



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4113101/2018 Hearing at Edinburgh on 6, 7, 8, 9, 12 and 13 August
2019, and Members' Meeting on 18 October 2019

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Employment Judge: M A Macleod
Tribunal Member: M McAllister
Tribunal Member: J Chalmers

A

Claimant
Represented by
Mr R Clarke
Solicitor

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B

Respondent
Represented by
Mr W Lane
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous Judgment of the Employment Tribunal is that the claimant's claims of direct discrimination on the grounds of sex under section 13 of the Equality Act 2010, and of harassment on the grounds of sex under section 26 of the Equality Act 2010, both succeed; and that the claimant's remaining claims all fail, and are dismissed. The case shall now be appointed to a hearing to determine remedy.

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REASONS

1. In this case, the claimant presented a claim to the Employment Tribunal on 3 August 2018, in which she submitted a number of complaints against the respondent. In particular, she complained that she had been discriminated

against on the grounds of sex contrary to sections 13 and 39, 26 and 27 of the Equality Act 2010; suffered detriment on grounds related to trade union membership or activities contrary to section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992; and that she was automatically
5 unfairly dismissed on the grounds of having made a protected disclosure to the respondent contrary to section 103A of the Employment Rights Act 1996 (ERA).

2. The respondent submitted an ET3 in which they resisted all of the claimant's claims.

10 3. Further particulars of the claims were provided by the claimant in the form of a table.

4. A hearing was listed to take place commencing on 6 August 2019, and that hearing continued on 7, 8, 9, 12 and 13 August 2019. Submissions were heard from the parties on 12 and 13 August, the former having been
15 curtailed by the illness of one of the Tribunal members, necessitating an early adjournment.

5. The claimant was represented by her solicitor, Mr R Clarke. The respondent was represented by their solicitor, Mr W Lane.

6. The claimant gave evidence on her own behalf, and called as a witness
20 Mark Anthony McHugh, Regional Officer for the Bakers Food and Allied Workers Union.

7. The respondent called to give evidence the following witnesses:

- Michelle Lisa Palmer (known as Lisa), Restaurant General Manager;
- Alan Paterson, Cook;
- Wioleta Walczyk, formerly Assistant Manager; and
- Ann Marie McVey, Office Manager.

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8. The parties presented a joint bundle of productions, to which reference was made throughout the proceedings, and to which some additions were made during the hearing.
9. At the start of the hearing, it was raised that the claim still appeared to have been listed as against C. However, on inspection of the Note following Preliminary Hearing by Employment Judge Porter dated 4 October 2018, the Tribunal noted that the claim against that respondent had been dismissed (43).
10. During the course of submissions, parties agreed that the Tribunal would only deal with the issue of liability in this hearing, and that remedy would be the subject of a separate hearing if required.
11. Following the conclusion of the evidence, I raised with the parties a matter which had previously been canvassed before Employment Judge Porter, namely whether an Order under Rule 50 of the Employment Tribunals Rules of Procedure was to be sought by either party. That matter is addressed in submission, and an appropriate Order set out above.
12. Based on the evidence led, and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

13. The claimant, whose date of birth is 15 November 1992, commenced employment with the respondent as a team member in the Livingston branch of C on or about 1 September 2017.
14. The respondent is a company which operates 5 C restaurants in Scotland, including the Livingston branch.
15. From 2011 until 2016, the claimant was in an abusive personal relationship with a male partner, with whom she had two children. The abuse she suffered took the form both of mental and physical abuse, and included threats to her. A feature of the relationship was that her former partner would force her to engage in sexual intercourse with men for money. She

reported the abuse to the police, and at times her former partner was held in custody. Following the ending of that relationship, her former partner continued to act in such a way as to cause the claimant distress. Her children were taken into care.

5 16. In January 2017, the claimant's former partner disclosed intimate
photographs of the claimant on a Facebook page, showing her in a state of
undress. She described the photographs as being of a sexual nature. The
Facebook page bore her name, though her former partner was solely
responsible for the page. She regarded this as an act of abuse and
10 revenge, and reported the matter to the police. She also raised this with
Facebook and requested that they take down the photographs and indeed
the profile, which happened, eventually, after many months on 20 March
2018.

15 17. The claimant was very distressed when she became aware that her former
partner had posted these photographs, and required to attend her General
Medical Practitioner (GP), who prescribed her anti-depressant medication.
She also received ongoing support from a Community Psychiatric Nurse
(CPN), her social worker and Women's Aid.

20 18. By September 2017, the claimant felt that she was in a position to seek
employment, in order to rebuild her confidence and independence and took
up the appointment as a team member in the C branch in Livingston.

25 19. In October 2017, an incident took place in the restaurant. The claimant was
working behind the till when a customer asked if a particular product was
gluten free. There was an allergy form kept at the till to enable staff to
advise customers about food sensitivities, but the claimant was unaware of
it. She went to speak to Lisa Palmer, her manager, who reacted by taking
her back to the till, and handing the form to the customer. The claimant felt
that Ms Palmer's handling of this matter was harsh – she believed that she
was shouted at and that Ms Palmer had pushed her back towards the till –
30 and was distressed about it.

20. Following this, the claimant spoke with Ms Palmer and explained why she had been so distressed by this incident. In particular, she explained that she had previously been in an abusive relationship and that she had poor mental health.

5 21. The claimant became concerned, over the ensuing weeks, at the management style of Ms Palmer, finding her “boisterous”, and feeling anxious that she would threaten staff with dismissal or the removal of staff meals from them.

10 22. In January 2018, the claimant joined the Bakers Food and Allied Workers Union (“the Union”). She made efforts to recruit colleagues to the Union, and placed sign up forms in the staff office at the Livingston branch. The forms came in a pack, attached to a bundle of papers explaining what it meant to be a union member and what benefits could be expected. The forms were disposed of by Ms Palmer. Her explanation before the Tribunal was that she had the habit of tidying up the staff office, and if papers were on the floor she would simply pick them up and dispose of them in the bin. The Tribunal concluded that this was not a credible explanation, as the pack was a reasonably thick set of papers, and would not be mistaken for loose sheets; in addition, the claimant’s evidence that the packs were not on the floor but placed on a table was believable.

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23. Each member of staff had the right to a certain budget allowing them to purchase a meal from the restaurant, each day on which they worked. The claimant’s contract of employment provided, under Rate of Pay, as follows (63):

25 *“Your basic hourly rate will be £7.50 per hour, exclusive of rest breaks, payable monthly on 20th of each month (if this falls on Saturday or Sunday) payment will be made on the subsequent Monday through your Bank. Meals on duty will be provided within guidelines. We operate an online payslip system with E Pay, a valid email address must be provided for this system to operate.”*

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24. The meals on duty were known as "staff meals". There were no guidelines made available to staff nor presented to the Tribunal.

25. A record, from the respondent's own system, of the staff meals taken during the months of October 2017 and January 2018 was produced at 129ff.

5 26. According to those records, no member of staff took staff meals on 5, 11, 30 or 31 October 2017; nor is any member of staff recorded as having taken a staff meal on 3, 4, 16 or 22 to 31 January 2018.

10 27. The respondent's explanation was that from time to time, no staff would take meals due to the fact that they might prefer to take their lunch allowance and spend it elsewhere, or that it might not be regarded as particularly beneficial to the health of the staff to eat from the restaurant every day upon which this was available. They denied that there was any order by the manager or by management in general to remove staff meals from the staff on these occasions. The proper process, it is understood, is that if such an instruction were to be given by management, as it is from 15 time to time in the event of till shortages, it would require to be sanctioned by senior management at headquarters rather than simply instructed by the branch general manager. No such sanction was sought on these occasions.

20 28. The claimant was quite clear that Ms Palmer would threaten to remove staff meals from staff, and did so on a number of occasions. She regarded the respondent's records as justifying that complaint.

29. We set out below how we sought to resolve this conflict.

25 30. The claimant expressed concern to her Union representative, Mark McHugh, about the staff meals being removed. His view was that the right to staff meals amounted to a consistent custom and practice and he was concerned at the suggestion that staff meals were being removed from staff as a form of punishment to them.

31. On 17 January 2018, the respondent issued the claimant with a letter of concern (88). This was written by Anne-Marie McVey, the respondent's office manager, based in their Coates Crescent office, the matters having been raised with her by Ms Palmer.

5 32. The letter stated:

"Dear A,

After your discussion with your Manager we are sending you this letter of concern about the following issues

1. Unacceptable attitude towards management

10 **2. Wilfully disobey a management instruction about the use of personal mobile**

3. Taking unauthorised smoke breaks

15 *Your overall attitude and work ethic is not to an acceptable standard with reference to the above and will not be tolerated further. Please ensure this is addressed without delay.*

The Company expect to see an immediate and sustained improvement in all of the above without delay. If there are any further incidents of any nature as stated above disciplinary action may be taken against you.

20 *If you need to discuss the content of this letter then please contact myself at Head Office on 0131 226 1010.*

Yours sincerely,

Anne-Marie McVey

Office Manager"

25 33. The claimant regarded this as retaliation for having sought to recruit other staff to the Union.

34. On 29 January 2018, Ms Palmer spoke to the claimant about her use of her mobile phone in front of customers, something which she had not herself observed but which had been reported to her by another manager. She also said that the claimant had not been serving customers in correct uniform. A note confirming that a discussion had taken place was produced (89), signed by the claimant and Ms Palmer. The note provides no detail as to the circumstances in which these matters arose, or how it was that the claimant was not wearing the correct uniform.

35. The claimant understood that the uniform point related to her not having her badge on, which she regarded as nit-picking; and was unsure why she was spoken to about her mobile phone use, as she asserted that she was not in the habit of using her mobile phone in front of customers. She had ongoing court proceedings relating to the custody of her children, about which she would from time to time receive a call from her solicitor. She would take such a call in the back office.

36. The respondent produced a notice (67) which they said was displayed in all restaurants. The notice stated that "Mobile phones are not permitted to be on your person whilst on shift", and "Anyone found to have a mobile phone on shift will face disciplinary (sic) action". The Tribunal was unable to come to a firm conclusion as to when the notice was first placed in the Livingston store. The claimant denied that she had ever seen it, and the respondent's witnesses were quite unclear as to when it was first displayed.

37. The respondent regards till shortages as a serious matter, as well as infractions of the rules relating to the staff discount policy.

38. In the claimant's contract of employment (66), it is stated, at paragraph 25:

"All shortages will be investigated in the first instance.

Any till shortages that are not errors and have not been reported will be subject to the following procedures if no explanation can be found.

a) 1st till shortage – Letter of concern will be issued.

b) *2nd till shortage – Disciplinary action may be taken against you .*

c) *3rd till shortage – Further disciplinary action may be taken and you may be removed from your position as cashier/till user.”*

39. The respondent also operates an Employee Discount Policy (68ff).

5 40. The Key Terms and Conditions are set out in that policy, as follows:

- *“To take advantage of the employee discount Employees will need to have registered a Colonel’s Club account; Employees will therefore be bound by the Colonel’s Club general terms and conditions which are available here: www.colonelsclub.com/kfc-terms-conditions.*

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- *The employee discount is intended for personal use only. Employees are permitted to purchase food for family or friends using their discount when eating together and providing the purchase is processed in the same transaction.*

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- *Employees are not permitted to share their employee discount card, Yum! ID or Learning Zone ID, or their Colonel’s Club login details with anyone else.*

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- *Employees must present their Colonel’s Club card or App for scanning prior to purchase if they wish to receive the employee discount. No other form of ID will be accepted, including but not limited to payslips or company identification badges. The employee discount cannot be applied retrospectively under any circumstances.*

- *Employees must not use their employee discount when logged into a till and must never process their own discount...”*

25 41. Evidence was heard to the effect that if an employee wishes to use their discount while at the till, they may do so with the permission of the shift manager, though that is not set out in the policy.

42. Under “Abuse of Employee Discount”, the policy states that any abuse or misuse of the employee discount may be considered gross misconduct and

under the terms of the employment contract may lead to disciplinary action up to and including dismissal.

43. The terms of the disciplinary procedure were not produced before this Tribunal, but the claimant's contract of employment set out the process to be followed.

44. Under "Disciplinary Procedure", at paragraph 11 (64), the contract confirms that the respondent's disciplinary procedure is held in the "Standards Library", but that a short summary was set out in that paragraph.

45. The paragraph went on:

"The Disciplinary Procedure, which applies to all employees, is designed to remove misunderstandings and to establish a clear method to ensure the fair treatment of those who become liable to disciplinary action. However, any conduct, which is injurious to the efficient running of the Company and safe working practices, will result in action under the Disciplinary Procedure. The stages will normally be implemented in order, but action may start at any stage in the event of serious misconduct or an aspect of poor performance that creates a risk to employees or customers.

(a) On the first occasion that an employee fails to reach the standards required, his/her Manager will interview him. In the event that a satisfactory explanation for the failure is not given, the employee will receive a formal verbal warning (recorded in the personnel records) and a period to improve.

(b) If the required improvement is not forthcoming during the agreed period or if a first offence is considered too serious for a formal verbal warning, a formal written warning will be issued and a further period for improvement given.

(c) Continued failure to achieve improvement, or further transgressions, will result in a final written warning being issued stating that continued failure will result in dismissal. Once again, a period will be given to improve. A

final written warning may be issued for a first offence should the offence be deemed sufficiently serious.

5 (d) *Failure to comply with the conditions of a final warning will result in dismissal with the notice entitlement according to the contract of employment, or payment of an equivalent sum in lieu. As an alternative to dismissal, demotion/downgrading may be considered where appropriate.*

10 (e) *Full details of the Company's disciplinary rules and Disciplinary Procedure, which will be followed in all cases, are contained in the Personnel Policy, a copy of which will have been shown to you and is also held at your place of work."*

46. Paragraph 14 of the contract provided that in cases of alleged gross misconduct, employees may be suspended from duty on normal pay.

15 47. On 5 February 2018, the respondent wrote to the claimant (90) to invite her to attend a disciplinary hearing. The respondent had noted that at 9pm and 9.04pm the previous evening, the claimant had processed two transactions, both of which showed the claimant as the cashier, and both of which referred to the reduction of the price charged by way of the "25% staff discount" (91).

