THE INDUSTRIAL TRIBUNALS

CASE REFS: 1871/16
2/17

CLAIMANT: **NATASHA McNICHOLL**

RESPONDENTS: **1. Bank of Ireland**
2. F

Judgment On Reconsideration

The unanimous judgment of the tribunal is that

(1) The claimant was not unfairly constructively dismissed and the said claim is dismissed.

(2) The claimant was not harassed on the grounds of age and the said claim is dismissed.

(3) The claimant was sexually harassed by the respondents and each of them and the tribunal orders the respondents, jointly and severally to pay to the claimant the sum of £18,483.07, by way of compensation.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Drennan QC**

Members: **Mr E Grant**
Mrs F Cummins

APPEARANCES:

The claimant was represented by Ms S Bradley, Barrister-at-Law, instructed by Equality Commission for Northern Ireland.

The first-named respondent was represented by Mr C Hamill, Barrister-at-Law, instructed by Jones Cassidy Brett, Solicitors.

The second-named respondent was represented by Mr D Sharpe, Barrister-at-Law, instructed by John Ross & Son, Solicitors.

Reasons

1. The claimant presented a claim to the tribunal on 22 August 2016 against the respondents in which she made claims, pursuant to the Sex Discrimination (Northern Ireland) Order 1976 and pursuant to the Employment Equality (Age) Regulations (Northern Ireland) 2006. The first-named respondent presented a response to the tribunal denying liability for the said claims on 28 October 2016.

The second-named respondent presented a response to the tribunal, denying liability for the said claims on 31 October 2016. The claimant presented a further claim to the tribunal on 16 December 2016 in which she also claimed unfair constructive dismissal. The first-named respondent presented a response, denying liability for the further claims on 26 January 2017. The second-named respondent presented a response denying liability for the further claims, on 11 January 2017. An Order for 'Consolidation', combining both sets of proceedings to enable them to be heard together was made by the tribunal on 6 January 2017.

1.2 In accordance with the tribunal's normal case-management procedures, following a series of Case Management Discussions, the following statement of issues was confirmed by the representatives, as amended, at the commencement of the hearing:-

"Legal Issues:

1. *Was the claimant subjected to sexual harassment as defined by Article 6A of the Sex Discrimination (Northern Ireland) Order 1976 in relation to the allegations set out in her claim form?*

2. *Was the claimant subjected to sexual harassment as defined by Regulation 6 of the Employment Equality (Age) Regulations (Northern Ireland) 2006 in relation to the allegations set out in her claim form?*

3. *Is the first-named respondent vicariously liable for the alleged conduct of the second-named respondent?*

4. *Can the first-named respondent rely on the statutory defence in Article 42(3) of the Sex Discrimination (Northern Ireland) Order 1976 on grounds that it took reasonably practicable steps to prevent the claimant being subjected to the alleged harassment on grounds of sex?*

5. *Can the first-named respondent rely on the statutory defence in Regulation 26(3) of the Employment Equality (Age) Regulations (Northern Ireland) 2006 on grounds that it took reasonably practicable steps to prevent the claimant being subjected to the alleged harassment on grounds of age?*

6. *Were the alleged acts of harassment continuing acts so as to bring the claims within the statutory time-limit and, if not, should the tribunal exercise its just and equitable discretion to consider all elements of the claims?*

7. *Was the claimant constructively dismissed contrary to Article 8(2)(b) of the Sex Discrimination (Northern Ireland) Order 1976?*

8. *Was the claimant constructively dismissed as set out in Article 127 of the Employment Rights (Northern Ireland) Order 1996?*

Factual Issues:

1. *Did the second-named respondent subject the claimant to unwanted conduct which satisfies the definition of sexual harassment?*

2. *Was the claimant subjected to the alleged sexual harassment during the course of her employment by a work colleague, namely the second-named respondent?*

3. *Did the claimant report the conduct of the second-named respondent to her line manager, Lisa McManus and Chris McLean (the second-named respondent's line manager) on 27 November 2015?*

4. *Was the second-named respondent given an inform warning following this report? Was this an appropriate sanction?*

5. *Did the second-named respondent subject the claimant to unwanted contact which satisfies the definition of sexual harassment in 2016? If yes, on what date or dates?*

6. *Did the second-named respondent subject the claimant to unwanted conduct on grounds that she was in a younger age category than he was?*

7. *What steps did management take to prevent the claimant being subjected to the alleged unwanted conduct following the formal complaint of harassment to HR by letter of 5 July 2016 and in a meeting of 6 July 2016?*

8. *Did the first-named respondent apply its internal procedures in the first-named respondent's Harassment and Bullying Policy in investigating the claimant's complaint of sexual harassment?*

9. *Were the complaints made by the claimant of sufficient seriousness to require immediate implementation of the formal procedures in November 2015?*

10. *Was the claimant less favourably treated than the second-named respondent by management moving her work station following her complaints?*

11. *Had the second-named respondent been observed by management to have drink taken when in the office on 1 July 2016 and, if so, what impact did this have on the claimant and what action was taken?*

12. *Did Lisa McManus inform the claimant the second-named respondent had reacted aggressively in response to her complaint in November 2015 and what impact did this have on the claimant?*

13. *Whether the claimant was treated less favourably than second-named respondent in that she was subjected to the disciplinary process in respect of her absence whereas the second-named respondent was*

not subjected to any disciplinary process pre-16 December 2016 in relation to the claimant's allegations of sexual harassment, aggressive behaviour and being drunk in the workplace. 'WORDING SUGGESTED BY PRESIDENT AT CMD ON 23.02.17 ACCEPTED BY CLAIMANT'.

14. *Was the claimant less favourably treated in the complaint related to management of her absence than the second-named respondent in the complaints of sexual harassment/aggressive behaviour and being drunk in the workplace?*

15. *Did the first-named respondent's treatment of the claimant amount to a repudiatory breach entitling the claimant to resign and treat herself as dismissed?*

16. *What the reason for the claimant's resignation?*

17. *When did the claimant apply for a visa to travel to Australia?*

18. *When did the claimant receive notification that her visa application had been successful?*

19. *When did the claimant book flights to travel to Australia?*

20. *When did the claimant leave for Australia?*

21. *Was the complaint lodged by the claimant on 5 July 2016 a formal complaint under the first-named respondent's Bullying and Harassment Policy or a grievance as stated in Paragraph 4 of the first-named respondent's IT3 in Case Reference No: 2/17IT?*

22. *Was there any obligation on the claimant to appeal a finding under the first-named respondent's Bullying and Harassment Policy?*

23. *What impact, if any, is there on compensation if the claimant did not exercise an option to appeal?*

24. *Has the claimant taken appropriate steps to mitigate any alleged loss?"*

1.3 At the commencement of the hearing, the claimant's representative confirmed the claimant was not making a claim for personal injury but only a claim for injury to feelings.

1.4 At the commencement of the hearing, the claimant's representative confirmed that, if the tribunal found the said dismissal was unfair, she wished to obtain by way of remedy, an award of compensation and, in particular, she did not seek an Order of Reinstatement or Re-engagement, pursuant to the provisions of Articles 147-151 of the Employments Rights (Northern Ireland) Order 1996.

1.5 It was not disputed by the representatives of the parties the first-named respondent was vicariously liable for the actions of the second-named respondent and other

employees of the first-named respondent, relevant to the subject matter of these proceedings subject to the statutory defence, pursuant to the Sex Discrimination (Northern Ireland) Order 1976 and/or the Employment Equality (Age) Regulations (Northern Ireland) 2006 (see later).

1.6 The Tribunal issued its decision in this matter (the Original Decision) on 13 June 2019, in which, pursuant to rule 49 of the Industrial Tribunal Rules of Procedure, contained in Schedule 1 of the Industrial Tribunals (Constitution and Rules of Procedure) 2005(the 2005 Rules of Procedure), then in force, the Tribunal anonymised, in the said decision, the names of the parties, witnesses and other persons employed by the first respondent relevant to the subject matter of these proceedings. In a Decision on Review (the Review Decision) issued on 17 December 2019 the Tribunal confirmed the Original Decision in in relation to the said decisions on anonymity, as referred to above. The Claimant appealed the Original Decision and the Review Decision to the Court of Appeal in relation to only the said anonymisation decisions made by the Tribunal. In light of the said appeal the Tribunal, on the direction of the Employment Judge, following an application by the representatives of the Claimant removed the said decisions from the Tribunal's Register and website, pending the outcome of the said appeal.

The Court of Appeal made the following order by consent of all the parties, on 5 February 2020, all parties having agreed that these terms were in full and final settlement of all matters arising or considered with this appeal, namely:

> *"1. Pursuant to s.38(1)(b) of the Judicature(N.I) Act 1978the appeal is hereby remitted to the Tribunal for the purpose of reconsidering the contentious anonymisation decisions and, if considered appropriate, rescinding same and making fresh decisions and determining how the case should be reported and published.*
>
> *2. There shall be no order as to costs among the several parties.*
>
> *3. There shall be liberty to apply"*

1.7 On 27 January 2020 the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 came into operation. The said Regulations revoked the 2005 Rules of Procedure and brought into force the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020 (the 2020 Rules of Procedure), which are contained in Schedule 1 of the said Regulations. The Tribunal therefore proceeded to reconsider the said contentious anonymisation issues, on foot of the order of the Court of Appeal in accordance with the 2020 Rules of Procedure. In so far as relevant to these issues, for the purposes of this Judgment, the 2020 Rules of Procedure provide as follows, namely:

> *"44- (1) A tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings. Such an order may be made in the following circumstances –*

(a) where the tribunal considers it necessary in the interests of justice;

(b) in order to protect the Convention rights of any person;

……...

(2) In considering whether to make an order under this rule, the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression

(3) Such orders may include –

……

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by use of anonymisation or otherwise, whether in the course of a hearing or in its listing or in any documents entered on the register or otherwise forming part of the public record.

……..

(6) "Convention Rights" has the meaning given to it in section 1 of the Human Rights Act 1996.

1.8 Due to the Covid-19 pandemic and the various restrictions imposed on the parties and the tribunal in relation to hearings and the use and administration of the tribunal building, this judgment has been regrettably delayed. In light of the foregoing, the parties and their representatives entered into discussions, at the initiative of the Tribunal to see what agreement, if any, there was between them in relation to the contentious anonymisation issues remitted by the Court of Appeal to the tribunal for reconsideration. Following those discussions, the parties and their representatives agreed that the claimant and the first respondent should not be anonymised in any judgment on reconsideration; but that the second respondent together with N and R should each be the subject of an anonymity order, pursuant to Rule 44 of the 2020 Rules of Procedure, in any such judgment. The parties and their representatives acknowledged that such an agreement was not determinative of the matter but submitted it would be a relevant factor for the tribunal to take into account in any determination of the matter by the Tribunal. However, there was no such agreement in relation to the witnesses, who had given evidence before the Tribunal or, with exception of N and R, as referred to above, those persons who did not give evidence but are referred to in the decision of the Tribunal.

