Case Number: 3347550/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms G	**v**	**1. London General Transport Services – Go Ahead London** **2. Mr E** **3. Mr F**

Heard at: Watford **On**: 2-5 October and 30 & 31 October 2017 (in chambers)

Before: Employment Judge R Lewis
Mrs S Boot
Mr R Clifton

Appearances

For the Claimant: Mr D Stephenson, Counsel
For the Respondents: Ms N Owen, Counsel

RESERVED JUDGMENT

1. The following claims set out in the agreed list of issues succeed and are upheld:-

   1.1 The first respondent and Mr F sexually harassed the claimant as alleged at Issues 1 and 4(a) and 4(d) (sexualised language);

   1.2 The first respondent and Mr E sexually harassed the claimant as alleged at Issue 3 (sexualised language);

   1.3 The first respondent sexually harassed the claimant as alleged at Issue 6 (laughter and language of Mr Affaine on 8 July 2016);

   1.4 The first respondent discriminated against the claimant directly on grounds of gender as alleged at Issue 11 (Mr Affaine on 8 July 2016);

   1.5 The first respondent treated the claimant less favourably on grounds of gender as alleged at Issue 13 (Mr Field on 8 July 2016);

1.6 The claimant was unfairly constructively dismissed by the first respondent and her complaint of constructive dismissal under the Employment Rights Act is upheld;

1.7 The claimant's complaint of discrimination in constructive dismissal succeeds and is upheld.

1.8 Save as stated above, the claimant's claims fail and are dismissed.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Remedy will be decided, unless otherwise agreed, at a hearing on **Monday and Tuesday, 12 and 13 March 2018** starting at 10am on the first day at Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford WD17 1HP.

2. By no later than **5 February 2018** the claimant is to send to the respondent an updated statement on remedy if so advised and final schedule of loss.

3. If the respondent wishes to call evidence at the remedy hearing, any statement must be served on the claimant no later than **26 February 2018**.

4. The parties are reminded of their continuing disclosure obligations relevant to remedy.

REASONS

Case management matters

1. This was the hearing of a claim issued on 20 October 2016, leading to a preliminary hearing before Employment Judge Gumbiti-Zimuto on 10 March 2017, at which the present listing was arranged and at which there was an agreed list of issues (40). The list of issues agreed on that date remained in being. Unusually, there was no correspondence about case management or preparation from either party, a helpful indication of the professionalism on both sides.

2. There was an agreed bundle of over 300 pages, to which additions were made in the course of this hearing; nothing turns on the point. The claimant was the only witness on her own behalf. The respondent called five witnesses. They were in order: Mr Mark Cambridge, operating manager; Mr Ricky Field, accident prevention manager; Mr E, bus driver; Mr F, bus driver; and Mr Nick Faichney, general manager. All witness statements had been

exchanged in good time. All witnesses adopted their statements on oath and were cross-examined.

3. A number of case management issues arose at this hearing.

4. The case was based on allegations of sexual harassment. The allegations were almost exclusively of verbal harassment, not of physical contact. By consent, a Restricted Reporting Order was made at the start of the hearing, which in accordance with Rule 50(5)(b) is now discharged.

5. At the joint request of the parties, a permanent anonymity order was made in accordance with Rule 50(3)(b) in relation to the claimant, and the two individual respondents.

6. The bundle contained at (127) what appeared to be intimate medical information about the claimant. When it appeared that Ms Owen wished to cross-examine about it, the judge indicated that that would be appropriate for a hearing in private, and the matter was not pursued.

7. The claimant had made covert recordings at work, and produced a bundle of transcripts. The recordings were covert in the sense that others taking part in conversations and meetings did not know that recordings were being made. It was confirmed that she had disclosed the audios and that the transcripts before the tribunal were agreed as to the accuracy of the transcribed words. The claimant's comments and editorialising in the transcripts were not agreed and we disregarded them. We agreed to admit the transcripts with the caution that where only one party to a conversation knows it is being recorded, the party who is recording may be able to manipulate the conversation. Although the tribunal agreed in principle to listen to an agreed selection of the audio recordings, we were not invited to do so.

8. Ms Owen at the start of hearing raised an issue as to the statutory defence in relation to Mr E and Mr F. The potential problems which arose were resolved through the pragmatism of Ms Owen and her colleagues. By consent, Mr E and Mr F were joined as additional respondents, and it was agreed that re-service could be dispensed with, and that the existing grounds of resistance would stand on their behalf. It was also agreed, and confirmed through professional and management channels, that the first respondent's solicitors and Ms Owen represented them. We nevertheless in these reasons refer to the company only as the respondent.

9. It was understood that this hearing would deal with liability only and at the end of the hearing provisional dates were set for remedy, which are now confirmed. The present judge confirmed that he holds office in an organisation which instructs the respondents' solicitors in matters unrelated to employment, and there was no objection to the constitution of the tribunal.

10. Case management, reading and evidence occupied the first three days of the hearing. Written submissions were presented, which both counsel

supplemented orally on the fourth day, and as stated above the tribunal deliberated after a short interval.

11. We record one specific matter of case management. At the end of submissions, the tribunal withdrew for a short discussion on whether there were any questions which we wished to put to counsel in light of the submissions which we had heard. In the event, we had one factual matter of clarification, which was whether on 8 July 2016 the claimant had in fact been a member of Unite. We put this question and the claimant firmly stated that she was not. Ms Owen did not have the opportunity to cross-examine or pursue the point, and we accept that with hindsight it might not have been prudent to put the question which we put. We deal with the matter in context below, and in the event do not find that anything of substance turns on it.

General observations

12. We preface our findings of fact with a number of matters of general approach.

13. First, as is not unusual in the work of the tribunal, we record that we heard evidence about a wide range of matters, some of it in depth. Where we make no finding about a matter of which we heard, or where we do so, but not to the depth to which the parties went, that is not oversight or omission, but a reflection of the extent to which the point was of assistance to us.

14. As is commonplace in the work of the tribunal, the case was advanced on a binary footing by both sides, which, as is usually the case, did not help us. We mean by this that the approach of each side, which was that its case was wholly to be accepted by the tribunal, which accordingly should reject the opposing case in its entirety, did not assist us, was not the basis on which we decided the case, and in this, as in most cases, did not in our view reflect the reality of the events.

15. The claimant in theory placed before the tribunal hundreds of complaints. We say in theory because she stated that she had been harassed every day in a full-time working life of two and a half years. However, the list of issues from which we work was modest and focussed, and we have not made findings beyond the list of issues.

16. We were troubled by the logical problems caused to the tribunal by a number of allegations of harassment upon which the claimant sought to rely, but which were not pleaded as issues, or as relevant background. We have not, for reasons which follow, regarded it as necessary to make findings on any of them. These issues were before us as the basis of the claimant's complaint that Mr Field failed properly to investigate her grievance. That allegation placed the tribunal in the position of being asked to consider whether Mr Field discriminated against the claimant by failing to investigate allegations upon which we need make no finding.

17. We record our concerns as to the rights of the non-parties against whom allegations of sexual harassment were made. Although the allegations were verbal, not physical, they were at times sexually explicit. A number of the colleagues against whom the claimant made such allegations were identifiable; many were interviewed by Mr Field; we did not hear from them as witnesses, and we approach the evidence against them with caution, balancing our duty to issue a public judgment with their rights to fair process in our adjudication.

