



EMPLOYMENT TRIBUNALS

Claimant: Miss. L Thomas

Respondent: Jelsons Limited

Heard at: By Cloud Video Platform (Midlands East Region)

On: 13th, 14th, 15th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th September 2021 & 7th October 2021

Before: Employment Judge Heap

Members: Mr. A Greenland
Ms. K Srivastava

Representation

Claimant: Mr. R Capek – Consultant on 13th, 14th, 15th & 16th September 2021

In person on 17th, 20th, 21st, 22nd, 23rd, 24th September & 7th October 2021

Respondent: Mr. A Rhodes- Counsel

COVID-19 Statement

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was fully remote via CVP. A face to face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The complaint of constructive unfair dismissal fails and is dismissed.
2. The complaint of wrongful dismissal fails and is dismissed.
3. The complaint of breach of contract relating to enhancements for working on Saturday and Sunday is dismissed on withdrawal by the Claimant.
4. The remaining breach of contract complaint relating to overtime payments fails and is dismissed.
5. The complaints of harassment relating to the protected characteristic of sex succeeds in part. The remaining complaints of harassment fail and

are dismissed.

6. The complaints of direct discrimination fail and are dismissed.
7. The complaint of victimisation fails and is dismissed.
8. The claim will be listed for a Preliminary hearing to be conducted by telephone to list a Remedy hearing and make Orders for preparation for the same.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Lisa Thomas ("The Claimant") against her now former employer, Jelsons Limited ("The Respondent").
2. The claim first came before Employment Judge Blackwell at a Preliminary hearing which took place on 12th November 2019. At that time the Claimant was acting as a litigant in person and the Judge was not able to identify the specific issues in the claim but identified that she was advancing complaints of constructive unfair dismissal and discrimination relying on the protected characteristic of sex.
3. Employment Judge Blackwell listed a further Preliminary hearing which came before Employment Judge Adkinson on 24th January 2020. By that time the Claimant was represented by solicitors and a Mr. Anastasiades appeared on her behalf. It was identified at that Preliminary hearing that the Claimant was advancing the following complaints:
 - a. Constructive unfair dismissal (relying on an alleged breach of the implied term of mutual trust and confidence);
 - b. Wrongful dismissal (which was parasitic on the claim of constructive dismissal given that it was common ground that the Claimant had resigned without notice);
 - c. Direct discrimination relying on the protected characteristic of sex;
 - d. Harassment related to the protected characteristic of sex;
 - e. Victimisation; and
 - f. Breach of contract.
4. The breach of contract claim originally related to both overtime payments that the Claimant contended that she was owed and monies that she said that she was due as enhancements for working on Saturdays and Sundays at various points during the course of her employment with the Respondent. The latter complaint was withdrawn by the Claimant during the course of the hearing. It has therefore been dismissed on withdrawal in the usual way.
5. There are a significant number of complaints of harassment and many of the issues in that and the other discrimination complaints overlap with the basis upon which the Claimant contended that there was a breach of the implied term of mutual trust and confidence which she relied on in the context of the constructive dismissal complaint. The individual allegations in respect of the

complaints of direct discrimination, harassment, victimisation and constructive dismissal are set out in the tables which feature within the Schedule attached to this Judgment.

6. One of the issues that Employment Judge Adkinson also had to deal with at the Preliminary hearing on 24th January 2020 was the issue of jurisdiction because the complaints of discrimination that the Claimant was advancing had been presented outside the time limit provided for by Section 123 Equality Act 2010. Employment Judge Adkinson concluded that it was just and equitable to extend time for the complaints to be heard and as such it has not been necessary for us to determine that issue.
7. The Respondent denied the claim in its entirety. Insofar as the discrimination complaints were concerned the Respondent's position was that the matters either did not occur as the Claimant contended; did not amount to unlawful discrimination or, if they had happened in certain cases, were not done by any alleged perpetrator in the course of their employment because they occurred out of work time.
8. For the purposes of the complaint of victimisation, the Respondent did concede, however, that the Claimant had done a protected act in relation to the grievance that she had brought on 25th September 2018. It is contended, however, that the fact that she had done so had no bearing on the way in which the grievance process was conducted.

THE HEARING

9. The claim was originally allocated 10 days of hearing time and whilst we were able to conclude the evidence within that period it was not possible to hear submissions and make our determination of the issues in the claim. Mindful of guidance from the Employment Appeal Tribunal we did not consider that written submissions only were appropriate in a complex case and so we listed a further day of hearing time to deal with those matters.
10. We should observe that the original time estimate was disrupted by a number of matters. Those included the Tribunal needing further time for reading in than had originally been scheduled, time for Mr. Capek to take instructions from the Claimant on various matters, determining an application to amend the claim made by Mr. Capek, time for discussions between the parties, determining an application to include further documents made by the Claimant and time taken to deal with issues arising from the Claimant's decision on day five of the hearing to part ways with her representative until that time, Mr. Capek. We say more about the amendment application below but in respect of all applications we determined them with reasons given at the time. Neither party has asked for written reasons in respect of those matters and accordingly we say no more about them.
11. In respect of the issue of representation, the Claimant indicated to us at the beginning of day five of the hearing that she no longer had trust in Mr. Capek and intended to report him to the police¹. We adjourned for Mr. Capek to discuss those matters with the Claimant and to see if a way forward to

¹ We have not enquired into the reasons for that and make no suggestion that there is any valid reason for the Claimant to do so arising from Mr. Capek's conduct. That is not a matter for us.

resolve their differences could be reached. Regrettably, it could not and Mr. Capek ceased to be instructed. There appears to be a dispute as to whether the Claimant or Mr. Capek terminated the retainer between them but again that is not a matter for us. The Claimant thereafter represented herself. At the time she was part way through her evidence and had all, bar one, of the Respondent's witnesses to cross examine. We allowed time for the Claimant to prepare cross examination questions; referred her to the list of issues to ensure that all matters were covered and assisted her in putting questions where appropriate so as to place her on as equal a footing with the Respondent who was represented by Counsel. We also took more frequent than normal breaks in the proceedings, particularly when the Claimant became upset and emotional in order to give her time to compose herself.

12. We should observe that the Claimant was not present during cross examination of the one witness for the Respondent who gave evidence whilst Mr. Capek was still instructed. We had not been aware that the Claimant was going to be elsewhere during that evidence and Mr. Capek had indicated that he wished to proceed in her absence. No application was made to recall that witness and in all events his evidence was not central to the matters that we were required to determine such as that we did not consider that it caused unfairness to the Claimant.
13. As we have already touched upon above one of the applications which we dealt with was in respect of an application to amend the claim made by Mr. Capek during the time when he remained instructed. We had raised at the outset with Mr. Capek that the last straw that the Claimant relied upon in her witness statement was not part of her pleaded case. After taking instructions Mr. Capek applied to amend the claim to include a significant number of other issues which it was said led the Claimant to resign. That application was opposed and we refused it with reasons given at the time. Neither party has asked us to embody those reasons within this Judgment and so we need say no more about them. The application was, however, relevant to the conclusions that we have reached in respect of the constructive dismissal claim.
14. We also heard an application from the Claimant herself to disclose additional documents. However, that application was withdrawn after discussion and again we need say no more about it.

WITNESSES

15. During the course of the hearing we heard evidence from the Claimant on her own account. Her evidence lasted for much of the hearing and, indeed, continued into day six.
16. On behalf of the Respondent we heard from the following witnesses:
 - a. Kevin Graham – a now former employee of the Respondent who the Claimant contends subjected her to harassment;
 - b. Lee Hurst – an area manager with the Respondent;
 - c. Ian Grundy – the site manager at the Respondent's Broughton Astley site;
 - d. Colin Thorpe – a site manager with the Respondent who worked at a site in Thurnby;

- e. Daryl Trueman – a site manager with the Respondent at their Hucknall site;
- f. Gabriele Heister – a quantity surveyor employed by the Respondent;
- g. Lee Martin – a former assistant site manager at the Broughton Astley site;
- h. Ben Turner – a painter and decorator employed by the Respondent;
- i. David Hockin – the Claimant’s former trade union representative;
- j. Anne de Vere Hunt – Human Resources (“HR”) officer employed by the Respondent who dealt with the Claimant’s grievance; and
- k. Jane Ives – HR director with the Respondent who dealt with her appeal against the grievance outcome.

17. We deal with the credibility of the witnesses from whom we heard below. In addition to the witnesses from whom we have heard we have paid careful reference to the documentation within the hearing bundle before us and to the helpful submissions received both from the Claimant and from Mr. Rhodes on behalf of the Respondent. If we fail to mention something in this Judgment that does not mean that we have not considered it as the parties can be assured that we have taken into account everything that we have been told when reaching our decision.

18. We should observe that we did not hear from MF against whom the Claimant levelled a number of allegations of discrimination and harassment. As we understand it he has left the employment of the Respondent and they had not called him to give evidence on their behalf. Given that we have not heard from MF and he has not been able to give his account of the allegations made by the Claimant against him we consider it appropriate to only refer to him by initials so that he cannot be easily identified by members of the public. We have considered the wider implications of the public interest in open justice but do not consider that the anonymisation of MF will detract from the public understanding of the Judgment.

19. We were also initially due to hear from PH. Again, as we did not hear from him we have decided that it is appropriate to only refer to him by his initials although no allegations were levelled directly against him by the Claimant. PH gave a witness statement for the Respondent but before he was due to give evidence informed them that he was no longer prepared to do so because he feared repercussions for himself and his family if he did so. On that basis we were told by Mr. Rhodes that the Respondent did not feel it appropriate to seek to compel him to give evidence. We were not told which side, if any, PH felt there may be repercussions from. We considered what weight we should attach to PH’s evidence but concluded that we were able to attach none given that his evidence was controversial, the Claimant had been denied the opportunity to cross examine him and there were unusual circumstances in which he had decided not to give evidence.

CREDIBILITY

20. Our findings of fact have invariably been informed by our assessment of the credibility of the witnesses from whom we have heard. We begin with our assessment of the Claimant. The Claimant was often jumbled in her evidence and it is clear that a number of dates and even events in the list of issues which were identified by Employment Judge Adkinson at the Preliminary hearing on 24th January 2020 were not entirely representative of

the claim that the Claimant sought to advance. However, we accept that the Claimant did not receive a copy of the Orders of Employment Judge Adkinson and was not made aware that if the list of issues did not correspond with her complaints then she needed to advise the Tribunal of that. The Claimant appears to have simply left matters in the hands of her two legal advisers with whom she has now parted ways. We do not find that unusual and we are satisfied that the differences in the issues recorded by Employment Judge Adkinson and the case that the Claimant was advancing resulted from misunderstandings by her representatives. We make no criticism of either of them for that as with respect to the Claimant her explanation of events is often muddled and somewhat difficult to follow.

21. There were also a significant number of occasions when the Claimant had to be reminded, including by us, to answer the question which had been put to her as her answers bore little if any resemblance to what she had been asked. We formed the view that this was not an attempt to be evasive but more the Claimant's erratic way of explaining things. That echoed the experiences of Ms. de Vere Hunt when she gave evidence as to the difficulties that she had had in understanding and following the Claimant when she attended various meetings with her.
22. Whilst the Claimant was often muddled and jumbled in her evidence and jumped from one topic to the next in an often quite confusing way, she was nevertheless consistent on the central matters of importance to her which were the alleged harassment by MF and Kevin Graham. It appears that those were the aspects of importance to the Claimant and regrettably her advisers had perhaps advanced a wider number of complaints than had been strictly necessary and which the Claimant had not grasped were part of the claim. Particularly, the Claimant did not appear to us to understand what had been advanced in respect of the victimisation complaints such that, despite prompts, that case was not put to either of the relevant witnesses.
23. We considered the Claimant to be credible in her evidence although confused in some aspects and we also formed the view that some of the allegations that she advances have been coloured by later experiences which she now views through a prism of extreme unfairness and some degree of paranoia. Indeed, as Mr. Rhodes points out the Claimant has made some significant and perhaps implausible allegations that when her flat was burgled only items relevant to her grievances (and thus this claim) were taken and that MF and Mr. Graham were likely responsible.
24. We have therefore been cautious when considering some of the Claimant's evidence and particularly have looked to where there is other witness or documentary evidence in support. However, as we have already observed we found her to be credible and consistent on the core issues.
25. In contrast we considered the evidence of Kevin Graham to be entirely lacking in credibility. He was argumentative, evasive, hostile and on a number of occasions flippant to the point of his conduct being inappropriate. One such example was when the Claimant put to him, quite properly as it was an allegation that she made against him, that he had told her that she looked sexy in her shorts and top his reply was not to deny that allegation but merely to state that "Linda Luscardi looks sexy in shorts". His conduct

was not to his credit and we considered him to be an entirely unsatisfactory witness.