20 48. Ms McVey wrote to the claimant with the invitation to the disciplinary hearing. The letter stated:

"Dear A,

25 *I am writing to invite you to attend a disciplinary hearing to be held on Thursday 8th December 2018 at 10.00 am in the Head Office... This is to give you the opportunity to provide an explanation for the following matters of concern.*

1. Consistent use of mobile phone whilst on duty, wilfully disobeying a management instruction that this is forbidden

2. Allegations of fraudulent activity whilst using the till with reference to staff discounts

As you will note, the meeting has been arranged in working time and it is in line with our disciplinary procedures. I should advise you that we therefore consider the requirement for you to attend to be a reasonable management instruction. This means that if you fail to attend and do not let us know, or fail to attend without a good reason, you are warned and forewarned that this will be treated as an act of misconduct. We could therefore take disciplinary action against you for your failure to obey a reasonable management instruction. That would be additional to the issues set out in this letter.

If you are unable to provide a satisfactory explanation for the matters outlined above, disciplinary action will be taken against you. One of these allegations are considered gross misconduct and could result in dismissal.

I have attached a copy of the company's disciplinary rules and procedures) of which you are aware) to which I will be making reference. Also enclosed is till receipts which will be used as evidence.

You have the right to be accompanied by a fellow employee or trade union official. Should you wish to do so, it is your responsibility to make the arrangements.

If you have any queries regarding the contents of this letter please contact me on 0131 226 1010.

Yours sincerely,

Anne-Marie McVey

Office Manager”

49. The letter did not explain which of the two allegations was “considered gross misconduct”. In evidence before the Tribunal, Ms McVey stated that it was the second allegation which she considered to fall into that category.

50. The letter contained a typographical error, identifying the date of the disciplinary hearing as 8 December 2018, when in fact it had been intended that the hearing should take place on 8 February 2018, three days after the date of the letter itself.

5 51. The claimant felt that the letter “came out of the blue”, and gave it to her trade union representative, Mr McHugh. She did not interpret the letter as having invited her to a disciplinary hearing on 8 February 2018, though she did think it was odd that the hearing should be so far in the future.

10 52. The claimant did not attend the hearing on 8 February 2018, as she did not understand the letter to have invited her to a hearing on that date.

53. On 8 February 2018, two letters were sent to the claimant.

54. The first letter (92) was sent by Ms McVey, and was headed “Letter of Concern”:

“Dear A,

15 *I am sending you this letter of concern because you're (sic) till was short £12.59 on 2nd February 2018 when you cashed up.*

No satisfactory explanation was found as to the reason for this shortage. Therefore as per Company policy and your contractual obligations under section 25 till Usage, please consider this the first stage of the process for
20 *till shortages.*

If this happens again, the next stage of the process will begin which could result in disciplinary action being taken against you.

Please ensure that you pay due care and attention whilst on till duties.

If you feel you need further training please notify your manager immediately.

25 *Yours sincerely,*

Anne-Marie McVey

Office Manager”

55. Attached to that letter (93/4) was a sheet headed “Store Money Movement” setting out closing till counts on 2 February 2018, showing a figure of -12.59 against the claimant’s name.

5 56. The second letter issued to the claimant on that date (95) conveyed a decision following the disciplinary hearing on 8 February 2018, and was written by Ms McVey, and stated:

“Dear A,

10 *You were sent a letter to attend a disciplinary hearing on Thursday 8th February 2018 to be held at Head Office in Edinburgh. The reason for this meeting was to discuss the following concerns.*

1. Consistent use of mobile phone whilst on duty, wilfully disobeying a management instruction that this is forbidden

15 ***2. Allegations of fraudulent activity whilst using the till with reference to staff discounts***

You failed to turn up for the meeting arranged for 8th February, it was held in your absence. After looking at the information we have available and your failure to turn up for said meeting. It has been decided that you leave the company no alternative but to terminate your contract with immediate effect.

20 *You have the right to appeal against this decision in writing within the next 7 days of the date of this letter to Mr Gordon Ritchie at the above address.*

Yours sincerely,

Anne-Marie McVey

Office Manager”

25 57. When it was put in cross-examination to Ms McVey that she should have been sure that the date on the original invitation letter had been correct

before proceeding to dismiss the claimant, she said that that was “perhaps” the case but that she was “99.900%” sure that she had the correct date.

58. However, it was drawn to her attention that the date on the original invitation letter had been incorrect, and as a result, she wrote again to the claimant on 5 9 February 2018 rescinding the earlier letter of dismissal and inviting the claimant to a meeting on 16 February 2018 in respect of the same allegations.

59. That hearing did not take place.

60. On 9 February 2018, the claimant attended at the store, and was met by 10 Ms Palmer, who told her that she had arranged cover for her as she was supposed to be at the disciplinary hearing in Edinburgh. The claimant said that this was not correct, as the date on the invitation letter had been December. She then told Ms Palmer that she was going to call her trade union representative, which provoked a strong reaction from Ms Palmer, 15 who was very unhappy about this. The claimant then telephoned Mr McHugh, and spoke to her. During the conversation with Mr McHugh, Ms Palmer interrupted and she and the claimant engaged in what Mr McHugh described as a “screaming match”, which he could hear down the phone line. At one point, Ms Palmer said to the claimant “ Stop 20 interrupting me, you stupid bitch”. Mr McHugh then asked the claimant to pass the phone to Ms Palmer so he could speak to her, which the claimant did. Ms Palmer took the phone and started shouting loudly at Mr McHugh, saying that “I don’t give a – about your trade union” (Mr McHugh, in evidence, did not quote the specific word which Ms Palmer had used).

25 61. Mr McHugh sought to remain calm but found Ms Palmer to be very loud and aggressive in that call. After the call ended he contacted Ms McVey to explain that the call had taken place, and confirming why the claimant had not attended at the hearing on that date.

30 62. Ms Palmer made a note of this conversation, which was produced (97), though it was unclear to the Tribunal what the purpose of this was. She said that while she was speaking to her trade union representative, she was

being interrupted by the claimant: *"I may have spoken loud, but wasn't shouting, due to A in my ear."*

63. On that day, the claimant, with the assistance of her trade union representative, prepared a grievance letter, which she submitted to the respondent in the person of Ms Palmer (98):

"Nature of Grievance:

- 1. Bullying and Harassment.*
- 2. Discrimination.*
- 3. Failure in Duty of Care to Employees.*

I/we wish to take out a grievance on the above points.

- 1. Bullying and harassment which is being witnessed by customers and fellow workers on a daily basis.*
- 2. Openly being discriminated against because of my trade union membership.*
- 3. Failure in Duty of Care to Employees on a number of grounds which we will discuss during the grievance hearing.*

In respecting the fair work and grievance process we would like to have this grievance heard within the guidelines set out in the ACAS Code of Practice."

64. Ms McVey, to whom the grievance was passed, invited the claimant to a grievance hearing, which she would hear, on 14 February 2018 at the respondent's head office in Edinburgh (99), at 2pm.

65. The claimant did not attend the grievance hearing on that day. She went to work at the Livingston store. When she arrived, she prepared for her shift, and then went to the floor of the store to start work. Shortly after she arrived, Alan Paterson, a chef, approached her and told her that Michael Zurinkas, a "burger boy", was showing photographs to staff in the store

from a Facebook page bearing the claimant's name. The photographs, he said, showed her in her underwear and naked. The claimant became distressed and started crying immediately.

5 66. While she was upset, Michael came to her, laughing, and asked her whether "your boobs are real", and "how much for a night with you". The claimant said, in evidence, that she felt everything from her past coming back to her. One of the most distressing aspects of her relationship with her former partner, she said, was that he would force her to have sex with other men, for money.

10 67. The claimant went to see Wioleta Walczyk, the duty manager at the time, who was in the office. She told Ms Walczyk what had happened. Michael was in close proximity at the time. Ms Walczyk's reaction was that she could do nothing about the situation, as the police would need to deal with it. The claimant was left with a very clear sense that Ms Walczyk was not
15 taking the matter as seriously as she hoped. The claimant felt that Ms Walczyk was laughing at her as she spoke to her. She told the claimant to go home due to her emotional state.

68. The claimant did go home. Ms Walczyk took no further action on the matter.

20 69. After arriving home, the claimant spoke to her mother, who encouraged her to report what had happened to management.

70. The claimant's mother contacted the respondent's customer complaint line, which recorded what was said. A note of the conversation was kept (101), in which the comments were noted as follows:

25 *"Daughter works for C her x bf has taken some photos of her and posted nudes of her online, the police are dealing with the matter and fb are taking them down, daughter has gone to work today and one of the staff there shared these photos with everyone around the store, so all the staff were laughing at her and the pictures the manager also shared this laughing
30 about it rather than dealing with the issue and shutting it down."*

71. The claimant also contacted the customer complaint line on that date, and her call was noted as follows (103):

5 *“Guest is an employee. Went into work, had to leave work today, was in an abusive relationship, guest partner its (sic) waiting for trial on remand, the guest ex partner created a facebook account and put half naked pictures, guest works colleagues have found this page and has shown everyone at work, told the manager, Theoleter [Wioleta] female, and just started laughing, guest was so upset started crying and had to leave her work, guest is getting messaged from her work mates saying its still being*
10 *discussed at work. Lisa is main manager, not in today. Manager today said if she leaves today that’s on her own accord and she cannot bring it up in the next meeting. Tasha is area coach. Guest is crying on the phone very upset, feels how can she go back after this and how they made her feel.”*

15 72. One of the respondent’s directors receiving notification of these complaints and drew them to the attention of Ms McVey on the afternoon of 14 February. He instructed her to give it “100% attention”. She telephoned the store and spoke to Ms Walczyk, who confirmed that an employee had been upset and had gone home. She instructed Ms Walczyk to call all staff to attend the store so that she could interview them the following day.

20 73. On 15 February 2018, Ms McVey attended the store, and took statements from a number of staff. The process she followed was to interview the staff about what had happened, taking notes while she did so, and then to ask the staff to write down what had happened.

74. The statements provided by the staff were produced to the Tribunal (105ff).

25 75. As to the notes which Ms McVey took, they were not produced to the Tribunal. No explanation was given as to where such notes were, whether they had been retained or filed, or what was in them. When the Tribunal asked Ms McVey where the notes were, she replied that “After everything went away, they just went away”.

76. Charles Taylor, a member of staff at Livingston, wrote a statement (105) in which he said:

5 *“My colleague noticed the page and told me about it as far as I’m aware it’s only me and my colleague that knows about it. I was going to talk to A privately about it and tell her what I’ve seen. As far as I’m aware no-one was laughing about her or the situation. I personally hate what A has been through. I would never spread anyone else’s business about the workplace and what anyone gets up to out of work is completely up to them. I hope that it can be resolved.”*

10 77. Ms Palmer, who had been at home and off duty on the previous day, gave a short statement (106):

“A staff member sent me a screenshot of a facebook profile. I was on my day off at the time.”

15 78. No further detail was elicited from Ms Palmer. For example, she was not asked, and did not say, who the staff member was who sent her the screenshot, when he did so, what it showed, and in what context or with what other information it was sent; nor what, if anything, she did about it. When she gave evidence before the Tribunal, Ms Palmer said the image was sent by Michael, but asserted that she could not remember what it
20 showed, and deleted it quickly after viewing it.

79. No notes of any further information provided at the time by Ms Palmer to Ms McVey were available to the Tribunal.

80. A statement was provided by Sara Parodi (107):

25 *“Nobody care about A when she was crying because all we are busy for our works nobody was joking about her.”*

81. A statement was provided by Ms Wolczyk (108):

“On the 14.02.2018 I was running the shift. A shift was starting at 14 o’clock. She was on time, she started her shift. She was doing all right. I asked her to do cleaning tasks. she went to the back of house to clean the

bin. After some time, she came to the office crying. She was very upset and said I can't work any more, because everyone have seen my tits! I said is no problem obviously in the situation like this better if you will go home. Nobody was laughing. I didn't laugh. I said I feel sorry for her and let her go home. She explained it was her ex-boyfriend who post this pictures. It was first time when I have heard about any pictures with her person on them. She left the store upset."

82. A statement was provided by Michael Zurinskas (109):

"I was on break. Sitting in the office with Wioleta and A came in and said everyone was laughing at a profile of her. Wioleta had told her to go home and take the day off. No one in the store was talking about the profile or laughing about it in my opinion."

83. A statement was provided by Gosia Szpalek (110):

"I was on that day at work when situation with A happened. She came on her shift at 1400 as usual then after 10 or 15 min I saw her upset and crying. I really don't know what happened because I was doing the burgers on Drive Thru, then I saw Wioleta Walczyk trying to figure out what happened and calm her down. I heard that she was upset about her facebook profile. Then after 40 or 45 min she left the shop and that was all."

84. A statement was provided by Alan Paterson (111). Ms McVey wrote the statement for Mr Paterson, reading it through to check he agreed with it, and then he signed it:

"On 14.2.18 I was working in kitchen. Michael approached me and showed me a facebook image of A insinuating prostitution. I asked him to stop. He went away."

A came into kitchen and I told her Michael had told me about the facebook page. A got upset and seemed to know about the page. She then left to speak to Wioleta. A asked to go home. Wioleta said ok. A then went

home. At no time was there any laughing or discussion with other staff once A left no one spoke about it.

I have asked this to be written for me and have read and agreed that this is a true account in my opinion of what happened.”

5 85. Ms McVey considered the terms of these statements, having taken them, and came to the conclusion that Mr Paterson and Mr Zurinkas had given accounts which could not be reconciled. She asked them both to come to the office to give them the opportunity to explain themselves or change their position, but neither was prepared to do so. She felt that apart from those
10 two individuals, none of the others knew what had happened, and their stories were conflicting.

86. She then wrote to the claimant on 15 February 2018 (112):

“Dear A,

*Today I visited the C Livingston store to investigate an incident that had
15 taken place on 14th February 2018. During individual interviews it became apparent to me that the incident that I was investigating involved yourself.*

*I would like to reassure you that the incident has been dealt with by Head Office and subsequently no other mention of it will be permitted in store. Any employee found to continue with any type of conversation surrounding
20 the topic will face disciplinary procedures.*

I would like to invite you to a welfare meeting, to be held at a time that is convenient to you. You can contact me on my direct line on 0131 240 3086 any time Monday to Friday between the hours of 9am and 5.30pm.