18. On a number of occasions and in a number of respects the claimant indicated an expectation of the respondent's management which was unrealistic. We accept Ms Owen's general submission that the standard which we apply in our consideration is that of the reasonable employer, not blessed with the hindsight of a tribunal hearing.

19. In our findings we have endeavoured to set out a mostly chronological narrative. We have however given our findings as we progress, which we think will render our reasoning easier to follow.

The legal framework

20. This claim was brought as a claim of direct discrimination on grounds of sex. Section 13 of the Equality Act defines direct discrimination as occurring where "A discriminates against B if because of a protected characteristic, A treats B less favourably than A treats or would treat others". The protected characteristic need not be the only or even main reason for the treatment, but must be a material one. The tribunal must focus on the treatment of the complainant, and not on the intention or motivation of the alleged discriminator.

21. Section 23 provides that "On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case." That was important in this case, and where the claimant relied on a hypothetical comparator, we had to construct a man in all material circumstances in the claimant's shoes, save only for his gender.

22. Section 26 defines harassment, which for these purposes, occurs if "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". Section 26(4) states "In deciding whether conduct has the effect referred to in sub section (1)(b) each of the following must be taken into account (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect." Although the point scarcely arose in this case, the correct approach requires a balance of the objective and subjective factors in the claimant's response to the event in question.

23. Section 27 provides that "A victimises B if A subjects B to a detriment because (a) B does a protected act". Section 27(2) includes in the definition of a protected act "doing any other thing for the purposes of or in connection with this Act; … making an allegation (whether or not express) that A or another person has contravened this Act". It was not disputed that the claimant's email of 17 June 2016 was a protected act, and that other protected acts followed.

24. Section 27 provides that "A victimises B if A subjects B to a detriment because (a) B does a protected act".

25. Section 27(2) includes in the definition of a protected act "doing any other thing for the purposes of or in connection with this Act; … making an allegation (whether or not express) that A or another person has contravened this Act".

26. A number of authorities have distinguished between the protected act, and the real, separable underlying cause of the treatment. We noted **Martin v Devonshires 2011 ICR 352**, at paragraph 22. *"There will, in principle, be cases where an employer had dismissed an employee … in response to the doing of a protected act … but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable." (*Emphasis added). We note also the caution expressed in the same paragraph to the effect that this approach should not be the basis of avoidance of the relevant provisions, and that we should be alert that such cases must be rare.

27. We understood the correct approach to be that if the Tribunal finds that there was a protected act and consequent detriment, it must consider whether the effective, operative cause of the treatment was the protected act itself, or some identified aspect of the protected act. We understood the authorities to remind us of the importance of carefully finding the facts on causation in situations which might be complex and multi-factorial.

28. S. 109(1) of the Equality Act provides that an employer is liable for 'Anything done by a person .. in the course of employment." It is trite law that the tribunal should apply a broad interpretation to the 'course of employment' and it was not in this case disputed that all the matters before the tribunal took place in the course of employment.

29. S .109(4) provides for what has been called 'the statutory defence, ' relied upon by the company in this case, which states (emphases added):

> "In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A (a) from doing that thing or (b) from doing anything of that description."

30. The respondent relied on the training delivered to Mr E and Mr F (318-321) and on the availability of policies and notices setting out corporate statements on those issues. Our understanding of the underlined words is that the employer who seeks to rely on s.109(4) must at least show that it took steps which engaged with the specific area or matter before the tribunal. Generalised statements of aspiration are insufficient.

31. This was also a claim of constructive dismissal. The claim of constructive dismissal is brought under s.95 (1)(c) of the Employment Rights Act 1996. That section provides that an employee is dismissed:

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

The correct approach is that the claimant must show that the respondent without proper cause conducted itself in a manner calculated or likely to destroy the relationship of trust and confidence which exists between employer and employee. The conduct of the employer must be considered objectively, not from the perspective of the feelings of the employee. It is important not to lose sight of the requirement that such conduct be "without proper cause" as there may be occasions when legitimate management decisions otherwise meet the statutory language. The conduct must be the operative cause of the resignation, and the resignation must follow reasonably promptly. It is for the claimant to prove the claim. A claim of constructive dismissal may also be brought under the provisions of the Equality Act.

Findings of fact: setting the scene

32. The claimant was born in 1970 and joined the employment of the respondent in late 2013. She underwent training as a bus driver, and was assigned to Northumberland Park garage in early 2014. The events with which we were concerned took place between then and her departure on sick leave on 17 June 2016, from which she did not return to work until her resignation the following September. Her job title was bus driver (49).

33. We heard and decided this case on the basis that the claimant was a competent driver and colleague. She gave evidence that she had been at various times a member of three different unions, Unite being one of them.

34. The respondent employs some 7,000 employees in 18 different locations. We were told that about 540 employees, including about 500 drivers, are based at Northumberland Park. For the drivers, the depot is of course literally a base, and most of their working day is spent on the road, working in isolation. The other staff based at Northumberland Park were administrative and management staff.

35. The names of drivers which we saw indicated a workforce of the ethnic diversity of North London. We were told that the pool of drivers was about

90% male (a ratio which had increased over the years with the departure of the mostly female conductors).

36. The management structure at Northumberland Park appeared very flat indeed. Mr Cambridge and Mr Field both joined in late 2014. We accept that the claimant had a generally good relationship with Mr Cambridge, Ms Owen invited us to note her email to him of 8 March 2016: "I think you are an excellent manager because you have made significant changes in the depot since you arrived and also there has been a better atmosphere at work too. You work really hard and you deserve a great future." (72A)

37. It was striking that no HR support was available at Northumberland Park. Mr Field told us that HR support was available from the respondent's offices at Merton, but that the role of the HR facility was to deal with company-wide issues, such as pay systems and TUPE, and not to provide support to managers dealing with individual employment issues.

38. Little reference was made in evidence to staff records, and we were told little about how or where they were kept, or who was responsible for them. Common sense suggested that they would be kept on site rather than at Merton, and that much of the material in them would relate to rostering, attendance, and safety related issues. As appears below, there were absences and inefficiencies in record keeping, entirely consistent with the minimalism of the HR function.

39. There was at time of this hearing an intranet and portal available to staff. However, the evidence about its introduction and content was not clear. The claimant's terms and conditions of 2013 do not refer to electronically available procedures, but to a manual and rule book (eg 57, 59). The rule book was indeed in the bundle (242) and was dated February 2013. Its focus was heavily on operational requirements, as appears from the index (243).

40. In an email on a related point Mr Cambridge on 3 January 2015 wrote to the claimant: "I suggest that you read the company's email policy which you would have been issued on the introduction of the employee portal" (64). We take that as evidence that in the course of 2014 a portal system was introduced and that procedures were posted electronically. Certainly by early 2015 the claimant and colleagues were using the internal email system.

41. The respondent had policies on the use of company email (255). There was a harassment policy dated January 2009 (256). It had a statement of equal opportunities policy of January 2009 (259). The respondent had a more striking policy on equal opportunities, diversity, inclusion and dignity, which was effective from 1 July 2016 (261). We noted in particular in that policy the sections on monitoring and communication (262A). They provide as follows:

> "**Monitoring**

> The company is committed to monitoring to ensure compliance with this policy and to measure progress towards being a more diverse and inclusive employer. The company will increasingly monitor all aspects of diversity… Senior managers will take appropriate action to address any issues that may be identified as a result of the monitoring process. The company will also monitor any complaints of harassment or action brought about under the grievance or disciplinary policies to ensure that the spirit and intent of this policy is being observed.
>
> **Communication**
>
> The details of this policy will be communicated to all current employees and new joiners."