26. He admitted to sending text messages to the Claimant but maintained that he did not know if any of the picture messages in the bundle were from him. That evidence fluctuated from the messages not being from him, that he did not know if he had sent them right through to a suggestion in some cases that the Claimant had manufactured them. That was despite the fact that one was signed off as "Kev". It is notable in this regard that at one point in his evidence Mr. Graham was at pains to correct the Claimant that his name was "Kev" and not Kevin. Again, that was inappropriate and appeared to neglect the fact that his own witness statement bore his full name.
27. We also found it unlikely as Mr. Graham claimed that he would not even be able to recognise part of a mobile telephone number which featured on some of the messages or to know whether he had sent them or not. We also considered his evidence that he immediately deleted messages which he received and so had none that he claimed the Claimant had sent to him rather unlikely and in general we considered him to lack credibility as a witness such that we did not accept the account that he gave to us as being anywhere approaching genuine.
28. With the exception of Anne de Vere Hunt and Jane Ives who we considered to be credible witnesses who gave an honest account we should observe that a number of the Respondent's witnesses appeared to have significant issues with the recollection of events. It was difficult to ascertain in some cases if that was a genuine lack of recall because of the passage of time or for some other reason or a more tactical approach.
29. Particularly, we had concerns as to the content of the witness statement which had been prepared on behalf of Mr. Hockin which was to the effect that he could not recall the content of messages that he had seen which were sent to the Claimant by MF and he must have known what the content was alleged to be given that was set out in the Orders prepared by Employment Judge Adkinson and upon which instructions must have been taken. That was not his oral evidence before us as he accepted that he had seen messages from MF referencing the Claimant wearing stockings and suspenders.
30. His witness statement also set out that his view had been that the Claimant had been encouraging MF but in fact that was not borne out at all in his oral evidence and it appeared only to serve to advance the Respondent's case that any messages that may have been sent could not amount to harassment because they were not unwanted. We considered Mr. Hockin's witness statement to be somewhat disingenuous but it is to his credit that he gave a more accurate account during his oral evidence.

THE LAW

31. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be.

Constructive dismissal

32. Section 95 provides for a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.

33. Tribunals take guidance in relation to issues of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA:-**

“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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

34. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will almost always inevitably be repudiatory by its very nature.

35. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee are only relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

36. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no unconnected reasons for the resignation, such as the employee having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).

37. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions, including continuing to accept pay or a lengthy delay before resigning. In those circumstances, an employee may

affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

Discrimination relying on the protected characteristic of sex

38. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 13, 26, 27 and 39.
39. Section 39 EqA 2010 provides for protection from discrimination in the work arena and the relevant parts provide as follows:
- (1) An employer (A) must not discriminate against a person (B)—*
 - (a) in the arrangements A makes for deciding to whom to offer employment;*
 - (b) as to the terms on which A offers B employment;*
 - (c) by not offering B employment.*
 - (2) An employer (A) must not discriminate against an employee of A's (B)—*
 - (a) as to B's terms of employment;*
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
 - (c) by dismissing B;*
 - (d) by subjecting B to any other detriment.*
 - (3) An employer (A) must not victimise a person (B)—*
 - (a) in the arrangements A makes for deciding to whom to offer employment;*
 - (b) as to the terms on which A offers B employment;*
 - (c) by not offering B employment.*
 - (4) An employer (A) must not victimise an employee of A's (B)—*
 - (a) as to B's terms of employment;*
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;*
 - (c) by dismissing B;*
 - (d) by subjecting B to any other detriment.*

Direct discrimination

40. Section 13 EqA 2010 provides that:
- “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”.*
41. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (see **Wong v Igen Ltd [2005] ICR 931**).
42. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.
43. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.
44. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomura International Plc [2007] IRLR 246**:

“‘Could conclude’ must mean that ‘a reasonable tribunal could properly conclude’ from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory ‘absence of an adequate explanation’ at this stage the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like..... and available evidence of the reasons for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.”

45. However, there must be something from which an inference could be drawn that the treatment complained of relates to the protected characteristic relied on. The fact that a person has that protected characteristic is not enough nor is a mere difference in treatment. Similarly, unreasonable treatment is not enough to establish that there has been discrimination (see **Bahl v The Law Society [2004] IRLR 799**).
46. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450**.)

Harassment

47. Harassment is dealt with by way of the provisions of Section 26 EqA 2010, which provide as follows:

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

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

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

(i) violating B's dignity, or

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

(2) A also harasses B if—

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

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

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

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

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

48. The conduct complained of, in order to constitute harassment under Section 26, must relate to the protected characteristic relied upon by the complainant. However, in respect of a complaint of harassment, the word “relate” has a broad meaning (see for example paragraph 7.10 of the EHRC Code).
49. As restated by the Employment Appeal Tribunal in **Nazir & Anor v Aslam [2010] UK EAT/0332/09** the questions for a Tribunal dealing with a claim of this nature are therefore the following:
- a) What was the conduct in question?
 - b) Was it unwanted?
 - c) Did it have the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant?
 - d) Did it have the effect of doing so having regard to an objective, reasonable standard and the perception of the complainant?
 - e) Was the conduct related to the protected characteristic relied upon?

Victimisation

50. Section 27 EqA 2010 provides that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

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

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

51. It will not be sufficient for a Claimant to simply use words such as “discrimination” for that to amount to a protected act within the meaning of Section 27 EqA 2010. The complaint must be of conduct which interferes with a characteristic protected by the EqA. There need not be explicit

reference to the protected characteristic itself but there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the EqA 2010 applies (see **Durrani v London Borough of Ealing UKEAT/0454/2012**).

52. In dealing with a complaint of victimisation under Section 27 EqA 2010, Tribunal will need to consider whether:
- (a) The alleged victimisation arose in any of the prohibited circumstances covered by Section 39(3) and/or Section 39(4) EqA 2010 (which are set out above);
 - (b) If so, was the Claimant subjected to a detriment; and
 - (c) If so, was the Claimant subjected to that detriment because he or she had done a protected act.
53. In respect of the question of whether an individual has been subjected to a detriment, the Tribunal will need to consider the guidance provided by the EHRC Code (as referred to further below) and the question of whether the treatment complained of might be reasonably considered by the Claimant concerned to have changed their position for the worse or have put them at a disadvantage. An unjustified sense of grievance alone would not be sufficient to establish that an individual has been subjected to detriment (paragraphs 9.8 and 9.9 of the EHRC Code).
54. If detriment is established, then in order for a complaint to succeed, that detriment must also have been “because of” the protected act relied upon. The question for the Tribunal will be what motivated the employer to subject the employee to any detriment found. That motivation need not be explicit, nor even conscious, and subconscious motivation will be sufficient to satisfy the “because of” test.
55. A complainant need not show that any detriment established was meted out solely by reason of the protected act relied upon. It will be sufficient if the protected act has a “significant influence” on the employer’s decision making (**Nagarajan v London Regional Transport 1999 ICR 877**). If in relation to any particular decision, the protected act is not a material influence of factor – and thus is only a trivial influence - it will not satisfy the “significant influence” test (**Villalba v Merrill Lynch & Co Inc & Ors 2007 ICR 469**).
56. In any claim of victimisation, the Tribunal must be satisfied that the persons whom the complainant contends discriminated against him or her contrary to Section 27 EqA 2010 knew that he or she had performed a protected act (**Nagarajan v London Regional Transport [1999] ICR 877**). As per **South London Healthcare NHS Trust v Al-Rubeyi (2010) UKEAT/0269/09** and **Deer v Walford & Anor EAT 0283/10**, there will be no victimisation made out where there was no knowledge by the alleged discriminators that the complaint relied upon as a protected act was a complaint of discrimination.

The EHRC Code

57. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

FINDINGS OF FACT

58. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of the issues in this claim.
59. We have inevitably therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaints before us. Particularly, the Claimant's very lengthy witness statement made a significant number of allegations which did not form part of the claim. It has not been necessary for us to make findings of fact about those matters – for example as to who may have broken into the Claimant's flat - although we have had reference to the background of them when assessing credibility.
60. The relevant findings of fact that we have therefore made against that background are set out below. References to pages in the hearing bundle are to those in the bundles before us and which were before the Tribunal and the witnesses.

The Claimant's employment with the Respondent

61. The Claimant is a painter and decorator with around 20 years experience. The Respondent is a residential building company based in Leicestershire who engages a wide range of skilled operatives to build and finish properties on their sites. The Claimant initially obtained work with the Respondent on a self employed basis which she came to be aware of through her brother who also works for the Respondent.
62. The Claimant was subsequently taken on as an employee by the Respondent and she worked for them between 21st July 2016 and 4th March 2019 when her employment ended by reason of her resignation. At the start of her employment the Claimant was given a statement of main terms and conditions of employment (see pages 63 to 67 of the hearing bundle) which set out that her hours of work were 8.00 a.m. to 3.30 p.m. each day working between Monday to Friday. The statement set out that the Claimant may be required to undertake additional hours as and when required by the Respondent or for the proper performance of her duties.
63. The work of the Claimant and other painters and decorators was to paint houses on new build sites. For the most part the Claimant was one of the only if not the only female painter and decorators employed by the Respondent and was often the only female on site.
64. The houses on the site are known as plots. It has been slightly confusing as to the arrangements for payment for work on plots but ultimately we accept that painters and decorators are paid on a price rate such as £500.00 for a two bedroom house or £750.00 for a three bedroom house. That payment is

made irrespective of how long it takes to paint the plot. For example, if the plot takes 5 days to paint the same rate is paid as would be the case if it had taken the painter 10 days. We accept that some painter and decorators will choose to work additional hours above their core hours on site such as after 5.00 p.m. or on a Saturday as the sooner they finish the plot they can move onto another which would maximise their earning potential. That time would not be paid because it is included in the plot price and is at the preference of the individual painter.

65. However, if the Respondent specifically requested that a tradesperson attend the site out of hours or on a weekend – for example if a plot is behind and needs to be completed urgently to ensure that a sale goes through – that time would be paid at an appropriate overtime rate in addition to payment of the plot price.
66. There would also be occasions when “snagging” work needed to be done on plots. That may be because the work of the painter had not been up to standard or it may be because there has been some damage caused by difficulties with materials or by other operatives. We accept that it would be usual for painters to snag their own plots and that if the reason for the snagging was because of their work not being up to standard that would be at their own cost as part of the plot price. However, if the snagging resulted from something that was beyond their control – such as damage by another tradesperson – the work would be paid for by the Respondent on an hourly rate.
67. There would also be occasions where a painter and decorator took longer than anticipated to complete a plot because they simply worked at a slower pace. It would be possible in such circumstances for the plot rate to fall below the rate of the national minimum wage. On those occasions, the Respondent would make a “top up” payment to bring the plot price overall to the rate of the minimum wage for the hours that had been worked.
68. We did not accept that operatives were free to undertake whatever overtime they wanted without authorisation and we preferred the evidence of the Respondent’s witnesses on that. We did not form the view that the Claimant was being untruthful about her understanding that all additional hours over core hours would be paid and we accept that she genuinely believed that that was what the arrangement was. However, we prefer the evidence of the Respondent on that point as it simply does not make commercial sense for any employer to allow employees to work whatever paid overtime they want without limit or authorisation. It seems to us that such a system would be open to the significant risk of abuse and endanger profitability.
69. Whilst the Claimant may have been asked by MF as her line manager to undertake some overtime, we ultimately have no way of ascertaining when that was, how much overtime was worked and whether or not it was paid. Whilst we did have a spreadsheet put together by Mr. Capek there was no documentary evidence to support the sums which were set out in that document and we had no details about how he had reached his calculations.
70. As we have already touched upon above the Claimant’s line manager was MF. At the material time with which we are concerned MF was one of two area managers. The other area manager was Lee Hurst. Each area

manager was responsible for sites in their specific area and generally speaking would have a team of operatives who they would use on those sites. Although it was possible for operatives to move to sites within the remit of the other area manager that would not happen routinely.

71. The Claimant does not record any problems with MF until December 2016, around five months after she had commenced employment with the Respondent. She described MF in her evidence as a tyrant and a bully and again we accept that that is the Claimant's genuine perception although that appears to be with the benefit of hindsight after events that were traumatic to her and which have clearly caused considerable harm to her mental health. Particularly, she referred in her evidence to having had banter with MF such as asking him if he "had the hump" and having, for example, elbowed him to get him to cheer up. Moreover, the Claimant's evidence was that her working relationship with MF was such that she would often joke with him and effectively give as good as she got. If MF was truly a tyrannical bully then we find it unlikely that the Claimant would have done any of that.
72. Whilst the Respondent's witnesses were keen to paint MF as a measured individual we consider that that has been downplayed and that his character and actions most likely fell between that described by the Claimant and the evidence of the Respondent.
73. It appears clear to us from the evidence of the Claimant and that of the Respondent's witnesses that MF was blunt and direct. We accept that he would swear, shout and become angry but we are satisfied from the evidence before us that he would act in that way with anyone that he was displeased with or whose work he took issue with. There is no evidence that the Claimant was singled out. Indeed, she accepted that when painting plots she would generally be working alone and would not have seen how MF acted with other operatives.

Flat tyre – December 2016

74. In December 2016 the Claimant's car had a flat tyre and she telephoned MF to explain to him that she would be late. We accept that MF may have been short with the Claimant and shouted at her that she would have to make up the time. However, whilst shouting at employees is clearly not acceptable MF was entitled to ask the Claimant to make up the time when she was late for whatever reason that was. Work on the plots has to run to time to ensure that properties are ready for the buyers when the sale completes and it is ultimately the responsibility of the site managers and area managers to make sure that that happens.
75. Whilst we accept on balance that MF shouted and swore at the Claimant on this occasion, we did not find that Mr. Martin who had also been present had been smirking during this incident as was alleged. That may have been the Claimant's impression at the time but we are satisfied from his evidence that he would not have done that because in the past he too had been shouted at by MF and would not have found it funny. Indeed, the Claimant's evidence was that MF might well have been smirking because of her own actions because she was trying to lighten the atmosphere by elbowing MF in "banter".

