn't mean to insult you and it must be so hard being so beautiful!! Look we are going to disagree from time to time and this is one of those times, come on let's hug it out." Then he grabbed her and hugged her. She was shocked and intimidated by his actions.

e) Before the Claimant joined the Respondent, Marc Trent took all the Senior Managers out for a Christmas meal and at that meal he talked about the Claimant joining in January 2022, and said that she was beautiful. It appears that Mr Joliffe has seized on this comment when he made the comments about the Claimant only getting the job because of how she looks.

f) On 15 February 2022 in Rugby, the Claimant was working in the top office and Mr Joliffe was next to her. Ionut Popa, Quality Systems Manager, came into the office and started talking to Mr Joliffe. At one point Mr Joliffe said: "isn't that right Angela?" She turned around and said: "Sorry I wasn't listening." He then said "I was telling Ionut that you have great massage hands, if he has a bad back you could give him a massage, go into the meeting room and Angela can feel you up." Ionut looked embarrassed as was the Claimant. She replied that this was absolutely inappropriate, she turned back around and got on with her work. Mr Joliffe left the room. She couldn't make out clearly what he said, but she did hear something like "Oh fucking hell." He then returned without Ionut and got really close to her and said "I'm so sorry, I didn't mean to offend you." She replied that his actions had embarrassed her and were very inappropriate and asked him to stop treating her this way.

g) Later that evening Sam Haden came in to talk to Mr Joliffe and began teasing the Claimant about one of the boys having a little crush on her. Luke the security guard was present and Bradley Diston. Sam said "You want to stop talking to Paul, you give him palpitations." Mr Joliffe immediately swung around in his chair and said "Go on then, I told you, you are a distraction and don't belong here" in front of everybody.

h) On 21 February 2022 Mr Joliffe was very aggressive during a telephone conversation with the Claimant. He said "no one knows what they're doing, I'm not

fucking slowing anything down, you don't know what you are doing" The Claimant interjected and said "what is the matter? Why are you talking to me like this? Mr Joliffe said "oh I don't know, I've just fucking had enough of Italians today" The Claimant said goodbye and hung up the phone.

i) On 24 February 2022 during a telephone call following an email from her, he said to the Claimant "Who the fuck do you think you are? You stupid little bitch! Who else is copied into that email? Think you fucking know how to run a site you twat, then be my fucking guest!" He was screaming at the Claimant. She tried to interject to calm him down, and said things like "Ian, I am on your team, I am trying to help you, no one is copied into the email" The Claimant realised that he was in a blind rage and she was very scared, so she let him go on. He continued "How fucking dare you, Matthew Bastow is safer and Owen Bates is safer than Sam Roberts, you are an idiot you fucking crazy stupid bitch" He continued with this level of abuse for two to three minutes and then said "FUCK YOU" and hung up.

j) Immediately after this incident Mr Joliffe called Dave Eyre, (he was Yard Manager in Rugby) and said to him "I have lost it, I've never lost it like that before, I'm fucking dead now, I don't know what to do." The Claimant was in the kitchen with Dave Eyre at the time and burst into tears. She was shaking and terrified.

k) On 28 February 2022 Mr Joliffe cornered the Claimant in the kitchen (in Rugby) and was screaming in her face after a HR Forum she had attended. He was screaming in her face and spitting as he shouted, "you're a fucking joke, who do you think you are?!, We are very capable of doing recruitment, that's why Nicola hates you, everyone hates you". This incident was witnessed by Joe Hunt, Rugby Transport Manager at the time, Donna Worrall – Sopergelston, Admin Manager, and Emily Ogden, Administrator. They shut the doors and stayed in reception.

l) In this case (k), as in other of the incidents referred to by the Claimant above, Mr Joliffe would abuse the Claimant in private. He was violently aggressive. He would lose control. He would be bright red, shouting, spitting, and getting really close to the Claimant's face and into her personal space. He is a tall, large man, towering over the Claimant, shaking with anger and his fists clenched.

m) In other incidents referred to in this paragraph 5, he would abuse the Claimant in a public forum, bringing whoever was in the room into it, laughing and ridiculing the Claimant publicly, trying to get them to join in. This was mainly in Rugby and around a variety of different people who worked in the yard, anyone he could get to join in or just embarrass her and make her feel awkward and humiliated.

n) On a number of occasions Mr Joliffe would grab and hug the Claimant saying "lets hug it out" after he had just screamed at her. It was very intimidating and made her feel violated.

o) The Claimant was frightened of Mr Joliffe. She spoke to her manager, Neil Joslin, about his behaviour after every event that happened, often in tears and shaken. Neil Joslin suggested that the Claimant should raise a grievance (rather than resign) so that this behaviour would not only end for the Claimant but so that no one else had to suffer at the hands of Mr Joliffe either.