42. Neither Mr Field nor Mr Faichney, giving evidence 15 months after the introduction of that policy, appeared aware of any system of monitoring of harassment cases, not even in the most basic sense: such as the individual tasked with receipt of monitoring information, or even a standard form to fill in about such cases. Mr Field's evidence was that harassment cases and sexual harassment cases in particular were a rarity of which he had almost no experience.

43. We were shown some material about the training of drivers. Mr E and Mr F had attended a one day course on "Delivering an Inclusive Bus Service" in respectively 2013 and 2015 (318/320) and the course programme (321) indicated to us diversity training heavily focussed on operational systems and in particular service delivery to disabled passengers.

44. We remind ourselves that the workplace was one where 95% of the staff present were bus drivers, of whom 90% were men. Many witnesses referred to banter, and we pause a moment to consider the meaning of the word. The dictionary definition of "playful friendly teasing" is helpful. Where the interaction of colleagues is no more than playful friendly teasing, and is accepted on both sides in that spirit, we accept that it can relate to any topic, and contributes to good feeling within the workplace.

45. Of greater difficulty is the situation where language, while expressed as playful and / or friendly and / or teasing, touches on what the Equality Act regards as protected characteristics. We accept as a matter of experience that an individual whose protected characteristic is the subject of teasing may feel peer pressure to fall in with the banter, even if he or she is personally uncomfortable or hurt or offended by it. We accept that there may be circumstances where interaction takes place which one party regards as playful teasing banter, and the other hears language which is on a spectrum from uncomfortable to harassment. Specific context is of great importance, and these are general observations and no more. We note that the word "banter" does not of itself mean that the interaction under consideration was playful teasing; or that it was automatically a euphemism for harassment. The area of uncertainty is well captured in the claimant's email of 13 November 2015 (paragraph 54 below).

46. The matters with which we were concerned mostly took place in June 2016 onwards. There are however a number of discrete background matters with which we consider relevant and which we now deal with.

Events before June 2016

47. In late 2014 the claimant submitted a written formal complaint against another driver, against whom in her witness statement she alleged "a number of comments towards to me of a sexual nature." It was common ground that as a result, a manager, Mr Malcolm Robb required the driver in question to cease acting as a mentor, which was seen generally, and by the individual, as a demotion. The claimant was told by her then manager, Mr Brian Norton, that her complaint had been dealt with, and she should not enquire any further. On 11 July 2016, and after her grievance interview, the claimant telephoned the individual driver and recorded the conversation. (D63-66). The conversation, while led by the claimant, is evidence that the individual driver felt that he had been "punished a lot" by the event in question.

48. It was common ground that there was no record of any paperwork relating to this matter, (and although the point was not pursued in detail, we take it that in the disclosure exercise the respondent undertook reasonable investigation both of the claimant's personnel record and of that of the driver complained against). The respondent could not explain this. The only question which Ms Owen reasonably could put about it was to ask the claimant whether she agreed that her complaint had been taken seriously, which the claimant agreed. Equally however, the claimant's assertion that having made a complaint, she was never given an outcome, formal or informal, was not disputed. We consider that she was, at the very least, entitled to be told that her formal complaint had been upheld. We also accept (contrary to her own view) that she was not entitled to be told in detail what action the respondent had taken against the culprit.

49. The second piece of background was on 3 – 5 January 2015. On 3 January the claimant sent a picture by email to the email group address for all drivers based at Northumberland Park (about 500 or so). The respondent's Communications Manager forwarded it on the same day to Mr Cambridge (who was not in the drivers email group). The Communications Manager wrote:

> "It seems that there are two culprits sending pictures!! This one is not too bad but it is not acceptable and some of the pictures are quite offensive……. It needs to be dealt with asap please……..." (64b)

50. Mr Cambridge emailed the claimant to tell her to stop, and to discuss the matter further and wrote:

> "Disappointing that you are one of only two drivers in the whole company who appear to be using the email for the purpose of sending pictures which do not relate to work."

51. The claimant was not amenable to this, and replied "that my emails are inspirational. and harmless. I don't understand whats the issue." She then stated that she did not have the company's email policy, which on 5 January Mr Cambridge forwarded to her. He clearly told her that in the event of a further occurrence, "you could be subjected to disciplinary action." (64) We do not know any specifics about the claimant's email or its contents. Our finding is that by 5 January 2015 at the latest the claimant was on clear notice that the email policy tended heavily against writing to the entire group of drivers, and that she had been told clearly that her opinion of the content of her emails was not necessarily that of management. It was a caution and no more.

52. On 13 November 2015 the claimant emailed Mr Cambridge stating that she wished to make a complaint against a controller, Mr Corbin. She wrote a short email, to which Mr Cambridge replied,

> "I am sorry to hear that the experience you have described below. Once you provide me with the exact details of the alleged incident, I will forward on to the Performance Manager Alan Robson for investigation." (67).

53. Mr Cambridge's response was timely and correct. He also, without knowing the details, identified that Mr Robson would deal with the matter, and explained to us in evidence that as the complaint was against Mr Corbin, it would be referred to Mr Corbin's line manager, Mr Robson, to deal with. It would not be for Mr Cambridge, who was the claimant's line manager, to deal with.

54. In a reply of the same day the claimant wrote a lengthy grievance (66-67). Her complaint was that Mr Corbin appeared to have repeatedly ignored her, and while not communicating with her, had placed her under threat of disciplinary action. As Mr Corbin was the claimant's controller, she was concerned that some form of confrontation was looming. She attributed the start of difficulties in their working relationship as follows (emphasis added):

> "He and I use to be ok and talk to each other and then one day all of a sudden after this one particular conversation he started behaving weird. That last conversation we had had: he asked me if I had ever had a black boyfriend to which I replied well Chris is quarter caste. He replied that's not black that's white. I had then said: well I'm sorry I don't date colleagues if that's what you are asking me? Are you? and the conversation was banter and I was fine with that. He laughed and I laughed and that was it. There was honestly no issue from that last conversation to which I can point a finger and say that either one of us were upset."

55. Mr Cambridge the same day forwarded the claimant's lengthy email to Mr Robson with the text "Alan, sorry, one for you." Mr Robson replied the same evening to say "Thanks. Not what I was expecting to be fair. I'll interview the controller and reply to the driver."

56. Mr Stephenson in cross-examination attached a great deal of weight to Mr Cambridge's use of the word "sorry". It seemed to us a casual usage, incapable of bearing the burdens placed on it by counsel. We interpret it to

mean no more than 'apologies for adding another piece of work to your plate.' Mr Robson's reply was timely and correct.

57. It was common ground at this hearing that that was the last anyone heard of the complaint. There was no evidence of Mr Robson having taken any action, interviewed Mr Corbin, replied to the claimant, or filed any record of the matter.

58. We accept therefore that the position before the events with which we were concerned was that the claimant had made two complaints, one expressly about sexual harassment and one involving banter with a possible sexualised implication, and that in neither instance had she had any formal outcome from the respondent.