1.9 In light of the Covid-19 restrictions, and in order to progress the matter, the parties and their representatives helpfully then made a series of written submissions to the tribunal; which, after taking into account their agreement as set out in the previous sub–paragraph, related to whether anonymity orders should be made by the Tribunal in relation to any of those witnesses who gave evidence to the Tribunal and/or in relation to any of the persons who did not give evidence to the tribunal but

are referred to in the decision of the Tribunal. In particular, the representative of the claimant submitted that both the witnesses who gave evidence but also those who did not, but are referred to in the decision should not be the subject of any anonymity order in any judgment on reconsideration, as they played a significant role in the events leading up to the harassment of the claimant and/or in the management of her complaint by the first respondent. The second respondent in his submissions, in essence, agreed with the submissions of the claimant on this issue of anonymity in relation to those that gave evidence to the tribunal; but he also considered that, even those who did not actually give evidence to the Tribunal, in effect did so by reference to the documentation before the tribunal relating to their actions, which was before the Tribunal, and should also be named in any judgment. The representative of the first respondent initially submitted that those who gave evidence to the Tribunal should not be anonymised but those persons, who did not give evidence, but are referred to in the decision, should be anonymised in any judgment on reconsideration. All parties and their representatives acknowledged, in their submissions that this issue of anonymity was a matter for the Tribunal, exercising its discretion, in accordance with the terms of Rule 44 of the 2020 Rules of Procedure. In a further submission, the representative of the first respondent stated, in so far as she had been able to obtain instructions from relevant persons, given some had left the first respondent and could not be traced, the preference expressed by them was not to be named and that consideration should be given to keeping such persons anonymous in the judgment on reconsideration. The Claimant's representative submitted it was irrelevant that witnesses had left the first respondent or that others, who had been spoken to would prefer not to be named; and, in particular, submitted that the principles of open justice could not allow a witness to dictate to the Tribunal on anonymity.

1.10 The Tribunal has carefully considered the written submissions by the parties and their representatives, in light of the terms of Rule 44 of the 2020 Rules of Procedure. The Tribunal is satisfied that, when considering whether it is appropriate to make any anonymity orders, pursuant to the said rule, it is necessary to have regard to the basis under which any such order should be made and, in particular, the importance of the principles of open justice, giving full weight to it and the right to freedom of expression. It is clear, under the said rule, the restriction on public disclosure can only be imposed in so far as the Tribunal considers it necessary, (1) in the interests of justice or (2) to protect the convention rights of any person. Such an Order is not restricted to parties or witnesses. A tribunal is therefore required, when determining this issue, to consider the competing rights and balance one against the other before reaching a decision. (see ***Fallows and others v News Group Newspapers (2016) ICR 801*** applying Rule 50 of the Employment Tribunal Rules of Procedure 2013, which apply in Great Britain, and which is in similar terms to Rule 44 of the 2020 Rules of Procedure).

1.11 The Tribunal was therefore required to consider these contentious anonymity issues, on foot of the order of the Court and Appeal and to do so, pursuant to Rule 44 of the 2020 Rules of Procedure, which was not in operation at the date of the original Decision and/or the Decision on Review. As the Tribunal was considering these issues, for the purposes of this Judgment on Reconsideration, it decided to rescind, for the avoidance of any doubt, the Anonymity Orders which it made in the Original Decision. The Tribunal, upon such reconsideration, after carrying out the above balancing exercise, is satisfied that, in the circumstances of

this matter, as set out in paragraph 2 of this decision, it is necessary, in the interests of justice and/or in order to protect the Convention rights of the second respondent and N and R, including, in particular, the right of each of them to a private life, pursuant to Article 8 of the Convention, to make orders of anonymity (pursuant to Rule 44 of the 2020 Rules of Procedure); and it so orders in respect of each of them. The Tribunal is confirmed in its decision by reason of the agreement made between the parties and their representatives referred to in paragraph 1.8 above. Turning to the issue of the anonymity of those witnesses who gave evidence to the tribunal and those persons, who did not give evidence to the Tribunal but are referred to in the Original Decision, the Tribunal is satisfied, after carrying out the necessary balancing exercise, that the principle of open justice and the Convention right to freedom of expression outweighs the Convention rights of those persons and each therefore must be named in this Judgement on Reconsideration. Indeed, other than a vague reference to a preference by such persons not to be named, the Tribunal was given no evidence to persuade it, when carrying out the said balancing exercise, that the principle of open justice and the Convention right to freedom of expression should not be exercised in this matter.

1.12 In light of the Tribunal's said decisions, pursuant to the Order of the Court of Appeal in relation to the contentious anonymity issues in the Original Decision and the Decision on Review, the Tribunal is satisfied, it is appropriate, in these circumstances, that this Judgment on Reconsideration, and not the Original Decision or the Decision on Review, should be issued to the parties and recorded in the register; and, further, in due course in the normal way, that this Judgement on Reconsideration, and not the Original Decision or the Decision on Review, will be placed on the Tribunal's website. (See further ***Ameyaw v Pricewaterhousecoopers Services Ltd (2019) UKEAT/0244/18***). The Original Decision and the Decision on Review, which were removed from the Register, on the direction of the Employment Judge, pending the decision of the Court of Appeal, will therefore not be replaced on the Register in the circumstances.

1.13 In this Judgment on Reconsideration, the Tribunal has corrected, in so far as necessary and appropriate, some factual errors and/or clerical mistakes and accidental slips which occurred in the Original Decision.

2.1 The tribunal heard evidence, on behalf of the claimant from the claimant herself; and, on behalf of the second-named respondent, the second-named respondent; and, on behalf of the first-named respondent, various employees of the first respondent, as referred to later in this decision. Having considered the evidence given by the parties, as set out above, the documents in the 'trial bundle', to which the tribunal was referred during the course of the hearing, together with the oral and written submissions of the representatives made at the conclusion of the hearing, the tribunal made the following findings of fact, insofar as relevant and necessary for the claimant's claims, as set out in the following sub-paragraphs.

2.2 The claimant ("Natasha McNicholl"), who was born on 30 May 1990 and is female, commenced employment with the first respondent ("Bank of Ireland") on 11 May 2015 where her main duties included administrative work and handling daily customer enquiries via telephone, email and letter. From in or about March/April 2016, the claimant also carried out work as a complaints handler. The second respondent ("F") who is male and aged in or about 51 at the date of this hearing, was employed by Bank of Ireland from in or about August 2004.

Natasha McNicholl and F were both based at all times relevant to these proceedings in the offices of Bank of Ireland in Belfast City Centre; but, at all material times, worked in different departments of Bank of Ireland and their different roles did not normally require them to work together.

2.3 At the relevant time material to these proceedings, Bank of Ireland had an operative policy relating to Harassment and Bullying, together with an Equal Opportunities Policy.

Insofar as relevant and material, the said Harassment and Bullying policy, which had been written in 2000, but not subsequently updated, stated:-

"Introduction

….

Each employee has the right to a working environment which is free from harassment and bullying. Harassment and bullying undermines the confidence and dignity of those affected by it. No-one should have to tolerate humiliating or degrading behaviour.

This booklet identifies the procedures for dealing with cases of harassment and bullying. To supplement these procedures a panel of individuals has been established to provide informal support to colleagues who may experience difficulties. The names of these support colleagues can be obtained confidentially form your own or any group Human Resources Department.

Each and every one of us has a responsibility to behave in a manner that respects and upholds the dignity of our colleagues and to ensure that nothing in our behaviour causes offence or humiliation to others. There is a particular responsibility on management to ensure that the policy is communicated and complied with.

….

Policy Statement

It is Bank of Ireland's policy that all employees are free to perform their work in an environment which is free of harassment, bullying and intimidation. Harassment and bullying will not be tolerated. Any member of staff making such a complaint. Any breach of this policy may be dealt with under disciplinary procedures.

What is Harassment?

Harassment is behaviour which could be reasonably described as unwelcome and offensive, humiliating or intimidating to the recipient. It is one side and imposed and affects the dignity of women and men at work.

Harassment includes actions, comments, jokes or suggestions which cause the recipient to feel threatened, humiliated or offended. What one individual

may be able to accept may nevertheless cause distress to another? It is no excuse to say "I only meant it as a joke". Offensive and unwelcome behaviour is NEVER harmless fun.

Harassment can interfere with the employee's job performance, undermine job security or create an intimidating/stressful or hostile working environment. It can also result in loss of esteem, lower productivity, absence and perhaps even an individual leaving the organisation.

It can also operate to the detriment of employees where

- *such conduct creates an intimidating, hostile or humiliating working environment, or*

- *an employee's response to harassment is used, implicitly or explicitly, as a basis for decisions affecting that employee's employment/deployment.*

Harassment can be physical, verbal or non-verbal. It can be repeated or persistent behaviour that can also take the form of an isolated incident. But it can occur in the workplace or outside the workplace eg at a work related event such as an external meeting, a function or a training programme.

Forms of Harassment

Harassment may take many forms. Sex … may provide the basis for harassment.

Employees can be harassment by management, colleagues, subordinates, customers, clients or contractors.

Sexual harassment is

Unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work. It can include unwelcome non-verbal, verbal or physical conduct based on the gender of the recipient.

Some examples of sexual harassment include

- *staring, leering, offensive gestures*

- *offensive publications, literature, use of technology*

- *unsolicited and unwanted gifts*

- *intrusion by following*

- *continued unwelcome suggestions for social activity*

- *use of affectionate or over familiar names*

- *questions or comments of a personal nature*

- *deliberate body contact, touching, groping.*

Cautions for Progressing a Complaint of Harassment

The policy outlines a number of options for progressing a complaint of harassment which are following

- *personal action*

- *personal action with support*

- *inform management*

1. *Personal Action*

   Whether the harasser or bullying is of a minor nature or you wish to resolve it in a low key manner, it may be possible for you to deal with the situation yourself.

   Make clear to the person who is harassing/bullying you that her/his behaviour is unwelcome and offensive and that you wish it to stop.

   Alternatively you might want to write to the person who is harassing/bullying you. You could explain what it is about the behaviour that is upsetting you and ask her/him to stop. You could also say that you will regard the behaviour as harassment/bullying but if that does not stop you will take further action.

2. *Personal Action with Support – What you Can Do*

   If you are concerned about making a direct approach on you own, you could ask, in confidence, a trusted work colleague or one of the designated support colleagues to accompany you.

   Both of these approaches enable you to try to resolve the issue yourself, either on your own, or with support, without the involvement of management.

   It is not necessary however to go through the above stages where you wish to make a complaint to management.

3. *Inform Management*

   If you are not confident about making a direct approach as already outlined, or if you have done this and the behaviour continues, tell your manager or HR what has happened and the issue will be progressed with a harassment complaint procedures.

   These procedures are used where management becomes aware of an issue of harassment/bullying. Once aware that there is an issue

the procedures require management to take action, either non-formal or formal.

The procedures provide for individuals to be accompanied/supported at meetings by a work colleague, designated support colleague or a trade union official, as appropriate.

4. Making a Complaint to Management

Tell your manager (or Human Resources) the nature of your complaint.