p) The Claimant raised a grievance and met with Neil Joslin and Marc Trent (Chief Executive) on 4 March 2022 to give an overview of her grievance as well as giving them the formal written details of her complaint.

q) The Respondent suspended Mr Joliffe. Alison Hopkins, Finance Director, investigated the grievance. Alison Hopkins did not meet with the Claimant to discuss the grievance, nor did she ask her to provide any further information, before a decision was made.

r) Neil Joslin, to whom the Claimant had spoken about the incidents she raised in her grievance, was not interviewed in connection with the grievance.

s) Neil Joslin made the decision as to what, if any, disciplinary action should be taken against Mr Joliffe.

t) The Respondent did not provide the Claimant with a written outcome in relation to her grievance, nor was she given a right to appeal.

u) On 25 March 2022 Neil Joslin telephoned the Claimant and told her that he looked into Mr Joliffe's eyes and could see he was sorry. He told her Mr Joliffe would not be back in Rugby (where the Claimant had been based when the majority of the events took place) and would not work "with people" again, however she would have to work with him for the BH1 project, when she returned from Rugby to Poole and that she would need to make sure she wasn't alone with him at any point.

v) The Respondent did not dismiss Mr Joliffe.

w) The Respondent required the Claimant to continue to work with Mr Joliffe.

x) On a number of occasions the Claimant informed Neil Joslin that she was unhappy with the grievance outcome, that Mr Joliffe was still employed, and that she would have to continue working with him.

y) His response was always to tell her to avoid Mr Joliffe.

z) From 4 April 2022, the Claimant was based at the Poole site permanently and there were multiple occasions when Mr Joliffe was threatening and discriminatory, all of which she raised with Neil Joslin, during 1:1's, by telephone or by email. Neil Joslin would merely reply "noted" or he would say "did he, are you sure?" or "it's hard when you are not in the room to hear the tone or meaning behind it" implying that she may not have been telling the truth or that it was just "banter". No investigations were carried out and he repeated that she should avoid Mr Joliffe. The Claimant can recall the following incidents involving Mr Joliffe from 4 April 2022.

(1) On many occasions he would make snide or inappropriate comments as she walked past him, or to other people (Alistair Munroe, Yard Manager. Matt Wiggett, Workshop Manager. Greg Colls, Quality Control Manager. Staff working in the Yard, such as Liam Hyde, Connor Farley, James McMillan, and new staff joining the business working on the lines) who would then tell her about them. His comments

included “she only got the job because of her looks, let’s see her fall flat on her face now". He would refer to the Claimant as a "dumb vacant bitch". He said some really bad sexual things about her such as I was “lining the boys up, that's the only reason why anyone was talking to her" she would “give out massages" or "favours to get people to help her or attend interviews".

(2) In May 2022 the Claimant had to meet with Mr Joliffe alone at the Holton Heath site. She had no key fob to get in or out and it was just him and her. Neil Joslin knew about it, that she was terrified, but did not ensure she was not required to meet him alone. Mr Joliffe said to the Claimant, in a very passive aggressive way "thank you for raising the complaint about me, I didn’t realise I swore so much, my family was shocked, that's definitely something I need to work on" he then said "whilst most of it was true, I'm really glad you raised it" The Claimant then said "look we have to work together, so we just have to move forward". She did everything to just pacify the situation and got out of there as quickly as she could. Mr Joliffe had to let her out of the building. As soon as the Claimant returned to her car Neil Joslin called her and she told him what had happened and that she didn't have a key fob to get in and out, and that it was really scary. Neil said he would note this, but never followed it up with her or Mr Joliffe.

(3) In June 2022, before the BH1 open evenings, Mr Joliffe went round to some of the people helping the Claimant with it saying, that she didn't have a clue what she was doing and that she was going to fail, no one will turn up, that she was useless and wearing tight jeans wasn't going to get her out of this one...

(4) In August 2022 during the recruitment process for A Change Programme Manager, which the Claimant worked on closely with Neil Joslin, they had shortlisted to a final stage two candidates, one being a female, Verity Pitman. Neil Joslin and the Claimant discussed the fact that it wouldn’t be fair/safe for Verity as she is a young, attractive female and she would have to work closely with Ian Joliffe.

aa) On or around 25 May 2022 the Claimant sent an email to Neil Joslin complaining about the continued misconduct of Mr Joliffe and asking the business to take some action to help her. No such action was taken by the Respondent.

bb) On 24 October 2022, Inga Harris, HR Advisor in Rugby, was dismissed because Ashley Harrod, the Rugby site Manager, felt uncomfortable around her as Inga allegedly touched his chest and messaged him on his day off.

cc) The treatment of Inga Harris and Ian Joliffe was completely inconsistent and disturbed the Claimant.

