



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103833/2020**

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**Held in Glasgow on 20, 21, 22 September 2021; 28 February 2022; 1,2, 3, 4, 8  
and 9 March 2022**

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**Employment Judge L Doherty  
Members Mrs J Ward  
Mr A Grant**

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**Ms Carole Dearie**

**Claimant  
Represented by:  
Mr G Woolfson -  
Solicitor**

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**Board of Directors of St Mary's Kenmure**

**First Respondent  
Represented by:  
Mr K McGuire -  
Solicitor**

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**Angus Gillon**

**Second Respondent  
Represented by:  
Mr K McGuire -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Employment Tribunal is that:

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1. the claim of unfair dismissal is dismissed;
2. the claim of discrimination contrary to Section 13 of the Equality Act 2010 is dismissed; and
3. the claim of discrimination contrary to Section 26 of the Equality Act 2010 is dismissed.

**REASONS**

1. The claimant brings a complaint of unfair dismissal contrary to section 95(1) (c) of the Employment Rights Act 1996 ( the ERA) and of sex discrimination contrary to section 13 and section 26 of the Equality Act 2010 (the EQA) . All claims are resisted.
- 5 2. The final hearing was conducted in person over a period of 10 days. The claimant was represented by Mr Woolfson, solicitor, and the respondents by Mr Maguire, counsel.
3. It was established at the outset of the Hearing that remedy raises complex issues in particular around pension loss, and therefore it was agreed that the  
10 Hearing would be split into Merits and Remedy. This Hearing therefore only dealt with of Merits.
4. The claimant gave evidence on her own behalf, and evidence was given on her behalf by Willie McKeown, a former Depute Director of Care, with the first respondent.
- 15 5. For both the respondents' evidence was given by the second respondent, and by Bernie Sanderson, the first respondent's HR manager.
6. The parties produced a joint bundle of documents.
7. The issues were as follows.

### **Unfair Dismissal claim**

- 20 8. The first issue for the Tribunal was had the respondents breached the implied term of trust and confidence in the claimant's contract of employment? At the point of submissions, the breach was said to arise as a result of the following course of conduct:
  - 25 a. Failure on the part of the first respondents to take any steps to investigate the child protection allegation and progress this with the claimant
  - b. The failure to provide any support to the claimant, and

- c. Mrs Sanderson informing the Service manager of Dochas House that the claimant had decided to transfer staff to the secure Unit, which the Service Manager had raised as a concern with the claimant ( the final straw).
- 5 9. The claimant's position is that if the Tribunal is not satisfied that there was a last straw event, that she was in any event entitled to resign as a result of the breach alleged at (a).
- 10 10. There are a number of factual issues between the parties arising from the matters upon which the claimant relies in claiming fundamental breach of contract, which the Tribunal has to determine.
11. In the event that the Tribunal is satisfied that there was a fundamental breach of contract, it will require to consider whether the claimant resigned in response to that breach.

### **Sex discrimination claims**

- 15 12. There is a factual issue in relation to a number of the matters relied upon by the claimant in support of her sex discrimination claims.
13. The allegations made by the claimant are made both as allegations of direct sex discrimination and of harassment .
- 20 14. There is an issue of time bar, the claimant's position being that she was subject to a continuing act, the last act of which occurred on 16th March 2020, and therefore the claims are in time. The issue for the Tribunal is whether the claims which are presented out with the statutory limitation period, are part of a course of conduct, the last act(s) of which is in time.
- 25 15. If the Tribunal is satisfied that the claims are in time, it will have to consider whether the treatment complained of occurred and amounted to less favourable treatment under Section 13 than would have been accorded to an appropriate comparator. The claimant relies upon a hypothetical comparator in all instances, other than the instance of alleged discrimination on 16 March 2020, when the comparator is Mr McKeown. In connection with the section 26

claim in the event the Tribunal is satisfied that the conduct complained of occurred, it will have to determine whether this was conduct relating to the claimant's protected characteristic of sex, and whether it had had the proscribed effect under section 26.

5 **Findings in Fact**

16. The first respondent, St Mary's Kenmure (SMK), is responsible for the operation of a secure unit providing residential care and education for children going through the Courts or Children's Hearing system. SMK's staff regularly deal with difficult and challenging circumstances in the course of looking after  
10 young people in care. In 2020, it was intended that a non-residential Unit, Dochas House, would open. Staff were recruited to work in Dochas House in around the beginning of March 2020, however Dochas House has not opened.

17. SMK are part of an organisation by the name of the Cora Foundation, which  
15 comprises a number of sister (but separate) organisations providing residential services for young people. SMK is governed by a Board of Governors. The second respondent, Mr Gillon, is the Chair of the Board of Governors. Mr Gillon provides this service as a volunteer.

18. The Board are non-operational and are responsible for governance of the  
20 SMK. SMK have charitable status. They are regulated by the Care Inspectorate and The Scottish Social Services Council (SSSC).

19. SMK have the benefit of an HR adviser, and have a number of policies and procedures in place, including a Child Protection Policy; a Whistleblowing Policy; and SOPs.

25 20. The Child Protection Policy provides under the heading 'Procedure':

*"If any member of staff suspects that the abuse has happened, is happening, or is about to happen, contact should be made with the Unit Manager, Assistant Unit Manager Senior Practitioner, Deputy Head of Service (Care), the Head of Service or Deputy Head of Service ( Education). The CPC team*

*will discuss and allocate an investigating officer, who will undertake the role of following up on the concerns raised.”*

21. The policy provides that allegations of abuse made against members of staff will be taken seriously; there will be a preliminary consideration by the Head or Depute Head of Service, who will decide if further investigation is necessary. The staff member may be redeployed or suspended, and the Care Inspectorate and SSSC informed, while the investigation is carried out.
22. The policy makes provision for the procedure in the event there are allegations of abuse against the Head of Service. It provides:
- “In cases where the member of staff against whom the allegation is made is the Head of Service, Deputy Head of Service (Care), or the Deputy Head Service (Education) a report will be provided to the Chairman of the Board of Directors of St Mary’s Kenmure who will convene an extraordinary meeting within seventy two hours in order to investigate the allegation. In the intervening period, the Chairman may wish to make an interim decision to protect the interests of the young people and staff member involved.”*
23. The Policy provides that the Head of Service and Depute Head of Service are Child Protection Co-Ordinators, responsible to the Board.
24. The National Guidance for Child Protection in Scotland document, which is relevant to operational matters in SMK, contains a definition of child abuse, which includes a failure to report abuse.
25. SMK’s SOPs on Whistleblowing provides that all staff are covered by the policy; that all concerns of unlawful inappropriate conduct, or practices that harm or endanger young people fall within the remit of the policy; and that investigations will be conducted within a reasonable timescale, depending on the nature of the allegation.
26. The SOPs contain provision about how concerns should be raised. It states that any concerns should be raised in the first instance with the person’s line manager. It also provides that in circumstances where a person wishes to raise a concern out with SMK management structure they can write to the

Board of Directors, or raise their complaint with the school's official correspondent, McSparran McCormack solicitors.

27. The SOPs also provide that it will not be appropriate for the employees to raise concerns anonymously. It states; *anonymous reporting means these concerns cannot be properly checked or explored and tends to increase the possibility that the reports may be malicious.*
28. The claimant, whose date of birth is 11/06/1962, was employed by the respondents from 3/07/17 as the Director of Services, having overall operational responsibility for the running of SMK. She was assisted in this task by a senior management team (SMT) comprising of a Depute Director, Mr McKeown, and Depute Head of Care, Ms Anita McGeachie.
29. There were 4 residential Units in SMK, each headed by a Unit Manager, with approximately 120 staff in total.
30. The Secure Unit operates 24 hours a day, year round, with staff working shifts to cover this. SMK's administrative staff work Monday to Friday, as did the claimant, who also covered an on call session one weekend in 8.
31. In March 2020, two quite lengthy anonymous letters of complaint about the claimant, Mr McKeown and Ms McGeachie ( the SMT), postmarked 5 and 8 March 2020, were received by McSparran and McCormack solicitors, who act for SMK. Mr Frank McCornack of that firm was referred to as SMK's Company Secretary.
32. The complaint dated 8 March made a number of complaints about the claimant and the management team, alleging high levels of bullying and harassment. It was alleged that the SMT locked themselves in the claimant's office for hours on end, and embarrass and criticised staff constantly in public. It was alleged that the SMT started work late and finish early, with an example given of Christmas Eve.
33. It was said that staff were afraid to speak up in case they were targeted. It was said that decisions were made based on favouritism, and that 'everyone' felt on edge, scared and afraid to speak up for fear of repercussions.

34. It was alleged that there was poor communication and that staff were asked for their opinion, for that only to be dismissed and criticised, mostly publicly.
35. It was alleged that everything was hushed and covered up, so that what appears on the surface to be a happy environment, was in fact quite toxic and dangerous for staff and in turn young people.
36. It was alleged that there was no support given to staff, and that the SMT constantly undermined and mistreated staff affecting their physical and mental health.
37. It was said that the complaint was submitted anonymously on behalf of staff at SMK. It was also said that the authors of the complaint were fearful of repercussion.
38. The complaint dated 5 March began with the following statement:
- 'It is with deep regret and sadness that I feel I have to write to you under the whistleblowing policy but as this is in relation to the senior management team and staff are all afraid to speak up, this is the only way to bring this to light'.*
39. The letter listed a number of complaints which were similar to those identified in the letter of 8 March.
40. It was alleged that since the claimant had been in charge there was a change in management style and staff morale, and it was requested that the incidents identified were looked into.
41. It was alleged the claimant and Ms McGeachie were rarely in before 9am and regularly left before 5pm, leaving lower-level staff to manage whatever happened, and that these staff were then punished if they make a wrong decision.
42. It was alleged that it was a regular occurrence for the SMT to have three hours in the morning and three hours in the afternoon the claimant's office, and that it seemed that nothing came from these meetings.