Non Formal Procedure

Complaints will be dealt with initially through the non-formal procedures except where, in the view of the management, the seriousness of the complaint requires immediate implementation of the formal procedures. The manager will approach the alleged perpetrator, outlining the nature of the complaint and the impact on the complainant. Where the alleged perpetrator accepts the nature of the complaint, resolution of the problem may take place in a low key manner. The manager will agree with the individual how her/his behaviour should be modified. However, where the alleged perpetrator disputes the content of the complaint, formal investigation may be necessary to resolve the issue.

Once a complaint has reported alleged harassment/bullying to management, action (either non-formal or formal) must be taken. In the event of the complaint being withdrawn by the complainant, the issue may, nonetheless, be investigated in the interests of each party involved.

Formal Procedures

A formal investigation will take place where

- *the seriousness of the issue, in the view of management requires it or*
- *where, following the non-formal procedures, there are conflicting versions of the alleged harassment/bullying from the complainant and the alleged harasser.*

The complainant is asked to submit a formal complaint in writing within seven working days.

The alleged perpetrator receives a copy of the complaint document and has asked to respond to it, in writing, within seven working days. A copy of the alleged perpetrator's response is forwarded to the complainant.

In the investigation will be undertaken by an independent internal or external investigator, supported as appropriate by HR, as sensitively, expeditiously

and as confidentially as possible while ensuring fairness to all parties involved.

Where the complaint is made against the individual's superior a more senior and independent member of management or independent external investigator will carry out the investigation. The outcome of the investigation will be conveyed in writing to both parties.

If, following the investigation, the complaint is substantiated appropriate disciplinary action will be taken against the alleged perpetrator. The alleged perpetrator has the right to appeal against the disciplinary action through the normal disciplinary procedure."

(The said policy did not expressly refer to harassment on grounds of age; and had not been updated, following the commencement of the 2006 Age Regulations. In light of the tribunal's decision as set out later, in relation to such harassment, it is not necessary to comment further on this surprising failure by Bank of Ireland).

2.4 In this context, it is also relevant to note that at the relevant time, the Labour Relations Agency had produced a joint advisory booklet with the Equality Commission for Northern Ireland entitled Harassment and Bullying in the Workplace. It is only a guide but is relevant in providing examples of good practice to be read alongside the said policy of Bank of Ireland, as referred to above.

The guide defines harassment as:-

"Where one person or persons engaged on unwanted conduct in relation to another person which has the purpose or effect of violating that person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that purpose.

The conduct should be regarded as having this effect only if, having regard to all the circumstances and in particular the alleged victim's perception, should reasonably considered as having that effect."

The guide also states –

"Employees should always be conscious of reasonable boundaries regarding language, banter, symbolism and established views.

The impact on the recipient is more important than the intention of the alleged harasser/bully. However, intentional harassment and/or bullying may be deemed a greater offence and is such the employer will have more latitude in dealing with the matter.

Failing to act can be as much of an offense as actually saying or doing something that constitutes harassment and/or bullying. Management reserve the right to act in a proactive manner regarding incidents of harassment and/or bullying for example, management do not need to wait until an employee registers a formal grievance to begin investigations or take action.

Some conduct can be assumed by management to be unwanted unless it can be proved to the contrary and it is recognised that there may be difficulties in knowing where to draw the line. A person's dignity can be violated without causing an harassive environment may not necessarily violate an individual's dignity.

Harassive in this context meaning – hostile, degrading, humiliating or offensive.

Behaviour that may not constitute harassment may still be deemed to be causing an employee a detriment as defined in the anti-discrimination legislation.

….

Many incidents of alleged harassment and/or bullying are less than straightforward. However, case by case approach can be adopted to address problem scenarios such as quite serious by one off incidents, second-hand witness to words or actions, the employer being totally unaware of any incidents of bullying and/or harassment, unduly sensitive employees and problems associated with perception and misperception.

The guide also refers to – what forms of discipline are appropriate?

As with any type of disciplinary action, an employer must act in a procedural correct manner which is reasonable, prompt and consistent and within the statutory framework in determining the disciplinary sanction. Hence the context within which the unwanted conduct occurred, the history of previews proven or non-spent incidents, either involving the alleged victim or other employers, the response of the organisation, the degree of hurt suffered by the complaint and the general organisation or culture within which the behaviour occurred may all be salient.

Will a formal complaint be prejudiced if a complainant did not attempt an informal resolution?

While there is widespread agreement that informal means of resolution should often be pursued initially, an employee was suffered harassment or bullying may choose to seek immediate redress through a formal procedure. For example the nature of the unwanted conduct might be such that it is appropriate that formal mechanisms are instigated without delay. Any complainant has every right to access the formal procedure without prejudice and should not be prevented from pursuing that course of action.

What training is necessary?

To ensure that procedures are consistently and fairly applied all those involved in the processing of cases must have the necessary training. The Labour Relations Agency can assist in the identification of training needs in the context in this and other employment spheres. All key individuals involved in the process, protocols and administration must have a good

working knowledge and understanding of the legislation relating to workplace harassment and bullying and the relevant internal policies and procedures. This is especially true for those who will be conducting investigations.

In addition those appointed to investigate should be trained in what are seemed to be the "softer skills" underpinned by knowledge and understanding. Some examples would be handling sensitive matters, recognising symptoms and warning signs and interviewing/listening skills in order to ensure that information is gathered sensitively and correctly ….

The Rule of Line Managers

Line managers and supervisors are often those who first become aware of emerging difficulties. From the outset it is vital that these individuals not only recognise the potential seriousness of issues that are presented to them but also have the necessary skills to be able to manage the situation sensitively and appropriately.

It cannot be assumed that these skills will already be well honed. Hence the first step in the development of effective procedures must involve training and frontline managers and how to do with harassment and bullying incidents. This could extend usefully to training in conflict management skills to ensure that issues are dealt with at the earliest possible stage and before they have the opportunity to escalate.

…."

2.5 After Natasha McNicholl commenced employment F introduced himself at her desk, as did many other employees. However, in subsequent weeks, F would frequently approach Natasha McNicholl at her desk and make conversation with her about trivial matters which to Natasha McNicholl seemed unnecessary and in particular since they were not working together in their respective roles and duties. Initially, she was prepared to give F the benefit of the doubt but, increasingly, these approaches began to make her feel uncomfortable and that such approaches were unnecessary and unwanted, which the tribunal is satisfied must have been obvious to F in her body language, even if she did not expressly challenge F and make her view clear at the time.

Approximately a month after Natasha McNicholl commenced employment F began a pattern of wrongful behaviour towards Natasha McNicholl. F approached Natasha McNicholl and provided her with a floor plan of the office. He was not asked to do so by any relevant line manager and he appeared to have done so, unsolicited and unwanted by Natasha McNicholl, after he had overheard a conversation between Natasha McNicholl and another female colleague. He did not provide a floor plan, for example, to a male colleague of Natasha McNicholl who joined shortly after she did. F's frequent approaches to Natasha McNicholl's desk and to other female staff was noted by Natasha McNicholl's line manager Lisa McManus to the extent that she considered speaking to him but unfortunately, given subsequent events, unfortunately, did not do so, having assumed F was just being friendly. F's frequent approaches to Natasha McNicholl's desk and talking to her were also noted by another female colleague to Natasha McNicholl, who assumed, wrongly, that Natasha McNicholl and F knew each other outside work.

In or about July 2015, Natasha McNicholl received a private communication message from F saying “have you noticed that N looks over us every time we talk”. Natasha McNicholl replied that she had not and would not care if she was; but was concerned that F seemed to be under the impression that there was some friendship or relationship between them when there was not because of the sending of this unsolicited message to her.

2.6 In or about August 2015, Natasha McNicholl was wearing her hair in a bun and F came over to her desk and remarked he found her hairstyle, which he referred to as a hun (half bun) was “really in fashion and that he had seen it on a website he was looking at”. Later the same day he brought over to Natasha McNicholl an eight page printout from the internet stapled together in a booklet of celebrity hairstyles and suggested she might want to try some of them out. The tribunal is satisfied he had prepared this specifically for Natasha McNicholl and it was unsolicited by her. There was no evidence before the tribunal that he provided any similar booklet for any other female employee. Natasha McNicholl understandably found this made her feel uncomfortable as it appeared F was spending time thinking about her appearance. She considered that this appeared to be inappropriate behaviour by F which had crossed the boundaries of normal social behaviour and appropriate office behaviour. F accepted, in the course of his evidence to the tribunal, that what he had done in relation to this incident in relation to the hairstyle of Natasha McNicholl was inappropriate action on his behaviour. In justification, which the tribunal found less than credible, he attempted to maintain he was from era where it was okay to pay a compliment to a colleague; and this was all that he was attempting to do.

2.7 On or about 3 September 2015, following Natasha McNicholl’s return from annual leave, during which she had been on holiday in Holland with her mother, F asked her had she had a nice time in Barbados. She had not been in Barbados and indeed had not told F if and/or where she was going on holiday during her leave. The tribunal is satisfied F then went on to say “*I seen your bikini photoshoot pictures and you are going to have lots of fan mail to catch up on from being away*”. She had told him she had no idea what he was talking about. There were and are no such photoshoot or photos of Natasha McNicholl in her bikini and again this seemed to be a product of F’s imagination, which understandably Natasha McNicholl found as a further example of inappropriate behaviour and comment on the part of F. The tribunal found his suggestion that this was some sort of “cheesy chat-up line” did not make sense in the circumstances and in no way, as he must have known, justified or explained his behaviour in making any such comment. During this period, F regularly made comments to Natasha McNicholl, when he came to her desk, when she was opening and sorting out company post, suggesting she was opening fan mail, which she felt was insinuating she was some sort of a celebrity. The tribunal is not satisfied that F, when making such a comment was merely referring to the volume of mail received by Natasha McNicholl as part of her customer service role but rather is satisfied it was a further example of his inappropriate and unwanted behaviour towards Natasha McNicholl. Indeed, the tribunal accepts that F’s comments, as referred to above, made Natasha McNicholl feel uncomfortable and on edge and to be concerned every time he passed her desk wondering what further comment he would make to her.

In or about September/October 2015, when Natasha McNicholl and F were leaving work, F commented that they always seem to meet at the lift in the evenings, making Natasha McNicholl feel concerned that F was timing his leaving from work in order to be in the lift at the same time. The tribunal has no doubt that F was intentionally doing so, as Natasha McNicholl suspected, and it was not a matter of coincidence; and it accepts, as a consequence, Natasha McNicholl felt uncomfortable and caused her to wait back in the evenings in order to avoid being in the lift with F at the same time. Further, at or about the same period, on a particular occasion, Natasha McNicholl was outside the office building, waiting for a lift home with her mother, when F approached her and asked her – "are your lost, how are you getting home?" The tribunal is prepared to accept, not without some hesitation, that this was a genuine enquiry by F as she appeared to be looking a little lost.