59. It was common ground that a further incident took place in January 2016. Mr E and a colleague were playing pool in the pool room. The claimant went into the room. In the conversation which followed Mr E said to the claimant that the other pool player was "feeling horny" and there was some laughter, to which the other person said that it was Mr E feeling horny, not him. The claimant's evidence was that she walked out of the conversation.

60. Mr E gave the tribunal honest evidence to say that this had taken place, and had not been said with any hidden intent or direction at the claimant. His evidence was that he noticed that the claimant "blanked" him after the incident, and he came to realise that the claimant's manner towards him had changed following the pool room incident. Mr E realised that the reason for the change in the claimant's manner towards him was the language which he had used. It was common ground that about two or three weeks after the pool room incident, Mr E approached the claimant and gave an apology for what he had said, and that the claimant in conversation accepted the apology. The claimant's evidence was that the apology was not sincere or good enough, but we attach no weight to that. Mr E had reflected, had the insight to realise that he was in the wrong, and had made an attempt to make amends. He did not seem to us particularly subtle in use of language, and we do not accept that the claimant was in a position to assess the sincerity of his apology.

61. We record, for the sake of completeness, that in the grievance which she presented on 23 June 2016, the claimant alleged a large number of other events of sexual harassment in the period between 2014 and early June 2016, about which this tribunal makes no finding.

Events in June 2016

62. We now turn to the events of the period between about 14 June and the claimant's email 17 June 2016.

The ferry incident

63. The first pleaded event in time formed issue 5. The allegation was whether a driver whom the claimant could not name said to another driver, whom the claimant could also not name, in the claimant's presence about the claimant words to the effect, "Why don't you take her somewhere, you seem close to her and it looks like she wants something." The allegation was also that the speaker was smirking and that the innuendo was plainly sexual. This matter was known in the evidence before us as the ferry incident, as it was alleged that one of those in the conversation was the driver of the 'ferry' service to bring the claimant back to the depot from the end of her route.

64. In her witness statement, the claimant said that the quoted words were said on the 14 or 15 June and spoken by another driver to the ferry driver. In her first iteration of this incident, handed in writing to Mr Field on 23 June, the claimant suggested the date might have been 13 June and identified the routes driven, and the speaker as her "leader." (138)

65. Ms Owen made the point, correctly, that the claimant had never identified either person. She had at a late stage in these proceedings been offered the opportunity to identify from driving licence photographs, but not been able to do so. Circumstantially, and considering the timings and routes, the respondent had identified two possible participants in the conversation, Mr Nanaty and Mr Mohammed, whom Mr Field interviewed on 9 September 2016. (163a and 163b) Neither gave any acknowledgement or recognition of the conversation or a conversation like it.

66. Mr Stephenson's closing submission on this allegation was a valiant attempt to make bricks without straw:

> "When one steps back and looks at the allegations in the round, they have a ring of truth to them. C has given a consistent account and honest account. It is entirely conceivable that comments like these were a regular occurrence…….. coupled with absence of formal equality training makes it more likely that similar comments of a sexual nature were made regularly."

67. We note also that in her email of 17 June, to which we come below, the claimant included a number of verbatim quotes attributed to other drivers, including a number which she headed "and just in the last two days" without mentioning this one.

68. We reject this allegation. It has not been proved to us on a balance of probabilities that this conversation took place as alleged. We add for avoidance of doubt that the claimant made no allegation against Mr Nanaty or Mr Mohammed by name, and that the logic of our findings is that we do not find that either of them was involved or responsible in any such incident.

Incidents with Mr F

69. The second matters to which we turn were Issues 1, 2 and 4 all of which relate to the conduct of Mr F. Mr F was joined as respondent and gave evidence. We approach them as three separate allegations. Issue 1 was that on 15 June 2016 Mr F said to the claimant that she had "a beautiful

body". Issue 2 was that he then followed her to the canteen. Issue 4 was that the next day he said to her "you are not wet today" and later "tell me if you're wet." Issue 4 also included an allegation of following the claimant to the canteen and looking at her "up and down twice."

70. In her witness statement, the claimant amplified further. She said that the first remark was made when she was locking up her bike before work, and it had been raining heavily. She said that the second and third remarks were made the next day, which was a fine day, when she met Mr F in the canteen.

71. In her email of 17 June the claimant's category of events of the last two days included the same matter: "How wet are you" (when I've come off my bike drenched in rain) which was followed by the same driver the next sunny day asking me "you're not wet today?....are you wet? Tell me if you're wet."

72. In her 23 June grievance, the claimant gave more narrative of the "body" conversation and wrote that "I did not respond and rushed into traffic office to sign on. I then rushed to the canteen to quickly pick up a coffee and he seemed to have been there or had he walked with me into the canteen I cannot remember."

73. She then gave a more detailed and measured narrative of the "wet" conversation in the canteen (83-84). Mr F was interviewed on 9 August by Mr Field (121) and denied the incidents or anything like them, saying that the claimant was "delusional" and "a dangerous character" (121).

74. The bundle included a record of Mr F's attendance at training on delivering an inclusive bus service (320-321) referred to above. In oral evidence Mr F stated that the claimant's sworn evidence to tribunal was untrue and that she had fabricated her allegations against him.

75. We reject the allegation that Mr F on either day followed the claimant into the canteen. Issues 2, 4a and 4b fail. The description given in the 23 June grievance, written closest to the events, quoted above, was that the claimant could not remember how he had come to be in the canteen on 15 June. On 16 June her account was "I cannot remember at what stage I had seen Mr F that day but definitely saw him in the canteen when I went in there to get a coffee."

76. When we consider the disputed verbal allegations, we prefer the claimant's evidence and we find as fact that on or about 15 June Mr F made the "beautiful body" remark to her and that on or about 16 June he made the "wet" remarks to her. We attach weight to the consistency and timing of the first iteration of these allegations, and to the elision from innocent usage of 'wet' to the use of innuendo.

77. We find that each remark constituted unwanted conduct of a sexual nature which had the purpose or effect of violating the claimant's dignity or creating

an environment for her which was intimidating, hostile, degrading, humiliating or offensive.

78. While we accept that Mr F had had some job specific training in relation to equality, we do not accept that the training met the requirements of the defence set out in section 109 (4) Equality Act. In particular while we accept that Mr F had general training in the equality issues which arise in service delivery, we do not accept that he had training in harassment or dealing with colleagues, or in particular in any specific question relating to sexual harassment. We regard the training which Mr F received, no matter how important or valuable, as not constituting action by the respondent which constituted all reasonable steps to prevent Mr F from sexual harassment or "anything of that description," such as to make good the defence. It follows that issues 1, 4(a) and 4(d) are upheld.

The e-cigarette issue

79. In her email of 17 June the claimant's list of sexualised remarks in the last two days included, "Do you like putting things in your mouth?" (75). In her email of 23 June she gave a more detailed account, which was that as she took out an e-cigarette, Mr E said, "Do you like putting things in your mouth?" She said that others laughed. She said that Mr E went on to say, "She should know not to put things in your mouth" and she replied with reference to his "filthy mind." The claimant's witness statement replicated the grievance. However, it omitted the "filthy mind" comment which the claimant had earlier attributed to herself. In his witness statement Mr E admitted that when he saw the claimant smoking he said jovially, casually and not meaning what he called 'any malice,' "Do you like putting things in your mouth…… you should know not to put things in your mouth." As a final iteration, Mr E's oral evidence was that the conversation was slightly different. It was that another driver said to the claimant who was smoking, "Do you like putting things in your mouth" Mr E said that he said, "Yes she likes putting things in her mouth." There was then a pause and perhaps a laugh and somebody said "oh oh oh" to which Mr E then said, "Not like that I was referring to her e-cigarette what do you think I meant?" at which point everyone other than the claimant burst out laughing.