43. It was alleged on a Friday normally the SMT leave work by 3.30pm, and that on Christmas Eve they all left early, leaving the rest of the staff to work their normal shift.
44. It was alleged that the claimant had a management style which left staff worried about being fired, suspended or punished for getting something wrong, but no support or training was offered.
45. It was alleged that Unit Managers are punished on a regular basis, and that staff are then scared to do anything for fear of getting into trouble.
46. It was alleged that Unit Managers who had worked for a long time were looking for new jobs, because they were worried about being suspended for doing something wrong, that they did not know what was right and what was wrong, because of the mixed messages they got from the claimant who was erratic, and that there was no guidance from senior management.
47. It was alleged that the claimant's mood swings were becoming more obvious and that her irrational behaviour was going to bring the organisation into disrepute. It was alleged she was unprofessional in her behaviour and her language, and that she had an knee jerk reaction to everything she did not like, and that her need to stop anything negative getting to the Board was obvious to all levels of staff. It was alleged that the claimant regularly had Control staff move the cars in the car park if they were slightly over the white lines in the car park.
48. It was also asserted that staff had stopped applying for jobs within the organisation as they were already earmarked for whoever was in the claimant's favour.
49. The complaint went on conclude as follows:
- “Willie and Anita not blameless, they see what is going on but they just do Carole's bidding, hiding things under the carpet whether it be a child protection issue or staff not doing their job which could have caused a child to die and not taking any action.*



*The list goes on and this is only a small sample of what is happening and I believe what is being kept from the Board.*

*I am bringing this to you but if you don't feel there is enough evidence to take any action I will send this to the care inspected and the SSSC to see if it raises concerns with them.*

*I know a number of staff and managers have been to HR to understand better what rights they have so HR could back up my claims.*

*I hope you will be able to do something to make things better as staff morale is at an all-time low and is only a matter of time before something very serious happens.”*

50. The letter purported to be signed for and on behalf of the staff of SMK.

51. The letters were passed by Mr Frank McCormack to Mr Gillon at some point prior to 16 March.

52. Mr Gillon did not think that the complaints were meritorious. He considered that they were likely to have been made by disgruntled members of staff who did not like the claimant's management style. At this stage he held the claimant in very high esteem and wanted her to defeat the allegations. He did not think that the complaint letter of 5 March raised a child protection complaint, as he considered it lacked any specificity. He viewed it as a 'through away remark', which was there as 'padding' to the complaint about the claimant's management style. He considered that it was completely lacking in specification and was not capable of being investigated.

53. Mr Gillon considered that the best way forward was to conduct a staff satisfaction survey or review, which might identify if there was anything in the complaints or not. He considered that this should be done by an external agency; the results of the survey would be reported to the Board and the outcome of the Survey could be circulated to staff so that it was made clear that the matter had been investigated. Mr Gillon made the decision to proceed in this manner over the weekend before Monday 16 March 2020.

54. The claimant was on annual leave until Monday 16 March.
55. The claimant at this stage was experiencing a number of difficulties in her personal life, which she had made Mr Gillon aware of. Mr Gillon had agreed that the claimant could work flexible hours, if she needed to, in order to help  
5 with the difficulties she was experiencing.
56. A Board meeting took place on 16 March at which the claimant and Mr McKeown were in attendance. The letters of complaint were not circulated to the Board at that stage, but the claimant and Mr McKeown were asked to remain behind after the Board meeting, when Mr Gillon and Mr McCormack  
10 met with them both.
57. Mr Gillon said that it was very difficult for him to do this but that he had received anonymous letters of complaint. The claimant and Mr McKeown were given copies of the letters of complaint.
58. Both the claimant and Mr McKeown were shocked and upset at the content  
15 of the complaints. The claimant became very distraught and began cry when she read the letters. Mr Gillon, who knew about the claimant's personal difficulties, was concerned that the complaints would 'tip her over the edge'. When the claimant started to cry, Mr Gillon said words to the effect '*I told Frank (McCormack) she would have a meltdown*'.
- 20 59. There was a discussion about who could have could have made the allegations; the claimant said she had an idea of who it could be, but was advised by Mr McCormack not to try to work out who had made the complaints.
60. Mr Gillon told the claimant and Mr McKeown that it was intended to carry out  
25 a staff satisfaction survey or review. The claimant accepted that this is how the Board were going to proceed. She was encouraged by Mr McCormack not to do anything rash.
61. Mr Gillon was very supportive of the claimant and keen that the claimant 'fight  
30 back' against the allegations, and he suggested to the her that she write a report with a response to the complaints. He suggested that she outline that

she had personal difficulties a result of which it had been agreed that she could work flexibly, and that much of her time would have been taken up preparing Tender documents, which would explain the length of the meetings. He believed that if this information was shared by the claimant it might bring staff on board with her, and he expressed that view to her.

62. Mr Gillon met the claimant privately in her office immediately after the meeting with Mr McCormack, and reiterated his view that she might respond to the allegations by providing information about her having flexible working due to her personal circumstances, and the amount of time she would need to prepare Tender documents in order to keep employees in work. The claimant said to Mr Gillon in the course of that conversation that he could suspend her, but Mr Gillon told her that would not be necessary.

63. On 17 March at 11.56 Mr Gillon emailed Mrs Sanderson, copying the claimant and Mr McKeown (page 105) as follows:

*'Further to our telephone conversation this morning, I need your assistance.*

*I have received from McSparran McCormick two letters of a 'whistleblowing' nature, neither are signed, and in my opinion seem to have a high degree of similarity in their composition. The Board wishes to act on these letters and wish you to approach an outside agency to carry out a 'Staff satisfaction review', for lack of a better title. I would anticipate the content of these letters would allow questions to be posed in a manner to draw out comment for all staff, it should refer to the Director of Service and Deputy Directors where necessary. As I understand the phrase 'senior management team' within the building will include the Unit managers and Assistant Managers.*

*To this end I have said to Carol and Willie at last night's Board meeting, that you need to be allowed to operate this enquiry without any chance of being accused of colluding with the Director of Services and/or both Deputes. Therefore, I have asked them to avoid any unnecessary discussion in this regard with you'.*

64. The claimant received this email.

65. The claimant decided to resign. She emailed Mr Gillon on the 17 March at 14.58 with her resignation, and she also sent him a letter on the same date giving him her decision.

66. The claimant's letter of resignation stated *inter alia*:

5 *"It is with the deepest regret that I tendering my resignation. I will be pursuing the early retirement route.*

*Following last night's meeting my position as Director SMK has without doubt become untenable. I will not and cannot accept the allegations aimed against me and although you intend to investigate this through a staff consultancy/survey it is nonetheless a personal and damning complaint that*  
10 *brings my professional integrity into question.*

*I have given almost 30 years to residential and secure care and it is since my time here at SMK that my unblemished record is in jeopardy. Back in January 2019, I was humiliated at a board meeting for giving in an unsatisfactory*  
15 *farewell speech to (the Head of Education) and this was raised and minuted at a Board Meeting. I recall vividly the embarrassment I felt at the time so to stand accused of doing this to staff is quite simply astonishing. I have never, ever publicly embarrassed any staff I have worked with. Although a difficult time for me, and my relationship with the Board I brushed it off and moved*  
20 *on but these allegations are not so easy to dismiss.*

...

*I know that you probably do not appreciate that when you asked me last night if I had thought of sharing some of my personal difficulties I was going through*  
25 *was for me an inference that this would help explain the vile allegation that my behaviour had been irrational, reactive and unprofessional. I have never conducted myself in this way. Yes, I am a strong-minded woman with a passion for doing the best for my kids but never have I behaved in this manner. To know that there are staff within SMK who have alleged this makes my position quite impossible. To justify my time arrival what time leaving, who*  
30 *I had lunch with, is quite frankly absurd. I work in excess of 50 hours per week*

*and have done so since taking up the post. I always saw it as part of what I do my work ethic and approach never abated over this time.*

...

*I thank you and all the opportunities you have given the and wish SMK for all the best for the future.”*

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67. The claimant resigned with three months' notice.

68. On 18 March Mr Frank McCormack emailed the Board members, copying the anonymous letters of complaint and advising of the claimants resignation. His email (page 227) headed 'whistleblowing', states *inter alia*:

10 *“Having taken advice we decided ( Angus and I) that the only way to deal with this was to give the copies of these letters to Carole and Willie and for us (Angus and I) to make no comment other than in general terms to indicate that Angus had been thinking long and hard all weekend and had decided that he would bring in, through HR, an outside agency to carry out a ‘Staff satisfaction review’.*

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*Carol was extremely distraught.*

*Willie was very angry and, along with Carol were extremely concerned about who may have written these letters and also what could be done about them.*

*We were firmly of the view that given that these had been under the ‘whistleblowing criteria’, the issues had to be investigated and commented on and that every opportunity would be given to Carol and Willie to answer these points and to refute and comment on what had been stated.*

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*We made it clear as we possibly could that any kneejerk from either of them would not be of the benefit to anyone within SMK.*

*It was also indicated that the outcome of the staff satisfaction review would be circulated to staff so that it was made clear to the staff that matters have been investigated and concluded.*

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*I want to stress that at no time did we comment at all on the allegations other than that they had to be investigated appropriately and that if resignation took place immediately it would be a self-fulfilling conclusion from the whistleblowers that what they had said was correct.*

5 *We impressed heavily on Carol not to do anything rash etc.”*

69. The email then went on to advise that the Claimant has resigned.

70. Mr Gillon did not want the claimant to resign. He thought highly of her at that time and considered that she should defend herself against the allegations. He had a lengthy telephone conversation with the claimant on the 18 of March where he sought to persuade her to change her mind about retiring, and to respond to the allegations. He again asked her to write a response to the allegations The claimant was hesitant about sharing any of her personal business with staff. Mr Gillon suggested to her that the organisation been *rugged* by the complaints and that if she did not stand and fight the allegations, her name could be blackened. He told her that the investigation would commence without delay, and that he had asked Bernie on the 17<sup>th</sup> of March to get it started.

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71. The claimant indicated that she needed to reflect on matters.