dd) Both the Claimant and Nicola Friend, HR Manager, had raised grievances against Mr Joliffe, with clear evidence of discrimination and harassment. Nicola Friend raised her grievance in October 2021. A number of other employees (including Matt Wiggett, Workshop Manager, and Liam Hyde) complained about his behaviour towards them including screaming at them and calling them cunts. His offences were prolonged and proven. Yet the Respondent made the decision that Ian Joliffe (a male) should remain as an employee and Inga Harris (a female) should be removed.

ee) The Claimant considered that this difference in treatment demonstrated that the Respondent had not taken and was not taking Ian Joliffe's behaviour seriously and that he was allowed to continue in the business whereas a female employee had been dismissed for a much less serious offence.

ff) The Claimant decided that she could not continue in her employment and resigned, on 1 November 2022.

gg) On 3 November she met with Marc Trent. He personally apologised to her and said he and the business had made a mistake. The business thought they needed Mr Joliffe for the construction of BH1 and that is why he wasn't fired for gross misconduct. Marc Trent said that he had let her down and this is why the business needed her, to make a change to the culture and that the business would never put her in a situation like this again. Marc stated that if she gave the company another chance and if things didn't change, then he would absolutely pay her – as she had requested in her resignation letter.

hh) Marc Trent also said that they would never tolerate this kind of behaviour again and that if it had been his daughter, wife, or mother that Mr Joliffe had spoken to in that way, him and his brothers would have given him what for.

ii) Marc Trent promised the Claimant and gave her his word that the business would never tolerate harassment and discrimination again and recognised the stress and anxiety it must have caused her and the impact it had on her health (being Type 1 Diabetic, the impact of the stress and anxiety was having an adverse effect on her blood sugars and physical health as well as her mental wellbeing). He stated that Ian Joliffe was to be removed from the business and again reinforced what a mistake the business had made.

jj) The Respondent decided to terminate the employment of Mr Joliffe on 4 November 2022. With effect from 12 November 2022 Ian Joliffe left the business.

kk) Based on the assurances made by Marc Trent on 3 November 2022, and learning that Mr Joliffe was leaving the business, she rescinded her resignation on 7 November 2022 and continued in her role. She was promoted to Head of People in March 2023.

ll) On 21 December 2023, during a 1:1, Neil Joslin stated that due to a Canadian company being interested in buying magnets from the Respondent, a work scope would need to be conducted to see how they would remove them from a vehicle and whether it would be cost efficient to do so, therefore on 8 January 2024 Ian Joliffe would be returning to the business to manage this project.

mm) Neil Joslin stated that the Claimant "hopefully wouldn't see Ian Joliffe and whilst we know what Ian Joliffe isn't good at, we know he is good at process".

nn) The Claimant was enormously upset by this news. She just couldn't believe that the Respondent was inviting Ian Joliffe back into the business and thereby reneging on all its promises, but most importantly exposing her and other females once again to the threat of assault, harassment and abuse.

oo) There had been no consultation with the Claimant before engaging Mr Joliffe and the Respondent took no measures to ensure that he would have no contact with the Claimant or any other female members of staff.

pp) Mr Joliffe was present in the Respondent's business from 9 to 12 January 2024.

qq) As a result of the Respondent's actions the Claimant resigned on 5 January 2024.

3. Constructive Unfair Dismissal (ss 95(1)(c) and 98(4) ERA 1996)

3.1 The claimant claims that the respondent acted in fundamental breach of contract in respect of the implied terms of the contract relating to (i) mutual trust and confidence; (ii) affording a reasonable opportunity for the prompt redress of grievances; (iii) the requirement to take reasonable care of the health and safety of employees; (iv) the monitoring of a working environment which is reasonably suitable for the performance of employees' contractual duties; and (v) supporting employees in the completion of the duties without harassment from colleagues . The alleged breaches are the Allegations set out above.

3.2 (The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

3.3 The Tribunal will need to decide:

3.3.1 Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

3.3.2 Whether the respondent had reasonable and proper cause for doing so.

3.4 Did the claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

3.5 Did the claimant delay before resigning and therefore affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

3.6 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

4. Wrongful Dismissal – Claim for Notice Pay

4.1 What was the claimant's notice period? The claimant asserts that this was three months.

4.2 The claimant resigned without notice and was not paid for that notice period.

4.3 Was the claimant dismissed and is she entitled to be pay for the lost notice period?

4.4 What compensation if any is the claimant entitled to bearing in mind that lost notice period and her duty to mitigate that loss?