2.8 On Friday 20 November 2015, Natasha McNicholl was in work and was to go out to dinner that evening as a part of team night out. In preparation for the event, she was in "*dressier*" clothes than normal and was wearing her hair down and styled. Throughout the day, F made gratuitous personal remarks about her appearance and what she was wearing and, on one occasion, pulling her hair when walking past the back of her chair, and then walking off without speaking. The tribunal does not accept this was a gentle grasping of a few strands of hair in a playful tug, by F, as he suggested in evidence; and in no way equated, as also wrongfully suggested by F, with a "*what about you*" or to a gentle tap on the shoulder of a male colleague when passing. F knew very well such actions were unwanted by Natasha McNicholl. Natasha McNicholl told Lisa McManus, the customer services team leader and Natasha McNicholl's line manager, about this incident during dinner that evening. Lisa McManus expressed concern and was sympathetic but it was agreed it would be discussed further at the beginning of the next week at work and that Lisa McManus would inform her line manager Liam Lagan, Head of Operations, about the incident. In a brief discussion on 24 November 2015 with Lisa McManus, Natasha McNicholl was told by Lisa McManus she had spoken to Liam Lagan about the incident but Natasha McNicholl was not informed at that time of any further action, if any, was proposed to be taken by either Lisa McManus or Liam Lagan.

2.9 On 26 November 2015, F emailed Natasha McNicholl a link to a picture of insect eating a carrot, which to Natasha McNicholl was suggestive of oral sex. Natasha McNicholl asked F why he had sent such an email to her, and he responded that it had been sent to her in error and was intended to be sent by email to another female colleague, whose first name began with similar letters, following a conversation that colleague had had about insects arising out a recent television programme – "*I am a celebrity get me out of here*". The tribunal can fully understand, having seen the said picture, Natasha McNicholl's upset; which view was also shared by Lisa McManus when shown the said email. Natasha McNicholl told Lisa McManus in relation to F's behaviour "you will have to do something, I can't work like this anymore". Lisa McManus assured Natasha McNicholl she would take action. F came to Natasha McNicholl's desk and apologised for sending her the email in error. Natasha McNicholl made it clear that he was not to send her any more messages and that she did not want to talk to him at all. The tribunal, not without some hesitation, accepts that this email was sent by F in error to Natasha McNicholl, as she subsequently accepted; but accepts the sending of this

email to other colleagues, given its content, was illustrative of F's wrong attitude to such matters and his absence of concern how such an email might be viewed by others.

2.10 Natasha McNicholl spoke to Lisa McManus in a meeting room on 27 November 2015 at which Natasha McNicholl outlined her serious concerns and unhappiness about the behaviour of F since the commencement of her employment, as referred to in the previous paragraphs; notes of which Lisa McManus took and a copy was provided to Natasha McNicholl. Lisa McManus said she would speak to her line manager Liam Lagan and potentially also take advice from HR as to what the next steps should be. Lisa McManus admitted, in the course of this meeting, she had never dealt with such an issue before and, as a consequence, she had to consult with Liam Lagan and HR to ensure procedure was followed and the best outcome achieved for Natasha McManus.

Following a discussion between Lisa McManus and Liam Lagan and the HR Business Partner Judith Skelton, there was a discussion, following advice from Judith Skelton, between Lisa McManus and Natasha McNicholl. Natasha McNicholl was advised by Lisa McManus that the next step would be up to her and how she wanted to deal with the matter and, in particular, whether she wished to proceed formally or informally. The tribunal is satisfied that in this conversation Lisa McManus did not go into any detail in relation to the relevant harassment policy of Bank of Ireland and procedures thereunder.

2.11 On or about 1 December 2015 having taken further advice from Judith Skelton, Liam Lagan decided to have a meeting with F to see whether he accepted or rejected what Natasha McNicholl had alleged against him and then to provide Natasha McNicholl with the options available to her in relation to what further action to take.

Subsequently Liam Lagan prepared an email of his meetings with F and then Natasha McNicholl, which the tribunal is satisfied sets out the principal matters that were discussed at these meetings. This email was copied to Lisa McManus and Judith Skelton but it was not copied to Natasha McNicholl or F. At the meeting with Natasha McNicholl, Lisa McManus was also present, which was held in the manager's office. No notes were taken at this meeting but the tribunal is satisfied that the email, dated 1 December 2015, referred to above, sent by Liam Lagan to Judith Skelton and Lisa McManus accurately reflects what was said at the meeting and, in particular is satisfied that no detailed reference was made by Liam Lagan to Natasha McNicholl about the various options available to her as set out in the harassment policy of Bank of Ireland. Similarly, the tribunal is satisfied that there were no notes taken at the meeting between Liam Lagan and F.

The said email, dated 1 December 2015, stated, as follows:-

> *"Judith Skelton/Lisa McManus, for info, just some informal notes.*
>
> *To advise that I spoke with F this morning with regards to the allegations and reiterated that behaviour unacceptable and that the degree of over familiarity in comments were totally inappropriate. F advised that there was not mal-intent, but I reminded him that regardless of how it was/was not*

intended, the comments were inappropriate for a work environment and understandably could cause discomfort/unease to other members of staff.

F brought up previous alleged incident in Bangor, and felt that this could now be used to somehow get him out of the business. I assured him there was no such motive and that this related solely to the fact that a female member of staff felt uncomfortable with his comments and actions to such a degree that they no longer felt comfortable at work. F apologised and stated that on that basis, he would no longer interact in any way that could be construed as "friendly" and all interaction would be on a purely business basis. I said that this was his prerogative, but as it was always a good working environment within Bank of Ireland; it would be sad to see this and that perhaps a better approach would be for F to stop and think before he said something/sent email and whether despite what he may/may not have intended to say, to think about how it could be construed by recipient and the potential to cause offence/or discomfort. F asked about next steps and whether this would go on his HR file. I advised that I could not comment until I had spoken to Natasha McNicholl. F later sent me a draft email which he proposed to send to Natasha McNicholl by way of apology I asked him not to send until I spoke to Natasha McNicholl.

Lisa McManus and I met with Natasha McNicholl and advised of the conversation that I had had with F and importance that no staff member should feel uncomfortable in their workplace. I advised of the conversation that I had had with Natasha McNicholl earlier, and that unless for purely business purposes, F would have no contact with Natasha McNicholl. Natasha McNicholl was also advised that my discussion had focussed on what was acceptable. Lisa McManus had subsequently arranged for Natasha McNicholl to swap desks with Chris McLean in Customer Services, so Natasha McNicholl is no longer in F's line of sight. I also advised that upon arrival of Karan Allan to the business, F would be moving desks (this had already been arranged prior to incident) and that he would no longer be facing down the office, but rather be facing the window. Natasha McNicholl was asked as to how she wished to proceed (escalate the complaint against F, face to face apology, email apology or deem action/conversations that have taken place already sufficient). Natasha McNicholl advised that on basis that F had been "spoken to" and that he would not continue with any non-business related communication (verbal, email or other), she would be satisfied to leave it at this and also understanding that if there was a re-occurrence, a full investigation would be triggered.

I then spoke to F, and advised him of the outcome, that the incident would proceed no further but there was to be no repetition (accidental or otherwise) so that any contact with Natasha McNicholl in the future was to relate to business purposes solely. F asked that same also applied to Natasha McNicholl.

I am hoping that this is the end of the incident and will try to monitor as best I can but thank you both for help with this.

[Tribunal's emphasis]

The tribunal does not accept Natasha McNicholl was pressurised into how to respond and has concluded that, at that time, which was relevant to the decision, Natasha McNicholl believed both Lisa McManus and Liam Lagan were acting in good faith and seeking to support her in resolving the matter as she wanted. However, it is also satisfied, as referred to above, that the detailed harassment policy was not explained or the options contained therein were not explained to Natasha McNicholl at that time. Further, it is satisfied that Natasha McNicholl was not informed about the "*Bangor*" incident as referred to in the email on 1 December 2015, and which will be referred to in more detail later in this decision. Further, the tribunal is also satisfied that Natasha McNicholl was not informed at the meeting by Liam Lagan of the email that he had received on 27 November 2015 from Ian Wright, a finance manager, in which he had confirmed, as had been indicated by Natasha McNicholl, that other female employees in the Department were complaining of inappropriate conduct by F, such as touching/stroking their arms when talking to them and other borderline inappropriate comments. The tribunal is also satisfied that Liam Lagan, although in his meeting with F referred to Natasha McNicholl's complaints about his conduct, he did not refer to what had been stated in the said email from Ian Wright.

However, the tribunal is satisfied that, at that time, in light of what she was told by Liam Lagan, as set out in his said email of 1 December 2015, Natasha McNicholl was content "*to leave it at that*" and not to take any further action and/or require Liam Lagan to do so, on the basis that F had been given a verbal warning, as referred to above, that F would not continue with <u>any non-business related communication (verbal, email or otherwise)</u>.

[Tribunal's emphasis]

It was not disputed by F that he was given such a verbal warning by Liam Lagan; but it was not confirmed to him in writing or any reference to same placed on his personnel file. The tribunal has little doubt that, if the terms of the verbal warning had been clearly set out and confirmed in writing to F, some of the difficulties which subsequently occurred in this matter might have been avoided. Prior to these events, F was never given training in the Harassment and Bullying Policy and, despite the issue of the verbal warning, he was not subsequently given training in the said policy. Indeed he was only provided with a copy of the said policy, when subsequently suspended from employment in July 2016 (see later). Dignity at work training only commenced in or about 2017, following the events, the subject matter of these proceedings. It was not therefore surprising that Kerry Hinks, the UK HR services manager of Bank of Ireland accepted in evidence that training in the Harassment and Bullying policy was inadequate.

2.12 Judith Skelton, as a HR manager surprisingly never minuted any of her meetings or advices to Lisa McManus or Liam Lagan as referred to above; although Liam Lagan did send to Lisa McManus and Judith Skelton the email of 1 December 2015, and never advised Liam Lagan to take a detailed note of his meetings with Natasha McNicholl and F. Further, Judith Skelton never ascertained whether Lisa McManus and/or Liam Lagan had been trained in or understood the harassment policy of Bank of Ireland. Indeed, it became apparent that neither Lisa McManus or Liam Lagan had been fully and properly trained in the said policy and did not obtain a copy of it or show it to Natasha McNicholl and explain its contents at their said

meetings. The tribunal is not convinced that Lisa McManus and Liam Lagan, prior to these events, had any relevant knowledge of the said policy or had even read it.

2.13 Following the verbal warning given to F in or about November 2015, there were no relevant "*contacts*" between Natasha McNicholl and F until certain events occurred in or about June 2016, to which further reference will be made later in this judgment.

2.14 On 11 April 2016, an email was circulated to all staff by Karan Allan, a financial reporting officer, with a copy of the new attendance policy of Bank of Ireland and return to work form attached. The new attendance policy was introduced in or about April 2016 and staff, which included Natasha McNicholl, were asked to familiarise themselves with its contents. The new procedure was also available to all staff to read on the internal website of Bank of Ireland.