80. It is clear that all of these accounts describe the same incident, and we attach no significance to any minor inconsistency between them. We accept that the claimant was smoking an e-cigarette, or was about to do so, and that Mr E made a remark about the claimant putting things in her mouth, which may have been in response to a first remark on the topic by somebody else; there was a group response; and Mr E then made a comment to the effect of, "No, what do you think I meant?"

81. We find that Mr E's remarks conveyed a sexual innuendo, as he himself acknowledged both in the words he used at the time and subsequently. We think it important that the evidence was that those involved in the conversation were a number of male drivers and that the claimant was the only woman present.

82. We accept that Mr E had no intention to distress the claimant, or specifically to target the remark at her, although he cannot have failed to see that she was the only woman present. He also must at that moment have forgotten that he had in a previous unguarded remark (in January, see above) caused unintended hurt to the claimant by using the word "horny" in her presence, and subsequently acknowledged that she had been upset.

83. We find that the exchange meets the test of sexual harassment and that it caused upset to the claimant. Issue 3 therefore is upheld. We repeat in relation to Mr E our findings in relation to Mr F about the section 109 (4) defence, and our rejection of it.

The email of 17 June

84. On 17 June the claimant wrote to all 500 drivers in the email group. The email should be read in full (75-76). It is robust and well written, and where it uses capitals, does so for proper emphasis. A short point which she made was that she did not wish to be the recipient of comments "which are of a blatant insulting sexual nature and/or those comments which have a sexual undertone to them." She quoted a number of the remarks, including the e-cigarette and the wet conversation, and, most graphically, "Come to the toilets with me……. I would love to show you how good I can fuck." She said that she would make a formal complaint if there was any recurrence and also that she did not wish to be touched, even socially or by a peck on the cheek. She captured a great deal of her emotion in one sentence: "Keep your hands AND thoughts to yourselves."

85. As stated, this went to all drivers in the drivers email group. It was forwarded eight minutes later by the Communications Manager to Mr Cambridge, who on the same day emailed the claimant

> "Emails of this nature are completely unacceptable and I believe that we have discussed this issue on a number of previous occasions. If you feel that you are suffering from any form of sexual harassment at work, there are policies and procedures which the company has in place to deal with this behaviour, as sexual harassment allegations are considered to be very serious. Emailing every driver in the garage about this is completely unacceptable…… as I am assuming that your allegations relate to a minority of male staff, not all 500. …… Please be further advised that if there is a further breach of the email policy, this could lead to formal disciplinary action being taken against you, which is a form of action which I would regret taking. However, this cannot continue."

86. The claimant replied that "I feel really depressed and stressed" and that she found the response "regarding disciplinary very threatening and offensive." (74)

87. Mr Cambridge arranged to meet the claimant, but she left work for a medical appointment, and was signed off from work. Mr Cambridge suspended the claimant's access to company email. He told the claimant the same day that he and colleagues had been approached by a number of drivers who had

taken offence at the claimant's email. We saw two examples in writing at page 75a. It was noted that both of those responses were, again unnecessarily, sent to the entire driver group, no doubt by use of 'Reply all'.

88. In evidence, the claimant admitted that with hindsight sending the email to everyone was not the best thing to have done, and that she was in a 'low state' and 'a dark place' when it was sent. Issue 9 was an allegation that Mr Cambridge had directly discriminated against the claimant "when he reproved her for sending her email of 17 June," and further that Mr Cambridge victimised her by informing her that she might be subject to potential disciplinary action, the grievance constituting a protected act for the purposes of the Equality Act.

89. We have approached this matter with great caution. Mr Cambridge referred in his email to having on previous occasions discussed a similar point with the claimant, although we had documented evidence only of one, the occasion in January 2015. There was no evidence to support the claimant's assertion that it was common place for drivers to send each other social and trivial communications by email to the entire group.

90. When we consider the complaint of direct discrimination, we do not see any evidence that a hypothetical comparator, with no material differences, would have been treated differently. It seems to us that the appropriate characteristics of the hypothetical comparator would be a man with grievances against a handful of colleagues, who had written in robust and at times obscene language to the entire driver group, and who had previously been advised in writing about proper use of the company's email system. We had no reason to believe that any such person would have been treated differently by Mr Cambridge in response. Issue 9 fails.

91. Mr Stephenson fell back opportunistically on two actual comparators, namely the two drivers whose emails at 75a had been sent to the entire group, in which each had registered his objection to the claimant's email and to it being circulated so widely. We do not find that a true comparison can be made between the claimant's email and the two responses. The responses were sent reactively, not proactively. They did not initiate the obscene language quoted by the claimant. The claimant had (as she accepted) sent her email to a readership of whom at least 95% had nothing to do with the content; the two replies were from and to members of that huge majority.

92. Although the pleaded word was "reproved" Mr Stephenson preferred to use the word "reprimand" in cross-examination and submission, no doubt because it is a word which would draw on the vocabulary of disciplinary sanction. We are aware of the caution to be applied when asked to consider the distinction between an allegation which is a protected act as such, and the manner in which the allegation was raised, which may not be protected. Mr Cambridge's email of 17 June seemed to us carefully presented, and to make abundantly clear that the subject of the reproof was the use of the email group, not the claimant's wish to express a harassment complaint.

We do not necessarily accept that his cautious language constituted reproof, reprimand, unfavourable treatment or detriment. Even if we are wrong about that, we find that this was a case where the manner of the communication was separable from its content. We accept that the reason Mr Cambridge sent the email of 17 June was the manner of the claimant's communication, not the substance of her message. Issue 18.1 therefore fails.

93. The claimant responded, indicating her unhappiness with Mr Cambridge. This led to a short conversation between Messrs Cambridge, Field and Faichney in which it was agreed that as the claimant had raised a concern against Mr Cambridge, he would not be the appropriate person to take matters forward, and that Mr Field should therefore be tasked with managing the claimant's immediate issues, in particular her sickness absence and expected return.

94. We add, for the sake of completeness on the point, that Mr Cambridge on 28 June emailed all the drivers to say that management were dealing with the matter and that they should refrain from adding comments to the email trail. Drivers were given a named contact to speak to as an alternative to sending another email "for all staff at Northumberland Park to see." (87)

<u>The claimant's grievance</u>

95. The claimant was called to a meeting with Mr Field on 23 June to discuss her health and return. It was not a formal grievance meeting. At the meeting, she gave Mr Field a written grievance (80-85) in which she set out a history of events of harassment and discrimination, almost all of them involving unwanted verbal sexual approaches. The document was clear and well presented and itemised, but was also anonymised. She referred to the perpetrators by number or letter of the alphabet, and not by name.