72. The claimant emailed Mr Gillon on the 18th of March at 13.51 stating:

20 *“I have reflected on your proposal and disgusted with Willie and Anita as it would directly affect them.*

*To issue a copy of the complaint could cause all of us reputational damage as staff would come to know the allegations directed against us. We are also concerned that a copy could be shared outside SMK and damage the organisation’s reputation. However we are open to further dialogue to bring this to a more satisfactory conclusion for us but if there are no other options we will revert to the original plan and that is to allow the outside agency to conduct its investigation and present the findings to board.*

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*As I stated to you Angus, the impact this malicious complaint has had and is significant to say the least and will not settle for anything more than having our voices heard and these allegations totally refuted. We are working on our response to the complaint will send to you once it is completed.”*

- 5 73. On 19 March the claimant decided to withdraw her resignation, She emailed Mr Gillon at 16.29 stating:

*“Following on from our lengthy discussions yesterday I have decided to do as requested and to temporarily suspend my resignation.*

10 *I have informed Bernie at this stage not to progress with my pension drawdown. During this conversation Bernie ‘slipped up’ that she had advised the people to go to the board. I had no idea that this was the case and although she had every right to give advice to anyone and do so confidentially, I am dismayed as to why the process such as mediation et cetera was not put forward as per our policy. To elevate this straight to the Board has left me*  
15 *concerned. For us to be offered no protection leaves us isolated and unsupported. I believe I have a very strong relationship with Bernie but this has blindsided me.*

*I must stress that I did not encourage the conversation and changed it to strategy for virus planning, but she’s clearly upset that one of the complaints*  
20 *states that HR can support claims and feels she has been ‘thrown under the bus’.*

*I asked again this matter be resolved as a matter of urgency. As I advised you yesterday Willie and Anita are now both looking to resign from their posts and this adds even more to the urgency to the matter.’*

- 25 74. In addition to this email, the claimant sent Mr Gillon a letter on 19 March retracting resignation. In that letter she stated:

*“Following lengthy discussions with yourself, as requested by you, I have decided to temporarily suspend my letter of resignation. I do so on the basis that the allegations against me be investigated speedily and the matter*

*brought to a satisfactory conclusion. I am resolute in my determination to refute all the allegations laid out against me as is Anita, and Willie.*

*Given that I cannot discuss this with Bernie, understandably, I have no idea how things are progressing and I am concerned that this becomes a protracted process. As explained to you in my resignation letter and our discussions, I strongly feel that my position has become untenable. I need to do to be able to do the role the Board are not only paying me for but rightly expect of me and there is a feeling between all of us involved in the allegations that we are doing our job with shackles on our hands with fear of further allegations. This cannot continue for any longer than is necessary to get through it.*

*The allegation that a child could die because of us is horrifying to say the least and I hope you understand and appreciate the impact this has had on us.”*

75. The claimant did not provide a response to the allegations as requested by Mr Gillon and referred to in her email of 18 March.
76. Mrs Sanderson was charged with organising the staff survey. She contracted two external companies who deal with staff surveys, but was unable to obtain a response.
77. National lockdown was announced on 23 March 2020.
78. Mr McKeown resigned on 23 March 2020.
79. In view of the fact that she was unable to engage an external agency, Mrs Sanderson decided she would prepare the staff survey herself. The survey did not contain any questions about child protection issues, but it did contain a section where staff could include whatever they considered relevant.
80. SMK remained open during lockdown, as it was the secure unit, and it still required to be staffed on a 24-hour seven day a week basis.
81. By 23 March 2020 Dochas House had not opened, but staff had been recruited to work there in early March. There were discussions involving the claimant about transferring staff from Dochas house to the Secure Unit to



avoid having to dismiss them, but no final decision had been made about the transfer.

82. The decision as to the transfer of these staff ultimately rested with the claimant as the Director of Service. Mrs Sanderson had no decision-making role. She met with Faith Watson, the Service manager of Dochas House to explain the proposal that staff recruited for Duchess house would be seconded to SMK, in order to avoid them being made redundant. In her discussions with Faith Watson, Mrs Sanderson indicated that the claimant was the decision maker on staff transferring from Dochas House to SMK.
83. On 25 March Ms Watson approached the claimant with concerns about staff transferring from Dochas House to SMK and told her that Bernie Sanderson said this was going to happen. The claimant gave her an assurance that she had made no decision about transferring the staff.
84. On 25th of March the claimant resigned. Her letter of resignation states:
- “Today it has been brought to my attention that Bernie Sanderson is most likely one of the authors of the complaints. For her to have anything to do with the investigation can only be prejudicial towards the 3 of us. I know you made a comment during one of the conversations with me that you weren’t sure ‘why there was a distance between you and Bernie’. I couldn’t answer it then, and I cannot answer it now as I have no idea except to say it was her car that was asked to be moved, following your instructions to me, and she has been named as someone in the complaint who can back up the claims.*
- I believe without a shadow of a doubt that the 2 Unit Managers have written the other complaint and they transferred from a sister organisation some time ago and one was seconded some time ago to SMK under a dark cloud following allegations against the Head of Service and a deputy head of service!!! I have taken advice and I am awaiting confirmation that they are unlikely to be protected under the whistleblowing legislation / policy due to the malicious content of the complaint. Regardless of this, if they are or are not, the situation has just continued to become untenable for me.*

Finally, I had a meeting today with the Service Manager from Dochas House who asked me to clarify some of the significant operational decisions that Bernie had made regarding her staff during this pandemic. Made in isolation of any discussion with myself or any senior managers i.e. Willie or Anita I may add. I had no idea she what she was talking about and she informed me that Bernie has told her I have made the decisions and that is why she came to me for clarification. Decisions I may add that would have undoubtedly had a serious backlash for me and would have strengthened any allegations that I am irrational and erratic, and therefore I am even more vulnerable remaining at SMK. I need to protect myself as nothing has progressed since last Monday in respect of the allegations and no supports are being put in place. As you know the impact of losing Willie has had a profound effect on myself and Anita but this good man has been downtrodden since getting accused of the allegations against us. I received a call yesterday from an outside agency stating they were devastated to hear I have resigned!!! I know who I told this to and even my right to confidential has been breached.

*I am reinstating resignation, and my final working day will be Sunday, 20 June 2020. This is my final decision. Enough Angus!!”*

85. The claimant’s resignation was accepted.

20 86. The staff survey was issued on 27 March.

87. Mr Gillon wrote to the claimant on 27 March advising that the survey had been sent out. The final paragraph of his letter to her advised that the SMK had an Employee Assistance Programme and provided details of a BUPA employee assistance line she could contact.

## 25 **Sex discrimination complaints**

*March 2018*

88. The claimant had issues with the Head of Education at SMK and had what she described as a contentious relationship with him. She discussed her issue with him from time to time with Mr Gillon, and Mr Gillon was aware of these. There was a discussion at some point in March 2018 about the Head of

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Education between the claimant and Mr Gillon. Mr McKeown was also present. The claimant and Mr Gillon did not agree on the approach to take to deal with the employee, Mr Gillon advocating a less formal approach, and the claimant wanted to have a more formal meeting with him. In the course of this discussion Mr Gillon said to the claimant that she was like a female dictator. The claimant left the room to draw breath after this comment was made. After the claimant left the room, Mr Gillon asked Mr McKeown if he thought she was coping. Mr Gillon later telephoned the claimant to apologise.

*July 2018*

89. In July 2018 the claimant had concerns about an employee accessing records in the light of the historical child abuse enquiry, and she raised these with Mr Gillon. The issues were also taken to the Board, and steps were taken in response to the concerns raised.

*January/February 2019*

90. At some point between January 2019 February 2019 the claimant attended a Board meeting chaired by Mr Farrell, one of the Board members. Mr Gillon was on holiday and was not present at the meeting. The claimant had given a speech at the Head of Education's retirement event. Mr Farrell did not consider the speech had been gracious. Towards the end of the Board meeting, when asked if there was any other business, he raised this, and his comments about the claimant's speech were minuted as part of the minute of the meeting. The claimant was upset and offended by Mr Farrell's comments.

91. Mr McKeown telephoned Mr Gillon to indicated he did not think that Mr Farrell's behaviour was appropriate. The claimant also contacted Mr Gillon and asked that the minute of the meeting containing Mr Farrell's comments about her speech was expunged. Mr Gillon did not agree that this should be done; he considered that the minute of the meeting was simply was that, and he suggested to the claimant that she was being overly sensitive about the matter.

*April 2019*

92. In April 2019 the claimant brought to Mr Gillon's attention the fact that two members of staff who did not work for SMK , and who worked for a sister but separate organisation, were being paid through SMK. Mr Gillon investigated this. He also considered the arrangement to be an irregular one. His investigations revealed that this was an arrangement put in place by a predecessor, which he would not have made, but which he concluded he could not now change.

#### *February 2020*

93. In February 2020 the claimant, Mr Gillon, Mr McKeown and Ms McGeachie had a meeting at which it was suggested by the SMT that there could be difficulty in staff working between sister organisations within Cora. Mr Gillon became agitated and frustrated in the course of the meeting, and his demeanour became aggressive, suggesting that staff could be told that they were free to leave at any time. In the course of that meeting he said to the members of the SMT words along the lines of: *'Yous need to get the gloves off and stop nursemaiding the staff.'*

#### **Note on Evidence**

94. There were a number of areas of dispute which the Tribunal had to resolve, and which are dealt with below.

95. Unfortunately the Tribunal did not always form a favourable impression of the credibility and reliability of the witness evidence.

96. Mr Woolfson made extensive submissions on the reliability of Mr Gillon. He cited the following in support of his proposition that Mr Gillon was not a reliable witness:

- a. His reluctance to accept that the document produced in the joint Bundle was the Child Protection Policy, contrasted with his subsequent acknowledge that the policies and procedures of SMK are approved and read by the Board.