2.15 The attendance policy provided, insofar as relevant and material as follows:-

> *"Types of Absence*
>
> *Frequent incidents of short-term and long-term absence are considered unacceptable and a cause for concern and further investigation. Four or more occurrence of absences in a rolling 12 month period are considered to be frequent.*
>
> *Definition of Absence*
>
> *Short-term Absence*
>
> *Short-term absence is defined as any period of absence of less than 4 weeks in duration.*
>
> *Long-Term Absence*
>
> *Bank of Ireland considers an employee who is unavailable for work due to ill-health for periods of 4 weeks or more as being on long-term sick leave.*
>
> *When the line managers require to discuss with the employee their level of absence, they may refer to the HR advisory team for advice and guidance. Where an employee has frequent absence Bank of Ireland will consider referring the employee to an occupational health consultant and/or, if appropriate, initiate disciplinary procedures."*

2.16 Under Bank of Ireland's disciplinary procedures, it is provided, insofar as relevant and material:-

> *"Disciplinary procedures in steps*
>
> *The disciplinary procedures consist of the following steps:*
>
> *1. Step One – Verbal Caution*
>
> *2. Step Two – Written Warning*

3. Step Three – Final Written Warning

4. Step Four – Dismissal or other Disciplinary Sanction.

Generally these steps will be progressive but the action taken and the step of procedure initiated will vary depending on the seriousness of the disciplinary matter and all the circumstances of the case

….

Step One – Verbal Caution

Where the employee's conduct or performance is unsatisfactory or where an employee is in breach of discipline and the matter is regarded as a minor infringement by the employee's immediate manager, the employee may be given a verbal caution by his/her immediate manager who will make and retain a note of the giving of the verbal caution. The fact that a verbal caution has been given to the employee will not be noted or kept on the employee's personal file. No disciplinary meeting will take place as the issue of a verbal caution is not a disciplinary sanction.

Verbal cautions have an active life span of six months.

….

Step Two – Written Warning

Where the employee's conduct, attendance or performance remains unsatisfactory or in the event of a further breach of discipline or where the circumstances otherwise require, a formal written warning shall be issued to the employee a copy of the written warning will be given to the employee and a copy kept on the employee's personal file. Written warnings have an active life span of twelve months.

Step Three – Final Written Warning

Where the employee's conduct, attendance or performance remains unsatisfactory or in the event of a further breach of discipline or where the circumstances otherwise require a final written warning shall be issued to the employee. A copy of a final written warning will be given to the employee and a copy kept on the employee's personal file. Final written warnings have an active life span of twelve months.

If acceptable improvements are made and maintained within the active lifespan of the verbal cautions/written warning or final written warning as appropriate the warning will expire after the relevant period and in the case of written warnings/final written warning the warning will then be removed from the employee's personnel file. If acceptable improvements are not made or maintain around the event of further breach of discipline or where the circumstances otherwise require the issue may proceed to the next step in the procedures.

Step Four – Dismissal or Other Lesser Disciplinary Sanction

If, following a final written warning, the employees conduct, attendance or performance is still unsatisfactory or if he/she is involved in further breaches of discipline or if the employee is found to have committed gross misconduct then the employee shall be dismissed or subject to other disciplinary sanction."

2.17 Pursuant to the said attendance policy Lisa McManus, the line manager of Natasha McNicholl as customer services team leader, held an absence review meeting with Natasha McNicholl following a series of absences by Natasha McNicholl in the period in or about September 2015 to in or about May 2016, the dates and reasons for which were recorded in an absence review meeting record signed by Natasha McNicholl and Lisa McManus at the conclusion of their meeting; and which Natasha McNicholl acknowledged, in evidence, was an accurate record of the meeting.

It stated as follows:-

"Absence (Date	*Reason for Absence*
11/9/15	*Cold/Flu*
22-25/9/15 (4)	*Cold/Flu*
18-25/12/15 (6)	*Side effects of previous surgery*
9-14/3/16 (4)	*Vomiting/Diarrhoea*
25/4-6/5/16 (10)	*Vomiting/Diarrhoea/General feeling of being run down/emotional distress due to bereavement of friend*

Is there an underlying reasons for the absence/s?

No underlying reason.

Are there any support requirements/support put in place?

Natasha McNicholl does not feel any extra support is necessary – discussed availability of EAP (Employee Assistance Programme).

Employee Comments?

Natasha McNicholl had no additional comments to make.

Is an Occupational Health referral appropriate? Y/~~N~~"

The tribunal is satisfied that the reference in the record to EAP arose in relation to the bereavement of Natasha McNicholl's close friend's father and which said bereavement Natasha McNicholl emphasised to Lisa McManus at the meeting in connection with the reason for her final absence as referred to in the record; and which absence was certified by her general practitioner. Significantly, in the judgment of the tribunal, Natasha McNicholl made no reference on the form or at the meeting to the events that occurred in or about November 2015 in respect of

the actions of F, as referred to previously as a reason for the said absences. The tribunal is satisfied that if, at that time, Natasha McNicholl had felt the events of November 2015 were relevant in relation to any of her said ill-health absences, she would have said so at the time to Lisa McManus and it does not accept that her failure to do so, as suggested by her in evidence, was anything to do with naivety or shame on her part at that time; albeit for the purposes of these proceedings she has now sought to do so, which the tribunal found less than credible in the circumstances.

On 13 May 2016, Natasha McNicholl asked Lisa McManus in an email for "*a copy of the notes that were taken at the time of the issues with F. I feel it would be useful as I want to raise the issue at the meeting with HR*".

2.18 A letter, dated 16 May 2016 was sent to Natasha McNicholl by Alyson Eccles, the relevant absences manager, which stated that, following the said meeting with Lisa McManus she was required to attend a Stage 1 disciplinary hearing on 24 May 2016.

The letter also stated:-

> *"This meeting has been scheduled in view of your level of sickness absence which totals five periods of absence in the rolling 12 month period. I enclose for your reference a copy of your absence review meeting which will be referred to during the course of the meeting. I enclose copies of the attendance policy and disciplinary procedures.*
>
> *I will chair the meeting and Lisa McManus will present the facts of the case. A HR representative will also be present. You are entitled if you wish to be accompanied by a work colleague, Union representative or partner's counsel representative …"*

2.19 The Stage 1 disciplinary meeting took place on 24 May 2016. Alyson Eccles was the disciplinary hearing manager. Lisa McManus was the investigating manager and Rachel McErlean, the HR advisor and Dominic Boyd, Natasha McNicholl's trade union representative. Notes were taken of the meeting which the tribunal is satisfied are an accurate record of the meeting, as confirmed by Natasha McNicholl in evidence.

The notes recorded as follows, insofar as relevant and material:-

> *"Lisa McManus – on 11 May we met and discussed all previous absences*
>
> *[Lisa McManus read out each of the absences and confirmed dates/reasons for absence as outlined in the absence review meeting form.]*
>
> *On 11 May we discussed there were no underlying issues, all absences were unrelated and there was no extra support needed although we did discuss EAP. Natasha McNicholl confirms she had no additional comments Rachel McErlean – has anybody got any points of clarity?*
>
> *Dominic Boyd – the absence 225/4-6/5 the return to work form states cold/flu but the absence form states vomiting.*

Lisa McManus – that's my mistake.

Natasha McNicholl – we did discuss a lot of reasons for that. It started as a cold then vomiting, the personal issue.

[The tribunal is satisfied that the personal issue referred to by Natasha McNicholl above is the bereavement but not the November 2015 events].

Dominic Boyd – we have three return to work forms. Natasha McNicholl does not recall the other two being completed.

Lisa McManus – there wasn't one for the fourth absence in March. I came back after a bereavement. A conversation was held but I didn't fill in the form. Unfortunately I have misplaced the other form.

[No further points of clarity – Lisa McManus left the room.]

Alyson Eccles – are you aware of the standards expected?

Natasha McNicholl – yes.

Alyson Eccles – Do you understand the impact of unplanned absence on the business/team?

Natasha McNicholl – yes the first absence I was sick on Thursday and took Friday off to recuperate. I came back in on the Monday and then was off again the following week. The first two absences were linked.

Alyson Eccles – you have had a run of ill-health are you taking any steps to manage your overall health?

Natasha McNicholl – I am a healthy eater and I exercise. The surgery I have never had side effects before. Running caused the stitches to be inflamed. This is two years after the surgery. I couldn't sit at a desk at that time.

Alyson Eccles – Lisa McManus talked to you about EAP. Is there anything else you think that the Bank can do to assist you?

Natasha McNicholl – no. The cold/flu is just one of those things. The surgery, I don't need any assistance.

….

Dominic Boyd – Natasha had a concern. Management told her they never had to do this before. A staff member has been off seven times and nothing was done. She found it upsetting. She feels singled out. She cares about her career. She came back too early from her first absences to not impact the absence. Natasha found herself in a situation where she was harassed by a colleague. We are not throwing mud here, let me explain. She was getting unwanted attention. It was dealt with by management and <u>has been</u>

resolved. It shows maturity on Natasha's part, not wanting a formal process and also knowing the impact it could have on the other employee, who is married with children. The issues seemed to be resolved, thankfully. Early in her career she has shown understanding, courage and loyalty. Many others would have wanted a formal process or taken a lengthy time off on stress for less. We are asking that is reciprocated.

[Tribunal emphasis]

Alyson Eccles – I am not sure where the comment "never been done before" came from. I can't comment on other individual's level of absence. Dominic Boyd/Natasha McNicholl – we understand.

Alyson Eccles – Is there anything else you would like to add?

Dominic Boyd – Bank of Ireland want Natasha McNicholl to comply with their procedures and we understand that. A return to work was not completed and we are giving Lisa understanding on that. We are asking that is reciprocated.

Natasha McNicholl - it was reiterated, I am not sure how many times that this hasn't been done before. I feel like they are saying I am here a year and causing all these problems. It is unfair to keep saying it has never happened before. Regarding the harassment, I have reviewed the disciplinary procedures and gross misconduct should be taken seriously. I am less of a risk to the business than that individual. I am hearing it has never been done before and I feel it would have been appropriate in other cases.

Dominic Boyd – you feel singled out.

Natasha McNicholl – yes.

Alyson Eccles – summarised the key points.

Rachel McErlean – outlined next steps.

Dominic Boyd and Natasha McNicholl confirmed they had nothing further to add."

The tribunal is satisfied that Natasha McNicholl's union representative Dominic Boyd, who was her representative at the hearing and had consulted with her prior to the meeting accurately reflected Natasha McNicholl's view at the time and, in particular, that the events of November 2015, involving F, had been resolved as there had been no further contact with F and that at the time Natasha McNicholl had not wanted to enter into a formal process. In particular, he did not suggest that the events of November 2015 were relevant to the reasons for her said absence; albeit he argued for them to be taken into account in relation to the imposition of any sanction. There was no suggestion by Natasha McNicholl or Dominic Boyd that, at that time, Natasha McNicholl was still suffering because of the events of November 2015. If Natasha McNicholl had thought it was linked or she was still suffering at that time, the tribunal is satisfied that she, or Dominic Boyd on her instructions, would have said so. Dominic Boyd did not give evidence and the tribunal, in the circumstances, is not satisfied, that any failure to suggest

otherwise, in relation to resolution or ongoing suffering was part of some "tactical" omission, as suggested by Natasha McNicholl in evidence, for the purposes of Natasha McNicholl's defence in relation to her sick absence, the subject matter of the Stage One disciplinary meeting.