Yours sincerely,

25 *Anne-Marie McVey”*

87. The claimant interpreted this letter as confirming that the investigation had concluded, and that no further action would be taken on this matter. The invitation to a “welfare meeting” she understood to refer to a meeting about her returning to work following the incident.

5 88. The claimant submitted a fit for work note to the respondent, dated 15 February 2018 (113) in which the reason for the absence was noted as “Stress at work”. She was certified as unfit for 13 days until 28 February 2018.

89. Ms McVey wrote to the claimant again on 16 February 2018 (114) to say:

10 *“Dear A,*

I am writing to confirm that your grievance meeting scheduled for today Friday 16th February 2018 has been postponed due to ill health. A telephone call was received from your trade union representative Mark McCue (sic) informing us of your non-attendance.

15 *When you return to work we will write to you again to try and arrange a suitable date to hear your grievance. Once the grievance outcome has been issued to you and the process completed, the disciplinary hearing that has been placed on hold will be rescheduled.*

Yours sincerely

20 *Anne-Marie McVey”*

90. The grievance meeting had been scheduled for 14 February; the meeting due to take place on 16 February was the rearranged disciplinary hearing.

91. On 8 March 2018, the claimant submitted a letter of resignation (115):

“I, A would like to resign from my position in C with immediate effect.

25 *I am resigning due to a number of issues which I have listed below.*

- *Sexual Harassment*

- *Trade Union Victimization*
- *Bullying and Harassment in the Workplace*

I shall also post a copy of my resignation to Anne Marie McVey at B in Edinburgh.

5 *Regards*

A”

92. The claimant's evidence was that the reason for her resignation was because people she worked with would “see parts of me that they would not normally see”. She considered that she had been belittled in the workplace, and that her employer took no steps to avoid any repetition of such behaviour towards her. She felt that the respondent “wanted me out” of the workplace.

93. The respondent replied to the claimant on 12 March 2018 (116) to say:

“Dear A,

15 *I was surprised to receive your letter of resignation on 9th March with immediate effect.*

I believe you may have reached this decision in the heat of the moment and I am not writing to ask whether this is really what you want to do.

20 *In your letter you outlined a number of issues and concerns as the underlying reason for your decision to resign. In order not to delay addressing these concerns I have arranged a grievance hearing to take place on Wednesday 14th March 2018 at 3pm ... This will be chaired by Gordon Ritchie and Maria Blanco will be present to take minutes. You are entitled, if you so wish, to be accompanied by a fellow employee or trade union official. If you wish to exercise this right then I would point out it is your responsibility to make the necessary arrangements. I would be grateful if you could confirm that these arrangements are acceptable.*

25

If you wish to reconsider your decision, please contact me within the next five days, and by Friday 16th March 2018 at the latest.

If you decide not to retract your resignation, then we will respect your wishes and process the termination of your employment and forward any monies which may be outstanding.

I look forward to hearing from you.

Yours sincerely,

Anne-Marie McVey”

94. The claimant did not attend the proposed grievance meeting, and had no further direct communication with the respondent.

95. Following her resignation, having reported the disclosure of intimate photographs on a Facebook account to the police, PC John Nicol emailed the respondent on 20 March 2018 (117/8) to request contact details of a number of employees based at the Livingston store. The respondent provided that information to the police. The claimant was, at the time, unaware of these exchanges.

Submissions

96. Mr Clarke, for the claimant, and Mr Lane, for the respondent, both presented lengthy and detailed written submissions on behalf of their clients. The Tribunal took time to read those submissions prior to hearing from each representative, who spoke to their submissions.

97. A short summary of each submission is set out below.

98. Mr Clarke submitted, at the outset, that so far as liability in this case is concerned, the Tribunal needs to do no more than consider Alan Paterson's witness statement (111), in which he states that he was working in the kitchen when he was approached by his colleague Michael. That, he submitted, amounted to a clear repudiatory breach of contract. No female employee would put up with that behaviour. The claimant was entitled to

resign then. The respondent should have had the “good grace” to accept that, and not to have put the claimant through the trauma of these proceedings.

5 99. The respondent cannot cure a repudiatory breach, by making amends or undoing what was done. How, he asked, could the claimant return to that workplace after what had happened, and how they made her feel.

100. There is no evidence before the Tribunal that the respondent took any steps from preventing that type of conduct from occurring, let alone reasonable steps.

10 101. He then made submissions about the witness evidence. He invited the Tribunal to find that where there was any dispute as to the facts, the evidence of Mr McHugh, the claimant’s trade union representative, should be preferred. He was the very essence of good reason, doing his best to assist the Employment Tribunal. His responses were reasonable and
15 truthful.

102. Without making any admissions, Mr Clarke expressed some anxiety about inconsistencies within the claimant’s evidence. He submitted that it was extremely distressing for the claimant to have to give evidence, particularly about the traumatic events through which she had had to go in
20 her former relationship, and the events of 14 February. When being cross-examined and challenged about the veracity of her evidence, the claimant became unsurprisingly unsettled and, some may say, argumentative, in response. However, the respondent never advanced the case that what the claimant said happened did not in fact happen, and that was confirmed by
25 the evidence of Mr Paterson.

103. The claimant was, he said, doing her best in very demanding circumstances to assist the Tribunal. Where there is any dispute between the witnesses, the claimant’s evidence should be preferred.

104. He also pointed to the reports submitted by the claimant and her
30 mother, produced at 101-104, contemporaneous with the events under

examination. These correctly record what had happened on that date. The claimant made clear at that stage that people in the workplace were laughing at her. When all of the employees were interviewed, they realised what had happened was unacceptable, and had an incentive to deny that they were laughing at the claimant.

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105. With regard to the respondent's witnesses, Mr Clarke submitted that all of them were adamant that meals had not been removed or not provided in October 2017 or January 2018, but the record clearly contradicts them. On 5 days in October and 15 days in January, no staff meals were provided. It completely undermines their credibility to deny that.

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106. Ms Palmer's evidence, he submitted, was completely unreliable, and she came close to being contemptuous of these proceedings. She did not take her evidence seriously. Mr Clarke cited as examples her statement that she did not remember what image she had been sent; that she could remember not shouting on 9 February but not what the image was, and when asked about it, very facetiously answered that "that's memory"; and was adamant that meals were provided every day in October and January.

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107. Ms McVey's evidence was, he argued, evasive and unreliable. For example, said Mr Clarke, when she was asked whether she had asked Ms Palmer who had sent her the image, she initially indicated that it was Michael, but then realised the implications of her answer and started to back-pedal. She was not doing her best to answer the key issue in the case, which was who had sent the photograph to Ms Palmer on 14 February.

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108. Mr Paterson was doing his best in some ways, though he was clearly very nervous. Similarly, Ms Walczek treated the proceedings with a lack of respect, answering questions flippantly, and showing that she had not taken the claimant's concerns seriously.

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109. Mr Clarke then focused on the events of 14 February as the key events in the case. The claimant saw everything that happened; other witnesses only saw their part. What the claimant told the Tribunal was the

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same as she told the respondent within hours of the incident. Both she (by reporting to the police and the respondent) and her union representative (by contacting the President of his union) took the matter wholly seriously, contrasting their approach with that taken by the respondent.

5 110. He invited the Tribunal to find that the claimant's version of events of what Michael said to her on the day in question should be believed.

10 111. He then turned to the investigation "of sorts" (as he put it) which Ms McVey carried out, and described it as "about as bad as it gets". He did not criticise the alacrity with which she went to the store but did criticise the way in which she went about the investigation, and particularly the way in which she dealt with Ms Palmer. Mr Clarke submitted that Ms Palmer was the branch manager, who had received the image the day before. She had an obligation to inform Ms McVey about this, and to tell her, when asked, who had sent her the image. Ms McVey would then have been clear that
15 Michael had been guilty of gross misconduct, and should have been suspended and made the subject of an investigation into his conduct. He argued that Ms Palmer's failure was such as to amount to gross misconduct itself.

20 112. Ms McVey, he said, accepted that it was a serious business, but when she interviewed Ms Palmer, she did not ask who had sent her the image. When asked about this in cross-examination, said Mr Clarke, Ms McVey did not have a clear answer as to why she did not do this. This beggars belief, in his submission. If she knowingly did nothing about this incident, that would amount to gross misconduct itself.

25 113. There was no proper investigation by Ms McVey. Her handling of this matter, he said, was inept, and as a result the respondent was in repudiatory breach of contract. She asserted that the investigation continued behind the scenes, but Mr Clarke submitted that there is no evidence of this. She attempted to portray the letter sent to the claimant at
30 112 as an invitation to an investigatory meeting; that was simply not the case, he said. This was in breach of the respondent's own policy, in

paragraph 6(d) and (e) on 84. The claimant was not even spoken to in the investigation. She did not meet with the claimant. The claimant expected better than this, he said, and was entitled to

5 114. Mr Clarke submitted that there were multiple breaches of contract, and that the claimant was entitled to resign in response to them.

115. With regard to the claim that she was subjected to detriments due to trade union activities, Mr Clarke invited the Tribunal to look between the lines and at the chronology of events, and to find that something was not right.

10 116. Ms Palmer said she had nothing against trade unions, but if that were so, why would she put the packs in the bin? As soon as the claimant joined the trade union, her card was marked. The claimant was sent the first letter of concern she had ever had on 17 January 2018, shortly after she joined the trade union. There had been no problems with the claimant before.

15 117. There was then, said Mr Clarke, a concerted effort to move the claimant out. The respondent seized the moment when the issue of the till receipts came up. The till receipts were timed at 9pm and 9.01pm on 4 February, and within 24 hours the respondent had invited the claimant to a disciplinary hearing, with remarkable alacrity. Ms McVey was in such a
20 rush to issue her letter that she didn't check the date of the hearing included in it. Mr Clarke submitted that it was extraordinary that the respondent acted so quickly against the claimant, and that it was because of her trade union activities. There was no evidence of any prior investigation having taken place. Contrast the way that she was treated, he argued, with the
25 way in which Michael was not disciplined over the images shown in the workplace on 14 February.

118. Mr Clarke then addressed the claimant's claim under section 39 of the Equality Act 2010, by submitting that the claimant was subject to a discriminatory dismissal on 8 March 2018. There was a continuing series of
30 acts up to that point. There could not be a clearer case of trust and

confidence in the employer being objectively destroyed by the employer's actions in this case.

119. If the respondent were to argue that they took all reasonable steps to prevent the actions of the employees for whom they were vicariously liable, the burden of proof is on the respondent to prove that there were preventative steps taken by the employer, or further steps which would have been reasonably practicable. Mr Clarke submitted that while the respondent had a bullying and harassment policy, there was no evidence of any training under that policy. Ms McVey had no HR training, and never gave the staff any training herself.

120. Mr Clarke then submitted that the Tribunal had jurisdiction to hear all of the claims made by the claimant, and referred to his written submissions, both to persuade the Tribunal that none of the claims is out of time, and also that if any were out of time, time should be extended by the Tribunal as a matter of discretion.

121. The claimant also seeks to argue that her resignation arose out of the making of a protected disclosure, namely the report of the incident involving Michael on 14 February, and was therefore automatically unfair under section 103A of the Employment Rights Act 1996.

122. For the respondent, Mr Lane commenced by rejecting the claimant's submission on the witnesses' evidence. He asked the Tribunal to find that the respondent's witnesses were credible, reliable and consistent. There were inconsistencies in the claimant's evidence, accepted by her own representative.

123. With regard to staff meals, the claim before the Tribunal is that staff meals were removed for an entire month in both October 2017 and January 2018. That position has not been proved by the claimant on the evidence.

124. He went on to observe that time bar is a major issue in this case. One route by which the claimant might overcome the time bar hurdle would be by seeking an extension under the relevant tests, but the onus is on the

claimant to adduce positive evidence to explain why the deadline could not be met, and no such evidence has been led. That door is therefore, he submitted, closed.

125. The other route would be by demonstrating that there was a series of continuing acts. Here this is not the case – different individuals have been involved in different acts.

126. With regard to the constructive dismissal claim, Mr Lane submitted that the respondent did not act in such a way as to amount to a repudiatory breach of the contract of employment. Ms McVey's response was to a complaint made by the claimant through the wrong channel, and therefore this was more to her credit. The claimant's own evidence described the letter sent to her by the respondent as having reached a conclusion, but the problem for the claimant was that this was directly contradicted by the evidence of Ms McVey, who suggested that the letter showed there was a live investigation ongoing. That is a "fundamental inconsistency". The claimant said that there was a telephone conversation about the investigation being closed, but Mr McHugh said he knew nothing about that, which was "incredibly destructive" of the claimant's position.

127. The ET1 complains that the repudiatory breach of contract was not to dismiss Michael, Wioletta and Lisa. It would have been unfair to have dismissed Michael.

128. The respondent's handling of the events of 14 February and subsequently amounted to an "entirely innocuous act", Mr Lane submitted. He denied that there has been a course of conduct. Michael's actions did not amount to a course of conduct. The claimant knew that the photograph had been in the public domain for a number of months. Both Ms Palmer and Mr Paterson knew about the photograph, having been told about it by the claimant. The claimant did not raise any questions with HR about this before 14 February.

129. The alleged final straw in this case was entirely innocuous, in Mr Lane's submission. In any event, the claimant did not resign in response

to the alleged repudiatory breach, and the constructive dismissal claim therefore falls at a number of hurdles.

130. Mr Lane accepted that there was a disclosure in this case, limited to the three matters raised in paragraph 41 of the paper apart to the ET1. However, what is not there is a suggestion that the claimant believed that the conversation tended to show a relevant failure, or was in the public interest. The claimant bears the burden of proof, which is therefore fatal to her case. The actions of Ms McVey are under scrutiny here, and the respondent says that she did nothing wrong.