5. Direct Sex Discrimination (s 13 Equality Act 2010)

5.1 Did the respondent do the following things:

5.1.1 The claimant repeats all Allegations set out above except Allegation h (which relates to her race); and

5.1.2 Permitting an individual who had committed acts of sexual assault and unlawful harassment and bullying to remain employed and requiring the Claimant to continue to work with him; and

5.1.3 Failing to monitor the individual's behaviour and dismiss him when his behaviour continued; and

5.1.4 Following the termination of his employment, re-engaging that individual to work within the business; and

5.1.5 When re-engaging him not taking any or any adequate action to prevent harm to its employees; and

5.1.6 Before re-engaging him not consulting with the Claimant about the proposal to re-engage him and the implications for her and her health.

5.2 Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated, known as the claimant's comparator. There must be no material difference between the circumstances of this comparator and those of the claimant. The comparator can be an actual person, or if there is no actual comparator then someone hypothetically. That is to say a hypothetical comparator whom the claimant says would not have been treated in the (less favourable) way in which the claimant was treated.

5.3 In relation to 4.1.2 the comparator relied upon is Ashley Harrod. As a result of his complaint about minor potentially sexual harassment by a female, Inga Harris, she was dismissed immediately for gross misconduct.

5.4 In relation to 4.1.3 to 4.1.6 the comparator is a hypothetical comparator – i.e. a male employee whose circumstances are materially similar to those of the Claimant and who raised complaints with their employer about sexual harassment, discrimination and bullying by a female colleague.

5.5 If the claimant did suffer less favourable treatment above, was this because of sex? Is the respondent able to prove that it was for a non-discriminatory reason unconnected to the protected characteristic in question?

6. Sexual Harassment (s 26 Equality Act 2010)

6.1 Did the respondent do the following things? The claimant relies on Allegations a, b, c, d, e, f, g, i, m, n, u, v, w, x, y, z, aa, bb, cc, dd, ee, ff, ll, mm, nn, oo, pp and qq set out above.

6.2 If so, was that unwanted conduct?

6.3 Was it of a sexual nature?

6.4 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?

6.5 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.

7. Harassment Related to Sex (s 26 Equality Act 2010)

7.1 Did the respondent do the following things? The claimant relies on Allegations a, b, c, d, e, f, g, I, k, l, m, n, u, v, w, x, y, z, aa, bb, cc, dd, ee, ff, ll, mm, nn, oo, pp and qq set out above. (namely, a repeat of the sexual harassment claim plus Allegations k and l)

7.2 If so, was that unwanted conduct?

7.3 Did it relate to the claimant's protected characteristic, namely her sex?

7.4 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?

7.5 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.

8. Harassment Related to Race (s 26 Equality Act 2010)

8.1 The claimant is Italian.

8.2 Did the respondent do the following things (Allegation h): On 21 February 2022 Mr Joliffe was very aggressive during a telephone conversation with the Claimant. He said …"oh I don't know, I've just fucking had enough of Italians today"

8.3 If so, was that unwanted conduct?

8.4 Did it relate to the claimant's protected characteristic, namely race?

8.5 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?

8.6 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.

9. Duplication of Harassment and Direct Discrimination

9.1 The claimant's complaints relating to sex are presented as both harassment and/or direct discrimination. The tribunal will determine these allegations in the following manner.

9.2 In the first place the allegations will be considered as allegations of harassment. If any specific factual allegation is not proven, then it will be dismissed as an allegation of both harassment and direct discrimination.

9.3 If the factual allegation is proven, then the tribunal will apply the statutory test for harassment under section 26 EqA. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination because under section 212(1) EqA the definition of detriment does not include conduct which amounts to harassment.

9.4 If the factual allegation is proven, but the statutory test for harassment is not made out, the tribunal will then consider whether that allegation amounts to direct discrimination under the relevant statutory test.

10. Reasonable Adjustments (ss 20 and 21 Equality Act 2010)

10.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? If so from what date?

10.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

10.2.1 PCP 1: permitting an individual who had committed acts of sexual assault and unlawful harassment and bullying to remain employed and requiring the Claimant and others to continue to work with him; and

10.2.2 PCP 2: failing to monitor the individual's behaviour and dismiss him when his behaviour continued; and

10.2.3 PCP 3: following the termination of his employment, re-engaging that individual to work within the business; and

10.2.4 PCP 4: When re-engaging him not taking any or any adequate action to prevent harm to its employees; and

10.2.5 PCP 5: Before re-engaging him not consulting with the Claimant about the proposal to re-engage him and the implications for her and her health.

10.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that a toxic and unsafe working

environment had a greater negative effect on her health because of her disability – raised levels of stress lead to raised blood sugar levels and may lead to physical and mental health complications.