2.20 Natasha McNicholl was sent a letter by Alyson Eccles on 27 May 2016 inviting her to a Stage Two disciplinary meeting on 6 June 2016. In the letter she stated:-

> *"… having considered your representations and having taken account of all the circumstances in this case, I am currently proposing that given your absences levels are exceeding acceptable standards as per the attendance policy, this warrants the potential disciplinary sanction of written warning. However before I make a final decision as to the disciplinary sanction, I would ask you to attend a second disciplinary meeting to be held under Stage Two of the disciplinary Procedures …"*

It was not disputed that Natasha McNicholl's said absences fell within the relevant criteria under the policy.

At the meeting on 6 June 2016, Alyson Eccles attended as disciplinary hearing manager, Rachel McErlean, as HR advisor, and Natasha McNicholl attended, together with Dominic Boyd.

The tribunal is satisfied that the notes prepared of the said meeting are an accurate record of the meeting.

In the course of the meeting, as recorded, it is stated, inter alia:-

> *"…. Dominic Boyd – we got the proposed sanction and feel disappointed. There were unusual circumstances; she was made to feel uncomfortable by a colleague. The incident pre-dated the absences and we can't say for certain but it can't have helped. A stressful situation is not good for our health. Natasha was mature in her approach. It was the right thing to do and achieved a resolution. She has now found herself in a more formal sanction. She had no control over absences. We are disappointed.*
>
> *Alyson Eccles – That situation, I take on board how you dealt with it. My part in this is to look at absence levels. You dealt with that in a very mature [way].*
>
> *Dominic Boyd – one may have had a bearing on her health as the absence was after that.*
>
> *Dominic Boyd – when are we talking about?*
>
> *Natasha McNicholl – the end of November. The incident was from September for about 1 and half/2months. It came to a head in November.*
>
> *Alyson Eccles – is there anything else you would like to add?*
>
> *Dominic Boyd – No, we are disappointed.*

Alyson Eccles – you understand what a written warning is?

Natasha McNicholl – Yes I am worried if I have another absence I will be brought straight back to disciplinary.

Rachel McErlean – any future absences will be managed by your line manager.

…."

No medical evidence was produced by Natasha McNicholl to support any link between the events of November 2015 and the said absences and again, as at the Stage One meeting, Dominic Boyd referred to resolution and did not refer to any ongoing concerns and difficulties for Natasha McNicholl at that time arising from the events of November 2015. As before, the tribunal is not satisfied, in the absences of any other evidence, that failure to do so was for tactical reasons as suggested by Natasha McNicholl. If Natasha McNicholl had any such ongoing concerns and difficulties arising from the events in November 2015, the tribunal is satisfied that Natasha McNicholl, or Dominic Boyd, on her instructions, would have said so as part of her defence to the sick absence; and the tribunal has concluded that, at that time, Natasha McNicholl had no such ongoing concerns and difficulties. In any event, even if the tribunal is wrong and Natasha McNicholl had such ongoing difficulties and concerns, which the tribunal does not accept, Alyson Eccles, the decision-maker in relation to the issue of whether a warning should be given to Natasha McNicholl was not told "the full story" by Natasha McNicholl or Dominic Boyd about any such link between the absences and the events of November 2015, in her defence to the proposed warning, before Alyson Eccles had to make her decision.

2.21 In a letter, dated 10 June 2016, Alyson Eccles wrote to Natasha McNicholl stating, after referring to the previous correspondence and the meetings under Stages One and Two of the disciplinary proceedings, concerning Natasha McNicholl's absence levels exceeding acceptable standards as per the absence policy, as follows:-

"…. Having reviewed all the information including your representation, I confirm that the sanction issued to you is a written warning. The sanction detailed above will be imposed with effect from date of this letter and you should regard this as a notice of my decision under the disciplinary procedures. This sanction will remain active for a period of 12 months. You should be aware that in the event of a further case of similar misconduct by you, during the active life span of the warning the issue may result in the disciplinary procedures being involved."

The letter also referred to the right of appeal and the relevant procedures to do so and the availability of the employee assistance programme as a support mechanism.

2.22 Natasha McNicholl did not pursue the EAP mechanism, as she was content with the support of her family and her union representative, whom she also felt were more impartial. Although she and Dominic Boyd felt the sanction was harsh, she did not appeal, on advice from Dominic Boyd, on the basis that she wished to avoid any risk of a greater sanction on appeal, such as final written warning. At no time

during the process did Natasha McNicholl or Dominic Boyd challenge the procedure/process carried out by Alyson Eccles, save in relation to their undoubted disappointment in relation to the sanction proposed and subsequently imposed by Alyson Eccles.

2.23 Natasha McNicholl received the said letter, dated 10 June 2016, which imposed the sanction of written warning for her absence at some time on that day, which was a Friday. She was upset and annoyed to have received such a sanction for her said absences. At some time over the weekend of Friday 10 June 2016 to Monday 13 June 2016, Natasha McNicholl and her fiancé Ben McReynolds, to whom she had become engaged in or about March 2016 and who, at that time, was also employed with Bank of Ireland , decided to make an application for a visa to work in Australia. Natasha McNicholl was unable, in evidence, to state precisely when the application was made, on-line; but the visa was granted to Natasha McNicholl at some time on 13 June 2016, a couple of hours following the making of the said application. Ben McReynolds, following the granting of the visa to Natasha McNicholl also shortly thereafter successfully applied for a similar visa. Each visa application cost £210.00. The visa was for a working holiday (temporary visa) requiring first entry to Australia before 13 June 2017 and the stated period was twelve months from the date of first arrival.

Natasha McNicholl and Ben McReynolds had previously discussed such a trip in general terms with friends prior to the weekend of 10/13 June 2016; but decided, at some time over that weekend, to proceed to obtain the visa and go to Australia for what Natasha McNicholl accepted was to be “a trip of a lifetime” and was clearly a major decision to make since it meant she would thereby take a year out of any employment in Northern Ireland. However, it should be noted that at the time of that decision to apply for a visa, there had been no other relevant contact with F.

2.24 Natasha McNicholl went to a travel agent in Belfast on 15 June 2016 and paid a deposit of £200 for multi-flex tickets for herself and Ben McReynolds, which provided for fixed dates and times of flights together with some pre-picked accommodation; and in particular, required travel to commence with a flight from Dublin to Dubai on 17 October 2016, followed by further flights to Bangkok and Singapore, with a final flight to Melbourne Australia, from Singapore to Melbourne. In the event Natasha McNicholl and Ben McReynolds arrived in Melbourne on 11 December 2016.

2.25 Natasha McNicholl initially stated, in evidence, that the final payment to the travel agent was made in or about end of August/beginning of September 2016; but, following further discovery during the course of the hearing, the final payment of £1,064.97 to the travel agent was shown to have been paid on 8 August 2016. In addition, at some date unknown, Natasha McNicholl also paid, probably in cash, as there were no receipts, a further £200/£300 to allow further flexi options before travelling to Australia. Having paid the said final payment Natasha McNicholl was therefore set to depart from Australia, pursuant to the visa, on 17 October 2016 which was the date which she arranged, as set out above on 15 June 2016, during her first visit to the travel agent.

2.26 Natasha McNicholl did not inform Bank of Ireland or any of her line managers, prior to her resignation from her employment (see later), that she had applied for and had been granted a twelve month working visa for Australia, with flights booked to

leave Dublin on 17 October 2016. The tribunal is not satisfied, as she suggested in cross-examination, but not in her witness statement, that, at the time of making the said application for the visa on 13 June 2016, she was also considering making an application for her career break. Natasha McNicholl knew it required, before any such application could be made, to have been employed for a period of continuous service. She believed "four years' service" was required; albeit in fact it was three years' service. She was fully aware she would have to establish grounds for flexibility on the part of Bank of Ireland, The tribunal notes that Natasha McNicholl did not raise any issue at all about the possibility of a career break at the meeting of 6 June 2016, either in the context of the sanction of the written warning or, as seen before, in the context of any reference to the events of November 2015; even though she acknowledged, in evidence, her union representative, before the meeting, had confirmed there might be some flexibility around the period of service before any such application could be made. In the circumstances, the tribunal is satisfied that, if a career break had ever been an option seriously considered by Natasha McNicholl, it had been ruled out by the time she made the application for the said visa.

2.27 Following the absence of any relevant contact between Natasha McNicholl and F following the incidents in or about November 2015 and the verbal warning given to F, as referred to previously, an incident occurred at the coffee machine which was situated in a sectioned off area on the office floor. As Natasha McNicholl approached the coffee machine area she was unaware F was already there. On seeing him, Natasha McNicholl stayed to obtain her coffee and did not walk away. During the period both Natasha McNicholl and F were at the machine, F struck up a short conversation with Natasha McNicholl; and, during that conversation, first names were used by both of them and F asked how Natasha McNicholl was. He offered to let her go first and put in the code to enable her to obtain her coffee before him. Despite the terms of the earlier verbal warning, of which he was fully aware, F also referred to the fact he had been listening to Natasha McNicholl's telephone calls and how she was good on the phone with difficult customers. The tribunal could understand and accept Natasha McNicholl's concern, given the reference to her work, that F appeared to be starting to resume behaviour, the subject of the earlier verbal warning, which he knew was unwanted and affecting her. Having obtained her coffee, Natasha McNicholl quickly removed herself from the area of the coffee machine and F proceeded to obtain his own coffee.

On 15 June 2016, R a female colleague of Natasha McNicholl and of a similar age who worked in a different Department but on the same floor as Natasha McNicholl, told Natasha McNicholl that F had been also bothering her for some time, had made repeated comments about her looks, namely colour and style of her hair, regularly touched her on the arm and back and shortly before R had spoken to Natasha McNicholl he had whispered in her ear that she had looked lovely that day – which the tribunal accepts was similar to behaviour of F towards Natasha McNicholl in or about November 2015. R reported this to her managers.

2.28 On 16 June 2016 Natasha McNicholl spoke with Lisa McManus and expressly informed her what R had told her about F's recent behaviour, as referred to above. Lisa McManus told Natasha McNicholl that R should speak to her line manager and she would also inform Liam Lagan. The tribunal, not without some hesitation, has concluded that, in the context of relaying the information about R, Natasha McNicholl may have expressed some concern to Lisa McManus, following

her conversation with F at the coffee machine, about her own position if F was behaving with another female colleague as he had previously with her; but is not satisfied she told Lisa McManus about the coffee machine incident or made it clear that she wanted to make any complaint herself or was requiring Lisa McManus to take any specific action at that time.

2.29 On 27 June 2016, Natasha McNicholl asked to meet Judith Skelton, the HR Business partner, and indicated her concerns about F and it was agreed Natasha McNicholl would put everything in writing and send it to Judith Skelton to take appropriate action. The tribunal is satisfied the meeting was friendly and Judith Skelton was sympathetic and supportive at the meeting, as illustrated from the tone of the email exchange between, them following the said meeting.