96. Mr Field therefore was tasked with investigating and reporting on the claimant's grievance. Mr Field had been employed by the respondent since 2000 and was an Accident Prevention Manager. He said that while he had conducted a large number of disciplinary investigations and appeals, he had no training in investigation, or harassment, or in sexual harassment. He had no HR support at all. As an Operational Manager, he understood that HR left the management of local individual employee issues to local management. Much of what followed resulted from Mr Field's inexperience in managing a case of this kind, his consequent failure to appreciate what it might involve, and the absence of experienced or expert advice or support available to him.

97. Mr Field made only a short note of his meeting with the claimant of 23 June (79) and on 28 June invited her to a grievance hearing on 1 July, offering her the right of accompaniment. On 1 July the grievance was arranged to take place on 8 July and stated: "As per your request, I will make Mr Edwin Affaine available to accompany you at this meeting;" the claimant's wish for a change of location was also respected. (89-90)

98. Mr Field made notes of the meeting on 8 July which were typed as 92-94. He did not know that the claimant was recording the meeting, which she subsequently transcribed. We were told that Mr Affaine is one of three elected Unite representatives at Northumberland Park, but is not a full-time seconded official, rather a working driver who has some opportunity to carry out union duties.

99. The question of whether the claimant was in membership of Unite at the time arose after conclusion of submissions (see above). Although we were initially troubled by it, on reflection the point does not seem to us to matter. The parties at the meeting of 8 July all understood that Mr Affaine was an employee of the respondent, who was present in the meeting to represent or accompany the claimant, who was thought to be in membership of Unite.

100. Mr Field agreed with the claimant's description, which was that Mr Affaine sat next to him, both facing the claimant, on the opposite side of a long table. There was no opportunity for the claimant to meet Mr Affaine before the meeting began. It seemed to us a telling indication of inexperience that neither Mr Field nor Mr Affaine was sensitive to the geography of the room, or to the unwisdom of two men interviewing a stressed female colleague about sexual harassment. The claimant spoke about the issues which concerned her. On this occasion, she identified by name the drivers who had been referred to anonymously in the document of 23 June.

101. We were mainly concerned with an incident involving Mr Affaine during the meeting. The claimant's transcript of the covert recording occupied D47-62 of the relevant bundle. The transcript (and we stress that the wording was agreed but we have not heard the original) records the incident at pages 55-58; at which point Mr Affaine left the meeting, and the claimant continued in some dialogue with Mr Field. Mr Field's notes record: "Prior to the conclusion of the hearing MJ had an outburst following the remarks said by MJ representative. EA stated to MJ that should warn drivers off by telling them she is either married or pregnant." (94). While we should not read too much into a brief note, we note that a fairer summary might have placed the events in strict chronology; would have avoided using the loaded word 'outburst'; would have avoided implying that the 'outburst' was how the meeting ended; and might have added that Mr Field had expressed some immediate disassociation from Mr Affaine's remark.

102. At the material point of the meeting, Mr Affaine said to the claimant that she should deter prospective harassers by saying that she was pregnant or married. He also put to the claimant the possibility that any driver might be joking in his remarks to her.

103. The claimant took immediate issue with the "pregnant/married" remark and pressed the point for a number of minutes, in consequence of which Mr Affaine left the meeting. The transcript shows that Mr Field responded at once to the remark by saying: "That's not really helping the situation is it?" and after Mr Affaine left said to the claimant: "I'll have a chat with Edwin… and ask him what he means…" (D55 and D58)

104. Mr Field and Mr Faichney both gave evidence that they had spoken to Mr Affaine informally to suggest that his remarks had been inappropriate.

105. On the day after the meeting, the claimant emailed Mr Field at 10am to give more details about her allegations against two colleagues and then, at 96, to complain about Mr Affaine. The section should be read in full (starting "Finally I managed to get home…") but the material part states:

> "Edwin was there for me, yet he sat opposite me, beside you and I felt he was questioning me on occasions as if he's against me… He also laughed on a couple of occasions… he said that Edwin said about [1 driver] "he was only joking"… Then Edwin sat there laughed and clapped his hands when he said; "The way to deal with these people was to have told them that "I am pregnant" or "that I have a husband".

106. The claimant then raised an issue as to her selection of Mr Affaine as companion, commenting that his behaviour "is exactly the reason why I am not with Unite." She concluded the section about Mr Affaine "This MUST form part of the investigation conclusion". On 19 July she wrote again to Mr Field to state that Mr Affaine's conduct "counts as direct sex discrimination and is a continuation of the harassment which I was complaining about".(102)

107. The list of issues raised Mr Affaine's behaviour and Mr Field's management of the meeting. We have read Issues 6 and 11 as complaints that Mr Affaine's actions amounted to direct discrimination and harassment. The actions complained of were the laughter at some point during the claimant's narration; the use of dismissive language including: "I don't think he would talk to you like that" and the "pregnant/married" remark.

108. We find first that the respondent was liable for any actions of Mr Affaine in the meeting which constituted a contravention of the Equality Act. We find that Mr Affaine was employed by the respondent. He was not employed by Unite. He was elected by the Unite members at Northumberland Park. He was permitted time and facilities in the course of his employment as driver to act as such representative. He attended on 8 July on the understanding that he was there as a Unite representative. However, the claimant's email of 9 July, in contradiction to what she said at the end of this hearing, was that she was <u>not</u> then a member of Unite; if so, the point is even stronger, because Mr Affaine was attending as companion, without any regard or relationship to Unite. In either event, we find that Mr Affaine participated in the meeting in the course of his employment, and that we should attach a wide construction to that phrase.

109. We find as fact that during the meeting Mr Affaine laughed; that he expressed scepticism of the claimant's allegations; and that he made the pregnant/married remark. We find that he treated the claimant less favourably than he would have treated a hypothetical male complainant of harassment, by trivialising and belittling her allegations; by expressing partiality in favour of the alleged perpetrators; and by advising her, as the apparent victim of harassment, to adopt tactics of avoidance, and to lie while

doing so, as an alternative to addressing the underlying wrong of harassment.

110. Applying the same findings, we find further that Mr Affaine's actions constituted harassment of the claimant.

111. Issues 6 and 13 address Mr Field's response in the meeting, and allege that: "The manner in which the grievance hearing was conducted amounted to harassment in respect of the failure of the respondent to act on comments made by Edwin Affaine" and less favourable treatment, "By not addressing Edwin Affaine's conduct during the grievance hearing."

112. We uphold both complaints. We apply to Mr Field's response to Mr Affaine the same hypothetical comparator and the same hypothetical situation set out above. Mr Affaine was present in the meeting as the claimant's companion, and as an employee of the respondent, subject to the rules and standards of the respondent. We find that placed in the hypothetical situation indicated above, ie with the hypothetical male complainant of harassment, Mr Field would proactively have intervened to make clear that Mr Affaine had, on behalf of the company, expressed an unacceptable response to the complaint. Mr Field was the senior employee in the meeting, and was charged with leadership of the meeting. It was the starting point of the investigation which had been delegated to him. He was responsible for upholding the standards of the company. We find that he failed to do so, and that his failure met the test of harassment. We find that he treated the claimant less favourably than he would have treated a hypothetical male complaining of harassment. We add that we accept that there was no element of intention in the actions which we have found on Mr Field's part. We also accept that he found himself in a difficult situation, and that he was genuinely unsure about his responsibility for the actions of a Unite representative.