10.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

10.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

10.5.1 The respondent could have dismissed the individual in March 2022 when the Claimant raised a grievance about his behaviour or in October 2021 when Nicola Friend raised a grievance about his behaviour; and

10.5.2 The respondent could have monitored the individual's behaviour and dismissed him when his behaviour continued; and

10.5.3 The respondent could have not re-engaged the individual in January 2024; and

10.5.4 The respondent could have put in place measures to ensure that the individual had no contact with the Claimant or with any other female members of staff; and

10.5.5 The respondent could have consulted with the Claimant before re-engaging the individual in January 2024 and considered her objections.

10.6 Was it reasonable for the respondent to have to take those steps and when?

10.7 Did the respondent fail to take those steps?

11. Remedy

Unfair dismissal

11.1 The claimant does not wish to be reinstated and/or re-engaged.

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

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

11.3.1 What financial losses has the dismissal caused the claimant?

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

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

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

11.3.5 If so, should the claimant's compensation be reduced, and if so, by how much?

11.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?

11.3.7 Does the statutory cap of fifty-two weeks' pay apply? (This is subject to a maximum of £105,707 after April 2023).

Discrimination

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

11.5 What financial losses has the discrimination caused the claimant?

11.6 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated for?

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

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

11.9 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?

11.10 Should interest be awarded? If so, how much?

ANNEX B – ACCEPTED SUMMARY OF LAW FROM WRITTEN CLOSING SUBMISSIONS OF RESPONDENT'S COUNSEL:

"Constructive unfair dismissal

5. Section 95(1)(c) ERA 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.

6. In order for an employee to be able to claim constructive dismissal, an employee must establish that:
   (1) There was a fundamental breach of contract on the part of the employer.
   (2) The employer's breach caused the employee to resign.
   (3) The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

7. If the employee leaves in circumstances where the above 3 conditions are not met, she will be held to have resigned and there will be no dismissal within the meaning of the legislation at all.

8. In **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA**, the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract. As Lord Denning MR put it at 226A:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

9. In **Western Excavating**, the Court of Appeal expressly rejected the argument that s95(1)(c) ERA introduces a concept of reasonable behaviour by employers into contracts of employment. This means that an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably.

10. The relationship of employer and employee is regarded as one based on a mutual trust and confidence between the parties. In **Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84, EAT**, the EAT held that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties' (affirmed by the EAT in **Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, EAT**). Browne-Wilkinson J stated: '*To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that*

its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.'

11. The existence of the implied term of mutual trust and confidence was approved by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) [1997] ICR 606 HL**. There, their Lordships confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Thus it is apparent that there are 2 questions to be asked when determining whether the term has, in fact, been breached. These are: (1) Was there 'reasonable and proper cause' for the conduct? (2) If not, was the conduct 'calculated or likely to destroy or seriously damage trust and confidence'?

12. A breach of the implied term as formulated in **Malik** will only occur where there was no 'reasonable and proper cause' for the conduct in question. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence: **RDF Media Group plc and anor v Clements [2008] IRLR 207, QBD**.

13. The 2nd requirement for establishing a breach of the implied term as expressed in **Malik** is that the conduct must have been 'calculated or likely to seriously damage or destroy trust and confidence'. A breach of this fundamental term will not occur simply because the employee subjectively feels that such a breach has occurred. The legal test entails looking at the circumstances objectively: **Tullett Prebon plc and ors v BGC Brokers LP and ors [2011] IRLR 420, CA**.

14. As Jacob LJ observed in **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908, CA**, the range of reasonable responses is not relevant.

15. A constructive dismissal is not necessarily an unfair one.

16. In **Omilaju v Waltham Forest London Borough Council** [2005] EWCA Civ 1493, [2005] IRLR 35, the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute *something* to the breach even if relatively insignificant. As a result, if the final act did not contribute or add anything to the earlier series of acts it was not necessary to examine the earlier history. This can be seen in the result on the facts in the subsequent Court of Appeal decision in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978, [2018] IRLR 833.

17. **Kaur** contains an important discussion of the last straw concept. Underhill LJ accepted **Omilaju** as the leading case on last straw arguments. In particular he

set out the following passages from the judgment of Dyson LJ which he said sum it all up and should require no further elucidation:

"14. The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27*.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA [1997] IRLR 462*, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, 350*. The very essence of the breach of the implied term is that it is "*calculated or likely to destroy or seriously damage the relationship*" (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at p.464, the conduct relied on as constituting the breach must "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" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para. [480] in *Harvey on Industrial Relations and Employment Law*:

> "Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which caused the employee to terminate a deteriorating relationship."

15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 157*. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

> "(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract: the question is, does the cumulative series of acts taken together amount to a breach of the implied term?...This is the 'last straw' situation."

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application...

19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a

breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

18. At paragraph 55 of the judgment, Underhill LJ in **Kaur** stated that in the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that date?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para.45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

EqA claims

Relevant protected characteristic

19. Section 11 EqA provides that sex is a protected characteristic.

Direct discrimination

20. Section 13 EqA materially provides:

(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.