2.30 On 31 July 2016, F, who is a recovering alcoholic, taking at the time prescription medication, appeared to be drunk in the office after lunch; smelling of drink, having consumed some beer at lunchtime. Despite observing this and noting F had fallen asleep at his desk in sight of colleagues, Lisa McManus took no further action at that time. The tribunal is not convinced Liam Lagan was in the office at the relevant time and saw what had happened. Even if he had been in the office and seen it, the tribunal is not persuaded that he, like Lisa McManus would have taken any relevant action against F. In essence, management seemed to be prepared to turn a blind eye to F's drink problem when at work; but F's difficulties in relation to drink on this occasion did not directly affect Natasha McNicholl or lead to unwanted conduct by F towards her.

2.31 On 4 July 2016 F passed in front of Natasha McNicholl's desk to leave the office building shortly before 5.00 pm. He did not engage in any contact with Natasha McNicholl at this time. He then reappeared at or about 5.05 pm and came back to obtain his bus pass, which was on the same lanyard as his work pass, and which he had left at his desk and which he required in order to travel home by bus. F had by this time missed his normal bus home and was going to have to get the next bus which left approximately 5.30/40 pm from the city centre. Instead of going to retrieve his pass F went straight over to Natasha McNicholl's desk, who was in conversation with at least one other female colleague. Without any invitation, said to Natasha McNicholl – "hi, how are you just thought I'd check in and see how you're doing". Natasha McNicholl said to him – "why are you coming back in her to talk to me?" F replied – "oh I just wanted to know how you are keeping". Natasha McNicholl did not respond and F walked away. F's then line manager Karan Allan observed the conversation from a distance and although she obviously did not hear what was said between Natasha McNicholl and F at the time noted that the conversation was short but there was nothing that occurred which suggested she required to intervene. However, F had to be fully aware such actions by him was contrary to the earlier verbal warning and was unwanted by Natasha McNicholl.

2.32 On 5 July 2016, following her meeting with Judith Skelton, on 27 June 2016, Natasha McNicholl sent in writing a list of her concerns in her own words to Rachel McErlean providing:-

> *"Full details of my concerns regarding my grievances with colleague F. I wish to outline the events of incidents that have occurred from the issue began after I joined the company in May 2015. My team leader*

Lisa McManus and head of operations Liam Lagan have been aware of the ongoing issues since my conversation with them on 27/11/2015 …."

In summary, Natasha McNicholl then set out her reference to the events of November 2015, which have been the subject of the previous sub-paragraphs of this decision. Having referred to the said events of November 2015, Natasha McNicholl stated, inter alia:-

"…. Over the next few days discussions were had between myself and management. They advised me they had spoken to F and he was given an informal warning to stay away from me and not to make any contact. I was told by management on numerous occasions that this type of issue "never happen in Bank of Ireland before" and "they were unsure how to deal with it". These comments were repeated on numerous occasions to me, and to be honest made me feel uneasy and I felt I was a troublemaker. I was then asked did I want the issue to be raised formally with HR. They asked me to make the decision and I was not given <u>any reasonable amount of time</u> to consider my decision. I felt it was uncomfortable and inappropriate to ask me "as a new employee who was vulnerable and very emotional" to make that decision. I at that time felt pressured and said I was happy enough as long as he stayed away from me. They reassured me that F was apologetic and did not know how his actions were being perceived. He was told to stay away and that he was not to make an apology to me via email (which he suggested) and no conversation is to be made between us on a personal or working level as it is not necessary. I feel now <u>on reflection</u> [Tribunal emphasis] that Bank of Ireland as a company and employer, let me down here and should have taken it upon themselves to take the appropriate steps to ensure that disciplinary action was taken against this employee, given the scale of his actions towards me. This is and was a period of long-term sexual harassment and should be seen as gross misconduct….Over the period of the next few months between December and June F made little or no contact with me which I was very glad of … I was moved seats immediately after the issues were raised in order for me to be out of his eye line, which <u>I was ok with</u> [Tribunal emphasis]. My issue with this was that I (the victim of his harassment) was moved seats and he (the person at fault here) was kept in position with no implications for his daily working life ….

<u>Upon reflection</u> again [Tribunal emphasis] in the last few months I am very surprised and angry by the way it was dealt with. However I remained confident in Lisa McManus and Liam Lagan's word that if F ever repeated any behaviour like this again, towards me or anyone else, it would be immediately escalated to HR …"

Natasha McNicholl then in this note referred to the events of June/July 2016 which have also been in the subject of the previous sub-paragraphs of this decision and concluded the note stating:-

"F's behaviour in the past few days especially is deeply concerning me …. I sought legal advice from a solicitor and employment tribunal on this matter and they advised me this is the correct step to take formally with HR. If, however, the matter is not dealt with and as an employer the company do not provide a safe and comfortable working environment for me (and my

fellow employees), I will have no choice but to seek help and further assistance with the above mentioned. I quite simply cannot work in the same place as this man and feel it is unfair to expect me to do so. I will refrain from resigning at this stage, however I see it a very real possibility in the near future if no action is taken …."

2.33 In this note, although there was reference to sexual harassment by F, there was no allegation of harassment on the grounds of age. Rachel McErlean replied to Natasha McNicholl in a letter dated 8 July 2016 noting, inter alia, that a formal complaint had been made by her under the harassment and bullying policy and of the next steps to be taken under the policy and, in particular, informing her that an independent investigator would be appointed who would be provided with the relevant submissions, including Natasha McNicholl's complaint and F's response and who would then commence the investigation, which would comprise interviews with the relevant parties and a review of associated documentation.

2.34 On 8 July 2016, F, following a meeting with Karan Allan, was "suspended", having been placed on special paid leave, following Natasha McNicholl's formal complaint under the harassment and bullying policy.

2.35 Following an initial meeting on 13 July 2016 with Kerry Hinks, the HR services manager, an external investigator/consultant Emma Woods was appointed by the Bank to carry out the said investigation into Natasha McNicholl's formal complaint and to provide an independent report and recommendations following the said investigation. Emma Woods was provided with a copy of Natasha McNicholl's complaint, dated 5 July 2016, as referred to above and other relevant paperwork including the note taken by Lisa McManus, dated 27 November 2015, referred to previously but also a note taken by Karan Allan, dated 17 June 2016, who was F's line manager.

In relation to this latter document, this related to the matters raised by R, who had told Natasha McNicholl on 15 June 2016, as referred to previously, of actions by F which had been referred by R to her line manager Lyndsay Hawthorne .Lyndsay Hawthorne had then asked for a meeting with Karan Allan, the line manager of F. Lindsay Hawthorne repeated, in essence, what R had told Natasha McNicholl on 15 June 2016. However, Karan Allan was not told at that time the identity of the staff member but was told by Karan Allan that the staff member did not want to make a formal complaint or for Karan Allan to speak with the staff member or to receive an apology from F. Lyndsay Hawthorne also mentioned that F would on occasion have touched female members of staff on the arm at the coffee station that made people feel uncomfortable. Karan Allan agreed to speak with F at her next 1:1 review meeting with F, which took place on 16 June 2016. At that meeting, F was initially annoyed about the allegations and, as set out in the note, suggested that he would just not talk to people in the office anymore. Following discussion, as set out in the note, Karan Allan detailed the advice she had given to him relating inter alia to "change his manners and be aware of making his comments with colleagues in a more open environment so that no-one feels under pressure or if it causes offence, the reaction of the member of staff is visible to all to see/hear so others could feedback to remark if it is unjustified and was satisfied by the end of the meeting, his manner gave her comfort and that F had noted that he should be more careful in interacting with colleagues". Karan Allan confirmed with Lyndsay Hawthorne that she had spoken with F.

The appointment of Emma Woods as an external investigator, pursuant to the harassment and bullying policy was the first time that such an action had been taken by Bank of Ireland.

2.36 Emma Woods, who is an experienced investigator and HR consultant, did not give evidence to the tribunal; but the tribunal is satisfied that the investigation carried out by her was thorough, detailed and comprehensive and that it involved detailed interviews with all the employees, including relevant managers to the complaints made by Natasha McNicholl. The tribunal totally rejects the attempts by Natasha McNicholl, for the purposes of this hearing, to undermine the investigation and the final report of Emma Woods, for which there was no credible evidence. Her actions, in doing so, did not impress the tribunal and raised serious doubts about Natasha McNicholl's credibility, in particular, when she wrongly and unfairly suggested that Emma Woods was "hand-picked"/chosen by Kerry Hinks to follow an agenda whereby she would find, in essence, for Bank of Ireland or her suggestion that, because Emma Woods was paid a fee by Bank of Ireland, her integrity was somehow in question.

It is not necessary to set out, for the purpose of this decision, the detailed notes prepared by Emma Woods, for the purposes of her report of the various interviews, detailed as appendices to the report. However the tribunal has no doubt about the accuracy of those notes of interview.

2.37 Emma Woods commenced her investigation on or about 21 July 2016. In the course of the investigation, Emma Woods carried out a series of lengthy of detailed interviews which involved relevant questioning of all such persons. In the circumstances, it was not surprising the investigation and report ultimately compiled by Emma Woods was not completed for some time or as quickly as Emma Woods hoped or intended. The tribunal could find no evidence to support any allegation by Natasha McNicholl that, in particular, during her second interview with Emma Woods on or about 19 August 2016,it was conducted by Emma Woods in any different way to her first interview on 21 July 2016, about which Natasha McNicholl had no complaint. In particular, the tribunal could not find that there were any grounds for Natasha McNicholl's allegation that Emma Woods's attitude, in the said second interview, was dismissive or, in deciding that Natasha McNicholl's complaints were to be considered in the existing investigation, that by doing so Emma Woods was purposely trying to confuse and distress Natasha McNicholl and to get her to give up and resign. The tribunal notes that in both interviews Natasha McNicholl was attended by her union representative Dominic Boyd, who was not called to give evidence, to support any such allegations by Natasha McNicholl. Indeed, the fact that the further complaints of Natasha McNicholl, made at the time of the second interview, namely her complaint that Natasha McNicholl felt she had been treated less favourably by F due to her age, length of service and her sex were to be included in this investigation and report, clearly contributed to the said delay by Emma Woods in finishing the report.

2.38 By letter dated 19 September 2016, Natasha McNicholl wrote to the HR Department of Bank of Ireland , which stated as follows:-

> *"Please accept this letter as notice of my resignation from my position of Business Services Advisor …. at Bank of Ireland . I feel that under the*

circumstances of the current ongoing investigation into my complaint of bullying and harassment and the past events which have been documented, I feel it is only appropriate that I resign from my position at this point. After much consideration and thought I have concluded that I am unable to return to work for a company who let me down on so many occasions. I feel that as a whole the Bank has treated me unfairly and been negligent and careless in steps they have taken to protect me. I am also disappointed that I have been subjected to unfair questioning and situations throughout the investigation process which have been confusing misleading and upsetting. In making this decision I have also taken into consideration that on the past few months I have been unwell due to stress from the ongoing situation and I feel by resigning it will be much benefit to my own physical health and mental wellbeing. I feel I have had no support from the Bank as an employer and had the Bank acted differently I would not be forced to resign. It is with much regret that I make this decision as I was intending on having long, promising career with Bank of Ireland and I am deeply upset and frustrated that I am unable to further my intended career path.