131. In relation to the discrimination claims, the respondent submitted that burden of proof did not shift. The claimant has not established, said Mr Lane, that there was a prima facie basis for finding that all but one of the alleged acts actually occurred, or that they were for the reason of discrimination or on the grounds of sex.

132. The claimant has simply failed to prove her claim of harassment on the grounds of sex, or her claim of victimisation on the grounds of sex.

133. He then addressed the employers' statutory defence. Mr Lane questioned whether Michael's actions were in the course of his employment. There is no evidence to show when the communications with Charles Taylor and Lisa Palmer took place. The respondent had a rule that mobile phones were not to be used in the workplace.

134. Referring in full to his written submissions, Mr Lane invited the Tribunal to reject all claims presented to the Tribunal and to find for the respondent.

25 **Observations on the Evidence**

135. It is appropriate, in our judgment, to set forth some observations on the evidence of the witnesses from whom the Tribunal heard during the course of this hearing.

136. The claimant gave evidence over the course of several hours, and at the outset of her evidence, required to relate to the Tribunal the history of an abusive relationship with her former partner. It was clear that such evidence was distressing to the claimant. During the course of her evidence, and under cross-examination, the claimant generally remained calm, but on occasion became argumentative and emotional. This affected the cogency of her evidence on occasions, and as Mr Clarke accepted, there were inconsistencies in her position.

137. Overall, however, we considered that the claimant was seeking to give truthful evidence to the Tribunal, and that her version of certain events, and in particular the events of 14 February, remained consistent from the point when she made the original complaint to the respondent to the evidence she gave before us. We were prepared to accept her evidence as generally credible and reliable. She was given considerable support by Mr McHugh, in particular relating to the somewhat fraught conversation with Ms Palmer during which he was able to hear what was being said through the phone, and in which he confirmed that Ms Palmer shouted angrily at him down the phone, consistent with the evidence of the claimant.

138. Mr McHugh we found to be a very sound, credible witness, whose evidence was patently truthful and helpful to the Tribunal. We were prepared to accept his evidence in preference to any different evidence given by the respondent's witnesses.

139. So far as the respondent's witnesses were concerned, it is appropriate to deal first with Mr Paterson. He was plainly very nervous, and somewhat reticent in his evidence. We considered that he was essentially truthful, though his evidence was not necessarily reliable in every respect.

140. Ms Walczek's evidence was similarly given in a respectful manner, but did not entirely satisfy the Tribunal as to its accuracy. We did not consider that she was giving untruthful evidence, but we did not consider her evidence to be completely reliable.

141. We found Ms Palmer to be a very unsatisfactory witness. Her manner in evidence, both in chief and in cross-examination, was, as Mr Clarke put it, almost contemptuous of these proceedings. We were surprised at this. She was extremely evasive and unwilling to be frank in her evidence, and we could not sustain Mr Lane's suggestion that she was a credible and reliable witness.

142. When asked a series of questions by Mr Clarke about the events of 14 February and the following day, Ms Palmer was singularly reluctant to engage, and her evidence was, in our judgment, marked by a lack of candour. When it was put to her that when she saw the image (whose details she resolutely denied remembering) sent to her on 14 February, she should have taken steps, she replied that she was "on my day off", and was unable to explain why she did not then show the image to Ms McVey on the following day. We were not convinced that we were hearing the full evidence which Ms Palmer could have given to us, and considered that she was seeking to diminish her part in these events. She gave the very strong impression, however, that she had little regard, at the time, for the effect of these events upon the claimant, which as her line manager we found astonishing.

143. The evidence of Ms McVey presented difficulties for the Tribunal as well. Ms McVey sought to convey the impression that she had done everything she should have when the report of the incident of 14 February was drawn to her attention. While it is quite true that she attended the store on the following morning to investigate the matter, her explanation of why she carried out the investigation in the way she did was unsatisfactory.

144. When asked (by the Tribunal) how she had conducted the investigation, she confirmed that she had asked some questions of each of the witnesses, and then asked them to write down their version of events. In doing so, she said that she had made some handwritten notes of her own. In response to further questions by the Tribunal, she was unable to explain what had happened to these notes (other than saying that they had "gone away"), leaving the Tribunal to wonder what was contained within those

notes. The statement of Ms Palmer, for example, was very brief, and raised a number of questions. Whether any questions were asked of Ms Palmer, and any answers elicited which could have shed further light on the matter, was not discernible from the evidence of Ms McVey, who was unable to explain what was contained in her notes.

145. Under cross-examination, Ms McVey became irritable and defensive, on one occasion when challenged by Mr Clarke responding “you’re very presumptuous” to his suggestion that her investigation was not carried out to an appropriate standard. This was not designed to assist the Tribunal.

146. Ms McVey also sought to suggest that having had it drawn to her attention that there were discrepancies in the till receipts on the evening of 4 February on the following morning, she was able to proceed to a disciplinary hearing because an investigation had already been carried out. Who carried that out, and when (given the shortness of the interval between the events), she was unable to say, and therefore the Tribunal was unable to find her evidence on this point in any way reliable.

147. In general, the Tribunal found the evidence of Ms McVey not to be helpful in its deliberations.

The Relevant Law

148. Section 103A of the Employment Rights Act (ERA) provides: “*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*”

149. Section 43A of the Employment Rights Act 1996 (“ERA”) provides:

“*In this Act a ‘protected disclosure’ means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*”

150. A qualifying disclosure is defined in section 43B as “*any disclosure of information which, in the reasonable belief of the worker making the*

disclosure, is made in the public interest and tends to show one or more of the following:

- 5 a. *That a criminal offence has been committed, is being committed or is likely to be committed;*
- b. *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
- c. *That a miscarriage of justice has occurred, is occurring or is likely to occur;*
- 10 d. *That the health or safety of any individual has been, is being or is likely to be endangered;*
- e. *That the environment has been, is being or is likely to be damaged;*
or
- f. *That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately*
- 15 *concealed.”*

151. Guidance is provided in **Chesterton Global Limited (t/a Chestertons) v Nurmohamed** [2017] EWCA Civ 979 as to the

20 interpretation of the public interest in circumstances where there may be a strongly personal element to the disclosure. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case and the number of employees whose interests the matter disclosed affects may be relevant. In this case, the court ruled the

25 disclosure to be in the public interest simply because of the numbers of employees affected but there were other features in the situation which might be said to render disclosure in the public interest (specifically mis-statements in the company accounts).

152. The following 4 points would normally be relevant when determining

30 whether a disclosure is in the public interests or not (taken from paragraph 34):

- (a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;

(c) the nature of the wrongdoing disclosed;

(d) the identity of the alleged wrongdoer.

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153. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, inter alia

10 “(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

...

15 (c) 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.”

154. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for claims of constructive dismissal is **Western Excavating -v- Sharp [1978] ICR 221**.

155. In considering the issues the Tribunal had regard to the guidance given in **Western Excavating** and in particular to the speech of Lord Denning which gives the “classic” definition:

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5 “An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time
10 without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.”

156. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

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“...whether the employer’s conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably,
20 if the employer’s conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract.”

157. What the Tribunal required to consider was whether or not there was
25 evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

158. We were also referred to, and took account of, the well-known
30 decision in **Malik v Bank of Credit & Commerce International SA [1997] IRLR 462**, in which Lord Steyn stated that “The employer shall not, without

reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.”

5 159. It is also helpful to consider the judgment of the High Court in **BCCI v Ali (No 3) [1999] IRLR 508 HC**, in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is “whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after
10 discovering it and can walk out of his job without prior notice.”

160. In **Jones v Collegiate Academy Trust UKEAT/0011/10/SM**, the EAT stated: “It is important to note that an objective test is to require whether the conduct complained of is calculated or likely to destroy or
15 seriously damage the relationship; the subconscious of intent of the respondent is irrelevant as the Employment Tribunal correctly held... The subjective perception of the employee is also not relevant. The respondents’ conduct must be repudiatory in order to establish a breach of the implied term; it must be conduct by the respondent which objectively
20 considered it likely to undermine the necessary trust and confidence in the employment relationship.”

161. **Omilaju v Waltham Forest London Borough Council [2005] 1 All ER 75** is helpful in considering whether or not the resignation of an
25 employee is a response to a last straw in a series of acts by the employer which amount, together, to a fundamental breach of contract. It is noted in that judgment: “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
30 implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.” This endorses the view of the court in **Lewis v Motorworld Garages Ltd [1985]**

IRLR 465: “The breach of this implied term 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.”

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162. The Tribunal also took into account the Employment Appeal Tribunal decision in **Wright v North Ayrshire Council UKEATS/0017/13/BS** from June 2013. In that case, having examined the line of authorities relating to claimants who resign for more than one reason, Langstaff J cautioned against seeking to find the “effective cause” of the claimant’s resignation, but found that Tribunals should ask whether the repudiatory breach played a part in the dismissal.

163. Finally, on this point, the respondent helpfully pointed us to the case of **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**, in which the Court of Appeal provided guidance that a Tribunal should ask itself the following questions:

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- a. What was the most recent act or omission on the part of the employer which the employee says caused, or triggered, her resignation?
 - b. Has the employee affirmed the contract since that act?
 - c. If not, was that act or omission by itself a repudiatory breach of contract?
 - d. If not, was it nevertheless part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?
 - e. Did the employee resign in response, or partly in response, to that breach?

164. Section 13(1) of the Equality Act 2010 (“the 2010 Act”) provides:

“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.”

5 165. The Tribunal also had reference to section 26(1) of the 2010 Act:

“A person (A) harasses another (B) if –

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

10 *(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...”

15 166. Section 27(1) of the 2010 also provides:

“A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

20 *(b) A believes that B has done, or may do, a protected act.”*

167. Section 27(2) confirms that a “protected act” includes *“making an allegation (whether or not express) that A or another person has contravened this Act.”*

25 168. Section 146(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”) prohibits employers from subjecting employees to detriments on the grounds of trade union membership or activities.

30 169. Parties also referred the Tribunal to a number of authorities, to which we had regard and, where appropriate, specific mention is made below.

The Issues

170. The parties set forth an agreed list of issues to be addressed by the Tribunal, under the headings of:

- Jurisdictional issue: time-bar;
- Automatic unfair dismissal;
- Direct discrimination;
- Sex Harassment;
- Sex Victimisation; and
- Detriment on grounds related to trade union membership or activities.

171. We address the issues as set out in the list of issues in our decision below, though taking the issue of time-bar last, rather than first. We considered that it was appropriate to consider the substantive issues, having taken considerable time to hear the evidence, and then to address the complex time-bar points, including the assessment of whether or not the claimant's allegations amounted to a continuing series of acts.

172. The issues for determination, therefore, are (in the order set out in the list of issues):

Jurisdictional issue: time-bar

1. Are any of the claimant's complaints out of time?

2. If any complaints are out of time, do they form part of a continuing act, taken together with acts which are in time?

3. If any of the claimant's complaints are out of time, should an extension of time be granted either on a 'just and equitable' basis or, as the case may be, a 'reasonably practicable' basis?

Automatic unfair dismissal

4. Did the claimant make a protected disclosure in terms of section 43A of ERA? Specifically, did the claimant:

5 a. make a disclosure of information during a conversation on 14 February 2018 which, in her reasonable belief, was made in the public interest and tended to show (i) that a criminal offence had been committed, was being committed or was likely to be committed, and/or (ii) that the health and safety of any individual has been, was being or was likely to be endangered, in terms of section 43B of ERA?

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b. make such a disclosure in accordance with any of sections 43C to 43H of ERA? Was the claimant dismissed by the respondent in terms of section 95(1)(c) of ERA?

5. If the claimant was dismissed, was the reason (or, if more than one, the principal reason) for the dismissal that she made a protected disclosure in terms of section 103A of ERA?

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Direct discrimination

6. Did the respondent, because of sex, treat the claimant less favourably than it treats or would treat others in terms of section 13 of the Equality Act 2010 (“the EqA”)?

20

7. The alleged less favourable treatment relied upon by the claimant is:

a. a colleague, Michael Zurinskas, sharing non-consensual explicit photographs of the claimant that he had found on Facebook amongst colleagues;

25

b. Michael Zurinskas approaching the claimant and saying to her ‘are your boobs real?’ and ‘how much for a night with you?’;

- c. **Wioleta Wolczyk and Michael laughing at the claimant;**
- d. **Wioleta Wolczyk saying there was nothing else she could do and sending the claimant home; and**
- e. **the respondent dismissing the claimant on 9 March 2018.**

5 **8. Is the respondent liable for any such less favourable treatment in terms of section 109 of the EqA? Specifically:**

a. if any such less favourable treatment was done by an employee of the respondent, was it done in the course of that employee's employment?

10 **b. if so, has the respondent shown that it took all reasonable steps to prevent the less favourable treatment?**

Sex Harassment

15 **9. Did the respondent engage in unwanted conduct related to sex that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her in terms of section 26(1) of EqA?**

20 **10. Did the respondent engage in unwanted conduct of a sexual nature that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her in terms of section 26(2) of EqA?**

25 **11. Did the respondent or another person engage in unwanted conduct of a sexual nature or that was related to sex which had the purpose or effect referred to above, and – because of the claimant's rejection of that conduct – did the respondent treat the claimant less favourably than it would have treated her had she not rejected to the conduct (sic?) in terms of section 26(3) of EqA?**

12. The alleged conduct relied upon by the claimant is as follows:

- a. a colleague, Michael Zurinskas, sharing non-consensual explicit photographs of the claimant that he had found on Facebook amongst colleagues;
- b. Michael Zurinskas approaching the claimant and saying to her 'are your boobs real?' and 'how much for a night with you?';
- c. Wioleta Wolczyk and Michael laughing at the claimant; and
- d. Wioleta Wolczyk saying there was nothing she could do and sending the claimant home.

10 **13. Is the respondent liable for any such conduct in terms of section 109 of EqA? Specifically:**

- a. if any such conduct was done by an employee of the respondent, was it done in the course of that employee's employment?
- b. if so, has the respondent shown that it took all reasonable steps to prevent that employee (i) from doing such conduct, or (ii) from doing anything of that description?

Sex Victimization

20 **14. Did the claimant do a protected act in terms of section 27 of EqA during a conversation on 14 February 2018?**

15. If so, did the respondent submit the claimant to a detriment because she did a protected act in terms of section 27(1) of EqA?