76. We have taken into account the fact that Mr. Martin did not recall MF shouting or swearing at the Claimant but as we have already indicated it was our impression that the Respondent's witnesses attempted to downplay MF's behaviour and that his actions in reality are likely to have fallen somewhere between the Claimant's account that he was a "tyrant and a bully" to the relatively mild mannered man described by many of the Respondent's witnesses. We find that MF did shout and he did swear but we are satisfied from the evidence that he acted in such a way with any operative, irrespective of gender, who either did not meet his standards or who worked less quickly than he expected.
77. In that regard, we accept the evidence of the Respondent's witnesses that the Claimant was slower in painting plots than others were although we do not accept that her work was seriously substandard as many of them claimed. We equally do not accept that the Claimant's work was of such quality that there were never any issues with it as she suggested. We find it likely that the position was something of a halfway house and that there were problems with speed and quality but equally that some of the "snagging" issues occurred because of difficulties with the materials that were being used.

Broughton Astley site

78. Whilst the Claimant could be sent to any of the Respondent's sites, in reality she was mainly based at the Broughton Astley site. MF was the area manager responsible for that site and the site manager at the time was Lee Martin. The Claimant contends that on 2nd February 2017 Mr. Martin swore at her when she asked for a snag list.
79. A snag list would be a list of jobs that needed to be attended to in order to bring a plot up to specification. It might include touching up paintwork or more significant jobs such as repainting entire walls.
80. On balance, we were not satisfied that this event occurred. The Claimant's evidence on the matter was very jumbled and included the fact that she would not have needed to have asked for a snag list. If that was the case, then of course Mr. Martin could not have sworn at her for asking for one.
81. In all events, even if it had happened the matter would have been relatively innocuous as bad language was not a rare thing on site and indeed the Claimant herself uses relatively colourful language. Even the Claimant's own witness statement recognised that what Mr. Martin is said to have said was to "*bring it up to my* [i.e. the Claimant's] *fucking standard*" which could be expressed to be a compliment.

The Claimant's fall at work

82. We accept the Claimant's evidence that in or around late February or early March 2017 she fell down stairs at the Broughton Astley site and bruised her coccyx. The Claimant's evidence on this point was detailed and consistent and she gave a lengthy background about why an accident involving her coccyx would have caused her a significant degree of pain and discomfort.

83. We also accept the Claimant's evidence that the accident had occurred on a Friday and she continued to be in pain over the weekend. She attended work on Monday as normal but was impeded in her work because of the injury that she had sustained. We do not find it unusual that the Claimant could not recall if she had seen a doctor or that she attended work (because if she did not she would not be paid) and do not consider that that affected her credibility on this issue as Mr. Rhodes suggests.
84. We accept that MF was on site that day and accused the Claimant of not having done much work. In turn she explained about the accident and the fact that she was in pain as a result. We also accept that without warning MF then touched the Claimant's coccyx and in doing so also touched her bottom. This caused the Claimant shock and also pain. We also accept that he said words to the effect to invite Mr. Trueman to feel her coccyx.
85. Whilst the Claimant's evidence about how MF touched her changed as to whether he had just touched her coccyx or her bottom or both we did not consider that to be so significant as to doubt the account that she gave. Her witness statement had been prepared by Mr. Capek and whilst we understand that there were several versions that the Claimant had reviewed it appears to us that she had not appreciated that all the relevant detail would normally be included. Her oral evidence therefore set out additional detail and we are satisfied that that was all that had occurred here. In our experience, that is not unusual.
86. We have taken account of the evidence of Darryl Trueman denied any recollection of the incident and told us that had it happened he would have recalled it because it would have stuck in his mind. However, we have already observed that a number of the Respondent's witnesses appeared to have significant memory problems and simply because Mr. Trueman may not have recalled something, it does not mean that it did not occur. That is particularly the case if there was something of a history of more unusual interactions between the Claimant and MF.
87. We have also taken account of Mr. Rhodes's submissions (on this point and many others) that the Claimant did not raise this point in her later grievance, we do not consider that to be a significant issue given that the Claimant failed to raise clearly almost anything other than general complaints of discrimination.

Snagging work at Loughborough

88. In or around March or April 2017 the Claimant was asked to attend one of the Respondent's sites in Loughborough. That site was not one which MF was the area manager of, but which was under the control of the other area manager, Lee Hurst.
89. The Claimant contends that Mr. Hurst berated her for repairing holes in a wall on a plot on the site. Mr. Hurst's evidence was that he could not recall this incident but that he would have told her if her work was not up to the standard that he expected and that would have been the case for anyone who he was responsible for managing on site.

90. The Claimant's evidence was that Mr. Hurst had told her that she should not undertake the fixing work and that he would get someone else to do it. Her evidence was also that she had been told that any negative attitude towards her from Mr. Hurst was because she was a member of MF's team and MF and Mr. Hurst did not particularly get on.
91. We accept that Mr. Hurst did speak to the Claimant about the holes that she had fixed in the wall but we do not accept that he berated her. The Claimant says that the berating was that she was told that she had not been asked to do the work and that she could not claim extra payment for it. We find that Mr. Hurst did not recall this incident because of the passage of time and because it would not be a particularly unusual situation as area managers were ultimately responsible for the plots and what happened on them. We find it likely that Mr. Hurst did take the Claimant to task telling her that she had not been asked to do the work because on the Claimant's own case he had told her just that and that he would get someone else to do it. The Claimant ignored that instruction and did the work anyway. It is perhaps not unsurprising that Mr. Hurst would have been irritated at that and told the Claimant so in terms.
92. Whilst it was not put by the Claimant in cross examination of Mr. Hockin that he had told her to leave allegations about Mr. Hurst out of her grievance that in our view is not a significant issue and does not affect the credibility of the account that she gave in respect of this incident.

Breakdown of the Claimant's car

93. In April 2017 the Claimant's car broke down and she was unable to attend work. That is not in dispute. The Claimant alleged in her witness statement and in the allegations set out by Employment Judge Adkinson that as a result of her not being able to attend work Mr. Hurst threatened to put her "on report" – that is subject her to disciplinary proceedings – by reporting her to Steven Merrick, a Director of the Respondent.
94. This was an area of the claim where the Claimant's evidence was contrary to the allegation that had been put. We are satisfied that this was not the Claimant being untruthful in her evidence or in the allegation put but was as a result of the fact that the allegations had been put for her and the statement prepared for her and she had not appreciated that matters were not accurate. She was able to explain much better in her oral evidence what she was in fact saying and we accepted her evidence that she had only spent a short amount of time with the solicitor who represented her at the Preliminary hearing and Mr. Capek thereafter was working off the list of allegations as set out at that hearing.
95. With regard to a number of allegations phrased for the Claimant our impression was that she was unsure what complaints in some cases were actually being advanced – the victimisation complaint particularly. Her focus was on matters concerning MF and Mr. Graham and we gained the impression that there had been a lack of detailed consideration about the other peripheral matters.

96. What we accept in fact happened during this incident is that the Claimant was upset that she was not paid for the day that she could not attend work. The Claimant thought that she should be paid because it was not her fault that her car had broken down and prevented her from attending site. We accept the evidence of Mr. Hurst, however, that if someone did not attend work then they would not be paid. That is a perfectly normal state of affairs and we are unsurprised that the Claimant was not paid.
97. However, the Claimant had arranged a lift to the site the following day with David Hockin, a trade union representative. She raised with him her complaint that she was not going to be paid for the day that she had been unable to attend site and he suggested that she join the trade union and he could become involved on her behalf. The Claimant did so and Mr. Hockin in turn raised the matter with the Respondent which resulted in an on site meeting with Mr. Merrick. The reason for Mr. Merrick's involvement was not therefore any report or threat of report by Mr. Hurst but because Mr. Hockin had become involved in the pay complaint.
98. Mr. Merrick attended the site for a meeting with the Claimant and Mr. Hockin. He sympathised with the Claimant's position but ultimately explained that if he made an exception for her then he would also have to pay other staff who did not attend work. That was a reasonable position for him to have taken and it was clear that he took matters seriously and wanted to deal with the Claimant's complaint such that he took time to attend the site for a meeting despite his seniority.
99. The Claimant also alleged that at the same time Mr. Hurst had threatened to lay her off because she had joined a trade union. That was not a matter referenced at all in the Claimant's witness statement and again the basis of this allegation was not in accordance with what the actual position was. In this regard there was no threat of lay off about the Claimant having joined a trade union. What had actually occurred was a discussion between Mr. Hurst and the Claimant about defective works. We accept that Mr. Hurst had originally blamed the Claimant's workmanship but after discussion it was accepted that the defects were caused by problems with the materials that were being used. We are satisfied that there was no threat of lay off.

Attendance at Broughton Astley on 6th August 2017

100. On or around 6th August 2017 the Claimant was directed by MF to attend at the Broughton Astley site. She alleges that Mr. Martin swore at her and told her that there was no work available for her and that she should leave. She further contends that on the same occasion there was work available that could have been offered to her and that she was told by Mr. Hurst that he didn't want her "sort" or "kind" there. The Claimant used both words when describing the incident but we accept that that is simply a matter of semantics and not a significant change in her evidence.
101. We accept that Mr. Martin told the Claimant that there was no work available for her and it is possible that during the course of that exchange he may have sworn. However, we do not find that he was shouting and swearing to the extent alleged and we are satisfied that this was a reasonably innocuous exchange, albeit that the Claimant would have been displeased about there being no work for her because it meant that she had had a wasted journey

and would not be paid. However, the reason that Mr. Martin told the Claimant that there was no work available for her was because that was true. Even on the Claimant's evidence there was in fact no full plot to paint. At most on her evidence there was a half plot which was still drying out. It would have been ready to paint the following week when the regular painter and decorator at that site at that time, Paul, had returned from leave.

102. We accept that it would make logical sense for Mr. Martin to have wanted to wait for that plot to be properly dried out and for Paul to paint it when it was ready rather than asking the Claimant to do the half job. Quite simply, he told her that there was no work for her because there was none. The Claimant does not suggest that there was any other work other than the half plot which she could have painted. We are satisfied that if there had been work available then Mr. Martin would have asked the Claimant to do it because it was not in his interests for work on the site to be delayed.
103. Whilst we accept that Mr. Martin may have made some reference to not wanting "your sort" here with reference to the Claimant, even on her own case that was because she was on MF's team. It had nothing to do with the fact that she was female. We consider that this is another aspect of the claim that has been articulated for the Claimant and which she had not properly considered because she had trusted her legal advisers to advance her case for her. It is not necessarily an unusual situation for Claimants to be confused about certain aspects of their claims, particularly ones where there are multiple discrimination allegations.

Comment to a security guard

104. The list of allegations set out that on the same occasion as the incident referred to immediately above, both MF and Mr. Martin commented to a security guard that the Claimant was a slower worker because she was a woman. That was said to come in response to the security guard having complained about the Claimant working late. The date of the incident in the Claimant's witness statement was not said to be this occasion but 20th December 2016. However, the date appeared to fluctuate in her evidence and we remained unclear as to when it was actually said to have taken place.
105. We found the evidence of the Claimant on the point both jumbled and confused and we prefer the evidence of Mr. Martin that he did not and would not have made any such comment. We found Mr. Martin to be credible on this point.

Kevin Graham

106. Kevin Graham worked for the Respondent on another of their sites. He and the Claimant were aware of each other as, until the events which occurred during her employment, the Claimant and Mr. Graham's sister were very good friends.
107. However, we accept the Claimant's evidence that she had no "long standing personal relationship" with Mr. Graham as the Respondent alleged (see page 51 of the hearing bundle). Over a number of years there were very few occasions when the Claimant had seen Mr. Graham which were mainly limited to her having seen him at his mother's funeral and at his sister's

wedding. We accept the Claimant's evidence that in respect of the former occasion Mr. Graham had asked his sister who the Claimant was because he did not know.

108. Despite the Respondent's position as to a "long standing personal relationship" even Mr. Graham's evidence did not support that. He made reference only (albeit repeatedly) to one occasion when he said that he had seen the Claimant which was at the hospital when his mother had been admitted there. His frequent and marked repetitions that the Claimant had been intoxicated at the time was not supportive of any assertion about a long standing relationship but merely appeared designed to cause embarrassment or paint the Claimant in a negative light.
109. We therefore do not accept that there was any close relationship between the Claimant and Mr. Graham as the Respondent contends and at best they knew of each other in passing via the Claimant's friendship with Mr. Graham's sister. We certainly do not accept that there was any degree of contact between Mr. Graham and the Claimant prior to her commencing employment with the Respondent.

Messages from Kevin Graham

110. We accept the Claimant's evidence that Mr. Graham would send her text messages and videos which had sexual content. Indeed, the Respondent does not deny that as set out in Mr. Rhodes's written submissions (see paragraph 33). Although we accept her evidence that they were sent more regularly we are only able to make findings of fact in respect of two messages which appear at pages 133 and 137 of the hearing bundle. Those are supposed to be "jokes" but clearly show women in a state of undress. One message relates to a supposed gynaecological procedure and the other and the other depicting a sex act being performed. We do not need to set out the content of those messages but suffice it to say it is perfectly obvious that they are of a sexual nature. Whilst the allegation as recorded by Employment Judge Adkinson relates to videos, that is sufficiently wide to encompass also the picture message that we have also found Mr. Graham to have sent to the Claimant.
111. As we have already observed we found Mr. Graham's evidence as to whether he had sent the messages in question to the Claimant to be entirely unsatisfactory and we accept her evidence that he had done so. Whilst Mr. Graham appeared to suggest that the Claimant could have changed a name in her telephone to match his (namely "Kev Old" and "Kev New") we do not accept that that was the case nor was it put to the Claimant by Mr. Rhodes that that was what had happened.
112. Indeed, Mr. Graham denied having sent a message to the Claimant which appears at page 206 of the hearing bundle despite the fact that the contact name was "Kev Graham" and it was signed off "kev x". We remind ourselves that Mr. Graham was at pains during his evidence to stress that he was called "Kev" and not "Kevin". We are satisfied that that message came from him and that he was not being truthful during his evidence about not recalling what messages that he had sent to the Claimant.