- 5 b. The inconsistency in his evidence as to when he decided to carry out a staff survey, and his acceptance on being referred to Mr McCormick email (page 234), that he had done this prior to the Board meeting of 16 March. Mr Woolfson also referred to the fact that Mr Gillon apologised and stated that he lacked memory from two years ago.
- c. Mr Gillon 's response as to the reason for having a staff survey, and what is said to be an inconsistency in his evidence between lockdown being a reason for the survey, and the fact that he simply made the decision to proceed in this way.
- 10 d. Mr Gillon's admission that it was possible that the claimant had asked him to suspend her.
- e. Mr Gillon's evidence that he had plenty of conversations with the claimant between 19 and 25, March and therefore she had support, in contrast with his evidence and cross-examination to the effect that he could not honestly say when every conversation took place.
- 15 f. Mr Gillon's acceptance that he was not qualified to decide if the allegation had any substance, in contrast to his evidence shortly after to the effect that he had no doubt in his mind that the claimant would not do anything to expose a child to harm.
- 20 g. Mr Gillon's evidence that he believed he was being given malicious information (in the complaints), contrasted with his acceptance that he could not know if the information was malicious, contrasted again with his evidence that he believed the information was 'malicious mischief'.
- 25 h. Mr Gillon's evidence to the effect that the claimant was not *overly comfortable* at the meeting on 16th March, and the fact that he suggested that his statement to the effect that he had told Frank the claimant would have a meltdown, corroborated that she was distraught. Mr Woolfson suggested that this showed an inconsistency in his position.

5 i. Mr Gillon's response during cross-examination that the complaints did not fall within the ambit of the Whistleblowing policy because they are anonymous, in contrast to his response when taken the email from Mr McCormick's at page 232 to the effect that the complaints met the criteria for the policy, when he responded that he *"assumed the lawyer checked it out.. If you say so."* This was despite the fact that Mr Gillon had the email at the time

10 j. Mr Gillon in his evidence in chief was able to recall the meeting of March 2018 in order to explain the context in relation to the Head of Education, and that he then appeared to have no recollection of meeting during cross examination.

15 97. Mr Woolfson also submitted that the Tribunal was entitled to have regard to the manner in which Mr Gillon provided his evidence. He referred in particular to his evidence in chief when Mr Gillon stated, in response to questions as to whether he had responded to the claimant in a volatile manner in April 2019, that he did not agree it was in his nature to be volatile. Mr Woolfson submitted that in cross examination about events in July 2018 Mr Gillon's manner changed. Mr Gillon had suggested in response to a question that he thought he was about the accused of something: then apologising, saying it was  
20 instinct. Mr Woolfson also referred to Mr Gillon's answer in cross-examination to the effect; *'that's ridiculous sir'*, and his response to the suggestion that CCTV footage was checked to investigate the child protection allegation, which was; *'Don't be ridiculous man'*.

25 98. Mr Wilson also referred to Mr Gillon's comment in response to his suggestion that Mr McCormick's email at page 230 did not state that there was a lack of information which meant the child protection allegation could not be investigated: *'He doesn't say a lot of things. He doesn't say the football scores from the week before.'*

30 99. Mr Woolfson submitted that the manner in which Mr Gillon gave evidence was relevant because he was disputing the claimant's account of how he behaved in certain meetings and discussions and using language attributed to him by

the claimant. He submitted that the Tribunal, in assessing the evidence as a whole both in relation to constructive dismissal and sex discrimination, was entitled to have regard to how Mr Gillon presented when giving his evidence.

- 5 100. The Tribunal agreed with Mr Woolfson that there were some issues with reliability in relation to Mr Gillon's evidence. The Tribunal was satisfied that some of those issues were explained by the passage of time, for example his inability to recall events with clarity from 2018/19, or his recall of the time line of events being diminished by a passage of two years.
- 10 101. Some of the matters which Mr Woolfson relied upon in terms of Mr Gillon's reliability where relatively uncontentious, albeit they did reflect to a degree on Mr Gillon reliability. Mr Gillon accepted that he had made the decision to conduct a staff satisfaction survey prior to the Board meeting on 16th March when he was taken to the relevant email, and this was not a material factor in contention. Similarly, it was not suggested by Mr Gillon that the reason why he decided to conduct the staff satisfaction survey was connected to the Covid lockdown.
- 15 102. It was not suggested by the respondents that Mr Gillon had had multiple conversations with the claimant between 19 and 25 March, and the Tribunal formed the view that his suggestion in evidence that had had 'plenty' was likely to be an exaggeration reflecting his view of the extent of the conversations he had had with the claimant prior to the 19th March.
- 20 103. Mr Gillon's view that the complaints about the claimant where malicious, while acknowledging that he was not qualified to decide himself whether an allegation had substance, and he did not have information to support his view that the complaints were malicious mischief, reflected in the Tribunal's view his high regard for the claimant at that time, even although he may no longer hold that view of the claimant now. In general terms, taking such a position may have opened Mr Gillon to criticism from a regulatory or governance point of view, but the Tribunal did not consider this point materially affected his reliability, or indeed the credibility of Mr Gillon's evidence. Mr Gillon may have
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been open to criticism for approaching matters in this way, but that itself did not impact adversely on his credibility or reliability.

104. In assessing the credibility of Mr Gillon, the Tribunal attached weight to the fact that he was prepared to make appropriate concessions, which were on the face of it were contrary to his interests. An example of this is that Mr Gillon accepted the comment attributed to him about the claimant having a meltdown at the meeting of 16th March. Furthermore, this was not the only concession which Mr Gillon made. It was put to him by Mr Woolfson that at the meeting in February 2020 he told the claimant not to “*namby pamby*” the staff. Mr Gillon denied saying this, saying it was not language he would use. He went on to say about that he may have used the term nurse maid. The fact that Mr Gillon was prepared to concede this tended to supported his credibility generally, as he was prepared to make a concession about his language which was arguably on the face of it more damaging to him (as Mr Woolfson subsequently submitted) than that which was attributed to him.

105. Similarly, Mr Gillon was prepared to make a concession to the effect that it was possible that the claimant had mentioned suspension when he met with the privately of 16 March. The claimant’s evidence on this point was not, as submitted by Mr Woolfson that she had asked Mr Gillon to suspend her, but rather she had said to him that he could suspend her, and he had told her this was not necessary. The fact that Mr Gillon was prepared to admit of the possibility that suspension had been mentioned by the claimant, again supported the credibility of his evidence generally.

106. The Tribunal was persuaded that this exchange occurred, but was not satisfied for reasons which are going into more fully below that it was said in the context that the claimant said she should be suspended in order for the respondents to carry out a Child Protection investigation, as appeared to be suggested in the claimants submissions.

107. The Tribunal did form the impression that Mr Gillon gave his evidence from time to time in a volatile manner, and on occasion with a degree of anger or hostility. This did tend to support the position that Mr Gillon would have



behaved in this manner on occasion in the workplace, and indeed the Tribunal has made findings to that effect in connection with the meeting of February 2020. In assessing Mr Gillon's evidence overall the tribunal took the manner in which he gave evidence into account, however this was one part of a larger analysis of the evidence which included an analysis of the oral evidence given by the witnesses, and the contemporaneous documentation which the Tribunal had before it, and the Tribunal gave a considerable degree of weight to both these elements in reaching its conclusions about credibility and reliability.

10 108. The Tribunal formed the view that in Ms Sanderson's evidence, in so far as it was material, was reasonably credible and reliable. The Tribunal did not hear from the manager of Dochas House, Ms Watson, but it concluded that she had been told by Ms Sanderson that a decision had been made to transfer staff from Dochas House to SMK, and that the claimant was the decision maker.

15 109. The Tribunal formed the impression that the claimant's evidence lacked credibility on the material points of what she said in the meeting of 16 March, and in discussion with Mr Gillon on 18 March with regard to a child protection investigation or an investigation with child protection at its core. The claimant's position that she insisted that there had to be an investigation with child protection at its core, was incredible for reasons which are gone into more fully below. The fact that the claimant's evidence was incredible on this material point, undermined her credibility generally in the Tribunal's view. The Tribunal's impression was fortified in that the claimant referred in her evidence on more than one occasion to the complaints about her management of staff, time keeping etc being the 'trivial' or unimportant parts of the complaint, (in connection with what Mr Gillon asked her to write a report about) and sought to create the impression that an investigation with a child protection allegation at its core, was the most significant issue for her arising out of the anonymous complaints. This is reflected in the first part of paragraph 16 of the paper apart to the ET1. An objective reading of her contemporaneous correspondence however, including both her letters of

resignation, reflect concerns about the criticism of the claimant's management style, and the fact that this criticism had been made by unidentified employees who continued to work for the organisation, rather than anything arising from the lack of an investigation into a child protection allegation. The dichotomy between the claimant's position at the tribunal about the significance to her of an investigation with child protection at its core, and the terms of her contemporaneous correspondence was unexplained by the claimant, and impacted adversely on the Tribunal's assessment of the claimant's credibility generally.

10 110. In its assessment of credibility, the Tribunal take into account Mr Maguire's submissions about the relevance of the fact that the claimant had accepted that she lied to Mr Gillon about preparing a report in her email of 18th March. The fact that the claimant misled or lied to Mr Gillon is an adminicle of evidence to which the Tribunal had regard in assessing her credibility, but  
15 was not of itself determinative in informing the Tribunal's impression of the claimant's credibility.

111. Mr McKeown's evidence mirrored that of the claimant to a considerable degree, which impacted to a degree on his credibility on a couple of matters, albeit not on all aspects of his evidence, and to the extent that it was relevant,  
20 the Tribunal accepted much of his evidence. However, Mr McKeown's corroboration of the claimant's statement at the meeting of 16 March about there having to be an investigation with child protection at its core was rendered incredible in light factors gone into more fully bellow.

#### *Meeting on 16 March*

25 112. One of the areas of dispute was what was said at the of the 16th of March about an investigation with child protection at its core.

113. It was not in dispute that the claimant was told that a staff satisfaction survey or review involving an outside agency was to be instructed .The claimant accepted she was told this in cross examination and that she agreed to that,  
30 and this is consistent with the email she received on the 17 March, and her first resignation email of 17 March.