16. The alleged detriments are as follows:

- a. Wioleta Wolczyk and Michael laughing at the claimant in response to the protected act;
- b. Wioleta Wolczyk saying there was nothing she could do and sending the claimant home in response to the protected act;

- c. the claimant being sent home in response to the protected act and thus losing out on a day's wage; and
- d. the respondent dismissing the claimant on 9 March 2018.

5 17. Is the respondent liable for any such detriments in terms of section 109 of EqA? Specifically:

- a. if any such detriments were done by an employee of the respondent, was it done in the course of that employee's employment?
- b. if so, has the respondent shown that it took all reasonable steps to prevent that employee from subjecting the claimant to the detriments?

10 Detriment on grounds related to trade union membership or activities

18. Did the respondent subject the claimant to a detriment/detriments in terms of section 146(1) of TULRCA? The alleged detriments are:

- 15 a. Lisa Palmer ripping up union forms and putting them in a bin;
- b. Lisa Palmer taking staff meals away from employees in October 2017 and January 2018 (on each occasion for one month);
- 20 c. Lisa Palmer starting to shout and saying that staff meals were not in the contract;
- d. the respondent sending the claimant a letter dated 5 February 2018 asking her to attend a disciplinary hearing on 8 December 2018;
- 25 e. Lisa Palmer shouting at the claimant, asking the claimant why she was in work, and then shouting 'stop interrupting me you stupid bitch' to the claimant;

- f. the respondent sending the claimant a 'letter of concern'; and/or
- g. the respondent inviting the claimant to a disciplinary meeting on 14 February 2018.
- 5 h. the respondent dismissing the claimant on 9 March 2018.

19. If so, did the respondent subject the claimant to such detriments for the sole or main purpose of:

- a. preventing or deterring the claimant from being a member of an independent trade union at an appropriate time, or penalising her for doing so; and/or
- 10 b. preventing or deterring the claimant from taking part in the activities of an independent trade union at an appropriate time, or penalising her for doing so?

173. The remaining issues set out in the list of issues came under the heading of Remedy, a matter which has now been determined to be dealt with at a separate hearing as required.

Discussion and Decision

174. The issues having been laid out above, the Tribunal sought to address them in turn in reaching its decision.

20 **4. Did the claimant make a protected disclosure in terms of section 43A of ERA? Specifically, did the claimant:**

- a. make a disclosure of information during a conversation on 14 February 2018 which, in her reasonable belief, was made in the public interest and tended to show (i) that a criminal offence had been committed, was being committed or was likely to be committed, and/or (ii) that the health and safety of any individual has been, was being or was likely to be endangered, in terms of section 43B of ERA?

25

b. make such a disclosure in accordance with any of sections 43C to 43H of ERA? Was the claimant dismissed by the respondent in terms of section 95(1)(c) of ERA?

5. If the claimant was dismissed, was the reason (or, if more than one, the principal reason) for the dismissal that she made a protected disclosure in terms of section 103A of ERA?

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175. It is necessary, firstly under this issue, to consider whether or not the claimant, on 14 February 2018, made a protected disclosure.

176. The disclosure which was relied upon by the claimant as taking place on that date. Paragraph 42 of the paper apart to the ET1 (23) states that the claimant's case is that the information she provided in the conversation on 14 February 2018 amounted to a qualifying protected disclosure under section 43B of ERA.

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15

177. We understand this to be a reference to the conversation which the claimant had with Wioleta Walczyk on 14 February 2018, in which she reported that Mr Paterson had alerted her to the fact that Mr Zurinkas was showing photographs of her in a state of undress to his colleagues in the workplace.

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178. We accept that the claimant did indeed report this to Ms Walczyk, and there appears to be no dispute by Ms Walczyk that this was the case. We found the claimant's evidence on this to be convincing, and it was supported by her report to the customer complaints line that evening (103). Mr Clarke submitted that we should accept the evidence of the claimant before any other witness as she was the only person who was present throughout, and could speak to the different interactions which she had with the different individuals involved. We accepted this.

30

179. The report which the claimant submitted to the respondent stated, referring to the claimant as "guest", that "*...had to leave work today, was in an abusive relationship, guest partner its waiting for trial on remand, the guest ex partner created a facebook account and put half naked pictures,*

guest works colleagues have found this page and has shown everyone at work, told the manager, Theoleter (sic) female, and just started laughing, guest was so upset started crying and had to leave her work...”

180. There is no doubt, then, that the claimant disclosed information to her employers, in the conversation which she had with Ms Walczyk. The respondent accepts this, to the extent that the claimant said that she felt too upset to work, that she felt this was because “everyone had seen her tits” and her ex-boyfriend had created a Facebook profile of her which included a compromising photograph.

181. We then require to consider whether that disclosure was made, in her reasonable belief, in the public interest, and tended to show that a criminal offence had been committed, was being committed or was likely to be committed, and/or that the health and safety or any individual had been, was being or was likely to be endangered.

182. The respondent submits that this disclosure, if that is what it is, was not made in the public interest. Neither Ms Walczyk nor the claimant said that the claimant made any reference to the public interest when they spoke on that date, and the reports to the customer complaint line make no such reference either.

183. It is important to recognise that the Tribunal must establish whether the claimant had a reasonable belief, in making the disclosure, that it was in the public interest. Guidance is provided in **Chesterton Global Limited (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979** in which Tribunals must give consideration to the whole circumstances of the case but in particular ask itself four questions in determining whether or not a disclosure may be in the public interest.

184. Firstly, the Tribunal must consider the numbers in the group whose interests the disclosure serves; secondly, the nature of the interests served and the extent to which they are served by the disclosure; thirdly, the nature of the wrongdoing disclosed, and fourthly, the identity of the alleged wrongdoer.

185. We note that a very recent decision has been issued by the Court of Appeal in **HCA International Limited v Ibrahim [2019] EWCA Civ 2007** in which this very matter was discussed. The court acknowledged that in that case the claimant had not said at the time of making the disclosure that he
5 believed it to be in the public interest – as here – but that that did not dispose of the matter entirely. The matter was not covered in the claimant’s evidence during the Employment Tribunal proceedings, that claimant having acted on his own behalf, and therefore the matter was remitted to the Tribunal to address the point about the claimant’s subjective belief at the
10 time.

186. The disclosure, in this case, was that a colleague of the claimant had been showing to other staff working in the branch a Facebook profile of the claimant showing her in compromising photographs, which had been put up without the claimant’s consent by an abusive ex-partner. It may be said that
15 such a disclosure serves only the claimant, in seeking to protect her interests from further sharing of embarrassing photographs. The evidence does not enable us to draw a conclusion as to the numbers in the group whose interests the disclosure served, beyond the claimant herself. It is not known, for example, how many staff employed in the Livingston branch,
20 were female and might have been affected by this, because we heard no evidence to enable us to draw any conclusion about it. Further, we conclude that the nature of the interests served were primarily related to the claimant’s own interests. The nature of the wrongdoing disclosed was that a colleague was, in quite unpleasant terms, sharing photographs of her in a
25 state of undress around the workplace, having had access to those photographs on Facebook; although we did have some difficulty in identifying precisely what the wrongdoing identified by the claimant was, in that the uploading of the photographs themselves, in an act of revenge by her ex-partner, was not done by any colleague in her workplace. Sharing
30 those photographs may be said to amount to a lower order of wrongdoing than having illicitly uploaded them to a wide audience on Facebook. Finally, the identity of the alleged wrongdoer was Michael Zurinkas, not her ex-partner, in the context of this claim.

187. The claimant said in evidence before us that her view at the time of making the disclosure was that her colleagues, some of whom were younger than she was, might see her in a vulnerable situation and fear that they could be bullied because they were young and naïve. In other words, she said that she did not want what happened to her to happen to the people she worked with.

188. The question for the Tribunal, then, is whether, at the time of the making of the disclosure, the claimant believed that it was in the public interest and had reasonable grounds for doing so.

189. It is not our view after very considerable deliberation, that the claimant had a reasonable belief that the disclosure was made in the public interest. She did not specifically say that she thought that at the time, which is understandable, but nor did she convey that in her evidence to this Tribunal. She said she was concerned about the impact upon her colleagues but she did not take the matter further than that. We have found this a difficult issue to disentangle, but on balance, we have concluded that the claimant's disclosure was not in the public interest nor did she have a reasonable belief that it was, at the time she made the disclosure.

190. Whatever view we might take of the actions of Mr Zurinkas – and let there be no doubt that we viewed his actions as disgraceful (based on the information before us), a point to which we shall return – we are unable to conclude that the claimant had a reasonable belief that the disclosure was made in any other interest than her own, and was not in the public interest. The disclosure was for a personal (and, we might add, an entirely legitimate) purpose, which was to limit the distribution of the photographs and seek the support of her employer in a distressing and embarrassing situation. While it might be suggested that the interests of women in the workplace of the respondent may be served by such a disclosure, highlighting an issue of some importance in the internet age, but in this particular case we are unable to conclude on the facts that there was, in the claimant's reasonable belief, a public interest in the making of the

disclosure. She complained to her employer because she wanted them to take action to protect her, and her alone.

191. Accordingly, we are unable to find that the claimant made a qualifying disclosure within the meaning of ERA, on the basis that we cannot conclude that the disclosure was made in the reasonable belief that it was in the public interest.

192. It follows from that that if the Tribunal were to find that the claimant was dismissed, it could not be for the reason or principal reason that she had made a protected disclosure.

193. We do not, at this stage, specifically address the question of whether it may be said that the claimant was dismissed by the respondent, but will return to this issue below.

Direct Discrimination

6. **Did the respondent, because of sex, treat the claimant less favourably than it treats or would treat others in terms of section 13 of the Equality Act 2010 (“the EqA”)?**

7. **The alleged less favourable treatment relied upon by the claimant is:**

a. **a colleague, Michael Zurinkas, sharing non-consensual explicit photographs of the claimant that he had found on Facebook amongst colleagues;**

b. **Michael Zurinkas approaching the claimant and saying to her ‘are your boobs real?’ and ‘how much for a night with you?’;**

c. **Wioleta Wolczyk and Michael laughing at the claimant;**

d. **Wioleta Wolczyk saying there was nothing else she could do and sending the claimant home; and**

e. **the respondent dismissing the claimant on 9 March 2018.**

8. Is the respondent liable for any such less favourable treatment in terms of section 109 of the EqA? Specifically:

a. if any such less favourable treatment was done by an employee of the respondent, was it done in the course of that employee's employment?

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b. if so, has the respondent shown that it took all reasonable steps to prevent the less favourable treatment?

194. The Tribunal considered the alleged less favourable treatment in its elements before determining the question set out at issue 6.

10 195. We have found that Mr Zurinkas did share non-consensual explicit photographs of the claimant that he had found on Facebook with colleagues. In our view, there is no doubt that he did so. Although his own statement to the internal investigation broadly denies that anyone was speaking about or laughing about the photographs, we heard evidence from
15 Mr Paterson that Mr Zurinkas had shown him the photographs, "insinuating prostitution"; from the claimant that Mr Paterson came to her to tell her that Mr Zurinkas had shown him the photographs; and from Ms Palmer, under cross-examination (with what has been described as notable reluctance) that on that day, when she was at home and on a day off, Mr Zurinkas was
20 the member of staff who sent an image to her, showing the claimant.

196. We also found that Mr Zurinkas did approach the claimant, after Mr Paterson had shown her the images, and made the comments alleged by the claimant. Mr Paterson did not confirm this to be the case in his written statement, but it is possible that he was not present at the point
25 when Mr Zurinkas approached her. The claimant gave clear and believable evidence about this, stressing how upsetting it was for her to have been spoken to in such terms, particularly given the history of abuse she had endured at the hands of her ex-partner. When she told us that Mr Zurinkas had asked her "how much for a night with you", she had found
30 that particularly upsetting as a reminder of the way in which she had been

abused in that relationship. In any event, we found the claimant's evidence on this matter to be compelling and we believed it.

197. We found that Mr Zurinskas was laughing at the claimant, again on the evidence of the claimant. Her evidence was consistent about the way in which he approached her, and indeed we found it entirely believable that he was treating her with such contempt when he was showing the photographs of her around the store, and sending them to Ms Palmer.

198. We were less certain that Ms Walczyk laughed at the claimant. Ms Walczyk, in her evidence, did not appear to us to be untruthful. What we concluded from this was that while she did not laugh at the claimant when she told her about the situation, she did not treat it with the seriousness which the claimant wanted her to. As a result, we do not go so far as to find that Ms Walczyk laughed at the claimant, though we do consider her response to have been inadequate at the time. The explanation may arise from the fact that Ms Walczyk accepted in evidence that she had not been given any training by the respondent in the Dignity At Work policy, and therefore did not know to take any particular steps when confronted with this situation.

199. The claimant also alleges that Ms Walczyk said that there was nothing she could do and sent the claimant home. In our judgment, little turns on this of itself. Ms Walczyk meant, we considered, that she could do nothing to have the Facebook profile taken down. This represented a misunderstanding of what the claimant was asking her about. The claimant was well aware that the respondent could not have the profile taken down; what she wanted was action taken by her line manager to support her. In that regard, Ms Walczyk was sympathetic to the claimant, and sought to help her by suggesting that she go home. However, she took no further action at that stage, and as a result, the matter may not have been dealt with had the claimant and her mother not complained to the complaints line later that day.

200. The final allegation of less favourable treatment was that the claimant was dismissed by the respondent, and that that amounted to an act of discrimination on the grounds of sex.

201. It is appropriate at this stage, then, to determine whether or not the Tribunal considered that the claimant resigned in response to a repudiatory breach or breaches of contract by the respondent.

202. In doing so, the Tribunal followed the guidance in **Kaur**.

203. Firstly, the Tribunal sought to determine what was the most recent act or omission on the part of the respondent which the claimant says caused, or triggered, her resignation.