113. We therefore accept that the messages which are at pages 132 and 137 were sent to the Claimant by Mr. Graham.
114. The evidence of Mr. Graham was that he sends those sort of messages and videos to many people, both male and female. Mr. Graham did not appear to acknowledge that it is necessary to pick one's audience and sending unsolicited messages of a sexual nature to a female colleague, even one that might be friends with his sister, was inappropriate. We do not accept Mr. Graham's evidence that the Claimant replied in kind or that she was happy to accept the messages. We have seen no evidence as to messages allegedly sent by the Claimant to Mr. Graham and as we have already observed we did not accept his convenient evidence that every time he received a message from someone he immediately deleted it.
115. We accepted the Claimant's evidence that she did not want to receive any messages from Mr. Graham and that they were unwanted and that she told him this directly in January 2019. Particularly, we accept the Claimant's evidence that she was concerned that her grandchildren often picked up her mobile telephone and she did not want them seeing material of that nature. However, we accept that that was not the only reason that the Claimant did not want to receive such messages from Mr. Graham and we are satisfied that she also found them offensive and that it was not appropriate for him to be sending them to her.
116. As we have already found above, there was no prior relationship between the Claimant and Mr. Graham which would have suggested that she would find the sort of messages that he sent acceptable.
117. However, we have no way of knowing whether Mr. Graham was at work when those messages were sent or whether this was something that he was doing out of his normal working hours. Indeed, it is entirely possible that they were sent in his free time given that the Claimant told us in her evidence that Mr. Graham would often send her messages into the evening when she suspected that he had been drinking. We do not find that they were therefore sent in the course of his employment.

Comments from MF - December 2017

118. The Claimant contends that in December 2017 MF bullied her by telling her to "stop being a whiney bitch" to "stop crying" and when she asked about her pay (which she contended was wrong because she was entitled to additional payments) said "we'll see next week".
119. Whilst the Respondent contends that those events did not occur, they have no way of knowing that and have not called MF to give evidence. Given that there were issues between the Claimant and MF and we are aware that she considered that her pay was incorrect, we accept her evidence that these events did indeed occur. That is despite there being some confusion in the Claimant's evidence as to dates and whether this incident occurred in early 2017 or December 2017.

Footing the ladder comments

120. A further allegation identified at the Preliminary hearing before Employment Judge Adkinson was that in December 2017 MF had asked the Claimant whilst she was up a ladder what underwear she was wearing and then sent her text messages asking her to wear a black mini skirt and stockings and suspenders.
121. This was another aspect of the claim where the allegation that had been told to Employment Judge Adkinson by the Claimant's then solicitors did not accord with what the actual complaint was. In this regard, the Claimant's evidence was that MF had made a comment to her when she was at the Respondent's Markfield site about the stairwell that she was going to paint being a good one for "footing the ladder" and that she had better call him when she was going to paint it so that he could "foot the ladder"; the inference being that he could look at her underwear whilst doing so.
122. Whilst the Respondent's evidence was that ladders were not used because painting in stairwells was done using scaffolding towers, that was not always the case and only came into force as a result of unconnected involvement by the Health & Safety Executive. Moreover, we accepted the Claimant's evidence that scaffolding towers were not always used.
123. However, whilst we accept the Claimant's evidence that that comment was made it was not the allegation that was before us – that was about a comment being made about her underwear whilst up a ladder - and no application to amend the claim to recast that particular complaint has been made.

Texts from MF

124. The Claimant contends that during the course of her employment MF sent her text messages asking her to wear stockings and suspenders whilst she was painting. This referred back to the occasion when he had commented about "footing the ladder" so that he could see her wearing them.
125. There was some confusion over the date on which it is said that this text message was sent and on day five of the hearing the Claimant gave three separate dates being 21st February, 22nd February or 24th February 2018.
126. However, the evidence of Mr. Hockin was that he did see a message sent by MF to the Claimant which referred to asking her to wear stockings and suspenders and that he had commented that MF would be sacked once the Respondent saw them. That was notably absent from Mr. Hockin's statement which portrayed that he did not recall any of the content of the messages, but he accepted when questioned by the Claimant that that is what he had seen. We are satisfied from the Claimant's evidence as confirmed by Mr. Hockin that she was sent text messages by MF which requested that she wear red stockings and suspenders.
127. In view of the way in which Mr. Hockin's statement had been written and the fact that he appeared otherwise to have a distinct lack of recollection of the vast majority of things that he was asked about, we prefer the evidence of the Claimant that she also showed him inappropriate messages of a sexual

nature that she had received from Mr. Graham and that Mr. Hockin had said that they would both be sacked once the messages came to light. He accepted in cross examination that he had made the comment that MF would be sacked but we accept that the reference was in fact made both in respect of MF and Mr. Graham.

128. It is also notable that the evidence in Mr. Hockin's statement was that he had seen the Claimant had been replying to messages (suggesting more than one reply) and that he viewed her as having been egging MF on. However, it is notable that his oral evidence appeared to accept the Claimant's account that she had only once replied with a photograph of herself in what we understand to be normal and modest attire saying that that was how she dressed (as opposed to dressing in stockings and suspenders).
129. We therefore accept that there was at least one text message sent regarding stockings and suspenders at some point in late February 2018 and that this was both unsolicited and unwanted by the Claimant who found it offensive. We have of course not heard from MF and although the Respondent is at pains to say that these incidents never happened, they have not called MF and no investigation or discussion was ever held with him about the matter. The Respondent therefore simply cannot know if the messages were sent or not and for the reasons that we have already given we accept that they were.

Removal of an overtime sheet by MF

130. The Claimant contends that in or around December 2017 MF removed an overtime sheet that she had completed in respect of snagging work that she had done at one of the Respondent's sites (there was some confusion over whether this was at Markfield or Broughton Astley).
131. The Claimant's evidence on this point was somewhat confused and appeared to rely more on an assertion that MF must have removed the overtime sheet because she was not paid correctly thereafter. There is nothing other than supposition that that was the case however and we do not find that this incident occurred.

Incident with Kevin Graham at Broughton Astley

132. We prefer the evidence of the Claimant as to what occurred with regard to Mr. Graham on 23rd January 2018 at the Broughton Astley site. Although at times jumbled, her account has been consistent and forceful as to the events of that occasion despite lengthy cross examination. The date of this incident was originally set at December 2017 in the Orders of Employment Judge Adkinson but it transpired during the Claimant's evidence that this and a later incident (recorded at paragraph 16.2.15) were in fact one and the same and the "rude gestures" that were being referred to were biting gestures. We come to why Mr. Graham made those gestures below.
133. We have taken into account Mr. Rhodes submissions that the Claimant's evidence before us was that she believed that Mr. Graham had been going to rape her and that this had not been said before, even in her witness statement, and as such affected credibility but we do not agree. We are satisfied that that is how the Claimant felt and the fact that she made that plain during her oral evidence rather than in her witness statement does not

affect her credibility. It is not unusual in our experience for evidence of that nature to be given and the Claimant was visibly distressed during this part of her evidence.

134. In regard to the 23rd January incident we accept that Mr. Graham entered the plot that the Claimant was painting on her last day on site at Broughton Astley. At the time she was part way up a ladder painting the walls. We accept that Mr. Graham told the Claimant that she was at the right height for him to bite her nipples. We further accept that he made the biting gestures to which we have already referred above before moving towards the Claimant with the result that she thought that he was leaning in to kiss her. We accept that he had also asked her for a kiss during this incident. As a result of Mr. Graham moving forwards towards her, she jumped backwards from the ladder and fell, landing on the floor.
135. We accept that the Claimant was scared and did not want to look at Mr. Graham and so she retreated to the other side of the room after telling him to “fuck off”. She believed that Mr. Graham had left the plot until he asked if he was going to get a kiss goodbye. The reference to goodbye was that the Claimant was leaving the Broughton Astley site that day to work elsewhere.
136. When Mr. Graham made his comment the Claimant realised that he was still in the plot she turned around and found that Mr. Graham had exposed his erect penis to her. She asked him why he had done that and we accept that Mr. Graham replied that it was because he wanted her to know that he had a “big cock” and then asked her if she thought he had a “big cock” to which the Claimant replied words to the effect of “not as big as the cock that it’s attached to”.
137. The fact that this incident occurred is also supported by a message that the Claimant sent to a friend after a further incident involving Mr. Graham which we shall come to below.
138. We have taken into account the Claimant’s evidence that Mr. Martin had seen that she was upset after the incident in question (albeit it was not said that he had seen what had happened) but he had no recollection of that or of the Claimant asking for her plot to be kept locked but simply because Mr. Martin had no recollection of those matters does not mean that the incident did not occur as the Claimant says.
139. Whilst the evidence of Mr. Graham was that the Claimant had said that she was going to take the Respondent to a Tribunal and the suggestion might be that such a message was to garner evidence for that, none of that was put to her in cross examination by Mr. Rhodes. Moreover, Mr. Graham’s evidence that the Claimant had told him that she had “screwed over” Ann de Vere Hunt made no sense given that her only involvement with the Claimant was after she made a complaint about his conduct and his evidence had been that he had had no further contact with the Claimant after that point.
140. We accept the Claimant’s evidence that on 11th May 2018 Mr. Graham again attended the site that the Claimant was working on. The purpose of that was for the Claimant to repay some money that she had borrowed from his wife (albeit that the money actually belonged to Mr. Graham as he was at pains to point out in his evidence). The Claimant had made reference to Mr. Graham

taking the money back during the incident on 23rd January 2018 because she thought that he believed that it gave him a form of hold over her. That had not happened at Mr. Graham's insistence, but the Claimant had arranged to repay the money in instalments.

141. We accept that the Claimant had originally arranged to meet Mr. Graham in the public house which he frequented after work in order to pay back an instalment of the borrowed monies.
142. That was clearly not a wise decision and we questioned the Claimant as to why she had not simply paid the money back to Mrs. Graham. We accept that, rightly or wrongly, she thought that that might cause trouble and she did not want to upset Mrs. Graham.
143. Whilst we have taken into account the point raised by Mr. Rhodes that it is implausible that the Claimant would arrange to meet Mr. Graham given her evidence that she had previously thought that he might rape her, we accept her evidence that she had arranged to meet him in public where she felt that she would be safe.
144. The Claimant had arranged to meet Mr. Graham at 3.30 p.m. and we accept her evidence that PH agreed that she could leave work early to collect the money, go and meet Mr. Graham and then return to the site later to complete her work. However, before the time that they were due to meet we accept that Mr. Graham arrived on site and located the plot that the Claimant was painting. Once she became aware that he was there, the Claimant went downstairs and met Mr. Graham at the door and paid him the instalment monies. She then believed that he left the site.
145. However, we accept that he had not left and in fact re-entered the Claimant's plot and went up the stairs into the bedroom that she was painting.
146. We accept that on that occasion Mr. Graham told the Claimant that she looked "sexy in her shorts and top" and that after he had said that she took steps to put on other clothing over the top of them. As we have already remarked above, rather than a simple denial of that allegation in cross examination Mr. Graham chose to deploy a flippant response and we did not accept his evidence on the point.
147. We are also satisfied that at a later point during the same incident Mr. Graham reached over and pulled the Claimant's false eyelashes out. He accepted in his evidence that the Claimant had paint on her eyelashes, although he denied pulling them out.
148. We also accept the Claimant's account that after Mr. Graham pulled out her eyelashes, he stroked her on the arm and then proceeded to grab her genitals over the top of her clothing.
149. There is evidence going to support the fact that something untoward had happened as the Claimant sent a message to a friend after the event. Clearly, unless the Claimant was setting up the Respondent – a point not put to her despite lengthy cross examination over a number of days – there would have been no basis to send the message at page 212 of the hearing bundle which shows her in some distress and with red eyes and we find that

that message gives credence to the fact that something untoward had occurred with Mr. Graham at that time. That message said this:

“Fuckin (sic) topped to fuck n (sic) scared ... that kev who shown his willy turned up plot”.

150. We find that that also supports the fact that Mr. Graham had previously exposed his penis to her and that he had attended the plot to see the Claimant that day. As above whilst Mr. Graham’s evidence appeared to be that the Claimant had been manufacturing evidence to take the Respondent to a Tribunal, we did not accept that and it is notable that that was not put to the Claimant in cross examination.
151. Mr. Rhodes submits that the Claimant’s evidence is implausible when she said that she had told a police officer who lived on the site in one of the completed properties and who she had done private work for and was told by that officer not to report the matter. We do not consider that to be implausible given the explanation that the Claimant gave about why she was told not to report it because the officer was speaking from her own experience about what had happened to her when she had reported an offence against her. We do not need to set out the details of that.