114. Mr Gillon's evidence in cross examination was that he did not recall child protection being at the centre of an investigation, being discussed at the meeting on 16 March.
115. When put to him in cross examination he said that the claimant said that an external agency should be involved, but he said that 'may very well have been the case' but he did not remember that specific form of words. It was the respondent's position in any event that they were going to involve an external agency.
116. The claimant's evidence was that in the course of the meeting of 16 March that she told Mr Gillon and Mr McCormack that there had had to be an investigation with child protection at its core. This was corroborated by Mr McKeown.
117. The Tribunal rejected this evidence. In reaching its conclusion on this point the Tribunal attached weight to the fact that the claimant's contemporaneous correspondence makes no reference to her insistence, or request, or even that she had raised, that the respondents should carry out an investigation with child protection at its core. This is despite Mr Woolfson submitting that the reason why the claimant resigned on the 17 of March was because she became concerned that the respondents would not carry out an investigation with child protection at its core, having seen Mr Gillon's email to Ms Sanderson of 17 March. It was unexplained by the claimant why her resignation letter of 17 March was framed in the terms set out above in the Findings in Fact, had she resigned because, having told the respondents that there had to be a an investigation with child protection at its core, was she becoming concerned that they would not carry out such an investigation..
118. Rather, the claimant's stated position in that letter of resignation of 17 March is that she will not accept the allegations aimed against her, and *although* the respondents intended to investigate this through a staff survey, it was nonetheless a personal and damning complaint which brought her personal integrity into question. She goes on later in the letter "...to know that the staff within SMK who have alleged this makes my position quite impossible...".

119. The terms of this correspondence suggests that the claimant's concern is about the fact complaints had been raised by staff at SMK, rather than that child protection was not at the core of the respondents investigation. This does not support the factual conclusion that the claimant said there had to be an investigation with child protection at its core on the 16 of March.
120. The Tribunal also attached weight to the claimant's email of 18th March (page 200), in which she states that to issue a copy of the complaint would cause her reputational damage as all staff will come to know the allegations against her. She also expressed concern that a copy could be shared outside SMK and damage the reputation of the organisation. She stated that she was open to "*further dialogue to bring about a more satisfactory conclusion to us*" (i.e. the claimant, Willie and Anita), but if there was "*no other option she would revert to the original plan*" which is to allow the outside agency to conduct an investigation and present its findings to the board.
121. The terms and tone of this email, are inconsistent with the claimant having made her position clear of 16 March that there should be an external investigation with child protection at its core. Rather the claimant is stating that she would be open to '*dialogue*' to bring about a more satisfactory conclusion to her, and although she agreed to '*the original plan*' to allow an outside agency to conduct its investigation this is presented as an alternative to '*a more satisfactory conclusion*' to her.
122. Further the '*original plan*', which the claimant was prepared to agree to, could only have been the instruction of an external agency to carry out a staff survey, as there was no other plan.
123. The Tribunal's conclusion that the claimant did not indicate that there should be an investigation with child protection at its core is also supported by the terms of the contemporaneous email from Mr McCormick of 18th March (page 227) the relevant parts of which are set out in the findings in fact. Albeit Mr McCormick did not give evidence, the tribunal considered it was entitled to attach some degree of weight to this email; the terms of this email were referred to by Mr Wolfson in cross-examining Mr Gillon. The content of that

email does not suggest that there was any discussion about investigation into a child protection complaint.

*Telephone call on 18 March 2020*

- 5 124. This was a relevant conflict in the evidence of the claimant and Mr Gillon is to what was said in the course of their conversation on the 18th and the general tone of the conversation.
- 10 125. It was the claimant's evidence that Mr Gillon *'berated'* her, that he spent 15 to 20 minutes shouting at her and saying how dare she resign and that her name that will be blackened and that her reputation would be tarnished. She said that he continued to shout and bawl at her and was speaking about galvanizing the staff. She said that she told him it was not appropriate to respond to the complaint but she said that she would speak to Willie and Anita about it. Her evidence was also that she told him that it was utterly inappropriate for her to respond to the complaint, but she would answer any questions put as part of an investigation and that child protection had to be the focus of that investigation. She said that Mr Gillon said he would get onto Bernie and get the ball rolling.
- 15 126. Mr Gillon denied shouting and berating the claimant, though he accepted that may have said to the claimant that to avoid her name being blackened she needed to fight the allegations. He also accepted that he may have said *'rugged'*, with reference to rug had been pulled from under the organisation by the allegations, and the claimant needed to stand and fight. He also accepted that in that had encouraged the claimant to respond to the allegations. He did recall the claimant being hesitant about the complaint being shared with staff, but not her refusing to respond to the complaint. His evidence was that he asked the claimant to retract her resignation, and he told her that that the investigation would commence without delay and he had asked Bernie to start the investigation on the 17th March.
- 20 127. There was also a conflict as to was whether in the course of this conversation Mr Gillon said to the claimant she was a *'wee girl'* or a *'stupid wee girl who needed to grow up'*, which is dealt with below under Sex Discrimination
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128. The Tribunal did not accept that Mr Gillon berated the claimant in the conversation of 18 March. It lacked plausibility that he would have adopted this tactic when he was trying to persuade the claimant to retract her resignation. It also lacked plausibility that, having been subjected to such behaviour, the claimant would have decided to retract her resignation, as she did.
129. In relation to the conflict as to whether Mr Gillon undertook to commence an investigation with child protection at its core in the course of the conversation of 18 March, the Tribunal was not persuaded that this occurred. In the context of the timeline it was plausible that Mr Gillon told her that the investigation would commence without delay and that he had got on to Bernie on the 17 March (which was the previous day) to start it.
130. Further, in reaching its conclusions the Tribunal had regard to the terms of the claimant's letter of 19 March.
131. The Tribunal did not accept Mr Wolfson's submission, that the claimant's letter of 19th March suspending her resignation made clear that it was extremely important for the child protection allegation to be investigated and for this to happen urgently.
132. The claimant's letter states that she is suspending her resignation on the basis that the allegations against her are investigated speedily and the matter brought to a satisfactory conclusion
133. The letter goes on: *"As explained to you in my resignation letter and our discussions, I strongly feel that my position has become untenable. I need to do to be able to do the role the Board are not only paying me for what rightly expect of me and there is a feeling between all of us involved in the allegations that we are doing our job with shackles on our hands with fear of further allegations. This cannot continue for any longer than is necessary to get through it.*
- The allegation that a child could die because of us is horrifying to say the least and I hope you understand and appreciate the impact this has had on us."*

134. The basis on which the claimant is withdrawing her resignation, is not that there is a child protection investigation, but that any investigation is dealt with quickly and the conclusion is one which is satisfactory to her.
- 5 135. This is supported in that the claimants resignation letter of 17 March, to which she refers, does not make any reference to an investigation with child protection at its core, or a child protection allegation, but rather states that her position has become untenable because she knows that staff within SMK have made allegations of unprofessional behaviour against her, and she goes on that it is absurd that she has to justify her arrival/leaving times etc.
- 10 136. The statement at the end of the letter about the impact the horrifying allegation that a child could die had had on the claimant, objectively could not be read as making it clear that the claimant wanted a child protection allegation investigated.
- 15 137. Further support for the Tribunals conclusion about what was discussed, is found in the claimant's email of 19 March, retracting her resignation, in which she asks that *'the matter is resolved as a matter of urgency'*. Resolution does not suggest as a prerequisite that there is an investigation with child protection at its core.
- 20 138. The Tribunals conclusion is further supported by the terms of the claimants resignation letter of 25 March in which she cites the fact that it has been brought to her attention that Bernie Sanderson was an author of the complaint; that she now believes without a shadow of doubt that two Unit managers had written other complaint, one of whom had previously complained about the head of service; and the last straw event which was an operational matter, involving Bernie Sanderson.
- 25 139. None of this suggests that the claimant had a concern about the fact that the respondents were not carrying out an investigation with child protection at its core at the point when she resigned, which points away from the conclusion that she raised this as a material point in her discussions with Mr McCormick and Mr Gillon on 16 March, or with Mr Gillon on 18 March. It simply lacked credibility from the Tribunal's perspective, that had the claimant raised either
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at the meeting of 16 March or telephone discussion of 18 March that there had to be an investigation with child protection at its core, that reference to this would not have been included in the claimant's quite fulsome contemporaneous correspondence.

5 *Request for a response to the complaints*

140. Mr Woolfson identified Mr Gillon's request for a report or response to the complaints from the claimant as an area of dispute. To the extent there was a dispute on this the Tribunal was satisfied that Mr Gillon had asked the claimant to respond to the complaint and had made suggestions, reflected in  
10 the findings of fact, as to what she could include in this. It appeared to the Tribunal that Mr Gillon accepted in his evidence that he had made the suggestions to the claimant and gave reasons why he had done so. There was no dispute, it seemed to the Tribunal about the fact that the claimant had not been asked to respond to a child protection allegation.

15 141. As part of the course of conduct relied upon at the outset of the Hearing, the following was identified:

*"By the second respondents' repeated insistence that the claimant respond personally to certain parts of the complaints by providing a formal report communication to staff."*

20 142. This was not a matter which was ultimately relied upon in submissions for the claimant.

143. Mr Woolfson's submission was to the effect that not a great deal turned on the report, and the fact that the claimant did not provide it, and the Tribunal agreed with that.

25 144. The claimant gave evidence to the effect that having withdrawn her resignation on 19 March she then contacted Mr Gillon and advised him that she did not intend to produce a report and apologised for having said that she would. The claimant then gave evidence about the discussions which were said to have taken place on 19<sup>th</sup>; objection was taken to this evidence to this  
30 the basis there was no notice of any of this in the ET1. Subsequently, as



pointed out by Mr Woolfson in his submissions, the claimant was not challenged in cross examination on her evidence that she had apologised to Mr Gillon.

145. The Tribunal did not consider it necessary to make any finding about whether the claimant contacted Mr Gillon to apologise for having said she would produce a report, and that she did not intend to do so, as ultimately it was not in dispute that no report was produced and the Tribunal did not consider anything material turned on the fact that it was not produced.

*Request for support on 17 March*

146. Ultimately not a great deal may turn on the conflict in the evidence between the claimant and Mr McKeown, and Mrs Sanderson, as to whether the claimant asked Mrs Sanderson for support on 17 March. The claimant said she did do this, and Mr McKeown again corroborated this. Mrs Sanderson did not recall requests for support from the claimant to her on 17th March. Given the terms of the claimant's resignation letter and the fact that she intimated her resignation on the 17th of March at around 3pm, the Tribunal found Mrs Sanderson's evidence on this point more plausible than that of the claimant. It appeared to the Tribunal to lack a degree of plausibility to suggest that the claimant would have requested support for a workplace investigation into the complaints, on the same day that she tendered her resignation.