<u>The grievance investigation</u>

113. Mr Field then set about his investigation. He interviewed the drivers who he thought had been named by the claimant or referred to, including Mr E and Mr F. Between 13 July and 10 August he interviewed nine individuals, preparing a typed summary note of each interview (98-121). The interviewees did not include Mr Affaine, possibly because Mr Field was wary of interviewing someone whom he thought of as a Unite representative, but also because as Mr Field had himself been present at the incident, he may have seen no need to ask Mr Affaine for his views of what he himself had witnessed, and on which he had formed his own views. When interviewed, Mr E denied the allegations against him. On subsequent reflection, and much to his individual credit, he admitted to Mr Field that the "horny" conversation had taken place and that he had been part of it.

114. On 10 August Mr Field wrote to the claimant to set out his conclusions (122-124). He explained to the claimant that a number of the perpetrators could not be identified or the incidents sufficiently clarified for them to be fully

investigated. Some of those involved had already left the business. Those who had been interviewed had given complete denials. His response on Mr Affaine was as follows:

> "I believe that the comments were intended as "devil's advocate" and in the context of the meeting. I do not think that Mr Affaine was harassing you. I have spoken to Mr Affaine and suggested a more tactful manner may have been appropriate. I should note that it was you who requested Mr Affaine attend this personal meeting as your companion."

115. Mr Field apologised for the failure to deal with the complaint against Mr Corbin in a timely manner, and offered the claimant the opportunity of working at a different location.

116. The claimant in response made a subject access request (126); a request for documentation (128); and submitted an appeal (130). The appeal then came to Mr Faichney, who interviewed the claimant on 31 August.

117. Issue 14 alleged that Mr Field directly discriminated against the claimant in, in short, aspects of his investigation and in rejecting her grievance; Issues 18.3 and 18.4 alleged that the conduct of the grievance and its rejection were acts of victimisation. A disproportionate amount of this hearing therefore focused on the matters which the claimant alleged had taken place between 2014 and June 2016, other than those which were pleaded issues, and in relation to which Mr Field in short found that the matters alleged by the claimant were not proven. Mr Stephenson cross-examined on these events, at times crossing the unclear boundary between whether the investigation was tainted by discrimination into the matter which was not before us, namely were the allegations well-founded.

118. There was no contemporary record of any event before June 2016 other than the complaint about Mr Corbin. On the claimant's best account, the only other written record of such a complaint was the 2014 complaint which the claimant accepted had in fact been actioned. Although the claimant wrote clear narrative, her narrative repeatedly lacked clarity as to names, dates, places and witnesses. Her case in the tribunal was not assisted by the claimant's pursuit of points which were plainly unsustainable, such as her conviction that she should have been present when Mr Field interviewed the alleged perpetrators; or that CCTV (which we accept is a silent and incomplete system) would have helped clarify her complaints; or, as she startlingly said in evidence: "There are ways of getting information from people in a police station."

119. That said, the obligation to conduct a fair enquiry was that of the respondent (not of Mr Field personally). We find that despite its size and resources, the respondent placed Mr Field, as investigator, in a position for which he had no relevant experience, almost no adequate training, and no support from HR, or elsewhere in management.

120. There was no evidence that Mr Field adopted the good common practice of investigators in such a case in a large number of respects. We cite just a

number of examples. He did not prepare identical questions for the interviewees; he did not begin meetings with open questions to set a scene; if manuscript notes were made, they were not retained; he did not ask interviewees to comment on the notes of their interviews; he did not put to the interviewees anything in writing, including the confidentiality obligation; the meetings he had with the interviewees were very short; on at least one occasion, an interviewee gave an astonishing reply which might have merited a separate inquiry ("Arriva drivers say they know her and that she sniffs cocaine") (108), which was not followed up. He did not follow up any of the other derogatory responses to his questions. Although the monitoring policy quoted above was introduced a week before he began his inquiry (on 1 July 2016) Mr Field appeared unaware of it both throughout the investigation, and indeed at this hearing (consistent with the absence from this process of professional HR input).

121. Although we note the above, we consider that the claimant and occasionally Mr Stephenson sought to apply to Mr Field an unrealistic standard of forensic detection. We do not seek to apply an unfair or unrealistic standard to an equality investigation. As Ms Owen rightly said, the standard is that of a reasonable employer. As Ms Owen also said, the respondent had, by the end of this process, interviewed some 15 employees, none of whom gave the claimant's allegations any corroboration, and many of whom responded with personalised attacks on her, including on her conduct and mental health.

122. Mr Field adopted a simplistic model of holding short meetings (most of them no more than 10 minutes), at which he read out to each interviewee what he understood to be the claimant's allegation against him, and asked for comment or response. The answers were predictable denials. On the material before him at the end of this process, Mr Field had little choice but to reject the claimant's grievances.

123. We ask whether Mr Field treated the claimant less favourably on grounds of gender in his conduct of the grievance and its outcome. Subject to one exception (see below), we can see no evidence that he did so, or that a hypothetical comparator would have been treated in any way differently. We regard the characteristics of the hypothetical comparator as a man with a harassment complaint, making allegations against a number of named colleagues, none of which was in any respect independently verified.

124. Applying similar reasoning, we reject the allegation against Mr Field of victimisation. We accept that the quality of his investigation is attributable to the matters set out at paragraph 96 above**.** We do not find that Mr Field conducted the grievance as he did, or reached the conclusions which he did, on the ground that it was a grievance about a form of unlawful discrimination, or otherwise under the Equality Act.

125. The exception is the event of 8 July and Mr Affaine's conduct. In that respect Mr Field was in a different position. He was a witness to Mr Affaine's words and conduct. He had seen and heard Mr Affaine's words

and behaviour in context, and their effect on the claimant, and failed to grasp the implications, seek advice, or otherwise respond. The question for us is not Mr Field's motive or intention, but the treatment of the claimant.

126. Just as Mr Affaine treated the claimant less favourably as a woman by advising her to avoid harassment by claiming falsely to be pregnant or married, so too Mr Field treated her less favourably by trivialising the event, placing reliance on an explanation ('devil's advocate') which was not that of Mr Affaine, and failing to apply corporate standards to the conduct of the meeting. We find further that in continuation of the same process and approach, Mr Field directly discriminated against the claimant by rejecting her allegation against Mr Affaine.

127. We uphold Issue 14.1 on the above basis. We reject the remainder of Issue 14. We reject those portions of Issue 18 (victimisation) which relate to the manner of the grievance and its outcome, which, as already indicated, we attribute to, in effect, structural failings within the respondent company.

128. We now turn to the final stage of the grievance, relating to Mr Faichney.

129. The claimant's appeal came to Mr Faichney to deal with. He was general manager of the garage at Northumberland Park and elsewhere and was in his first year as general manager.

130. He received the appeal and paperwork in support, and arranged to meet the claimant on 31 August at head office. He was accompanied by Ms Man, a general manager, who was there as what he called a side member, and was, we note, the only woman manager involved in this process.

131. The claimant attended the meeting on 31 August alone. She recorded the meeting, without the knowledge of the other participants. As a result, she undermined her own complaints about Mr Affaine by failing to reveal that the 8 July meeting had also been recorded. The meeting lasted over two hours with a break, and the notes are more detailed than those kept by Mr Field (147-152). The claimant may not have been her own best advocate, in terms of presenting a coherent analysis from which Mr Faichney could work. There was some confused correspondence about the possibility of a further meeting, which did not assist us. It is possible that the claimant had no real faith in the appeal process, as indicated by what Mr Faichney fairly called the confrontational language of an email she wrote on 5 September: "I'm done with games please get the appeal outcome out to me as soon as possible".