Telephone call to the Claimant from Kevin Graham

152. We accept the Claimant’s evidence that on 24th February 2018 Kevin Graham made a telephone call to her whilst she was at home.
153. We did not accept his version of events about this occurrence which was that he had seen the Claimant’s distinctively decorated car while taking his motorbike to a dealers to be serviced and had mentioned it to her a few days later. Again we prefer the Claimant’s evidence on the point. That was despite the fact that there was some clarity in date as to this event on day five of the Claimant’s evidence which saw her pinpoint the date as 24th February 2018 as opposed to January or February 2018. We do not consider that pinpointing of a date to affect the Claimant’s credibility on this event and she gave a detailed and otherwise consistent account.
154. We accept that Mr. Graham made a telephone call to the Claimant and that her daughter had originally answered. When the Claimant took over the call Mr. Graham asked her if she liked red or white wine and that he wanted to see her. Although the Claimant had not told Mr. Graham where she lived he indicated that he had previously driven around looking for her car which is a distinctive one because of how it is decorated. We did not accept Mr. Graham’s evidence that this did not happen because he does not drink wine and would not have been offering to purchase any.
155. We also accept the Claimant’s evidence that Mr. Graham told her that he had booked his car into a garage which was near her house so that he could come to “service her” (an obvious reference to sexual intercourse), that he wanted to put his tongue all over her and that he wanted to fuck her. The Claimant terminated the telephone call at that point.

Telephone call and text message from MF – 24th February 2018

156. We accept the Claimant's evidence that shortly after she received the call from Mr. Graham, she was telephoned by MF who asked her if she was on her way to work yet. We further accept that thereafter he sent her a message referencing her wearing red stockings and suspenders which was again referring to the issue about "footing the ladder".
157. Whilst there was some confusion as between the Claimant's evidence and the record made at the Preliminary hearing, again we consider that that is explained by the Claimant's reliance on her representatives to put forward her case without due attention to the matter. We found her to give credible evidence on this event and the Respondent of course did not call MF and is not in a position to say that this incident did not occur.
158. We do not accept the Respondent's position that this was part of workplace "banter" that the Claimant had with MF. It was clearly much more than asking if MF "had the hump" or similar and was making sexual references. We accept that the Claimant found such messages unwanted.

9th April 2018 – Sapcote site

159. On 9th April 2018 the Claimant was working on a plot at the Respondent's Sapcote site where she had been transferred to work on 19th March 2018. We accept her evidence that Mr. Graham had still been attempting to make contact with her by telephone but that she had not been answering his calls or replying to his messages. There is support for that position at page 121 of the hearing bundle which is a message that we accept was from Mr. Graham indicating that he had been trying to contact her and saying that she was not replying to him.
160. We accept the Claimant's evidence that Mr. Graham telephoned her and she answered the call without checking the display and thinking that it was her daughter calling. We accept her evidence that Mr. Graham told her that he was on site behind the show house and that he wanted to see her and that she refused.
161. Mr. Rhodes submits that the Claimant's account has differed as to where Mr. Graham said that he was standing (whether this was in the show home, behind it or at the side of it) but we do not consider that to be a significant issue. The Claimant's evidence as to the substance of the incident has been consistent.
162. It is also submitted by the Respondent that it is implausible that this event took place because Mr. Graham would not have been able to find the Claimant on a large site. However, we accept the Claimant's evidence that she was in her car which, as we have already remarked, is distinctive and that it would not have taken Mr. Graham long to locate her parked next to the plot that she was working on as Sapcote only had 68 houses on the site.
163. Whilst Mr. Rhodes also points to the fact that the Claimant had referred for the first time in cross examination to having telephoned Mr. Graham to ask him not to attend site because he would get her into trouble, we did not consider that to be something which undermined her account. It is not

unusual for oral evidence to raise minor matters of this nature and we are satisfied that the Claimant did not appreciate the need to raise everything within either the claim or her witness statement.

Incidents with MF 10th April, 19th June and 13th July 2018

164. The Claimant contends that on 10th April 2018 MF furiously shouted and swore at her about getting the plot that she was working on finished before returning an hour later and again shouting and swearing at the Claimant saying “come on cry baby, let’s see them tears”.
165. Again, the Respondent has not called any evidence from MF about this point and given what we have already found as to the Claimant’s working relationship with MF we are satisfied that he shouted and swore at her although we find it more likely than not that it was not done “furiously” but more in the blunt and abrupt manner that we have found MF operated in. we are also satisfied that he made the “cry baby” comment.
166. However, whilst inappropriate and the Claimant should not have been sworn at or shouted at, we are satisfied from her own account that this was because MF felt that not making sufficient progress on the plot. We remind ourselves that it was ultimately his responsibility for the plots to be finished on time.
167. We are satisfied from the evidence of the Respondent – and Mr. Martin particularly - that MF would have taken anyone to task in this way that he perceived was behind with work on their plot. Indeed, Mr. Martin had been spoken to in blunt terms by MF previously.
168. The Claimant contends that MF failed to cooperate with her in securing payment of the wages that she was due when she asked him to do so on 19th June 2018. We cannot make any finding that MF should have taken some steps to secure payment of monies owed to the Claimant because the position as to whether she was owed any monies for overtime etc is extremely unclear.
169. The Claimant also contends that MF swore at her when she enquired about pay; failed to cooperate in obtaining outstanding wages and suggested if she wanted to be paid for “extras” then she should try escorting. We are satisfied that MF did swear at the Claimant on this occasion and did make the comment about escorting and again the Respondent has called no evidence to counter that assertion when it was open to them to do so.
170. However, we make no finding about a lack of cooperation on securing the payment of wages for the same reasons as we have given in respect of the 19th June incident.

Meeting with Anne de Vere Hunt

171. On 15th May 2018 Anne de Vere Hunt met with the Claimant at the Broughton Astley site as it had been reported that there had been an incident involving the Claimant and Mr. Graham.
172. Whilst the Claimant says that MF was also mentioned at the meeting we accept the evidence of Anne de Vere Hunt that he was not. We find it more

likely than not that the Claimant has not correctly recalled matters in that regard because she was upset at the meeting and, indeed, the evidence of Anne de Vere Hunt is that what the Claimant was telling her was very hard to follow. That is not unlike the Claimant's evidence before us, but we are satisfied that that was as a result of very heightened emotions rather than any lack of candour on her part.

173. We should observe that there are no notes of the meeting with the Claimant on 15th May 2018. The evidence of Ms. de Vere Hunt was that she initially attempted to take notes on her laptop but the Claimant was not clear in what she was saying and it was too difficult to do so. Whilst we have some sympathy for that position because we also encountered similar issues in following some of her evidence at the hearing, we are surprised that Ms. de Vere Hunt did not take even basic details given the seriousness of the issue that the Claimant was raising about being the recipient of an indecent exposure.
174. We are satisfied that during the meeting the Claimant explained to Ms. de Vere Hunt that Mr. Graham had exposed his penis to her. Whilst we accept that the Claimant indicated that she wanted matters to be dealt with informally we are very surprised that Ms. de Vere Hunt agreed to that. What had been reported to her was a sexual offence and that was a matter so serious that it clearly needed investigation and action to be taken to protect both the Claimant and others to whom Mr. Graham came into contact with in the workplace. However, we accept that ultimately she was simply following what the Claimant had asked her to do.
175. Instead, Ms. de Vere Hunt indicated that she would meet with Mr. Graham to discuss the matter. She wrote to the Claimant in that regard on 30th May 2018 and the relevant parts of her letter said this:

“Following on from our conversation in which you expressed your concern regarding the unwanted attention from another employee.

I have not opened an investigative case as you have expressed a wish not to get the employee into trouble. I spoke with your Brother, Dean, who told me he had spoken to the person and told them to keep away from you as you are not interested.

Dean also told them that the company are aware of the situation and so I will have a meeting with them to confirm that we are aware and the consequences should additional contact be made.

Please advise me should you receive any further unwanted attention from this person”.

176. In fact, Ms. de Vere Hunt never met with Mr. Graham because he refused her request to attending a meeting. Instead, Mr. Graham had a telephone discussion with Ms. de Vere Hunt. Again, it is surprising that there are no notes of that discussion given the severity of the matter and it is equally surprising that Ms. de Vere Hunt did not press for attendance at a meeting which would of course have been an entirely reasonable management instruction. The fact that Mr. Graham refused to attend a meeting and according to his evidence did not even bother to ask Anne de Vere Hunt what

the basis of the allegations against him were is indicative of his failure to take his actions and the impact that it has had on the Claimant seriously. That was also our impression of his evidence before us which, as we have already observed, was inappropriate and cavalier. Equally, if Mr. Graham had not done anything wrong as he contended then it beggars belief that he would not have asked what the allegations were and he provided no reasonable explanation for that position.

177. After the telephone call Ms. de Vere Hunt wrote to Mr. Graham. The terms of that letter were insufficiently strong to properly convey to Mr. Graham how serious his behaviour had been. All that was said was this:

“Thank you for calling me in response to my letter, requesting a meeting with you, to discuss a potential issue between yourself and an other (sic) employee.

Whilst you did not wish to come to the office we did discuss the matter over the phone and you have assured me that you have no intention of making contact with the person concerned. You advised that you had removed all contact information from your phone.

I did explain that the person did not wish to make anything formal and it was not reported by them, but a third party who had become concerned.

I trust that I will not be asked to become involved any further and this will be the end of the matter.”

178. We are satisfied that the approach that Ms. de Vere Hunt took, whilst clearly not robust enough, was borne from inexperience rather than any intention not to deal with what the Claimant had raised and that she genuinely thought that she was taking the best approach given that the Claimant had asked her to deal with matters informally.

The Claimant's sickness absence

179. On 12th July 2018 the Claimant began a period of sickness absence suffering from work related stress. She submitted a statement of fitness for work (“Fit Note”) to the Respondent dated 16th July 2019 which signed her off as being unfit to work for two weeks. She continued to submit further Fit Notes until her resignation from employment. We come to that resignation further below.
180. By the time that she commenced her sickness absence Ms. de Vere Hunt had spoken to the Claimant's sister and was aware that the Claimant wanted to now formally advance complaints about Mr. Graham. She wrote to the Claimant on 20th July 2018, 30th July 2018 and 10th August 2018 asking for a written statement about the events that the Claimant was concerned about. The Claimant did not supply that.
181. The Claimant sent a text message to Ms. de Vere Hunt on 21st August 2021 (see page 229 of the hearing bundle). She apologised for the delay in producing the report and explained that she had a number of personal problems that had caused her not to be able to complete it.

182. Ms. de Vere Hunt wrote again on 21st August 2018 to say that whilst she appreciated the issues that the Claimant had in her private life, she was unable to investigate her concerns without a written account of what had occurred. Ms. de Vere Hunt explained that she did not need a report but a “simple What, Who and When preferably in date order”. She asked the Claimant for that information by 28th August 2018.
183. The Claimant did not supply that information. She did send text messages to Ms. de Vere Hunt but they did not supply the level of detail that was required to commence an investigation.
184. Ms. de Vere Hunt wrote to the Claimant again on 6th September 2018 to invite her to a meeting to discuss her health and anything that could be done to enable a return to work (see page 83 of the hearing bundle).
185. That meeting did not take place because Mr. Hockin said that the Claimant would not be attending because MF would be present. The Claimant contends that it was inappropriate to invite her to a meeting where MF was present because she had also made complaints about him. We are satisfied that Ms de Vere Hunt was in fact not aware of any complaint about MF of a sexual nature at that stage. The nearest that the Claimant had come to a complaint about MF was a text message that she had sent to Ms. de Vere Hunt on 25th June 2018 when she referred to MF trying to get her to leave, preventing her from earning money, moving the goalposts and “going ape” and that he was “as bad as Kevin Graham”.
186. Ms. de Vere Hunt involved MF because she had intended him to be present at the meeting as the Claimant’s line manager. After a complaint was raised about him being present, he was not involved in or invited to any further meetings.

The grievance and appeal process

187. On 25th September 2018 the Claimant sent a letter to Anne de Vere-Hunt who dealt with Human Resources (“HR”) within the Respondent. We should note that at this time the Respondent did not have an HR department as such and Ms. De Vere Hunt had moved into this position from working as a Personal Assistant to one of the Directors. She does not appear to have had any formal training or background in HR other than what she had developed on the job working for the Respondent.
188. The Respondent accepts that the Claimant’s grievance letter, which features at pages 84 to 86 of the hearing bundle, amounted to the doing of a protected act for the purposes of her victimisation complaint.
189. The letter did not provide any detail about the complaints that the Claimant was advancing as Ms. de Vere Hunt had been asking her for for some time. She named MF, Lee Hurst, Lee Martin and Kevin Graham. Under the name of each she complained of various strands of discrimination but without any detail about that. The relevant parts of the letter in that regard said this:

*“MF
Discrimination\Direct\unlawful\Association
Harassment*

Victimisation

Lee Hurst

Direct discrimination

Victimisation

Lee Martin

Direct Discrimination by perception

Harassment

Victimisation

Unlawful discrimination

Kevin Graham

Unlawful discrimination

Harassment

190. The Claimant's letter said that she would be sending through a detailed account by no later than 1st October 2018 and would be submitting supporting evidence such as statements and text messages by no later than 5th October 2018.
191. Ms. de Vere Hunt acknowledged the Claimant's letter on 27th September and indicated that she would await receipt of the further detail that the Claimant had indicated that she would provide.
192. Although we have considered the evidence carefully because it is quite an unusual position, we accept that the Claimant was not able to submit her notes and some of the evidence that she wanted to rely on – including the text messages from MF – because her flat was burgled and those items were taken. Whilst it appears extraordinary that the mobile telephones with messages on and the Claimant's statement for Ms. De Vere Hunt were the only items taken, we have seen a police report that the Claimant had made – which in itself is a serious matter if the burglary was not true - and there is evidence of the existence of the text messages from the oral evidence of Mr. Hockin.
193. We do not therefore consider that the Claimant had made up the burglary as the Respondent appears to suggest to justify not being able to produce the text from MF (the suggestion being that they did not exist). We should stress that we are making no finding as to the Claimant's suggestion that it was MF and/or Mr. Graham who were behind the burglary. That is a matter for the police not this Tribunal.
194. Ms. de Vere-Hunt accepted in her evidence that the Claimant had told her that she was not able to provide the details at that stage because of the burglary.
195. What is plain is that the burglary affected the Claimant very deeply. Indeed, she believes that during the course of the same she was, or possibly was, subjected to a sexual assault. Again, we stress that we are making no findings about that because it is not necessary to do so. We mention this simply because the Claimant's mental health was considerably affected and it is plain that she still remains deeply affected by the matter when giving evidence on such matters at the hearing. Indeed, as a result of the burglary

she was assessed and given a period of lengthy treatment by the Crisis Resolution and Home Treatment team (see page 88 of the hearing bundle).