204. The claimant resigned by letter, which was received by the respondent on 8 March 2019 (115), in which she said that she was resigning due to a number of issues, which she then listed as:

- *“Sexual Harassment*
- *Trade Union Victimisation*
- *Bullying and Harassment in the Workplace.”*

205. At paragraph 28 of the paper apart to her claim form (20), it was stated that *“The claimant felt that despite disclosing the harassment she had suffered in the workplace, her employer did not take her concerns seriously, continued to employ Michael, Feoletta and Ms Palmer and did not to (sic) assist the Claimant in return to the workplace. This was the last straw after the way the Claimant had been treated throughout her employment as outlined above.”*

206. In her evidence before this Tribunal, the claimant was asked why she decided to resign on that date. Her response was that having discussed the matter with her trade union representative, she had decided to give the respondent time to see if they were going to take action against the people involved, or offer her a different position, but when she got the letter saying

that they were not doing anything, she and her representative felt that nothing was going to be done, and she felt that that was so unfair that she had to resign.

5 207. In our judgment, the claimant resigned because she was extremely dissatisfied with the way in which the respondent had treated her, in relation to a number of matters, in comparison to the way in which they had treated other staff, and in particular Mr Zurinskas.

10 208. The claimant identified in her evidence the respondent's actions in connection with the investigation surrounding the events of 14 February, and in particular the letter sent to her by Ms McVey arising out of that investigation.

209. It is important then to consider the respondent's actions following the report which they received, via the complaints line, that the claimant had been distressed by her treatment on 14 February 2018 in the store.

15 210. Mr Clarke, both in cross-examination and in submission, was extremely critical of the investigation which was conducted by Ms McVey on her attendance at the store on 15 February. He described it as "woeful". In our judgment, Mr Clarke was entirely justified in his criticisms of the investigation, and of the evidence about it before us.

20 211. Although Ms McVey did attend at the store on the day following the report, she said she did so on the instruction of a director of the business. Of itself, that is of little consequence, other than demonstrating that the issue was not reported to her by Ms Walczyk, and that the claimant went home in a state of distress without any action being taken or planned by
25 management on that day.

212. In any event, Ms McVey's investigation was conducted in an unusual manner. She appears to have asked questions of the witnesses in turn, taking notes as she did so, but then asking them each to write down their version of events. The Tribunal can make no findings about the information
30 she received in the question-and-answer process she said she followed

because, as she put it, the notes “went away”. Quite why those notes were not placed with the statements, so as to present a complete picture, is unclear to the Tribunal. In our view, a proper process would have ensured that all relevant information from the meetings with witnesses was retained and available for scrutiny.

213. The vagueness of her evidence did not assist the Tribunal in understanding what happened to the notes, in any event. It is not clear whether they were destroyed, or lost, or simply filed, but clearly the respondent either was unable to or chose not to present them as evidence.

214. The significance of this is that in our judgment, the statements which were provided by the witnesses give rise to a number of questions, which do not appear to have been pursued. In particular:

- The witness statement of Ms Palmer (106) is notably brief, but states that “a staff member sent me a screenshot of a facebook profile”. Of itself, that discloses important but not useful information. A reasonable investigation would have asked her the identity of the staff member; when the screenshot was sent; what the screenshot showed; who, if identifiable, was shown in the screenshot; and whether Ms Palmer still had it on her phone, to be able to display it to Ms McVey. None of those questions appear to have been asked. When Ms Palmer gave evidence before us, she did, with some reluctance, confirm that the sender was Mr Zurinskas, and that it came during her day off, confirming that it was sent at a point during his working day from the workplace.
- The witness statement of Mr Zurinskas does not address any of the specific allegations made by the claimant against him. In fairness to him, as well as to the claimant, he should have been asked to address the allegations that he had approached the claimant laughing; and had shown the photograph of the facebook profile to colleagues in the store and shared it with Ms Palmer. The statement

does not address any of these points, and as a result does not assist the respondent in reaching any firm conclusion.

- The witness statement of Mr Paterson does not specifically address what was said by Mr Zurinkas, and does not ask for an explanation as to what “insinuating prostitution” meant.

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215. In addition, the Tribunal regarded the failure of Ms McVey to speak to the claimant in order to obtain her statement as part of the investigation as quite unreasonable. There was no explanation by her as to why she did not seek the claimant’s full version of events, whether before or after she had spoken to the witnesses.

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216. Ms McVey suggested that her letter of 15 February 2018 (112) to the claimant made clear that she was carrying out an ongoing investigation, and that the request to meet her for a “welfare meeting” was in fact an invitation to meet her to continue the investigation.

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217. We found this explanation to be incredible, and unsupported by the terms of the letter.

218. The second paragraph of the letter stated:

*“I would like to reassure you that the incident **has been dealt with** by Head Office and subsequently no **other** mention of it will be permitted in store. Any employee found **to continue with any type of conversation surrounding the topic will face disciplinary procedures.**” (Tribunal’s emphasis).*

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219. In our judgment, it was clear to the claimant that the matter was closed. The letter confirmed that the matter “has been dealt with”, using the past tense; it also said that anyone who continued to speak about this matter would face disciplinary procedures in the future.

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220. What followed was an invitation to a welfare meeting owing to the claimant being absent from work, in our judgment. The claimant took it to mean such a meeting, rather than any continuation of the investigation.

221. The letter did not say, or even imply, that the investigation was ongoing. It made clear that the matter had been dealt with. It did not say what, if any, conclusion was reached, other than to let her know that if there was further conduct of a particular kind that would attract disciplinary action.

5 A plain reading of the letter demonstrates that this was an attempt to close down the investigation. We do not accept that the letter can, on any view, be interpreted as giving the claimant the opportunity to give a statement or respond to statements given by any other witness.

222. We concluded that Ms McVey was being, at best, disingenuous when she said that the investigation was continuing and that she wanted to give the claimant the chance to give her side of the story. The letter did not say that, nor even hint at the possibility. Even if the respondent did intend to continue the investigation, they did not tell the claimant that, and she had no reason to believe that that was their intention.

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223. The claimant's interpretation of the letter, when she read it, was that the investigation was complete; that her allegations had not been upheld; that no action was to be taken in relation to what had happened on 14 February; that staff had been talking about the Facebook profile and the photographs of her in the workplace; and that she was to attend a welfare meeting in order to take matters forward. Her reaction was one of dismay, in particular because no action was being taken against Mr Zurinkas and therefore she would require to return to work in the same workplace, with the same colleagues, without any further action being taken. At that point, in our judgment, it was clear that she no longer felt able to trust the management of the respondent.

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224. In addition, it is important to place this letter in context. The claimant had received, over time, letters of concern and criticisms from management about her conduct and appearance in the workplace. While she associated those with her trade union activities (to which we shall return), the most significant of these interactions with management occurred on 5 February 2018.

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225. On the evening of 4 February 2018, the claimant had been working at the store, and had recorded two transactions on the till, one at 9pm and the other at 9.04pm (91).

226. On the following day (though the time is unclear), Ms McVey, in head office, had not only received those receipts but had drafted and sent a letter (90) inviting the claimant to a disciplinary hearing on “Thursday 8th December 2018”, to answer two allegations, the second of which related to “allegations of fraudulent activity whilst using the till with reference to staff discounts”. This was a reference to the two transactions which she registered on the previous evening.

227. It was said in that letter that one of the allegations (though not which one) was considered gross misconduct, and could result in dismissal.

228. The claimant did not attend at the disciplinary hearing on 8 February, because that was not the date which the letter told her to attend. While it might be obvious that the hearing would not be taking place as far off as December, it was, in our view, reasonable for the claimant not to attend on 8 February because she had no knowledge that she had to.

229. The respondent dismissed the claimant in her absence, with immediate effect (95). That decision was rescinded (96) when it was realised that there had been an error in the original invitation, and a further invitation was issued to a fresh hearing on 16 February 2018. For reasons which do not require digression at this stage, that hearing did not take place, and matters were then superseded by the events of 14 February 2018.

230. The context is important, in our judgment, because within the previous two weeks of having received the letter from Ms McVey of 15 February telling her, in effect, of the conclusion of the investigation, the claimant had been the subject of a remarkably expeditious process leading to her dismissal.

231. If we consider the timeline, the speed at which Ms McVey acted is quite extraordinary. She confirmed that she received the receipts from the finance department on the morning of 5 February at the earliest; within a matter of hours she had invited the claimant to a hearing, with the threat of dismissal hanging over it, to take place 3 days later. She said in evidence that an investigation had been carried out prior to her taking the decision to move to disciplinary hearing (a step required by the respondent's own disciplinary policy), but was unable to point to any report or evidence to show who carried out the investigation or when. It was our conclusion that no prior investigation was carried out before Ms McVey made the decision to move to disciplinary hearing, and that that was done with improper haste.

232. Although the dismissal was overturned, the disciplinary process was to be continued. In our judgment it is hardly surprising that the claimant felt threatened by the respondent in this process, and vulnerable in her employment with them. When, on 15 February 2018, she was told that the investigation into what was for the claimant an extremely serious incident had concluded, and to her understanding no further action would be taken, the claimant's reaction was entirely understandable.

233. In particular, the claimant understood that she was being taken to a disciplinary hearing for a matter relating to the use of her staff discount, as well as an allegation about her mobile telephone use, within 4 days of the incident involved; while no action was to be taken against Mr Zurinkas for displaying indecent photographs of her, and laughing at her in the store about this.

234. It is understood that the respondent was unaware of the allegation now made by the claimant that Mr Zurinkas had asked her the two inappropriate questions she gave evidence about; but the reason they were unaware of this was that they failed to seek a statement from the claimant setting out her evidence about the matter. Their investigation was inadequate.

235. The claimant was then absent from work from 15 February 2018 due to ill health, until her resignation on 8 March 2018.

236. It is our judgment, then, that the most recent act on the part of the employer which triggered the claimant's resignation was their failure to take proper action to support her following her allegation that indecent photographs had been shared in the workplace by a colleague, and in particular that the letter of 15 February made clear to her that no further action would be taken about that incident. That caused the claimant to believe that she would require to return to the same workplace, with the same colleagues who had seen the photographs, and in the case of Mr Zurinkas, shared the photographs, without any steps being taken to address his misconduct, or the failings of her managers Ms Palmer and Ms Walczyk. She considered then that she had lost all trust and confidence in her employer.

237. Next, the Tribunal must ask if the claimant had affirmed the contract since that act. The respondent does not argue that she did, and we agree.

238. The Tribunal must then consider whether that act was by itself a repudiatory breach of contract.

239. In our judgment, the respondent's failure to carry out a fair and reasonable investigation into the events of 14 February 2018 amounted to an act in repudiation of the implied term of trust and confidence essential between employer and employee. The claimant was left with a clear understanding, which we considered to be based on the plain terms of the letter of 15 February 2018, that the matter was concluded; that no action would be taken against any staff, and in particular Mr Zurinkas; and that she was expected to return to the same workplace and the same colleagues. This outcome, based on an inadequate investigation, dealt the claimant's trust and confidence in the respondent as an employer a fatal blow. We accepted that for the claimant this amounted to a fundamental breach of her contract of employment, and that she had justification in resigning as a result.

240. The respondent put forward a number of arguments against this conclusion, with which it is only right we now deal.

241. The respondent submits that Ms McVey gave evidence about how seriously she took the claimant's concerns, and that that assertion was supported by the evidence of Ms Palmer, Mr Paterson and Ms Walczyk; in addition, that Ms McVey immediately commenced an investigation into the events of 14 February 2018 and made clear to the witnesses how seriously the respondent took the matter.

242. In our judgment, Ms McVey may have considered that she was taking the claimant's concerns seriously, and may well have told the witnesses that she was doing so, but her actions betray her failure actually to do so. Had she taken the claimant's concerns seriously, she would have spoken to her personally, and asked her to lay out precisely what those concerns were. She failed to do so, and in so doing revealed that she was more concerned with carrying out a process rather than actually addressing the claimant's concerns. Her letter of 15 February was, in our judgment, an attempt to close this matter down, not an attempt to maintain a live investigation in order to hear fully from the claimant.

243. The respondent suggests that there was a contradiction between the evidence of the claimant, when she said that she felt let down by the respondent who was not doing anything, and had reached a conclusion; and that of Mr McHugh, who said that the letter was indicative of a live investigation. In our view, there is no contradiction in this evidence. There is a difference of opinion as to the effect of the letter. However, it is necessary to examine the claimant's state of mind when receiving the letter, and to interpret, objectively, the terms of that letter, and when we do so, we can find no basis for concluding that the investigation was a live one when she wrote the letter of 15 February 2018.

244. The respondent then denies that it committed a repudiatory breach of contract by failing to dismiss Mr Zurinskas, Ms Walczyk and Ms Palmer, and argues that on the evidence which Ms McVey had it would not have been

fair to have dismissed any of them; and that the documentary evidence did not amount to sufficient evidence to dismiss them. That may be so; but as we have made quite clear, the evidence which Ms McVey had arose out of an inadequate investigation, and had that investigation been properly pursued, it is likely that a basis at least to take action against those individuals would have emerged.

245. In our judgment, the claimant's complaint was that while management acted quickly to take action against her for perceived misconduct, no action whatever was taken against Mr Zurinkas or the two line managers for their conduct surrounding this matter.

246. That the claimant said, in cross-examination, that the only inappropriate omission in this regard was the failure to dismiss Mr Zurinkas, does not take matters much further. Her claim is based on the assertion that she resigned, at least in part, because the respondent failed to take action against the three individuals, and in our view it is crucial to place that in the context in which they had rapidly taken action against her herself when the occasion arose.

247. It should also be said that Ms McVey's position appeared to be that she brought Mr Zurinkas and Mr Paterson into a room to tell them that they could not both be telling the truth, and that one of them would have to say more, though without success; and that having done that, she was left with a "one word against the other" situation. We disagree. Ms McVey had the evidence of Mr Paterson; the complaint of the claimant; and the evidence of Ms Palmer, vague and unhelpful though it was, that a member of staff had shared the photograph of the Facebook profile with her on the day in question. There was ample evidence to demonstrate that Mr Zurinkas was, at the very least, vulnerable to criticism, and had that evidence been properly considered, action would have followed against him. However, Ms McVey resolutely insisted before us that she could not take further action based on the evidence she had, and we did not accept that to be a credible position on her part.