*Lockdown*

147. Mr Woolfson also submitted there was dispute as to the relevance of the lockdown measures. The Tribunal did not consider that this was a material area of dispute. It was accepted by Mr Gillon that the decision to request a staff satisfaction survey review had been made before Lockdown. Mr Woolfson in his submissions referred to a question he put to Mr Gillon to the effect that the claimant wanted the complaints investigated in their entirety to which Mr Gillon replied; '*which we could not do because of the pandemic*'. It appeared to the Tribunal that this evidence had to be taken in the context of the clear acceptance by the respondents that they had decided to deal with this matter by way of a staff satisfaction survey, regardless of Covid, and that

the impact of Covid was that they were unable to engage an external agency to conduct the survey.

*Last straw incident*

148. It did not appear to the Tribunal that there was any material dispute on this point. The Tribunal accepted Ms Sanderson's evidence that the claimant was that the decision maker about staff transfers, and that she told Ms Watson this. The Tribunal also accepted that Ms Watson approached the claimant with concerns about staff transferring from Dochas House to SMK, and she said to the claimant that Bernie had told her this was happening.

149. The Tribunal notes the claimant's evidence was that she had not made this decision, and the tribunal accepted this, as it was consistent with her contemporaneous letter of resignation. In reaching this conclusion the Tribunal also take into account Mrs Sanderson's evidence about the claimant's involvement was effectively that she would have been involved, but she candidly accepted that she could not remember all the conversations involving staff and the claimant. This appeared to suggest an uncertainty on her part as to what was discussed, and when or with whom.

**Sex Discrimination claims**

150. The Tribunal also had to resolve the conflicts of evidence such as there were, in relation to the complaints of sex discrimination.

*Meeting March 2018*

151. The Tribunal was prepared to conclude that Mr Gillon had said to the claimant that she was acting like a female dictator in the course of meeting discussing the Head of Education. Although he denied it in evidence in chief, Mr Gillon had no recollection of the meeting in cross examination, and it was plausible that the comment had been made, taking into account the background of the claimants contentious relationship with the Head of Education.

*July 2018*

152. Mr Gillon is alleged to have told the claimant to mind her own business when she raised issues about employees accessing records unaccompanied. It was

not in dispute this matter was taken to the Board, and resolution put in place, and against that background the Tribunal was not satisfied that Mr Gillon told the claimant to mind their own business.

*Board Minutes of January/February 2019*

5 153. The Tribunal was satisfied that at the conclusion Board meeting towards the beginning of 2019 comments were made by the Chair, Mr Farrell which were critical of the claimant's speech at the Head of Education's retirement event. The Claimant was frank about her views about the Head of Education, and it was entirely plausible that she found the adverse comment about her speech  
10 upsetting.

154. The Tribunal was also persuaded that Mr Gillon said to the claimant, when she asked that the part of the minutes of the Board meeting which recorded the criticism of her was were expunged, something to her along lines of she was being overly sensitive. In reaching this conclusion the Tribunal take into  
15 account that Mr Gillon could not remember saying that the claimant was overly sensitive, although he did give positive evidence that he did not say 'so *goddamm sensitive*' on the basis this was not the type of language he would use. The flavour of his evidence however was that there was no need to expunge the minute of the board meeting. Against that background the  
20 Tribunal was persuaded that he had indicated to the claimant that she was being overly sensitive in asking for the minutes to be expunged.

*April 2019*

155. Mr Gillon is alleged to have told the claimant to mind her own business when she raised issues about financial irregularity in terms of how two members of  
25 staff were paid. The Tribunal was not satisfied that he had said this, as he gave evidence as to the investigations he carried out after the claimant had raised this, and the fact that he agreed with the claimant, but he considered there was nothing he could do about it..

*February 2020*

156. It is alleged that Mr Gillon behaved in an aggressive manner in the course of this meeting and told the claimant that she had to stop being “*namby-pamby*” with the staff.

5 157. The claimant and Mr McKeown were both present at this meeting, and both give evidence about Mr Gillon’s aggressive manner and demeanour. Mr Gillon also give evidence and produced notes which he took his own personal use from the meeting. He said he could on occasion he felt the SMT were ‘ganging up’ on him.

10 158. The Tribunal was satisfied it was likely that Mr Gillon was agitated and did adopt an aggressive demeanour the course of this meeting. Such a conclusion is supported by the content of his notes, which suggest that the members of SMT were told they should tell staff that we are free to leave.

15 159. Further, Mr Gillon accepted that he used language akin to namby pamby, denying that he said that, as it was not language he would have used, but saying he may have said not to nurse maid staff, or to stop mursmaiding staff.

160. The Tribunal accepted Mr McKeown’s evidence, as recorded in the findings in fact, and was persuaded that Mr Gillon addressed and the SMT with a degree of aggression and said to them ‘*yous need to get the gloves off..*’ etc and that this comment was addressed to all the members of the SNT.

20 *Meeting on 16 March 2020*

161. It is accepted that Mr Gillon said words to the effect: “*I told Frank she would have a meltdown*”, referring to the claimant.

*Telephone call on 18 March 2020*

25 162. There was a conflict as to was whether in the course of this conversation Mr Gillon said to the claimant she was “*a wee girl*” or “*a stupid wee girl who needed to grow up*”.

163. Mr Gillon gave a clear denial of that statement in evidence in chief.

164. Mr Woolfson submitted that when Mr Gillon was asked about this in cross examination, he firstly responded "*I would not have said those words*", before denying this in clearer terms when asked by the Employment Judge.
165. The sequence of questioning however on cross examination was that Mr Woolfson put to Mr Gillon that he said to the claimant how dare you resign, to which he responded "*I would not agree to these words*".
166. It was then put to Mr Gillon you called her "*a little girl*" or "*a wee girl* or words to that effect", to which he responded "*absolutely not*".
167. It was then put to Mr Gillon the claimant was very clear that that happened, and that he called her "*a wee girl*" or it might even be "*a stupid wee girl*" during a telephone call of 18th March, to which Mr Gillon responded I would not say those words to the claimant. It was at that stage the employment judge intervened for clarification.
168. On balance the tribunal was not persuaded that Mr Gillon said to the claimant that she was "*a wee girl*" or "*a stupid wee girl who needed to grow up*".
169. In reaching this conclusion to the Tribunal take into account the its assessment generally of the claimant's and Mr Gillon's credibility. In assessing Mr Gillon's evidence, notwithstanding any deficiencies in his reliability and manner, Mr Gillon was prepared to make concessions in his evidence which were potentially damaging to his position, which are referred to above, and the fact that he did so tended to enhance his credibility. Furthermore, he was prepared to concede that he had used some of the language which the claimant objected to the course of the conversation on 18th, albeit his take on this was different to that of the claimant's, but he denied the wee girl comment attributed to him. The Tribunal also take into account, that again, it appeared unlikely that Mr Gillon would have used this language to the claimant in circumstances where he was trying to persuade her to remain in the respondents employment, and retract her resignation. It also appeared unlikely or that she would have responded positively, as she did by retracting her resignation, had he said that to her.

170. The Tribunal notes that when giving evidence in chief about the conversation of 18 March with Mr Gillon, the claimant did not say that he had called her a *wee girl*, or a *stupid wee girl* in the course of that conversation.
171. The claimant's evidence about this alleged comment emerged as part of a lengthy passage of evidence in response to a question in chief as to when she next contacted Mr Gillon after sending her retraction of resignation email on the 19th of March. She said she phoned him later that day to make sure he had received her email. She said she apologised for having said that she would produce a response to the allegations and that she did not intend to do this (referred to above). Towards the end of her evidence in response to this question, she volunteered that she told Mr Gillon that she had received an email from Joe Farrell (another Board member) telling her that he would have binned the complaints, and Mr Gillon shouted that Joe should not have said that. She went on to say when she said laughable (in relation to parts of the complaints she was being asked to respond to), and Mr Gillon told her that she needed to grow up and that she was "*a stupid wee girl*" and there was nothing laughable about the allegations.
172. This evidence was objected to at this stage on the basis there is no notice of the ET1 of this alleged conversation.
173. It was not put to Mr Gillon in cross examination that the *wee girl* comment was made on the 19th of March.
174. Mr Wolfson in submission highlighted that the claimant had given evidence in chief that the *wee girl* comment had been made on 19th March, and that during cross examination she said she thought it was 18 or 19 March, but she thought it was 18 March. He submitted that this should not impact on the Tribunal's assessment of the claimants credibility, in the circumstances where the conversations were with the same person and one day apart in difficult circumstances for the claimant. The Tribunal did attach some weight to the inconsistency between the ET1 and the claimant's evidence in chief, on this point but it was not determinative of the issue and was only one factor to which it attached a degree of weight, alongside the others referred to above.

## Submissions

175. Both parties helpfully produced and written submissions, which they supplemented with oral submissions. In the interests of brevity these are not reproduced here, but the material parts of the Submission are dealt with under  
5 Note on Evidence, or below.

## Consideration

176. Section 95 of the Employment Rights Act 1996 (the ERA) provides:

10 “(1) *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.”*

177. This claim is brought under section 95 (1) (c) and both Mr Woolfson and Mr McGuire made extensive submissions as to the applicable law. There appeared to be no material disagreement about the applicable principles  
20 which the Tribunal has to apply.

178. Both parties took the Tribunal to the well-known case of *Western Excavating (ECC) Ltd v Sharp (1978) ICR 221* and the dicta of Lord Denning in the case  
25 “*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”*

179. Both parties also referred to *Woods v WM Car Service (Peterborough) Ltd [1981] ICR 666*, in which the EAT confirmed that there is an implied term in a contract of employment that the employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.
180. The implied term of trust and confidence was confirmed in *Malik v Bank of Credit and Commerce International SA [1998] AC 20* where the House of Lords also confirmed that the test whether there has been a breach of the implied term of trust and confidence is objective and must involve an examination of all the circumstances.
181. The parties also referred to (*London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493*) which an authority for the proposition that a relatively minor act may be sufficient to entitle the employee to resign if it is the last straw in a series of incidents. There is no need to characterise the final straw as unreasonable or blameworthy conduct, though an entirely innocuous act on the part of the employer cannot be a final straw.
182. Reference was also made to *Williams v The Governing Body of Alderman Davies Church In Wales Primary School UKEAT/0108/19* in support of the proposition even if there has been no final straw, there can still be a constructive dismissal if there has been a repudiatory breach of contract by the employer, and the employee has not affirmed the contract. This case became relevant in Mr Wilson's submission, in the event the Tribunal was not satisfied that there was a last straw incident. In that instance the claimant relied on the alleged breach by virtue of the fact that the respondents failed to take any steps to investigate the child protection allegation and progress this with her.