196. There were further texts exchanged between the Claimant and Ms. de Vere Hunt with the Claimant asking on 13th December if she could have an informal meeting (see page 233 of the hearing bundle). Ms de Vere Hunt replied to the text arranging holiday for the Claimant with a proposed return to work on 7th January 2019 and suggesting a date for a meeting. She also wrote to the Claimant on 20th December 2018 to ask her to attend a meeting on 3rd January 2019. That meeting did not take place as the Claimant was unwell and it was pushed back twice because of that.
197. On 14th January 2019 the Claimant attended a grievance meeting with Ms. de Vere Hunt. Notes were taken by an HR Administrator and we accept that they are a reasonable account of what was discussed. The Claimant said that MF and Mr. Graham had been sending her “crude messages” and that MF had been calling and harassing her. No reference was made to Mr. Martin or Mr. Hurst.
198. Not unreasonably Ms. de Vere Hunt explained more than once during the meeting that she needed dates and times and evidence including copies of messages and witnesses of what the Claimant was telling her. The Claimant said that she knew that she did not explain things well and that she would get the information to her. Other than the fact that it was said that messages and calls had been received from MF and Mr. Graham, no further details were provided at the meeting.
199. The Claimant’s evidence was that Ms. de Vere Hunt told her at the meeting that she would not need to “put pen to paper”. We are satisfied that Ms. de Vere Hunt did want things in writing and that the Claimant’s reference in this context was that it was suggested that if there were difficulties writing things down then the Claimant could use a Dictaphone to record the detail of her grievance.
200. Towards the end of the meeting there was a discussion about settlement of the matter and a parting of the ways. We accept that that was a matter raised by the Claimant rather than at the instigation of Ms. de Vere Hunt.
201. On 18th January 2019 Ms. de Vere Hunt wrote to the Claimant explaining that the Respondent was unable to enter into settlement discussions because they were not clear on the basis of the grievance that she wanted to raise (see page 106 of the hearing bundle). The Claimant was invited to a further grievance meeting which was originally scheduled for 25th January 2019 but the Claimant indicated that she was unable attend and so it was re-arranged for 29th January 2019. At this meeting Mr. Hockin attended with the Claimant in his capacity as her trade union representative.
202. Some time before the meeting the Claimant had contacted Mr. Hockin and told him that she had found some messages from MF and Mr. Graham that she had thought had been lost. We accept the Claimant’s evidence that she had used a number of handsets during the course of her employment with the Respondent and she had come across them after believing that the handset was broken. We accept her evidence that Mr. Hockin was shocked at the content of the messages and commented that both MF and Mr.

Graham would be sacked when they came to light. Indeed, Mr. Hockin accepted that he had made that comment about MF in his oral evidence. We accept that the handset on which those messages were stored was stolen in the burglary and so the Claimant was not able to provide them to the Respondent although she did provide others at the second grievance meeting.

203. Mr. Hockin commented at the meeting that he had seen some of the messages although he said that he could not recall exactly what they said. As we have already commented, he managed to recall the content in his evidence before us, however, and that they referred to the Claimant wearing stockings and suspenders.
204. By the time of the meeting the Claimant no longer had the telephone with messages from MF regarding asking her to wear stockings and suspenders but she did provide evidence of other messages and ones from Mr. Graham (see page 109 of the hearing bundle). We have already dealt with the content of those latter messages above.
205. The Claimant again indicated that she needed to write down her account of what had occurred that she was complaining about in the context of her grievance and it was agreed that she would provide that to Ms. de Vere Hunt by the following Monday. As we shall come to, that did not happen.
206. At the meeting reference was made to checking for messages on MF's mobile telephone and Ms. de Vere Hunt said that she thought that she would be able to do that without having to take the handset from him. Enquiries were made with IT after the meeting, but it transpired that it was not possible to obtain them (see pages 139 to 141 of the hearing bundle).
207. We accept Ms. de Vere Hunt's evidence that she did not think that she could ask MF for his work mobile telephone because he was also allowed to use it for personal use. However, what did not occur to her was simply to look at the messages between himself and the Claimant given that most mobile telephones group messages between individual contacts. Whilst that was clearly an error on Ms. de Vere Hunt's part we accept that it was not deliberate and it was simply something that did not occur to her. We remind ourselves that at that stage at least Ms. de Vere Hunt did not have a great deal of HR experience.
208. On 4th February 2019 Ms de Vere Hunt wrote to the Claimant because she had received a message from her that there would be a delay in providing the information that it had been agreed at the second grievance meeting would be with her that day. The Claimant had said that she would have all of the information by 6th February 2019. Ms. de Vere Hunt explained that she had been unable to access MF's text messages and that the Respondent was therefore reliant on the Claimant to provide as much information as she could. Ms. de Vere Hunt had also replied to the text message that the Claimant had sent. In the Claimant's message she had asked for Ms. de Vere Hunt's email address so that she could start sending her parts of the grievance report through. Alternatively, she asked her if she would like it all together. The Claimant is critical that Ms. de Vere Hunt replied to say that she would prefer to have everything altogether although we are not surprised that she took that approach rather than receiving information piecemeal.

209. The Claimant did not provide the written statement and evidence to Ms. de Vere Hunt on 6th February 2019. Instead, she wrote a relatively short letter dated 7th February which was received by the Respondent the following day. The Claimant apologised for not having contacted Ms. de Vere Hunt sooner and said that she was struggling to provide supporting factual evidence about her grievances. She said that that could not be done “with speed” unless they were to go “down the police route” where the police would be able to obtain copies of the messages from MF and Mr. Graham. She indicated that she did not want to do that at that time.
210. The Claimant also referred to personal issues that she was having to deal with and that she considered that there were some “red flags” concerning evidence that had gone missing during the burglary of her flat. She indicated that the burglary was already in the hands of the police.
211. On 8th February 2019 Ms de Vere Hunt wrote to the Claimant closing the grievance. The relevant parts of her letter said this:
- “I have asked you on the 29th January and also the 4th January to provide us with evidence to support your grievance however this has not been forthcoming. Your letter received today, 8th February confirms that you are finding it difficult to collate and produce evidence. You therefore give me no option but to close this grievance”.*
212. We accept that the Claimant may not have received the letter until 15th February 2019 but that was likely to be a delay in the post and we accept it was not any deliberate delay on the part of Ms. de Vere Hunt. Whilst the delay only gave the Claimant a short amount of time to appeal, she was still able to do so and it would have been open to her to ask for additional time.
213. The Claimant was notified of her right of appeal against the decision to close the grievance and that that should be directed to Jane Ives. The Claimant contends that that was inappropriate because Ms. de Vere Hunt would have known that Jane Ives was away on annual leave and so would not be there to receive her appeal. Nothing turns on this point however because Jane Ives as Group HR Manager was the appropriate person to appeal to; she was not absent for a lengthy period and picked up the grievance when she returned to work and in all events the Claimant still never provided the necessary information to fully investigate the complaints that she had made in the grievance. Particularly, next to nothing had been said about discrimination from Mr. Hurst and Mr. Martin.
214. The Claimant contends that the decision to close the grievance came because she made Ms. de Vere Hunt aware that she had reported matters to the police. That can only be a reference to the burglary because she had not complained to the police about harassment by MF and Mr. Graham at that time. In fact, her letter made plain that she did not want to do that at that time.
215. We do not accept that the grievance was closed for that reason. We accept the evidence of Ms de Vere Hunt that the reason that she had closed the grievance was because she was not getting the statement (the simple who,

what when etc) that had been promised by the Claimant and the supporting evidence that she said that she had to allow a full investigation.

216. We remind ourselves that the Claimant had been asked for that both before and after her grievance letter and appears to have asked her no less than seven times for that information over the period July 2018 to February 2019. Seven months had passed and the matter was no further forward. We are satisfied that that was the reason that the grievance was closed and not because the Claimant had reported anything to the police or that there was any desire to cover things up.
217. Whilst we accept that Ms. de Vere Hunt closed the grievance because she did not think that she was able to investigate it without the Claimant's statement and evidence, we do not consider that that was the correct approach. We are troubled that the Claimant had made it plain that Mr. Graham had indecently exposed himself to her but that that was never formally taken forward. That was a serious matter and yet nothing was done about it. Ms de Vere Hunt had all the necessary information to investigate that and to speak formally to Mr. Graham and determine that part of the grievance.
218. Similarly, she knew that the Claimant was saying that Mr. Graham and MF had been sending the Claimant inappropriate text messages. She could and should have spoken to them both about that and viewed the mobile telephone of MF as it was a work phone belonging to the Respondent. She could have dealt with those parts of the grievance and told the Claimant that she was dismissing the rest because there was no detail or evidence. In reality, it appears to us that those were and continue to be the real issues of concern to the Claimant. However, in our view the failure to deal with matters in that way comes down to inexperience on the part of Ms. de Vere Hunt at that time.
219. It is also contended by the Claimant as part of the claim that Ms. de Vere Hunt unduly delayed dealing with the grievance. Other than the point about the annual leave of the appeal officer which we have already dealt with above, there was no delay on the part of Ms de Vere Hunt. The reason for the delay was because she was waiting on information from the Claimant which was never forthcoming.
220. Had we found there to have been any delay, however, we would not have found that that was because the Claimant's grievance was a protected act. There was no evidence to that effect and that was not a matter that was put to Ms. de Vere Hunt in cross examination despite the Claimant being reminded to do so. This appeared to us to be another area where the Claimant was unsure of the case that she was actually bringing and had relied on her legal advisers to deal with that.
221. The Claimant sent a text message to Ms de Vere Hunt on 14th February 2019. That message asked to arrange a meeting to discuss the grievance.
222. Ms de Vere Hunt wrote to the Claimant the same day to refer her to the previous letter as to why the grievance had been closed and to remind her of her right of appeal and how that should be exercised.

223. The Claimant chose to exercise her right of appeal and wrote to Jane Ives on 15th February 2019 (see pages 148 to 150 of the hearing bundle). The Claimant said that she would supply all supporting evidence by 18th February 2019. As we shall come to below, that did not happen either.
224. We should observe that we accept that the Claimant was not deliberately failing to provide the information but that she was genuinely struggling with what was required and although she had every intention to keep to the timelines that were agreed she was simply unable to do so.
225. The Claimant referred in her appeal letter to the process being a shambles on both sides and a lack of help from the Respondent. She referred to the receipt of messages from MF and to Mr. Graham having exposed himself to her and touched her.
226. The Claimant did not supply the detail or supporting evidence by 18th February 2019. Instead she wrote to Ms. Ives the following day saying that she had not supplied that because she had not heard if her appeal was being allowed. She did refer within that letter to having supporting evidence in her possession. The Claimant asked to speak with Ms. Ives about the matter and referred to receiving support from Crisis and from the police because she did not think that matters had been dealt with fairly by the Respondent.
227. The Claimant set out that she was complaining about “*unlawful discrimination (sex) Direct Discrimination, by Perception/Association as well as Health & Safety*”. No details about that were provided. The Claimant also made plain that she was suffering financial hardship and that the Respondent was no longer paying her statutory sick pay.
228. Ms. Ives wrote to the Claimant on 25th February 2019 – ten days after she had submitted her appeal – apologising for the delay and explaining that she had been on annual leave. She invited the Claimant to a meeting on 20th March 2019 and stressed to her the importance of bringing details of the complaints with her and explained that otherwise the Respondent would be unable to investigate. There was a delay in the meeting taking place, but it was explained to the Claimant why that was and the letter said this:
- “I have given you a few weeks to pull your information together as the business has been requesting since July 2018 for you to provide us with the details of your complaint i.e. names, places, dates, times and witnesses so that we can pursue this. This hopefully allows you ample time to get this information for the meeting”.*
229. We accept that that was the reason for the gap between the letter and the meeting and was to the Claimant’s benefit given the obvious difficulties that she was having in putting her grievance together. The Claimant is critical of that position and we understand that this is part of her complaint about undue delay in the grievance being dealt with. We do not accept that this did amount to undue delay because the Respondent had been seeking details of the Claimant’s grievances since July 2018 and she was still yet to provide them in full despite promises to do so. The delay was to the Claimant’s benefit as it allowed her additional time to pull the information together.