21. A claimant who simply shows that he or she was treated differently from how others in a comparable situation were, or would have been, treated will not, without more, succeed with a complaint of unlawful direct discrimination: **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL**.

22. A claimant may rely on an actual or hypothetical comparator but there must be *"no material difference between the circumstances relating to each case",* per section 23(1) EqA. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL** (sex discrimination), Lord Scott explained that this means that *"the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."* (para 110).

23. A complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. The protected characteristic need not be the only reason for the treatment but it must be an "*effective cause*" (**O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1997] ICR 33, EAT**) (para 43H) or have a "*significant influence*" on the treatment (**Nagarajan v London Regional Transport [1999] ICR 877, HL**). In **Nagarajan**, Lord Nicholls stated (paras 886E-F):

> *"'Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."*

24. In a case of alleged subjective discriminatory treatment, the test to be adopted was expressed by the House of Lords in **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL at 1072D:** A tribunal must ask: why did the alleged discriminator act as he or she did? What, consciously or unconsciously, was his or her reason?

25. Linden J in **Gould v St John's Downshire Hill [2021] ICR 1, EAT** (a case of alleged discrimination because of marriage) set out at para.66:

> *''…the logic of the requirement that the protected characteristic or step must subjectively influence the decision maker is that there may be cases where the "but for" test is satisfied – but for the protected characteristic or step the act complained of would not have happened – and/or where the protected characteristic or step forms a very important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the protected characteristic or step itself did not materially impact on the thinking of the decision maker and therefore was not a subjective reason for the treatment. This point is very well established in the field of employment law generally where, for example, an employer may be held to have acted by reason of dysfunctional working relationships rather than the conduct of the claimant which caused the breakdown in those relationships (see e.g. the cases on the distinction between dismissals related to "conduct" and dismissals for "some other substantial reason", such as Perkin v St Georges Healthcare NHS Trust [2006] 617 CA; and the cases in relation to public interest disclosures such as Fecitt & Others v NHS Manchester (Public Concern at Work Intervening) [2012] ICR 372 CA and Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 EAT)."*

Harassment

26. Section 26 EqA materially provides:

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

27. In **Pemberton v Inwood [2018] ICR 1291, CA**, Underhill LJ gave updated guidance in relation to the "effect" aspect of the harassment test. In **Pemberton**, the guidance included the following:
"In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

28. In **Ahmed v Cardinal Hume Academies EAT 0196/18**, the EAT confirmed that it understood the **Pemberton** guidance to mean that the question of whether or not it is reasonable for the impugned conduct to have the proscribed effect is effectively determinative.

Burden of proof

29. Section 136 EqA materially provides:

Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(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 subsection (2) does not apply if A shows that A did not contravene the provision…

30. In **Fennell v Foot Anstey LLP EAT 0290/15**, HHJ Eady stated that '*although guidance as to how to approach the burden of proof has been provided by this and higher appellate courts, all judicial authority agrees that the wording of the statute remains the touchstone'.* (para.38)

31. The relevant principles have been established in 4 key cases: **Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931, CA; Laing v Manchester City Council and anor [2006] ICR 1519, EAT; Madarassy v Nomura International plc [2007] ICR 867, CA**; and **Hewage v Grampian Health Board [2012] ICR 1054, SC.** In **Hewage** the Supreme Court endorsed the 2 earlier decisions of the Court of Appeal in **Igen** and **Madarassy**. In **Igen** the Court of Appeal established that the correct approach for a tribunal to take to the burden of proof entails a 2-stage analysis. At the 1st stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the 2nd stage engaged, whereby the burden then 'shifts' to the respondent to prove – again on the balance of probabilities – that the treatment in question was 'in no sense whatsoever' on the protected ground.

32. In **Royal Mail Group Ltd v Efobi [2021] UKSC 33** (paras 18-38), the Supreme Court held that the enactment of s.136 EqA did not change the requirement on the claimant in a discrimination case to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

33. In direct discrimination cases, something more than less favourable treatment (discounting an employer's explanation for such treatment) is required to establish a prima facie case of discrimination. In **Madarassy** (para.56) it was said by Mummery LJ that:

> *"The court in **Igen v. Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*

34. Mummery LJ went on in **Madarassy** (para.57) to state:

> *"Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.*

35. Since **Madarassy**, the courts (including the Court of Appeal) have largely eschewed the proposition that a finding of less favourable treatment without more is a sufficient basis for drawing an inference of discrimination at the first stage – see, for example, **Hammonds LLP and ors v Mwitta EAT 0026/10** (paras 77-81) and **Transport for London and anor v Aderemi EAT 0006/11**.