183. Mr Woolfson referred to *Nair v Lagardere Sports and Entertainment Ltd [2020] EWHC 2608* in support of his position that conduct can include a failure to do something, which is fact specific.

5 184. Finally, both parties also referred the Tribunal to the case of *Kaur v Leeds Teaching Hospitals NHS Trust [2019] I.C.R. 1*, where the Court of Appeal identified five questions that it should be sufficient from tribunals to ask when determining a claim of constructive dismissal.

185. Mr Woolfson set out the claimant's case in answer to each of these questions identified in *Kaur* as follows:

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

1. This was Mrs Sanderson having informed the Service Manager of Dochas House that the claimant had decided to transfer staff to the  
15 secure unit, which the Service Manager then raised as a concern with the claimant.

Question 2: "Has he or she affirmed the contract since that act?"

2. No, as the claimant gave notice on the same day.

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

3. No, the claimant is not arguing that the final straw was itself a repudiatory breach.

25 Question 4: "If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?"

*Yes, the final straw was part of a course of conduct which it is summited cumulatively amounted to a breach of the implied term of trust and confidence.*

*The course of conduct comprised:*

- 5 (a) *the failure on the part of the first respondent to take any steps to investigate the child protection allegation and progress this with the claimant,*
- (b) *the failure to provide any support to the claimant, and*
- 10 (c) *Mrs Sanderson informing the Service Manager of Dochas House that the claimant had decided to transfer staff to the secure unit, which the Service Manager then raised as a concern with the claimant (the final straw).*

186. There was no issue that the claimant did not affirm what was said to be the last straw act, and as it is not suggested that that last straw event was a material breach, although it is in issue as to whether the claimant was entitled  
15 to treat this as a last straw. Nor is it suggested that the lack of support is a standalone breach of contract, but it is relied upon as part of a course of conduct.

187. The Tribunal began by focusing on the first of the matters relied upon (the failure on the part of the first respondent to take any steps to investigate the  
20 child protection allegation and progress this with the claimant) which is also said to be a standalone breach, and considered;

- (1) whether there was reasonable and proper cause for the this conduct and, if not,
- (2) whether the conduct was calculated or likely to destroy or seriously  
25 damage trust and confidence.

188. Mr Woolfson accepted that the claimant by retracting her resignation had affirmed any breach of contract which had occurred prior to that retraction being submitted. He submitted that the claimant resigned on 17 March after she saw the email of 17 March because she was concerned about the lack of

any reference to child protection allegation that she was losing confidence that this was going to be investigated. Her position was that this was not about exonerating her but being transparent and holding her accountable. As indicated above, given the terms of the claimant's contemporaneous correspondence, the claimant's position on this was lacking in credibility in the Tribunal's view.

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189. In any event, for the reasons which are gone to above under Note on Evidence the Tribunal was satisfied that the claimant was told at the meeting on 16 March that there was going to be a staff survey or review, and that she did not object to this, or raise any issue about the necessity of carrying out an investigation with child protection issues at its core, on being told that this was how the respondents intended to proceed.

190. Even if the Tribunal is wrong about that, then on the claimant's own case (i.e. that she resigned because she was losing confidence that the respondents were not going to carry out an investigation with child protection at its core) then she lost the right to rely on any breach which occurred prior to the 17th of March, when she retracted her resignation on 19 March. This is not the situation analysed in paragraph 45 of *Kaur*, referred to by Mr Wolfson, were the breach had passed the *Malik* threshold at some earlier stage, but the employee soldiers on, not losing the right to rely on that by affirmation of the contract, and the last straw revives her right to resign. The claimant had resigned, but then retracted that resignation.

191. Mr Woolfson submitted that claimant's retraction of her resignation was conditional on an investigation with child protection at its core being carried out. For the reasons outlined above under Note on Evidence, the Tribunal was not satisfied that the claimant had agreed to retract her resignation on the condition that there was an investigation with child protection at its core. Nor did it conclude that that her letter of 19 March amounted to a conditional or suspended retraction of her resignation on the condition that an investigation with child protection at its core was carried out, as suggested by Mr Woolfson. That is not what either her letter or email of that date stated on an objective reading. The basis of the withdrawal is a speedy investigation

with a satisfactory conclusion. Objectively that can only be read as satisfactory to the claimant. The statement at the end of the claimants letter of 19 March is simply that, a statement about the impact of an allegation.

- 5 192. This Tribunal heard a very considerable amount of evidence in this case about the respondent's Child Protection Policy, Whistleblowing, and what type of investigation(s) the respondents might have carried out. There was also a considerable passage of evidence about when Mr Gillon advised the other Board members about his decision to carry out staff survey, the mechanics of making that decision.
- 10 193. Mr Woolfson made it clear however that the claimant is not relying upon any breach of the Child Protection Policy, or the Whistleblowing Policy. Criticisms might be levied against the respondents about the approach that they took to these complaints. In particular, it may be that Mr Gillon could be criticised for so readily taking the view that the content of the complaints against the claimant was malicious mischief, or for not considering or being familiar with  
15 the terms of respondent's policies on child protection or whistleblowing, or for not conducting a formal meeting of the Board in order to take decisions as to how to proceed. This Tribunal however is not concerned with the respondent's compliance with regulatory rules or regimes, or with issues of  
20 governance of the voluntary board of a charity. Its focus is on the claimant's claim which requires it to consider against the facts which are found, whether the respondents have conducted themselves, without reasonable and proper cause, and if not, was the conduct calculated or likely to destroy or seriously damage trust and confidence.
- 25 194. The conduct complained of is the failure to take steps to investigate the child protection allegation and progress this with the claimant. Mr Woolfson questioned the witnesses at some length about why a child protection investigation should have been carried out, what kind of investigation could have been carried out, and why the respondents did not carry out such  
30 investigation. That latter point it seemed to the Tribunal was not in fact a contentious issue for the respondents. They did not carry out a child protection

investigation because they did not consider that the allegations had sufficient specificity to identify a child protection issue which they could investigate.

195. While criticism might be levied at the decision to conduct an investigation by way of a staff survey, the respondents reason for this was that the complaints were anonymous ;the respondents did not consider that they raised a child protection issue which could be investigated because what was alleged was so lacking in specification; in those circumstances it was considered that the best way forward was to conduct an external staff satisfaction survey or review which might identify if there was anything in the complaints or not.
196. The Tribunal was not satisfied that the respondents in not taking steps to investigate a child protection allegation in response to what was alleged in terms of the anonymous letter of complaint, where they advised the claimant that the complaints would be investigated by way of a staff survey, and she did not raise any objection to that, or request that an external investigation be carried out with child protection at its core, could be said to be acting without reasonable and proper cause, or if they were, that that was in a manner calculated or likely to destroy or seriously damage the claimant's trust and confidence.
197. Further, as submitted by Mr McGuire, even if the Tribunal is wrong in its factual conclusion on this point, and Mr Gillon had undertaken to carry out an investigation into the child protection allegation on 19 March, it could not be said that the failure to take any steps to investigate the child protection issue or progress that with the claimant in the period between 19th and 25th of March amounted to the respondents conducting themselves without reasonable and proper cause or in a manner which was calculated or likely to destroy trust and confidence. The claimant retracted her resignation on the 19 of March at around 4.30pm and resigned in the 25 March at 1.45pm. Administrative staff and the claimant (who, other one on call every 8 weeks), worked Monday to Friday 9am to 5pm. The period of time between the retraction of the claimant's resignation and her second resignation was less than 4 working days, to reflect the working hours for non-operational staff.

198. Lockdown intervened on 23 March, and although the claimant and Mr McKeown suggested that this is no impact at all on the respondents organisation because SMK was a secure unit and required to remain open, the could be no doubt that Covid lockdown measures had a considerable impact across Society as a whole and on other organisations and working behaviours generally. This is consistent with Mrs Sanderson being unable to obtain a response to a request for an external agency to carry out a survey and taking decision to draft the survey herself.
199. If there was a failure to progress the investigation and advise the claimant of its progress during this period, given the time scales involved, applying an objective consideration to the facts and circumstances, this could not amount to a material breach of contract.
200. In relation to the provision of support the Tribunal concluded that although Mr Gillon encouraged the claimant to 'fight' the allegations, no formal support was offered to the claimant, prior to her resignation of the type which was offered in the respondents letter to her of 27 March 2020. The Tribunal did not consider that the failure to offer formal support in the period of less than 4 working days, with Lockdown intervening, amounted to conduct on the part of the respondents which was without reasonable or proper cause, or which was calculated, or likely to destroy trust and confidence.
201. In relation to the last straw event, the Tribunal was satisfied that the claimant had been told by Ms Watson that Mrs Sanderson had told her that the decision was made to transfer staff from Dochas house to SMK, when the claimant had not made that decision. The Tribunal was satisfied that this did happen, and that it has the quality of a last straw incident, as identified in *Omilaju*, in that staff had been told that had made a decision about their transfer, for which the claimant was responsible, when at that stage she had not made that decision.
202. The Tribunal notes that at the outset of this case, in addition to the matters relied upon submission, it was indicated that the claimant relied upon; the second respondents repeated insistence that the claimant respond personally

to certain parts of the complaints by providing a formal report communication to staff; and the involvement of Bernie Sanderson in the complaints and the subsequent handling of the complaints.

5 203. These were not matters which Mr Woolfson made submissions upon, the Tribunal assumed there were no longer insisted upon as part of the course of conduct relied upon. In the event that is incorrect, then there was no evidence before the Tribunal to suggest there was anything untoward in Mrs Sanderson being involved in the handling of the complaints in the period up until the claimant's resignation on 25th March. One of the reasons which the claimant  
10 give for her resignation was that she had learned that Mrs Sanderson was an author of one of the complaints, but the Tribunal heard no evidence to reach a conclusion on this.