248. The respondent then denied that it committed a repudiatory breach of contract by failing to assist the claimant to return to the workplace. They point to the attempts made by Ms McVey to assist her to return to the workplace, which attempts the claimant resisted, as well as the documentary evidence supporting that assertion. In our judgment, Ms McVey did not convey to the claimant that she was seeking to assist her to return to the workplace; what the claimant understood was that Ms McVey was telling her to return to the same workplace, without having done anything about her concerns.

249. In our judgment, to suggest that the claimant failed to engage with those attempts by Ms McVey overlooks the claimant's sense, on receiving her correspondence, that Ms McVey had completely failed to engage with her in the investigation. That the claimant may have accepted in cross examination that the respondent was seeking to assist her to return to the workplace does not advance matters; the claimant's problem was with the fact that, having taken no action, the respondent appeared to want her to return to the same workplace with the same colleagues. That places an entirely different context upon the matter.

250. Given that we have found, in this context, that the claimant did resign in response to a repudiatory breach of contract, it is unnecessary to address the question of whether there was a course of conduct. We do not, by any means, regard the breach leading to resignation as an innocuous act.

251. Finally, the Tribunal must ask whether the claimant resigned in response to the repudiatory breach.

252. The respondent submits that the claimant said that she resigned because her colleagues had seen parts of her that they shouldn't see, or had seen her naked.

253. In our judgment, there is no doubt that the claimant resigned in response to the respondent's repudiatory breach of contract. The claimant was dismayed by their failure to act on her allegations and carry out a reasonable investigation, and by the indications that they intended her to

return to work alongside colleagues who had seen the photographs under consideration. What the claimant was expressing in answer to those questions (which answers must, of course, be taken in context with her whole evidence and what she said at the time) was her unwillingness to accept the effect of the repudiatory breach of contract by returning to a workplace in which she believed that she had been humiliated.

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254. Accordingly, we have concluded that the claimant resigned in response to a repudiatory breach of contract by the respondent, and that she was, therefore, dismissed by the respondent with effect from 8 March 10 2018.

255. We have therefore concluded that the respondent has been responsible for the actions which the claimant has alleged to have been less favourable treatment on the grounds of sex.

256. What we must consider now is whether those actions amounted to less favourable treatment on the grounds of sex, under section 13 of the 15 2010 Act.

257. The burden of proof lies upon the claimant to show a *prima facie* case of discrimination on the grounds of sex; and if she can do that, it is then for the Tribunal to determine whether the respondent's explanation is sufficient to show that it did not discriminate (**Barton v Investec Henderson Crosthwaite Securities Limited** **UKEAT/18/03**). The 20 respondent argues that the claimant has not shown a *prima facie* case that she has been treated less favourably than the respondent treated or would treat others. They also observe, in terms of section 23(1) of the 2010 Act, 25 that on a comparison of cases for the purposes of section 13, there must be "no material difference between the circumstances relating to each case".

258. The respondent denies that the claimant was subjected to the acts alleged under this heading, except that relating to Mr Zurinkas sharing non-consensual explicit photographs of the claimant which he had found on 30 Facebook among colleagues. The Tribunal, however, has found that in each instance, the claimant was subjected to the acts alleged by the

claimant and set out in the list of issues under the heading of direct discrimination.

259. The respondent then argues that the claimant was not treated less favourably than a hypothetical male comparator whose circumstances are not materially different to the claimant's would have been treated.

260. In our judgment, the claimant was subjected to treatment which was less favourable than that which would have been given to a hypothetical male comparator whose circumstances were not materially different to the claimant's, in the following respects:

- Mr Zurinkas shared photographs which were both explicit and sexual in nature, and which had been uploaded to Facebook without the claimant's consent, with a number of colleagues. Those colleagues were both male and female, and had that been his only act, it may not have been possible to conclude that the actions of Mr Zurinkas were on the grounds of sex, or would have happened to a male colleague. However, Mr Zurinkas then approached the claimant and made two comments, of an explicitly salacious and sexual nature – “are your boobs real?” and “how much for a night with you?” – and in our judgment it is quite clear that he would not have spoken to a male colleague in that manner.
- In laughing at the claimant it is our judgment that Mr Zurinkas, in light of his sexual comments to her, would not have acted in the same way towards a male colleague.
- Most significantly, in our judgment, the respondent treated the claimant less favourably than it did Mr Zurinkas in the manner in which they dealt with each of them through the investigation and disciplinary processes. To the claimant, they acted with alacrity on 5 February 2018, on discovering a potential act of misconduct by her in relation to the use of her staff discount, by inviting her to a disciplinary hearing intended to take place within three days, and dismissed her without giving her the opportunity to attend at least

one more hearing. That series of actions, albeit subsequently revised, contrast sharply with the way in which the respondent investigated the claimant's allegations against Mr Zurinkas. The investigation was, in our judgment, quite inadequate, and failed to make proper or reasonable inquiries into very serious allegations levelled against a colleague by the claimant. The investigation was closed down without any action being taken against Mr Zurinkas, for reasons which do not bear scrutiny. The comparison between the treatment of the claimant and Mr Zurinkas is stark: the respondent moved quickly to take action against the claimant for two unproven allegations, and yet when they had significant information to suggest that Mr Zurinkas had acted in an offensive and sexualised manner towards one of his female colleagues, they took no steps at all to deal with that allegation in any meaningful way. Ms McVey suggested that she did not have sufficient information on which to base any disciplinary action, but as will be apparent from our conclusions above, we do not accept that as a credible finding, both because of the information she had and her failure to ask further relevant questions about the statements she was given. Fundamentally, her failure to acknowledge that in addition to Mr Paterson's statement she had the claimant's statement undermined her evidence that she could not take matters further.

261. Accordingly, we have reached the view that the claimant was treated less favourably than a man would have been, on the grounds of sex, in relation to these points.

262. What we then have to consider is whether the respondent can be held to be responsible for the claimant's less favourable treatment, particularly in relation to the actions and failings of Mr Zurinkas.

263. That involves considering two matters: was the respondent vicariously liable for the actions of Mr Zurinkas; and secondly, was the respondent able to demonstrate that it had taken all reasonable steps to avoid or prevent such a situation arising?

264. It is clear that Mr Zurinkas shared the photographs of the claimant with, at the very least, Mr Paterson in the workplace during his shift, and Ms Palmer, outwith the workplace, again probably during his shift. What he did was not part of his normal duties, but in our judgment he was acting in the course of his employment when he acted this way, as he was doing it at work and when it was drawn to his employer's attention, no action was taken by them. That failure to take action arises in two particular contexts: firstly, the failure by Ms Walczyk to report the matter on the day in such a way as to encourage further investigation; and secondly, once the matter was reported to them, they signally failed to take any action to deal with Mr Zurinkas when the evidence required them, in our view, to investigate his actions, at a minimum. It is clear from the case of **Jones v Tower Boot Co Ltd 1997 ICR 254, CA** that "in the course of employment" is to be interpreted broadly, as a question of fact. In our judgment, these actions were carried out by Mr Zurinkas, Ms Walczyk and Ms Palmer in the course of their employment.

265. In our judgment, it cannot be said that the respondent had taken all reasonable steps to avoid or prevent such a situation arising. It was clear that none of the staff from whom we had heard had received, prior to 14 February, any training in the Dignity At Work policy, even among managers such as Ms Walczyk or Ms Palmer; and that Ms McVey, who was Office Manager, had no HR training or background. What emerges from this is that Mr Zurinkas should have been well aware, by any standard, that his actions were completely unacceptable; but the respondent failed to prevent the incident by failing to take the mere precaution of training their staff or at least their management to address such problems when they arose.

266. Ms Palmer's inaction is difficult to understand. When she received the screenshot on 14 February, not only did she fail to take any action about it at all, she was very reluctant to divulge any information about the matter to Ms McVey. It is clear that at the very least Ms Palmer did not have training in the Dignity at Work policy which would have guided her to an understanding that this was a serious matter.

267. As a result, we are entirely unpersuaded that the respondent took any reasonable steps to avoid or prevent such an incident occurring, nor that they took any reasonable steps to deal with the matter when it did. The respondent has submitted that the matter was taken seriously by Ms McVey, and pointed to the speed at which she reacted to the report and the fact that she told a number of people that it was serious. That may be so, but in our judgment her response, in her investigation, was inadequate to deal with the seriousness of the issue which had arisen.

268. Accordingly, it is our conclusion that the respondent must accept responsibility for the actions of Mr Zurinkas, Ms Palmer, Ms Walczyk and Ms McVey. In so finding, we have found that the respondent has directly discriminated against the claimant on the grounds of sex in the manner alleged by the claimant.

Sex Harassment

9. Did the respondent engage in unwanted conduct related to sex that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her in terms of section 26(1) of EqA?

10. Did the respondent engage in unwanted conduct of a sexual nature that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her in terms of section 26(2) of EqA?

11. Did the respondent or another person engage in unwanted conduct of a sexual nature or that was related to sex which had the purpose or effect referred to above, and – because of the claimant's rejection of that conduct – did the respondent treat the claimant less favourably than it would have treated her had she not rejected to the conduct (sic?) in terms of section 26(3) of EqA?

12. The alleged conduct relied upon by the claimant is as follows:

- a. a colleague, Michael Zurinskas, sharing non-consensual explicit photographs of the claimant that he had found on Facebook amongst colleagues;
- b. Michael Zurinskas approaching the claimant and saying to her 'are your boobs real?' and 'how much for a night with you?';
- c. Wioleta Wolczyk and Michael laughing at the claimant; and
- d. Wioleta Wolczyk saying there was nothing she could do and sending the claimant home.

13. Is the respondent liable for any such conduct in terms of section 109 of EqA? Specifically:

- a. if any such conduct was done by an employee of the respondent, was it done in the course of that employee's employment?
- b. if so, has the respondent shown that it took all reasonable steps to prevent that employee (i) from doing such conduct, or (ii) from doing anything of that description?

269. It is our judgment that the evidence clearly demonstrates that the actions of Mr Zurinskas in sharing the Facebook profile of the claimant, showing non-consensual indecent images of her to colleagues within and outwith the workplace amounted to conduct which was related to sex, and of a character which had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her in terms of section 26(1) of EqA. There is no doubt about the effect upon the claimant of this act. It caused her to be deeply distressed, to the extent that she had to leave the workplace and submit a complaint to her employer, having reported the matter immediately to her manager. We accepted the claimant's evidence that the effect of this was deepened in the context of what she had had to endure in the abusive relationship with her ex-partner, but whether the respondent was fully aware of that relationship or not, we are of the view that Mr Zurinskas' actions

amounted to harassment related to sex which had the prohibited effect of violating the claimant's dignity. In our judgment, this goes to the heart of the claimant's case: she could no longer contemplate working for the respondent because they had seen her in such compromised and humiliating images, without her consent, and because the respondent failed to take the matter sufficiently seriously to assure her of their support and protection.

270. We have also found that Mr Zurinkas approached the claimant and asked her two questions of a sexual nature, namely "are your boobs real?" and "how much for a night with you?". It would be difficult to imagine an approach more calculated to subject a colleague to sexual harassment than this one. The second question in particular implied that the claimant was or had been willing to engage in prostitution, which, whether the respondent was aware of her relationship history or not, was bound to violate her dignity and create a hostile, humiliating, degrading and offensive environment for her. His actions were indefensible. He was, in our judgment, guilty of conduct amounting to harassment under section 26 of the EqA.

271. We have found, in addition, that Mr Zurinkas laughed at the claimant when he made these comments, and that he followed her to the office where she made her complaint to Ms Walczyk, and that that conduct also amounted to harassment under section 26.

272. We have not found that Ms Walczyk laughed at the claimant, nor that in saying she could do nothing about the matter and sending her home she treated the claimant in such a way as to amount to harassment.

273. We are invited then to address the question of whether, as a result of the claimant's rejection of Mr Zurinkas' conduct, the respondent treated the claimant less favourably than they would have if she had not rejected the conduct. This is a much more difficult question to answer. There is no doubt that the claimant rejected Mr Zurinkas' conduct, both at the time and by reporting it to Ms Walczyk and subsequently to the customer complaints line. We have also found, under the section 13 claim, that the claimant was

treated less favourably on the grounds of sex in respect of these same allegations. We are not persuaded, however, that the respondent acted in such a way because, of itself, of her rejection of the conduct of Mr Zurinkas. The evidence does not allow for such a conclusion. We have
5 found that the respondent acted the way it did because it carried out an inadequate investigation, but we do not conclude, on what we have heard, that this means that the less favourable treatment was because the claimant had rejected the conduct of Mr Zurinkas. It is not clear that that was the case, and therefore we do not uphold this submission of the claimant.

10 274. However, we have upheld the first two issues in this section, under issues 9 and 10. We must therefore consider whether the respondent is liable for that conduct, and if so, whether they took all reasonable steps to avoid or prevent such an occurrence.

15 275. Our conclusion in relation to that question is the same as that set out above under direct discrimination. We consider that the respondent was vicariously liable for the actions of Mr Zurinkas amounting to harassment on the grounds of sex, and that they did not take reasonable steps to avoid or prevent such conduct taking place.

20 276. We therefore uphold the claimant's claim that the respondent subjected her to harassment on the grounds of sex under section 26 of EqA.

Sex Victimisation

14. Did the claimant do a protected act in terms of section 27 of EqA during a conversation on 14 February 2018?

25 **15. If so, did the respondent submit the claimant to a detriment because she did a protected act in terms of section 27(1) of EqA?**

16. The alleged detriments are as follows:

- a. Wioleta Wolczyk and Michael laughing at the claimant in response to the protected act;**

- b. Wioleta Wolczyk saying there was nothing she could do and sending the claimant home in response to the protected act;**
- c. the claimant being sent home in response to the protected act and thus losing out on a day's wage; and**
- d. the respondent dismissing the claimant on 9 March 2018.**

17. Is the respondent liable for any such detriments in terms of section 109 of EqA? Specifically:

- a. if any such detriments were done by an employee of the respondent, was it done in the course of that employee's employment?**
- b. if so, has the respondent shown that it took all reasonable steps to prevent that employee from subjecting the claimant to the detriments?**

277. The Tribunal must determine, firstly, whether the claimant did a "protected act" under section 27 of the EqA on 14 February 2019, in her conversation with Ms Walczyk.