132. Mr Faichney asked Mr Field to interview four more possible witnesses who had been identified or become identifiable since the first round of meetings. The interviews took place on 6 and 7 September, again conducted by Mr Field one-to-one and leading to short typed notes. None of the witnesses was able to advance the claimant's case (159-162).

133. In the course of Mr Faichney's enquiry it was suggested that a female member of the administration team had been sexually harassed, or could otherwise assist the inquiry. Mr Field spoke to her on 8 September (163) to see if she wished to be interviewed. She did not, and Mr Field recorded the fact (163).

134. A further line of enquiry led the respondent (not, we repeat, the claimant) to identify the two possible drivers involved in the alleged ferry incident (163A and 163B) and they were interviewed on 9 September. We have dealt above with their answers.

135. Mr Faichney effectively found himself in the same position as Mr Field, only more so. We mean by this that just as Mr Field found that nine interviews led to no corroboration of any allegation of the claimant, so Mr Faichney found the same after about fifteen interviews. That included interviews undertaken on the basis that the respondent had undertaken the work of trying to identify some of those to be interviewed.

136. Mr Faichney wrote a detailed reply to the claimant (164-173), setting out point by point why each of her allegations remained rejected. Many of these were allegations which were not before this tribunal.

137. A number of matters dealt with by Mr Faichney should be recorded. He wrote: "I too apologise for your complaints [about Mr Corbin] not being considered promptly or a manager speaking to you about this complaint."

138. He wrote that he considered that Mr Field had been an appropriate and suitable person to investigate the grievance.

139. In dealing with the "horny" conversation he wrote:

> "I will speak to the employees concerned to firmly remind them of appropriate conversations with colleagues at work and how offence can be easily caused. I note you state you have already accepted the apology from the second driver."

140. In relation to Mr Affaine, he wrote:

> "Mrs Man and I consider the language to have been an inappropriate choice of words, and whilst it is difficult for us to understand fully having not been in that meeting, it does appear unsatisfactory to some degree. I note that Mr Field has already spoken with Mr Affaine and suggested a more "tactful manner" be employed going forward. I will speak to Mr Affaine again to reaffirm that advice and remind him of his obligations whilst at work. Given the differing viewpoints concerning this interaction, it would be difficult for me to reach a difficult conclusion… Mr Affaine attended as your representative at your request, exercising your right to be accompanied which is welcome. Mr Affaine was not representing the company or there to support Mr Field."

141. In conclusion, Mr Faichney hit one nail firmly:

> "You expressed concern that you felt like the company thought you were lying, however Mr Field simply said that he could not substantiate your complaint. Having now heard the appeal against your grievance, I understand how Mr Field reached that decision and how it was difficult to investigate a myriad of complaints submitted at once, with vague detail and through a broad range of communications received."

142. Those comments are, we find, well made and capture something of Mr Field's difficulty. We add that they were even more reason for him to have had professional support in his investigation.

143. Mr Faichney went on to state that he gave a commitment to a number of steps involving staff at Northumberland Park in relation to harassment and discrimination issues. He stated that he would cause to be re-issued a staff notice to all employees regarding dignity at work from 2009 (173A to 173B) which indeed was sent by Mr Faichney to all Northumberland Park managers and supervisors. It is curious that in writing this Mr Faichney made no reference to the dignity and diversity policy which the company had apparently adopted on 1 July, just a few weeks earlier. We repeat our concern that those in the respondent's HR function failed to provide guidance, leadership or training in that new policy.

144. Mr Faichney was the subject of Issues 15 and 18.4. At Issue 15 the claimant pleaded a claim of direct discrimination in rejection of the appeal. The claim fails. We place Mr Faichney in the position attributed above to others of hearing the grievance appeal of the hypothetical male comparator who otherwise was in materially identical circumstances. We bear in mind that Mr Faichney was not in Mr Field's position in relation to Mr Affaine, nor did he have the benefit of a recording or transcript of Mr Affaine's precise words and manner of speaking them. We find that the hypothetical comparator would have been treated identically, and the claim fails.

145. Issue 18.4 was that in effect the claimant was victimised through rejection of her grievance. We disagree. The grievance was rejected because on the material before him Mr Faichney had no reason to uphold it.

146. Although the claimant's language of 5 September had suggested that she was at the end of her tether, she did not in fact resign until she had received the grievance outcome. Her undated resignation was received on 21 September (176, 174).

147. Although the letter should be read in full and the claimant was not her own best advocate, the substance and her reasoning may be summarised shortly in her second paragraph: "I feel that I have raised legitimate complaints, but that management have failed to investigate these complaints thoroughly and indeed have colluded to enable a culture of sexual harassment and bias to flourish." In evidence, the claimant graphically described the sense of freedom which she felt after resigning.

<u>Constructive dismissal</u>

148. In this case the breaches of trust and confidence were relied on compendiously by Mr Stephenson. Where the trust and confidence issue refers to a respondent's grievance procedure, we think it right to approach the matter cautiously. We bear in mind that no employee has a contractual right to have her grievance upheld. Her right is to have a fair and proper process, in which it is not the role of the tribunal to usurp the decision maker or set the outcome.

149. However, the claimant's circumstances were highly unusual. We were told of three grievances of sexual harassment. (Mr Faichney's outcome letter referred to another grievance on another point, about which we heard no evidence and can make no comment). The 2014 grievance must have succeeded, but the respondent never told the claimant of it. The 2015 grievance disappeared, and the respondent acknowledged and apologised for a failure of process.

150. We have found that in at least one material respect, namely the events of 8 July, the behaviour of Mr Affaine, and the failure of Mr Field to respond appropriately on behalf of the respondent, the claimant's grievance should have been upheld, and that the failure to do so was, on the part of Mr Field, an act of discrimination. Although we have not found that Mr Faichney's rejection of the appeal was a further act of discrimination, Mr Faichney failed to remedy the wrong previously done in relation to that matter.

151. We have also found that the discrete acts of discrimination found above took place; and we accept that the respondent has failed to provide the claimant with redress for them.

152. We find that taken together the discrete discrimination claims which we have upheld, including those which formed part of the grievance process, constituted, without proper or reasonable cause, breaches or a breach of the duty of trust and confidence, as well as constituting discrimination on grounds of gender, and that the claimant with reasonable promptness resigned in response.

153. We find that in those circumstances it has been made out that the claimant was constructively dismissed by the respondent, both as a matter of "ordinary" unfair dismissal under the Employment Rights Act 1996 and as a matter of dismissal within the meaning of the Equality Act 2010. Accordingly those claims succeed. We find that the repudiatory actions of the employer which led the claimant to resign included acts of discrimination and harassment, from which it follows that we find that the claim of sex discrimination in constructive dismissal also succeeds and is upheld.

154. The respondent has not shown that the claimant committed blameworthy conduct such as to have contributed to her dismissal and lead to reduction under either s.122(2) or s.123(6) ERA.

155. The parties are reminded that the option of settling their differences before the remedy hearing remains open to them.

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Employment Judge R Lewis
Date: 4 December 2017

Sent to the parties on: .....

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For the Tribunal Office