36. In **Hammonds**, the EAT overturned an employment tribunal's finding that the claimant, a solicitor of mixed race, had established a prima facie case of race discrimination on the basis that significantly less work had been given to her than to her white comparators, thus showing a pattern of marginalisation. The EAT held that this was an insufficient basis from which to draw an inference of discrimination. Those facts indicated a difference in race and a difference in treatment, which at most showed a possibility that the claimant's law firm could have discriminated on the ground of race in allocating work but not that it had done so. For a prima facie case to be established, the tribunal would have to find facts from which they could conclude properly that the claimant had been discriminated against on grounds of her race. Furthermore, in the EAT's view, if the tribunal had inferred race discrimination not from unreasonable treatment alone but from the lack of explanation for such treatment, that was, in light of Mummery LJ's judgment in **Madarassy**, also an error. And in the **Aderemi** case the EAT agreed with the employer that the employment tribunal had wrongly conflated less favourable treatment, which had to be proved on the balance of probabilities, and the issue of whether there was a prima facie case that such treatment was meted out on the ground of race.

37. In **Madarassy** (para.58) the Court of Appeal also observed that '*the absence of an adequate explanation…is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant*.'

38. The Supreme Court in **Efobi v Royal Mail Group Ltd [2021] ICR 1263, SC**, also commented on this point as follows (para.40): '*Whether the employer has in fact offered an explanation and, if so, what that explanation is must...be left out of account. It follows that...no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation*.'.

39. Thus it is submitted that a failure to provide an explanation, without more, is not capable of shifting the burden of proof.

40. Furthermore, it is not enough for a claimant to show that he or she has been treated badly in order to satisfy the tribunal that he or she has suffered less favourably treatment: **Essex County Council v Jarrett EAT 0045/15**.

41. The fact that a claimant has been subjected to unreasonable treatment is not, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift: **Glasgow City Council v Zafar [1998] ICR 120, HL** – where their Lordships held that an employment tribunal had not been entitled to draw an

inference of less favourable treatment on the ground of race from the fact that the employer had acted unreasonably in dismissing the employee.

Time limits EqA

42. Section 123 EqA materially provides:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other periods as the employment tribunal thinks just and equitable.

(2) …

(3) For the purposes of this section-

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

43. A claimant should not get the benefit of any extension of time in complying with ACAS EC where time has already expired: **Pearce v Bank of America Merrill Lynch and ors 0067/19 EAT**.

44. The key authorities in relation to continuing acts were reviewed by the EAT in **Moore Stephens LLP and others v Parr UKEAT/0238/20/OO** (paras 26-38). Whilst this matter was appealed to the Court of Appeal the case law summary was not criticised. Most recently time limits have come before the Court of Appeal in **Jones v SoS for Health and Social Care [2024] EWCA Civ 1568** (paras.24 to 30) and **HSBC Bank plc v Chevalier-Firescu [2024] EWCA Civ 1550**.

45. The Employment Tribunal should not take too literal an approach to the question of what amounts to a continuing act by focusing on whether the concepts of *"policy, rule, scheme, regime or practice"* arise on the facts of the particular case, those are merely examples of when an act extends over a period per **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA** (para 47-52).

46. The onus to persuade the Tribunal that it is just and equitable in all of the circumstances to extend time is on a claimant. The Tribunal's discretion is broad (**Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA**; **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA**). However, it does not follow that exercise of the discretion is a foregone conclusion. Indeed, Laing J in **Miller and ors v MoJ and ors** EAT 0003/15 stated that time limits are to be observed strictly in employment tribunals and the Court of Appeal made it clear in **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA:

"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule."

47. In **British Coal Corporation v Keeble and ors** [1997] IRLR 336 EAT, the EAT previously suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in section 33 of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has co-operated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

48. In **Southwark London Borough Council v Afolabi** [2003] ICR 800, CA, the Court of Appeal confirmed that, while the checklist in section 33 provides a useful guide for tribunals, it need not be adhered to slavishly. In **Department of Constitutional Affairs v Jones** [2008] IRLR 128, CA, the Court of Appeal emphasised that the factors referred to in **Keeble** are a 'valuable reminder' of what may be taken into account but their relevance depends on the facts of the individual cases and tribunals do not need to consider all the factors in each and every case.

49. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] ICR D5, CA, the Court of Appeal upheld an employment judge's refusal to extend time for a race discrimination claim presented 3 days late. It noted that the judge had referred to the factors set out in s.33(3) of the Limitation Act 1980, following **Keeble**. As to the first factor, the length of and reasons for the delay, the judge had been entitled to take into account that, while the 3 day delay was not substantial, the alleged discriminatory acts took place long before A's employment terminated, and that he could have complained of them in their own right as soon as they occurred or immediately following his resignation.