278. A "protected act" has a number of meanings.

279. A protected act may be the bringing of proceedings under the EqA. That does not apply in this case.

280. It may be the giving of evidence or information in connection with proceedings under the EqA. Again, this does not apply here.

281. A protected act may be doing any other thing for the purposes of or in connection with the EqA, or making any allegation, whether or not express, that A or another person has contravened the Act.

282. What is alleged here to amount to a protected act is the conversation on 14 February 2018 with Ms Walczyk. The claim does not specify in any greater detail as to what it was in that conversation that could be said to

amount to a protected act. The respondent, helpfully, submitted that it should not be regarded as a protected act, primarily because the evidence did not support that assertion. In particular, they point to the evidence of Ms Walczyk that the claimant made no suggestion that discrimination, harassment or victimisation had taken place; and the evidence of the claimant herself when she did not appear to suggest that the conversation included an allegation that any person had contravened the terms of the Act, whether express or implied.

283. The claim itself is rather imprecise on what it was about the conversation on 14 February which amounted to a protected act. The further and better particulars presented by the claimant do not take matters much further (49) when the protected act is said to be that the claimant informed the manager on shift about the incident.

284. However, in our judgment, this is capable of fulfilling the definition of a protected act in terms of section 27. The claimant raised with her manager the fact that she was distressed due to having been told by Mr Paterson that Mr Zurinskas was sharing intimate photographs of her with his colleagues, and to having been approached by Mr Zurinskas asking questions of a sexual nature in reference to the photographs themselves, and laughing at her. Although she did not expressly mention that she was accusing any individual of having committed any kind of unlawful act under the provisions of the EqA, it is, in our judgment, quite clear that she was raising with her manager the fact that she had been distressed by actions amounting to harassment on the grounds of sex to which she had been made subject. Her manager was unaware of the implications of what she was being told, but that does not affect the question of whether or not this amounted to a protected act.

285. In our judgment, therefore, reporting the incident to Ms Walczyk amounted to a protected act under section 27.

286. The claimant then complains that she was subjected to a number of detriments as a result of having done the protected act.

287. The first detriment to which the claimant refers is that Ms Walczyk and Mr Zurinkas were laughing at her in response to the protected act. We are unable to sustain this allegation. We do not find that Ms Walczyk laughed at the claimant when this was reported to her. Mr Zurinkas was already laughing at the claimant, and not because, in our view, she did a protected act, but because he considered the finding and sharing of the photographs to be amusing, and worthy of mockery of the claimant.

288. We do not find that Ms Walczyk's reaction in saying she could do nothing and sending the claimant home amounted to a detriment as a result of the protected act. Ms Walczyk was perhaps naïve in her reaction but we do not consider that she acted detrimentally to the claimant in either of these aspects. It appears that she meant that she could do nothing about the photographs on the Facebook site, but that she should appeal to Facebook and to the police. While that was a frustrating reaction to the claimant because of her previous attempts to have the profile deleted, it was not a detrimental thing to say. Sending the claimant home was not detrimental either; it was, on one view, the act of a sympathetic manager who could see that the claimant was very distressed and unable to continue her shift. The fact that that meant that the claimant may have lost wages does not, in our judgment, amount to a detriment.

289. Finally, the claimant maintains that her dismissal was a detriment to her as a result of having done the protected act. In our judgment, there is no basis for this assertion. The claimant's dismissal, based on her resignation in response to a repudiatory breach of contract, did not arise because of the fact that she had done the protected act: it arose because of the inadequacy of the respondent's response to that. Of itself, there is no evidence to support or justify the claimant's claim that her dismissal was an act of victimisation.

290. Accordingly, we do not find that the claimant was subjected to detriments as a result of having done a protected act under section 27 of the EqA.

Detriment on grounds related to trade union membership or activities

18. Did the respondent subject the claimant to a detriment/detriments in terms of section 146(1) of TULRCA? The alleged detriments are:

- a. Lisa Palmer ripping up union forms and putting them in a bin;
- 5 b. Lisa Palmer taking staff meals away from employees in October 2017 and January 2018 (on each occasion for one month);
- c. Lisa Palmer starting to shout and saying that staff meals were not in the contract;
- d. the respondent sending the claimant a letter dated 5 February 10 2018 asking her to attend a disciplinary hearing on 8 December 2018;
- e. Lisa Palmer shouting at the claimant, asking the claimant why she was in work, and then shouting 'stop interrupting me you stupid bitch' to the claimant;
- 15 f. the respondent sending the claimant a 'letter of concern'; and/or
- g. the respondent inviting the claimant to a disciplinary meeting on 14 February 2018.
- h. the respondent dismissing the claimant on 9 March 2018.

19. If so, did the respondent subject the claimant to such detriments for the sole or main purpose of:

- a. preventing or deterring the claimant from being a member of an independent trade union at an appropriate time, or penalising her for doing so; and/or
- 20 b. preventing or deterring the claimant from taking part in the 25 activities of an independent trade union at an appropriate time, or penalising her for doing so?

291. The basis for the claimant's claim that she was subjected to detriments as a result of having been engaged in trade union activities is that following her joining the trade union, she sought to encourage others to join the union, and put materials in the staff office at the Livingston store; and that following that decision, management visited upon her a number of detriments which she attributes to their displeasure at her trade union involvement. The respondent resolutely denies this, and each witness specifically denied that they had had any concerns about the claimant's trade union activities.

292. It is important to recognise, before considering the alleged detriments, that the Tribunal must determine whether or not the respondent subjected the claimant to such detriments for the sole or main purpose of preventing or deterring the claimant from being a member of an independent trade union at an appropriate time, or penalising her for doing so, or preventing or deterring the claimant from taking part in the activities of an independent trade union at an appropriate time, or penalising her for doing so.

293. In this case, it is our view that the claimant's case is built upon the timing of the events which she regards as detriments, as happening following her joining the trade union. The detriments were, she maintained, related to her trade union activities.

294. While the claimant appeared to be quite convinced of this, we were not so persuaded. We came to the conclusion that while the claimant was suspicious of management in their attitude to her trade union activities, they were not the basis upon which the alleged detriments arose in this case.

295. Taking each alleged detriment in turn, then:

- We were not convinced that the evidence before us was sufficient for us to conclude that Ms Palmer ripped up union forms to put them in the bin. Ms Palmer's position was that she would tidy the office from time to time, and clear up loose papers on the floor. The claimant said that the papers involved were in fact packs of paper which would

be difficult to rip up, and therefore Ms Palmer's version of events could not be believed. In this instance, we were not persuaded that the evidence demonstrated exactly what had happened, and without a firm conclusion, we could not decide that this amounted to a detriment which to which the claimant was subjected.

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- We were not persuaded that the evidence demonstrated that the staff meals were taken away from employees for the whole months of October 2017 and January 2018. Indeed, the claimant's representative's position in submission was that the respondent had deprived staff of meals only for part of each month, as shown by their own records. The evidence on this from all of the witnesses was confused and unsatisfactory. There was some evidence that where there was a shortfall in the tills, staff meals could be removed, but only with the authority of head office; there was evidence that this was done by Ms Palmer as a punishment to staff; there was evidence that from time to time staff would simply choose not to take up their meal allowance in the interests of their own health. Our judgment was that it was clear that the allegation as presented to us was not proved: meals were not removed from staff for the whole of the month in either case, and the reason why it happened was entirely unclear on the contradictory and confused evidence before us. While that left us with some suspicions as to what had happened, we were unable to reach a firm conclusion that this amounted to the detriment alleged, nor that it was on the grounds of the claimant's trade union activities.

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- That Ms Palmer started to shout and say that staff meals were not in the contract does not persuade us that this was a detriment on the grounds of trade union activities. There was reference in the contract to staff meals, and accordingly, at the very least, she was mistaken. However, this behaviour appears to have been characteristic of Ms Palmer from time to time, and it is impossible for us to conclude that it happened on the basis of the claimant's trade union activities.

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- It is quite true that the respondent sent the claimant a letter dated 5 February 2018 inviting her to a disciplinary hearing. However, in our judgment that was not done because of the claimant's trade union activities, and we rejected this assertion.
- 5 • Ms Palmer conducted herself in a quite extraordinary manner when speaking to the claimant in person and to Mr McHugh by telephone. It did not appear to us, however, that this was because of the claimant's trade union involvement, but because Ms Palmer had become enraged in her conversation with the claimant, for reasons
10 which were not entirely clear but which in our view had nothing to do with her trade union activities. Ms Palmer did nothing to prevent the claimant from speaking to her trade union representative, and indeed spoke to him (or perhaps more accurately shouted at him) by telephone.
- 15 • The respondent sending the claimant a letter of concern and inviting her to a disciplinary meeting on 14 February 2018 were both actions which we accepted were carried out, but we were simply not persuaded that they had anything to do with the claimant's trade union activities. The respondent was entitled to seek to take action
20 against the claimant if they considered that her conduct required to be addressed. What concerned us, under the claim of direct discrimination, was the manner in which that was done when nothing was done in relation to Mr Zurinkas, but we were not convinced that the claimant was subjected to a detriment due to her trade union
25 activities in this regard.
- We accept the respondent's submission that under section 146(5A) of TULCRA the constructive dismissal cannot amount to an act of trade union detriment.

296. It is our judgment that the claimant was not therefore subjected to
30 detriments on the basis of her involvement in trade union activities, and this claim does not succeed.

Jurisdictional issue: time-bar

1. Are any of the claimant's complaints out of time?

2. If any complaints are out of time, do they form part of a continuing act, taken together with acts which are in time?

5 **3. If any of the claimant's complaints are out of time, should an extension of time be granted either on a 'just and equitable' basis or, as the case may be, a 'reasonably practicable' basis?**

297. We now seek to address the jurisdictional issue of time bar.

10 298. Firstly, are any of the claimant's complaints out of time? The claimant's position is that all of the claimant's claims are in time, other than the claim of trade union detriments. ACAS was contacted on 4 June 2018 (1), and an Early Conciliation Certificate was issued on 4 July 2018, with the claim being presented to the Tribunal on 3 August 2018. Parties are agreed that any claims relating to alleged unlawful conduct on or before 4 March 15 2018 may be time-barred.

20 299. It is correct, in our judgment, that the time limit for raising a claim in relation to any alleged discriminatory conduct which formed part of the constructive dismissal claim begins to run from the date of termination of employment, and not from the date of the repudiatory breach to which it refers.

25 300. In our judgment, the complaints which were made by the claimant under direct discrimination all formed part of the claimant's reason for resignation. The events on 14 February 2018 commenced a sequence of actions which culminated in the claimant's resignation on 9 March 2018, based both upon the acts themselves and the respondent's response to them. The claimant resigned because she considered that she could no longer return to the Livingston branch once her colleagues had seen her in compromising photographs, but the respondent did not properly investigate the matter, leading to her being treated less favourably than a male 30 comparator. That amounted, in our judgment, to a continuing series of acts

which led to the claimant's resignation, and accordingly the allegations under the direct discrimination claim were all critical to the finding that the claimant was constructively unfairly dismissed by the respondent on the grounds of her sex. It amounted to "an ongoing situation or a continuing state of affairs", in our judgment (per **Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**).

301. Although there were a number of individuals involved in the actions alleged to have amounted to direct discrimination, we were of the view that those events on 14 February 2018 were so closely linked together by the inadequate investigation and response by the respondent to those events that they were integral to the claimant's resignation, and thus to her claim of direct discrimination.

302. Accordingly, it is our judgment that the claimant's claim of direct discrimination was not presented out of time.

303. The claimant's claim of harassment centred on specific actions, all of which took place on 14 February 2018, namely the approach by Mr Zurinkas and the actions or omissions of Ms Walczyk. The claimant's constructive dismissal was not alleged to amount to an act of harassment, and accordingly, under this heading, the unlawful acts started and ended on 14 February 2018. That means that they were out of time, having taken place some 18 days prior to the date upon which any act would be said to be out of time in this case.

304. The respondent submitted that the Tribunal heard no evidence as to the explanation of the claimant as to why she did not present the claims for harassment within the statutory timescale, and therefore that the Tribunal can reach no proper conclusion as to whether or not they were presented within such a time as should be considered just and equitable.

305. The respondent also observes that the onus is upon the claimant to prove that it is just and equitable to extend time.

306. The respondent argues that the Tribunal should extend time, on the basis that the two critical factors in this case are the length of the delay and the absence of prejudice to the respondent by the length of the delay.

5 307. It is, in our judgment, just and equitable to allow the claim of harassment on the grounds of sex to proceed in this case. It is true that we heard little evidence about the claimant's precise reasoning for presenting the claim at the stage she did, but we did hear evidence of the impact of these events upon her, and it is relevant to consider that the claimant was aware that an investigation was being carried out by the respondent into the events of 14 February, albeit for a short period of time until she received the letter of 15 February, and that she was absent due to illness until the date when she resigned. The delay was not, in our view, significant, and it is perfectly clear to us that the respondent has not been inhibited in any way or prejudiced by that delay in the presentation of the evidence.

15 308. The reality is that the respondent always had to prepare to present evidence about the events of 14 February, as they were relevant to the direct discrimination claim, which is not time-barred. In these circumstances, it would be quite inequitable, in our judgment, to find that the Tribunal had jurisdiction to hear the claim of direct discrimination but not the claim of harassment when they arose out of the same facts and circumstances.

309. We are persuaded, therefore, that the Tribunal has jurisdiction to hear the claim of harassment under section 26 of the EqA.

25 310. It is our conclusion, accordingly, that the claimant's claims of direct discrimination on the grounds of sex under section 13 of the EqA and of harassment on the grounds of sex under section 26 of the EqA both succeed, and that the remaining claims fail, and are dismissed.

311. The case should now be appointed to a hearing on remedy on a date to be fixed by reference to the availability of the parties.

5 **Date of Judgement: 7th January 2020**
 Employment Judgement: M MacLeod
 Date Entered in Register: 10th January 2020
 And Copied to Parties

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