230. We accept that that was the reason for the delay between the letter and the meeting as was explained by Ms. Ives at the time. Although the Claimant asserts that this was because she had done a protected act, again that was not put to Ms. Ives during cross examination.
231. The Claimant wrote to Ms. Ives on 28th February 2019 complaining about the delay in receiving communications about the appeal from her. She did not provide any material further details about the complaints that she was pursuing over and above those previously provided.
232. On the same day that the Claimant wrote this letter she also wrote a further letter resigning from employment with the Respondent with immediate effect. She referred at the final paragraph to her belief that she had been constructively dismissed. The resignation letter is a lengthy one and so we do not set out the entire content here. However, the letter made the following points:
- a. That the process violated the Respondent's grievance procedure and the ACAS Code of Practice on the basis that there had been a delay in dealing with the matter and so the outcome should be null and void;
 - b. That the Claimant was innocent of any wrongdoing and that she had been discriminated against and subjected to sexual harassment;
 - c. That HR had closed the grievance;
 - d. That HR had known about health and safety breaches but had acted as the Claimant's accuser, prosecutor, Judge and hangwoman and pass judgment on her and closing the case;
 - e. That she considered that it was impossible to obtain a fair resolution via HR; and
 - f. That she had been forced to resign because of those matters and the hardship that had been caused to her.

233. Jane Ives acknowledged receipt of the Claimant's letters on 4th March 2019. The relevant parts of her letter said this:

"As stated in my letter dated the 25th February 2019 (attached), the Company and myself take these allegations extremely seriously and are not taken lightly. However, as Anne de Vere Hunt and your union representative Dave Hockin has explained to you on numerous occasions since July 2018, as a business we cannot investigate your allegations without specific details from yourself.

To clarify we have requested for names, places, dates, times and specifics of what was said or done, any witnesses and whom was involved during meetings that were held with you by Anne de Vere Hunt and by letter. To this date we still have not received this information.

I am disappointed that you feel that you need to resign from the business, as we have given you the right to appeal and numerous opportunities to provide us with evidence to support your allegation. This detail would then have been heard in the appropriate timeframe giving you ample time to prepare your case.

I have looked at all the documentation that has been shared by yourself and Anne de Vere Hunt and her responses are supportive to you with an aim to get a satisfactory resolution for you.

However, as you have already decided to resign from the business and choose not to use the appeal process, this now closes the grievance process”.

234. The Claimant thereafter entered into a period of early conciliation via ACAS and at the conclusion of that process presented the claim that is now before us for determination.

CONCLUSIONS

235. Insofar as we have not already done so we deal with our conclusions about each of the remaining complaints which are before us.

Constructive dismissal

236. We begin with considering whether, either singularly or cumulatively, the 28 separate acts that the Claimant relies upon breached the implied term of mutual trust and confidence. We have found a number of those acts not to have occurred as the Claimant contended that they had or to otherwise be relatively innocuous events but by far the most serious is the sexual harassment which the Claimant was subjected to by MF and Mr. Graham (which we say more about below) and particularly the indecent exposure incident and sexual assault which we are satisfied was perpetrated by the latter.
237. The Claimant relies upon a last straw argument with the final straw being said to be that her grievance was closed down after she reported events to the police. Whilst the Respondent relies upon arguments as to affirmation, if that last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee’s right to resign (see **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA**).
238. The questions for us to consider in that regard are:
- (i) What was the most recent act (or omission) on the part of the Respondent which the claimant says caused, or triggered, her resignation?
 - (ii) Has she affirmed the contract since that act?
 - (iii) If not, was that act (or omission) by itself a repudiatory breach of contract?
 - (iv) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? And
 - (v) Did the employee resign in response (or partly in response) to that breach?

239. The most recent act that the Claimant relies upon in her claim as having caused her resignation was that it was said that the Respondent had stopped the grievance procedure because she had reported matters to the police. That cessation of the grievance process took place on 9th February 2019.
240. The Claimant resigned from employment on 28th February 2019. It cannot reasonably be said in our view that she affirmed the contract by that delay because it was a matter of less than three weeks at a time when she was pursuing an appeal against the outcome of her grievance and during which she was absent from work suffering from mental health issues.
241. Had we found that the Respondent had deliberately closed the grievance as claimed because the Claimant had reported matters to the police then we would have had little hesitation in concluding that that amounted to a repudiatory breach of contract but that of course was not the reason for closing the grievance. The reason for closing it was that the Claimant had failed to provide the information that the Respondent had been asking for since July 2018.
242. However, the main problem with this aspect of the claim is that on the Claimant's own case the last straw that she had identified was not actually the operative cause of her resignation.
243. The application to amend the claim, which we refused with reasons given orally at the time, set out the reasons that the Claimant relied on as having finally made her decide to resign and those were said to be as follows:
- (a) The decision to close the grievance on account of the Claimant's failure to provide evidence in support;
 - (b) The delay in receipt of the letter communicating that which was dated 8th February 2019 but did not arrive at the Claimant's home until 15th February 2019 giving her only three days to submit an appeal against that decision;
 - (c) That she was required to submit her appeal to Jane Ives by 18th February 2019 when Ms. de Vere Hunt was or should have been aware that the former was on holiday on that date and for the whole of that week;
 - (d) That there was a 13 day delay in the Claimant receiving a response to her appeal which she considered to be unacceptable;
 - (e) That there was a further delay of 23 days from the date on which the letter was written until the appeal hearing was scheduled; and
 - (f) That the Claimant's statutory sick pay had come to an end and given the circumstances the

Respondent should have exercised its discretion to continue to pay her.

244. Those matters were consistent with the Claimant's letter of resignation, was an application which she supported with instructions at the time and were, we are satisfied, the real reasons for the Claimant terminating her employment. The Claimant did not, therefore, resign in response to the last straw upon which she relies and for that reason the claim for constructive dismissal fails and is dismissed.

Wrongful dismissal

245. It is common ground that the Claimant resigned from the Respondent without notice and that the wrongful dismissal claim is dependant upon the constructive dismissal claim succeeding. As it has not, it follows that the wrongful dismissal claim also fails and is dismissed.

Breach of contract – unpaid overtime

246. We can deal with this aspect of the claim in relatively short order. We have not been taken to anything to demonstrate that there was an entitlement to overtime payments which were not authorised or directed by the Respondent. We cannot therefore identify the contractual term that the Claimant is required to show has been breached.
247. However, even if we had determined that there were occasions on which the Claimant had been asked or directed to work overtime we have no way of quantifying what sums might have been earned or when and whether those have been paid or not. Whilst we have a spreadsheet produced by Mr. Capek it is unclear where those figures are derived from and we have certainly seen no documentation in support.
248. It follows that the Claimant has not persuaded us that there are any sums of unpaid overtime which are due – and the burden is on her to do so - and this part of the claim accordingly fails and is dismissed.

Direct discrimination

249. There are two acts of direct discrimination which the Claimant advances in these proceedings. The first of those is Mr. Martin having sworn at her, telling her that there was no work for her that day and asking her to leave. The second is Mr. Martin's refusal to give the Claimant work even though it is said that there was work available for her.
250. It was identified before Employment Judge Adkinson that the Claimant was relying upon an actual comparator, "Paul the painter", or in the alternative a hypothetical comparator.
251. We have already found above that Mr. Martin told the Claimant that there was no work available and asked her to leave the site. We have found that he may have sworn during that exchange but not that he was shouting and swearing to the extent alleged by the Claimant.

252. However, the reason why that happened was not because the Claimant was female. The reason why Mr. Martin said that there was no work for the Claimant was because there was not. There is nothing at all to suggest that had the Claimant been male then work would have been made available. The most that the Claimant can say on this point is that it is alleged that Mr. Martin said that he did not want “your sort” or “your kind” there and she was the only female painter and decorator on the site. However, on the Claimant’s own case that was not said because she was a woman but because she was on MF’s team and the “your sort” reference was about that team.
253. It follows that the Claimant was not given work not because she was female but because there was genuinely no work available and this complaint of direct discrimination fails and is dismissed.
254. The second act complained of is that it is said that there was work available which was not given to the Claimant and it was instead allocated to Paul when he returned to work from leave. However, as we have already set out above even on the Claimant’s own case there was only half a plot to paint. The plot had not dried out and whilst the Claimant could have made a start on it and extra radiators put in to help it dry out, it made logical sense to wait until the plot was ready to be painted as a whole. That would be ready when Paul, Mr. Martin’s regular painter, was back at work after his leave. That was the reason why the plot was not given to the Claimant and we accept that there was simply no work available that Mr. Martin had for her to do at that time.
255. Whilst Paul was treated more favourably than the Claimant by being allocated the plot, he is not an appropriate comparator because his circumstances were materially different to that of the Claimant in that there was a plot ready for him to paint. There was not one ready for the Claimant.
256. There is also nothing to suggest that the Claimant would have been treated any differently if she was male and she had attended Broughton Astley when there was no work available.
257. It follows that the complaints of direct discrimination fail and are dismissed.

Harassment

258. The Claimant advances 11 acts of harassment. We shall deal with each of those in turn.
259. The first of those is MF feeling the Claimant’s bottom after she had fallen downstairs on site the previous week. We have found above that this did occur. Applying the principles in **Nazir** we go on to consider whether this was unwanted. We are satisfied that it was. Whilst the Claimant and MF had “banter” with each other than plainly did not extend to being physically touched.
260. We are satisfied that the conduct was of a sexual nature within the meaning of Section 26(2)(a) EQA 2010 because it involved the placing of MF’s hand on or in close proximity to her bottom. We are also satisfied that it was conduct that violated the Claimant’s dignity because it involved unwanted

and intimate touching. We accepted her evidence that she was shocked and upset about the incident and it was perfectly reasonable for the conduct to have had that effect.

261. This complaint of harassment is therefore well founded and succeeds.
262. The next act of harassment complained of is of Mr. Graham making rude gestures of a sexual nature towards the Claimant saying that he wanted to bite her nipples and sending the Claimant pornographic videos from his mobile telephone to hers. We deal with the “gestures” issue as part of the 23rd January 2018 issue below.
263. However, taking into account the complaint about pornographic videos being sent to the Claimant by Mr. Graham we accept that that happened on at least two occasions as we have set out above and those messages are in the bundle at pages 133 and 137. The date of those messages was 12th April 2018 and they duplicate the allegation said to have taken place on 11th April 2018 and which we deal with below.
264. We accept that that conduct was unwanted because the Claimant had no longstanding friendship with Mr. Graham as was alleged by the Respondent which would have seen her find the messages amusing and nor did she reciprocate in the sending of messages of this or any other nature which would have implied that she welcomed such contact. We accept her evidence that she found the messages offensive and that accordingly they were unwanted.
265. Again, those messages were of a sexual nature within the meaning of Section 26(2)(a) EQA 2010 given that they depicted pornographic acts. We also accept that they violated the Claimant’s dignity because of the content and that again it was reasonable for them to have had that effect.
266. However, as we have found above we can make no finding that the messages were sent in working hours and in all likelihood they were sent later into the evening after work when Mr. Graham had possibly been drinking. Therefore, the Respondent is not liable under Section 109(1) EQA 2010 for these acts because they were not done by Mr. Graham in the course of his employment. For that reason, this complaint of harassment against the Respondent fails and is dismissed.
267. The next incident of harassment was MF asking the Claimant whilst she was up a ladder what underwear she was wearing and sending her text messages asking her to wear a black mini skirt and stockings and suspenders. We will take those allegations separately.
268. We dismiss the first part of this allegation on the facts because on the Claimant’s own account MF did not ask her what underwear she was wearing whilst she was up a ladder. The incident in fact involved MF commenting about the stairwell on the Claimant’s plot that it was a good stairwell for footing the ladder. However, as we have already observed this was not the allegation before us and there was no application to amend the claim.
269. As to the second part of the complaint, we have found that MF did send the Claimant a message asking her to wear stockings and suspenders. We

accept that that was unwanted conduct and do not accept the Respondent's submissions that this was part of "banter" between the Claimant and MF for the reasons that we have set out in our findings of fact above.

270. Again, we accept that the sending of such messages was conduct of a sexual nature within the meaning of Section 26(2) EQA given the content and the fact that MF was asking the Claimant to wear a certain type of sexualised underwear.
271. We also accept that the content of the message violated the Claimant's dignity because of what she was being asked to wear and that that was intended for a sexual purpose on MF's part and that again it was reasonable for them to have had that effect.
272. This part of the claim of harassment is therefore well founded and succeeds.
273. The next act of harassment complained of is Mr. Graham trying to kiss the Claimant whilst she was up a ladder saying that she was the right height to bite her breasts causing her to fall from the ladder as a result. We deal with this incident alongside the allegation of Mr. Graham making rude gestures of a sexual nature. We accept that those gestures were biting gestures made at the time that the comment was made about biting her breasts.
274. We have accepted that all of that conduct took place. Again, it is plainly conduct of a sexual nature within the meaning of Section 26(2) EQA. We also accept that it was plainly unwanted conduct as the Claimant had no interest in Mr. Graham in a sexual sense and nor was there any "longstanding friendship" which would have been this conduct being in any way appropriate.
275. We accept that this incident violated the Claimant's dignity and that was plain from her upset and shock at what had happened and her reaction at the time. It was again reasonable for the conduct to have had that effect on the Claimant.
276. We do not accept that this was not conduct in the course of Mr. Graham's employment. Whilst he was not working on the same site as the Claimant the incident occurred while the Claimant was at work and on the Respondent's site. Whilst it may not have been in Mr. Graham's working hours was not to the point. But for his employment with the Respondent he would not and could not have been on site and the conduct took place in the context of the working environment.
277. This complaint of harassment is therefore well founded and it succeeds.
278. The next act of harassment complained of is Kevin Graham exposing his erect penis to the Claimant. We have accepted that this incident took place. Again, by its very nature exposure of genitalia is plainly conduct of a sexual nature within the meaning of Section 26(2) EQA. It was also unwanted conduct and conduct which reasonably violated the Claimant's dignity for the same reasons as we have given in respect of the allegation immediately above. Also for the same reasons this was conduct which took course in the place of Mr. Graham's employment.