50. Section 33(1) of the Limitation Act 1980 requests the court or tribunal to consider the prejudice that each party would suffer if the extension of time were granted. The Court of Appeal in **Chief Constable of Greater Manchester Police v Carroll** [2017] EWCA Civ 1992, CA, summarised the test as follows: "*The essence of the proper exercise of the judicial discretion under s.33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant.*' Although s.33 does not apply to employment tribunals when deciding whether to extend time under EqA, a consistent line of authority beginning with **Keeble** shows that they are generally expected to apply an equivalent test.

51. In **Miller and ors v Ministry of Justice and ors** EAT 0003/15, Laing J (as she then was) set out five key points derived from case law on the 'just and equitable' discretion. One of these points was that, while it is for the tribunal to decide what factors are relevant and how they should be balanced, the prejudice that a respondent will suffer from facing a claim which would otherwise be time-barred is 'customarily' relevant. Laing J elaborated that there are 2 types of prejudice that a respondent may suffer if the limitation period is extended: (i) the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and (ii) the forensic prejudice that a respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses. Both parties in **Miller** argued that, while a lack of forensic prejudice does not in itself lead to an extension of time, the employment tribunal is bound in every case to take forensic prejudice into the balance. Laing J noted that she was not formally required to consider this submission in the circumstances of the case but went on to state that she would have rejected it. In her view, it is obvious that, if there is forensic prejudice to a respondent, that will be 'crucially relevant' in the exercise of the discretion, telling against an extension of time, and may well be decisive. However, the converse does not follow: if there is no forensic prejudice to the respondent, that is (a) not decisive in favour of an extension, and (b), depending on the tribunal's assessment of the facts, may well not be relevant at all. As noted by Laing J in **Miller**, the nature of forensic prejudice is that, the later a claim is brought, the further back in time the evidence needs to go, and the quality of evidence suffers as memories fade and witnesses become unavailable.

52. In **Concentrix CVG Intelligent Contact Ltd v Obi** [2023] ICR 1, EAT, O sought to bring claims of sexual harassment and racial harassment, which she presented on 4 June 2018. The sexual harassment claim relied on three incidents, one in early November 2017, one in late November, and one on 6 January 2018. The claim of racial harassment relied on a single incident that occurred at the beginning of November 2017. The employment tribunal found that O's racial harassment claim was presented four months out of time, that it was a one-off (and so was not part of any conduct extending over a period for the purposes of s.123(3)(a) EqA, and that it was not just and equitable to extend time. In so concluding, the tribunal took into account, among other things, that there would be prejudice to CCVGIC Ltd because a number of employees who might have given evidence had left its employment, and memories would have faded. As to the sexual harassment claim, the tribunal found that the three incidents constituted conduct extending over a period, meaning that the time limit for O's claim in relation to all three began to run on the date of the final incident on 6 January 2018. On that calculation, O had presented her sexual harassment claim one day late. However, the tribunal went on to find that it was just and equitable to extend the time limit to allow O's claim to proceed. It noted that the delay of one day did not cause any genuine prejudice to CCVGIC Ltd, whereas refusing to grant the extension would deprive O of an outcome or remedy at all for the harassment alleged. CCVGIC Ltd appealed, arguing, among other things, that it was an error for the tribunal to focus on the one-day delay when assessing what forensic prejudice was caused by the late presentation of the claim, given that the factual inquiry would extend back in time as far as the earliest of the three incidents. It submitted that forensic prejudice had to be

assessed in light of how long ago the incidents actually occurred, and that, given that the tribunal had found that such prejudice was established in relation to the incident of racial harassment at the start of November 2017, the same prejudice had to be weighed in the balance in relation to the incident of sexual harassment that occurred at the same time.

53. The EAT allowed CCVGIC Ltd's appeal. It referred to the Court of Appeal's decision in **Adedeji** where the claim of discriminatory constructive dismissal was formally only a few days late but the constructive dismissal was said to have arisen from the cumulative effect of a series of episodes of discriminatory treatment going back much further in time. In those circumstances, the Court of Appeal held that it was not an error for the tribunal to take into account the prejudice that the respondent would face if it had to answer to factual allegations going significantly back in time, even though it would have had to do so had the claim been presented in time. The EAT in the present case reasoned that, just as it is not an error to take such 'real time' forensic prejudice into account, so, conversely, in a case where there may be an issue of such potential forensic prejudice if time were to be extended, the tribunal would err in principle if it failed to consider that aspect, as it would fail to take into account a relevant consideration. As for the result in the present case, the EAT agreed with CCVGIC Ltd's submission that the tribunal erred in failing to address the forensic prejudice question in relation to the earliest incident of sexual harassment and that, had it done so, it would have been bound as a matter of consistency to take on board the finding of forensic prejudice it had made in relation to the racial harassment incident."