15 204. In relation to Mr Gillon's alleged insistence the claimant produce a formal communication to staff, the Tribunal understood this to refer to the report which Mr Gillon asked the claimant to provide, and about which the Tribunal has made findings. Those findings did not include that he was insisting that the claimant produce a formal communication to staff.

20 205. It is not suggested that the straw incident was capable of amounting to a repudiatory breach of contract, and therefore in light of its conclusions on the course of conduct at (a) and (b) above, the Tribunal was not satisfied that the respondents had acted in repudiatory breach the claimant's contract of employment entitling her to resign, and the complaint of unfair dismissal does not succeed.

25 **Sex Discrimination complaints**

206. The claimant submits that she has been directly discriminated against under section 13 of the EQA and has been subject to harassment, in terms of section 26 of the EQA. In connection with both claims she relies on a course of conduct as follows:

- (1) At meeting in March 2018 Mr Gillon referred to her and being like a female dictator;
- (2) At some point in January/February 2019 the claimant was reprimanded by Mr Farrell, who was chairing a Board meeting at which she was in attendance, about the contents of a speech she had made at the Head of Education's retirement event. The claimant was upset by this. When she approached Mr Gillon to ask that this be removed from the minutes of the board meeting, he told her to stop being so *'goddamn sensitive'*;
- (3) In February 2020 Mr Gillon told the claimant to stop namby-pambying the staff
- (4) On 16 March 2020 Mr Gillon said the course of that meeting said words to the effect: *"I told Frank she would have a meltdown"*.
- (5) In a telephone conversation in 18 March 2020 Mr Gillon told the claimant she *"needed to grow up and stop being a wee girl"* or *"a stupid wee girl"*.

207. There is an issue of time bar in connection with this claim, the claimant relying on a course of conduct; only the last two alleged acts are presented on time.

208. Section 123 of the Equality Act 2013 (the EQA) provides;

- (1) *Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*
- (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) *such other period as the employment tribunal thinks just and equitable.*

.....

- (3) *For the purposes of this section—*



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

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

5 209. The starting point for the Tribunal’s consideration was to consider if the alleged acts of discrimination, which are brought in time, occurred. If they did, the Tribunal would go to consider whether the acts alleged overall amounted to a course of conduct extending over a period which could be treated as done at the end of that period (i.e. on the date of the alleged act(s) which were on  
10 time).

210. There is no dispute that the acts alleged to have taken place in March 2018, January/February 2019, and February 2020 are out of time. The Tribunal therefore considered the acts alleged to have taken place in March 2020, which are brought in time.

15 211. For the reasons gone into above, the Tribunal was not satisfied that the wee girl or stupid wee girl comments attributed to Mr Gillon had been said.

212. The Tribunal then considered the comment which Mr Gillon accepted he made in the course of the meeting of the 16th of March. The claimant relies for the purposes of section 13 claim on Mr McKeown as a comparator. The  
20 claimant’s case is that Mr McKeown was equally as upset as the claimant, but the comment was not made to him, and the reason it was made to the claimant was because of her gender.

213. The respondent’s position is that the reason Mr Gillon made the comment was because he was aware of the personal difficulties which the claimant was  
25 experiencing, and was concerned that this complaint would tip her over the edge. He had no knowledge of any such difficulties in Mr McKeown’s life.

### **Direct Discrimination – Section 13**

214. Section 13 (1) provides:

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

215. Section 23 provides:

5 (1) *On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*

216. The Tribunal was persuaded that the reason why Mr Gillon made the comment was because he was aware of the difficulties the claimant was  
10 experiencing and did have a concern about the impact of the complaints upon her, whereas he is he had no such knowledge or insight into Mr McEwan's circumstances, and therefore no such concern. The Tribunal formed the view that Mr Gillon would have made the comment equally about a male colleague whose circumstances, as understood by Mr Gillon, were the same as the  
15 claimant's. In fact, the claimant did become more upset than Mr McKeown in the course of 16 March meeting. Mr McKeown's evidence was that Mr Gillon made the comment after the claimant started to cry; there was no evidence that Mr McKeown cried during the meeting. This lends support to the Tribunal's conclusion as to the reason why Mr Gillon made the comment ,and  
20 that it was unconnected to the claimant's sex.

### **Harassment- Section 26**

217. Section 26 provides:

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

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

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

(i) *violating B's dignity, or*

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

218. The first matter which the Tribunal has to consider is whether the unwanted conduct related to relevant protected characteristic, in this case sex. The Tribunal did not conclude the comment related to the claimant’s sex. There was nothing inherent in the comment which was related to sex, and the Tribunal was satisfied was it explained by Mr Gillon’s understanding of the claimant’s personal circumstances, and the effect he thought the complaint would have on her, both of which were unrelated to her sex.

219. The Tribunal therefore did not conclude that the claimant was subjected to any acts of discrimination, complaints about which are presented in time.

220. The consequence of this is that it is not unnecessary for the Tribunal to consider if the claimant was subjected to acts extending over a period, as the remaining alleged acts are out of time.

#### **Just and Equitable extension - Section 123 (1) (b)**

221. Mr Woolfson raised, only at the point of Submission, that the Tribunal should extend time to consider acts which were out of time on the grounds of justice and equity. He accepted that this not had been identified as an issue at the outset of the Hearing, and that was no argument contained in the ET1 that time should be extended on the grounds of justice and equity.

222. Mr Woolfson relied on paragraphs 24 and 25 of the judgment of LJ Bean in *Abertawe Bro University Local Health Board v Morgan (2018) EWCA Civ 640* as authority for the proposition that it the Tribunal should consider extending the time under section 123 of the Equality Act, absent any notice of this being the position, or any evidence being heard.

223. What is said in that case is:

*“24.... The thrust of Mr Allsop’s argument was that, in the absence of an explanation from the claimant as to why she did not bring her claim in*

*time and the evidential basis for the explanation, the tribunal could not properly conclude that it was just and equitable to extend time.*

5 25... *I cannot accept that argument. As discussed above, the discretion given by section 123 (1) of the Equality Act to the employment tribunal to decide what it ‘thinks just and equitable’ is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is that whether there is an explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal ought to have regard...”*

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15 224. Mr Woolfson submitted that any lack of fair notice point about the extension of time argument, was met in that the respondents dealt with a section 123 extension in their submissions. Mr McGuire submitted it was too late to introduce this argument at the Submission stage.

20 225. This case has benefited from fairly extensive case management, and the claimant has on two occasions added additional information or further particulars to the claim. There was a clear identification of the issues at the outset of the hearing which included whether there was a course of conduct which the claimant could rely upon to present her claims under section 13 and 26 of the EQA. In these circumstances the Tribunal did not consider that it was consistent with the overriding objective in the Tribunal Rules to allow

25 an argument that time should be extended on the grounds of justice and equity to be introduced the stage of Submission. Had such an argument been identified, then there would have been the opportunity for the respondents to cross examine on the reason for the delay, and there is considerable prejudice to them in having the been denied this opportunity, but then having

30 to face an argument about just and equitable extension of time.

226. LJ Bean's judgement makes it clear that the Tribunal does not have to be satisfied that there was a good reason for the delay, or even hear evidence about that. But that is not the issue here; the issue is the respondents had no notice of this argument, and were therefore unable to explore it in evidence.
- 5 The prejudice suffered by the respondents as a result of that is considerable and, has to be weighed against that to the claimant, in not allowing the argument to be presented at this stage. In conducting that balancing exercise the Tribunal take into account that there has been extensive case management; that the claimant has added further particulars to her claim
- 10 twice; she had complaints which were intimate; and she had relied a course of conduct argument in bringing her claim. Balancing those factors the Tribunal was satisfied that the prejudice to the respondents outweighs that to the claimant, and the argument should not be allowed late.
227. The Tribunal however also considered the position in the event that this
- 15 conclusion is wrong.
228. Firstly, it considered what the reason for the delay was. Clearly it had no evidence about the reason for the delay, and therefore was unable to reach a conclusion as to why there was a delay. Mr Woolfson submitted that the claimant's answers to questions in cross examination about why she did not
- 20 raise a grievance about the alleged sex discrimination, to the effect that she would not do that to SMK, and that in any event the grievance would be dealt with by a friend of Mr Gillon's, was not in the Tribunal view evidence about the reason why she did not raise a claim. Indeed, the fact the claimant did not think she could have a fair grievance hearing might suggest that she would
- 25 have been more inclined to raise a tribunal claim, which is the type of issue which could have been explored in cross examination, had notice of this argument been given, and had it been suggested in evidence that these were reasons for the delay in lodging the claim.
229. The reason for the delay is however not the only matter which the Tribunal
- 30 would have to consider, and it would have to consider the balance of prejudice in extending time, or not doing so.

230. The Tribunal was satisfied that there was significant prejudice to the respondents in this case in that the events complained of in 2018/2019 occurred now a number of years ago, and Mr Gillon's memory about these events was affected by the passage of time. Indeed, Mr Woolfson made extensive submissions about the reliability of Mr Gillon's evidence. That it appeared to the Tribunal was a significant factor, and outweighed the prejudice to the claimant in this instance in circumstances where she and had presented other complaints which were on time.

231. In conclusion on this point, Tribunal notes that the events of February 2020, which were more recent, and where Mr Gillon was alleged to have said to the claimant to stop namby-pambying the staff, were not considered be an act of sex discrimination. It was Mr McKeown's clear evidence the comments were addressed to all the senior management team, '*you's had better get the gloves off etc...*' and albeit he then suggested that Mr Gillon was a looking at the claimant, he was clear that the comments were directed to all the SMT members. The SMT comprised of Mr McKeown and the claimant therefore there was no relevant comparator, with both the claimant and Mr McKeown being spoken to by Mr Gillon in this way, and there was nothing to suggest the comment was related to the claimant sex.

232. The effect of the Tribunal's conclusions is that it found the claimant was not subjected to discrimination under section 13, or section 26 of the EQA and these claims are dismissed.

Employment Judge: Laura Doherty  
Date of Judgment: 30 March 2022  
Entered in register: 30 March 2022  
and copied to parties