279. It therefore follows that this complaint of harassment is also well founded and it succeeds.
280. The next allegation of harassment is of Kevin Graham telephoning the Claimant from outside her house and telling her that she wanted to put his tongue all over her and he wanted to “fuck” her. Whilst we are satisfied that this incident occurred and for the same reasons as we have already given in respect of other incidents involving Mr. Graham that this amounted to harassment, it was not something that took place in the course of his employment. This was an incident which occurred away from the workplace and outside the working time of both the Claimant and Mr. Graham.
281. Accordingly, this act of harassment is not something that the Respondent was liable for under Section 109 EQA 2010 and accordingly this part of the claim fails and is dismissed.
282. The next allegation of harassment is MF telephoning the Claimant and asking her during the conversation if she had red stockings and suspenders. This element of the claim fails on its facts because on the Claimant’s own case this was not what had happened and all that was said by MF was to ask if she was on her way to work. That innocuous question cannot amount to harassment.
283. The next complaint is of MF sending a text message to the Claimant on 24th February 2018 asking her if she was wearing a short skirt with red stockings and suspenders. We have found as a fact that this incident occurred. For the same reasons as we have already given in respect of the earlier allegation relating to messages about “stockings and suspenders” this also amounted to harassment. It follows that this complaint is well founded and also succeeds.
284. The next act complained of is Mr. Graham sending the Claimant a pornographic video and sexually explicit text messages to her on 11th April 2018. The correct date of this incident is in fact 12th April 2018 (see page 133 of the hearing bundle). This is a duplication of the complaint which we have already dealt with above and so we do not need to deal with it again here.
285. The next allegation of harassment is Mr. Graham telling the Claimant that she looked “sexy” in her shorts and top before reaching forward and pulling out the her false eyelashes, grabbing hold of her, stroking her arm and grabbing hold of her genitals. We have accepted that that incident occurred.
286. It is also again plainly conduct of a sexual nature within the meaning of Section 26(2) EQA given what was said and that physical contact, including with the Claimant’s genitals, was made. For the same reasons as we have already given in respect of the incident on 23rd January 2018 we accept that this conduct was unwanted, violated the Claimant’s dignity and was done in the course of Mr. Graham’s employment.
287. It follows that this complaint of harassment is also well founded and succeeds.

288. The final act of harassment complained of is MF commenting to the Claimant that if she wanted to get paid for extras then she should try escorting. We have already found above that this incident occurred. We are also satisfied that it was unwanted. Whilst there was “banter” between the Claimant and MF that did not include comments on this nature.
289. We are satisfied that this incident violated the Claimant’s dignity and created a humiliating environment. That is because the context was that MF was suggesting that the Claimant should engage in prostitution. It was perfectly reasonable for the conduct to have had that effect on the Claimant given that such references are offensive. Finally, we are satisfied that the conduct related to the protected characteristic of sex given that MF’s comment was such that the Claimant should become a sex worker.
290. It follows that this complaint of harassment is also well founded and succeeds.

Victimisation

291. As we have already set out above, it is accepted by the Respondent that the Claimant’s grievance amounted to a protected act.
292. The Claimant contends that the Respondent unduly delayed the grievance process and that the reason for that was that she had done a protected act.
293. As we have already found above the Respondent did not unduly delay dealing with the grievance process. The delay was in fact caused by the Claimant failing to provide the details of the grievance to Ms. de Vere Hunt as had been promised and in delaying meetings.
294. The only delay, if it can be called that, on the part of Ms. de Vere Hunt was in respect of passing the right of appeal to Jane Ives when she was on annual leave. However, in reality there was no one else to pass the matter to and the obvious person to deal with the appeal was Ms. Ives because of her position within the Respondent company.
295. In all events, it was never put by the Claimant to Ms. de Vere Hunt that the reason for any delay (had we found that there was any) was influenced by the fact that she had done a protected act.
296. Moreover, in respect of the Claimant’s contention that there had been delay in scheduling the appeal hearing as we have set out above that was for good reason so that the Claimant could gather her evidence together as she had been asked to do for some considerable time. The fact that the Claimant had done a protected act played no part in that decision nor was that suggestion put to Ms. Ives in cross examination.
297. It follows that the complaint of victimisation fails and is dismissed.

REMEDY

298. We have heard no evidence as to remedy and there will be a Preliminary hearing conducted by telephone to list a Remedy hearing and make Orders for the preparation for the same. However, we urge the parties to enter into further dialogue to determine if they are able to resolve matters without the need for a further hearing.

Employment Judge Heap

Date 23rd December 2021

Note:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

SCHEDULE

Constructive unfair dismissal

| Incident Number | Date | Alleged act |
|------------------------|---------------|---|
| 1 | December 2016 | The Claimant informed the Respondent that she would be late because she had a flat tyre and MF was verbally |

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| | | aggressive to her and told her that she needed to make up the time lost by her lateness. |
| 2 | 2 nd February 2017 | Mr. Martin swearing at the Claimant when she enquired about a snag list. |
| 3 | In February or March 2017 | After the Claimant fell downstairs on site MF asking to feel the Claimant's bottom and asking Darryl Trueman if he also wanted to feel it. |
| 4 | March or April 2017 | Lee Hurst berating the Claimant for repairing holes in the wall on a site where she was working. |
| 5 | April 2017 | Lee Hurst threatening to put the Claimant "on report" (that is subject her to disciplinary proceedings) when she was unable to attend work because her car had broken down by reporting the matter to Steven Merrick, a director of the Respondent. |
| 6 | April 2017 | During the same incident Lee Hurst threatening to lay the Claimant off because she had joined a trade union. |
| 7 | June or July 2017 <i>This was identified in the Claimant's witness statement as being 6th August 2017.</i> | Lee Martin swearing at the Claimant and telling her that there was no work available for her that day. |
| 8 | June or July 2017 | During the same incident Lee Martin refusing to give the Claimant work even though work was available. |
| 9 | June or July 2017 <i>This was identified in the Claimant's witness statement as being 6th August 2017.</i> | During the same incident Lee Martin telling the Claimant that he did not want "your sort" there. <i>This was originally identified as a complaint relating to Lee Hurst but it was clarified that this was an error and the incident was said to relate to Mr. Martin.</i> |
| 10 | June or July 2017 <i>This was identified in the Claimant's witness statement as being 20th December 2016.</i> | During the same incident MF and Lee Martin telling a security guard who had complained about the Claimant working late that she was slower because she was a woman. |
| 11 | 23 rd January 2018 | Kevin Graham making rude gestures of |

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| | <i>This was originally said to be in December 2017 but was identified on day 5 of the hearing as being on the above date and the same incident as number 15 below.</i> | a sexual nature towards the Claimant saying that he wanted to bite her nipples and sending the Claimant pornographic videos from his mobile telephone to hers. |
| 12 | December 2017 <i>This date was originally not identified but during the course of evidence was said to be early 2017 but on day 6 was identified as being December of that year.</i> | MF bullying the Claimant and shouting at her to “stop being a whiney bitch”, to “stop crying” and in response to her queries about pay saying “we’ll see next week”. |
| 13 | December 2017 | MF asking the Claimant whilst she was up a ladder what underwear she was wearing and sending her text messages asking her to wear a black mini skirt and stockings and suspenders. |
| 14 | Not identified | MF removing the Claimant’s overtime sheet from the records which was necessary to ensure that she was paid. |
| 15 | 23 rd January 2018 <i>This date was originally only identified as January 2018.</i> | Kevin Graham trying to kiss the Claimant whilst she was up a ladder saying that she was the right height to bite her breasts causing her to fall from the latter as a result. |
| 16 | 23 rd January 2018 | During the same incident Kevin Graham exposing his erect penis to the Claimant. |
| 17 | 24 th February 2018 <i>This date was originally identified as being January or February 2018 but the more specific date above was given on day 5 during the Claimant’s evidence.</i> | Kevin Graham telephoning the Claimant from outside her house and telling her that she wanted to put his tongue all over her and he wanted to “fuck” her. |
| 18 | 24 th February 2018 | MF telephoning the Claimant and asking her during the conversation if she had red stockings and suspenders. |
| 19 | 24 th February 2018 | MF sending a text message to the |

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| | <i>There was a change in the Claimant's evidence as to the date of this incident from 21st February 2018 on day 5 and then back to 24th February 2018.</i> | Claimant asking her if she was wearing a short skirt with red stockings and suspenders. |
| 20 | 9 th April 2018 | Kevin Graham arriving on the site on which the Claimant was working and scaring her by saying that he had been watching her from the showroom. |
| 21 | 10 th April 2018 | MF furiously shouting and swearing at the Claimant about getting the plot that she was working on finished before returning an hour later and shouting and swearing at her saying "come on cry baby, let's see them tears". |
| 22 | 11 th April 2018 | Kevin Graham sending the Claimant a pornographic video and sexually explicit text messages. |
| 23 | 11 th May 2018 | Kevin Graham telling the Claimant that she looked "sexy" in her shorts and top before reaching forward and pulling out the Claimant's false eyelashes, grabbing hold of her, stroking her arm and grabbing hold of her genitals. |
| 24 | 19 th June 2018 | MF failing to cooperate in securing payment of the Claimant's wages when she asked him to do so. |
| 25 | 13 th July 2018 | MF swearing at the Claimant when she enquired about pay and failing to cooperate in securing payment of the Claimant's wages when she asked him to do so. |
| 26 | 26 th June 2018 or her last day on site <i>This was originally identified as 13th July 2018 but was changed in evidence on day 6.</i> | MF suggesting to the Claimant that she should try "escorting" and maybe she would be paid for "extras". |
| 27 | Not identified | The Respondent unduly delayed dealing with the Claimant's grievance. |
| 28 | 9 th February 2019 | The Respondent stopping the |

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| | | grievance procedure because the Claimant had reported matters to the police. |
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Harassment relating to the protected characteristic of sex

| Incident Number | Date | Alleged act |
|------------------------|---|---|
| 3 | In February or March 2017 | After the Claimant fell downstairs on site MF asking to feel the Claimant's bottom and asking Darryl Trueman if he also wanted to feel it. |
| 11 | 23 rd January 2018 <i>This was originally said to be in December 2017 but was identified on day 5 of the hearing as being on the above date and the same incident as number 15 below.</i> | Kevin Graham making rude gestures of a sexual nature towards the Claimant saying that he wanted to bite her nipples and sending the Claimant pornographic videos from his mobile telephone to hers. |
| 13 | December 2017 | MF asking the Claimant whilst she was up a ladder what underwear she was wearing and sending her text messages asking her to wear a black mini skirt and stockings and suspenders. |
| 15 | 23 rd January 2018 <i>This date was originally only identified as January 2018.</i> | Kevin Graham trying to kiss the Claimant whilst she was up a ladder saying that she was the right height to bite her breasts causing her to fall from the latter as a result. |
| 16 | 23 rd January 2018 | During the same incident Kevin Graham exposing his erect penis to the Claimant. |
| 17 | 24 th February 2018 <i>This date was originally identified as being January or February 2018 but the more specific date above was given on day 5 during the Claimant's evidence.</i> | Kevin Graham telephoning the Claimant from outside her house and telling her that she wanted to put his tongue all over her and he wanted to "fuck" her. |
| 18 | 24 th February 2018 | MF telephoning the Claimant and |

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|----|--|--|
| | | asking her during the conversation if she had red stockings and suspenders. |
| 19 | 24 th February 2018 <i>There was a change in the Claimant's evidence as to the date of this incident from 21st February 2018 on day 5 and then back to 24th February 2018.</i> | MF sending a text message to the Claimant asking her if she was wearing a short skirt with red stockings and suspenders. |
| 22 | 11 th April 2018 | Kevin Graham sending the Claimant a pornographic video and sexually explicit text messages. |
| 23 | 11 th May 2018 | Kevin Graham telling the Claimant that she looked "sexy" in her shorts and top before reaching forward and pulling out the Claimant's false eyelashes, grabbing hold of her, stroking her arm and grabbing hold of her genitals. |
| 26 | 26 th June 2018 or her last day on site <i>This was originally identified as 13th July 2018 but was changed in evidence on day 6.</i> | MF suggesting to the Claimant that she should try "escorting" and maybe she would be paid for "extras". |

Direct discrimination

| Incident Number | Date | Alleged act |
|------------------------|-------------------|--|
| 7 | June or July 2017 | Lee Martin swearing at the Claimant and telling her that there was no work available for her that day. |
| 8 | June or July 2017 | During the same incident Lee Martin refusing to give the Claimant work even though work was available. |

Victimisation

| Incident Number | Date | Alleged act |
|------------------------|----------------|--|
| 27 | Not identified | The Respondent unduly delayed dealing with the Claimant's grievance. |