As per the terms of employment contract, I am aware I need to give four weeks' notice. I remain unfit for work I will remain on sick leave until my employment completion which should 17/10/16."

It will be recalled that this date is the date of travel of Australia, which had been fixed on 15 June 2016.

2.39 In an email, dated 21 September 2016, following the sending of the said resignation letter, Natasha McNicholl contacted Emma Woods to find out when Emma Woods was due to complete her findings and investigations as Emma Woods had previously given her an expected date of the week starting 19 September. It was not able to be completed until on or about 26 September 2016, when Emma Woods delivered it to Bank of Ireland ; and, by a letter dated 21 October 2016, Rachel McErlean sent to Natasha McNicholl, at her home address in Northern Ireland, a copy of the investigation report stating:-

"You will note that the report contains sensitive personal data. In light of that you should keep the report confidential. You will note that certain information has been redacted due to have being sensitive personal data which does not relate to you.

The bank will now take steps to implement the recommendations of the report.

You do have the right of appeal all or any part of the findings that you are not content with. Should you wish to do so please inform me in writing within seven days …".

By this date, as set out previously, Natasha McNicholl, unknown to anyone at Bank of Ireland, had left, pursuant to her visa for her flight ultimately to Australia, arriving finally in Australia on or about 11 December 2016.

2.40 In a letter, dated 25 October 2016 Natasha McNicholl, who was already out of the jurisdiction on her trip to Australia, acknowledged receipt of the investigation report

carried out by Emma Woods in a letter sent on her behalf by Natasha McNicholl's mother.

She also stated:-

> *"As I was informed of the completion date of 12 September 2016 I was extremely disappointed that there was a further delay until the 19 September 2016 again. I made various methods of contact with Emma Woods and Bank of Ireland to retrieve these documents to no avail and eventually I have now received them on 21 October 2016. I now find it unreasonable that you have afforded myself one week in which to read and study this detailed report and gather my findings. So in this regard I would ask that you grant an extension of four weeks. I feel that this would be a reasonable request given the facts.*
>
> *Again I would also like to inform you that the further delay in this process has caused me further unnecessary stress and anxiety and has deeply affected my private and personal life to the extent that I have had to seek further GP advice on how best to deal with the situation. …."*

By letter dated 11 November 2016, in reply to the letter dated 25 October 2016, received on 2 November 2016, an extension was granted for four weeks to review the report and it confirmed that, in relation to the right to appeal, this required to be done in writing by 30 November 2016.

No such appeal was ever made by Natasha McNicholl.

2.41 Natasha McNicholl went off on sick leave in early July 2016 and did not return to work.

2.42 In the investigation report of Emma Woods, insofar as relevant and material, she reached the following conclusions, namely, particular:-

> *"5.2.6 Conclusion*
>
> *On the basis of the information available to me, the first time I can conclusively identify that Ms McNicholl indicated to her line management that she wanted them to take action in relation to F's conduct towards her was on Friday 27 November 2016.*
>
> *The accounts of any conversation that took place between Lisa McManus and Ms McNicholl on Friday 20 November 2016 vary in relation to what was said and what was agreed between them. I would, also note that any conversation that did take place on Friday 20 November regarding F was in the context of a social function on a Friday night after work. In my opinion had Ms McNicholl wanted to raise a serious concern, a work related function was an inappropriate forum to do so and gave a confusing message about the serious of any information she was conveying. In my opinion irrespective of what was said or was not said on Friday Night, had she had serious concerns Ms McNicholl should have raised this again the following Monday morning in the correct manner.*

On 27 November 2016 Ms McNicholl appears to have raised a number of concerns about F while simultaneously indicating she did not want to "get him in trouble" or disciplined in his job. I have been unable to establish any evidence that she was required to make a decision there and then, although it is clear that the decision whether to pursue formal action was left to Ms McNicholl.

In my opinion while some of the alleged incidents raised by Ms McNicholl could potentially fall within the definition of sexual harassment, these instances were not examples of the most serious types of behaviours (such as, for example, offensive language, physical touching of a sexualised nature) which in my opinion would have required Bank of Ireland to intervene and instigate formal procedures irrespective of Ms McNicholl's views on the matter.

On review of the harassment and bullying policy I note that it details the following in relation to "non-formal" procedures: ("complaints will be dealt with initially through the non-formal procedures except where in the view of the management, the seriousness of the complaint requires immediate implementation of the formal procedures."

The policy further states:-

"The manager will approach the alleged perpetrator, outlining the nature of the complaint and the impact on the complainant. Where the alleged perpetrator accepts the nature of the complaint, resolution of the problem may take place in a low key manner. The manager will agree with the individual how his/her behaviour should be modified"

5.3 That Ms McNicholl has been treated less favourably than F.

Ms McNicholl maintains that she has been treated less favourably than F in relation to how her informal concerns were dealt with in 2015 ….

5.3.5 ***Conclusion***

The information available indicates that Ms McNicholl's concerns were taken seriously by her line management. This is suggested by the fact that Ms McManus and Mr Lagan met with HR Business Partner Ms Skelton, for advice and guidance on the matter. I found no evidence that F's word was more "valuable" than Ms McNicholl's given that the information indicates that Ms McManus and Mr Lagan took Ms McNicholl's concerns at "face value" and sought to take to advice and make appropriate action to address them.

The information available to me indicates that Ms McManus did tell Ms McNicholl that she had never dealt with a situation like this before because that was the reality of the situation. I do not accept that Ms McManus saying this to Ms McNicholl implied that Ms McNicholl was "starting trouble".

In relation to the alleged comments about F not having done anything like this before and never having received "criticism" like this before, there are conflicting accounts as to what was said with Ms McNicholl's account being different to that of both line managers. In the absence of meeting notes and on the basis of the information available I am unable to conclude as to whether specific comments were made, although I conclude that the tone and inference suggested by Ms McNicholl are at odds with the actions taken by her line management.

The information available to me indicates that Ms McNicholl wanted to move seats and it was agreed and facilitated as part of informal discussions in order to make her more comfortable in the work environment. I also note this was done in a manner so as not to draw unnecessary attention to the situation between her and F, in that Ms McNicholl swapped seats in sequence with another employee … who wanted to sit in the seat closer to the rest of his colleagues. I also note that F moved seats as well, albeit a few weeks later, when his new line manager Ms Allan moved into the section. Again I believe this was done in a manner so as [not to] draw unnecessary attention to the situation and in an attempt to be sensitive to the feelings of those concerned.

In conclusion, there is no evidence to support Ms McNicholl's assertion that she has been treated less favourably than F in the handling of her complaint. As outlined in the previous allegation in this complaint Ms McNicholl's concerns were dealt with in accordance with Bank of Ireland's harassment and bullying policy and resulted in F receiving an informal warning. I can see no evidence that Ms McNicholl has been treated less favourably than F in relation to age, sex, relationship with managers or length of service.

This element of Ms McNicholl's complaint is not upheld.

…..

Therefore the information available leads me to conclude that the issues raised by Ms McNicholl were dealt with in line with Bank of Ireland's harassment and bullying policy at the time. I do not conclude that Ms McNicholl's line management should have taken the decision at that time to proceed to the formal process. I further conclude that Ms McNicholl was in agreement with the approach taken by her employer at the time and did not raise concerns about this course of action for a further six months. Therefore Ms McNicholl is now retrospectively criticising her employer considerable period of time later for not taking a different course of action, despite her having been in agreement at the time.

[Tribunal's emphasis]

7.1 That F has demonstrated inappropriate behaviour towards R which equates to sexual harassment and this should have led to a formal investigation against F…..

Ms McNicholl maintains that R informed her that F regularly commented on R's looks particularly the colour and style of hair and regularly touches her arm and back, and one occasions (15 June 2016) he whispered in her eye that she looked "lovely" that day. Ms McNicholl is of the opinion that this should have been escalated and a formal investigation given that she had raised an informal complaint about similar conduct in November 2015.

…..

7.1.4 Conclusion

The information available to me indicates that an informal complaint was raised by R to her line manager, Ms Hawthorne in relation to F's conduct towards her. This involved F allegedly invading her personal space and culminating him in him whispering in her ear "I love the colour of your hair". Ms Hawthorne spoke to F's line manager, Ms Allan, in relation to the concerns and they in turn were discussed between Ms Allan and F at his weekly review meeting during which F was reminded of "office etiquette". R did not indicate that she wished to pursue a formal complaint against F at the time. After Ms Allan's conversation with F he had no further interaction with R and the matter was resolved in that there was no repetition of the unwanted behaviour towards her.

Had this been the only incident of concern involving F, I would be satisfied the situation has been dealt with appropriately. However, in light of the previous complaint made by Ms McNicholl in November 2015, and the fact that F was told that further repetition of similar behaviour would result in formal action being taken, it is my opinion that this matter should have been escalated at the time a second informal complaint had been raised. He had recent history of unwanted behaviour towards another female member of staff (Ms McNicholl) and aspects of F's behaviour towards R could reasonably be construed as further evidence of sexual harassment. For this reason, irrespective of R's desires, I am of the view that Bank of Ireland should have taken the decision to investigate F's conduct formally at the time a second complaint was raised.

In my opinion the seriousness of this repeated allegation of similar behaviour by F does not appear to have been reinforced fully during his conversation with Ms Allan, given that Ms Allan's conversation with F was broached on the basis of "office etiquette" rather than making it explicitly clear to F that this was a further allegation of unwanted behaviour towards another female member of staff.

This informal approach appears to be due to the lack of information sharing between Mr Lagan and Ms Allan in relation to F at the time his

line management changed and specifically the fact that Ms Allan was unaware of the details of the previous complaint from Ms McNicholl or the fact that F had been informed that further repetition would be dealt with in a formal way. This was further compounded by the fact that Human Resources were not made aware that a further concern had been raised, and therefore were not in a position to provide appropriate advice on the situation involving F.

In conclusion, the information available to me indicates that F's behaviour towards R was unwanted and could reasonably be considered as satisfying the definition of sexual harassment within Bank of Ireland's s Harassment and Bullying policy that being:

> *"Unwanted conduct of a sexual nature or other contact based on sex affecting the dignity of women and men at work. It can include unwelcome, non-verbal, verbal or physical conduct based on the gender of the recipient."*

In my view F's behaviour is at the less serious end of the spectrum of behaviours that could reasonably be considered as sexual harassment, however this does not diminish the fact that formal action should have been taken at the time. In my opinion formal disciplinary action should be instigated against F now that new information has come to light demonstrating that a similar situation has arisen with another employee despite F being warned of the repercussions of a repeat of similar behaviour.

In expressing this view I am aware that R did not consider F to have been harassing her. However, in light of the fact that this was a second informal complaint from a different female member of staff in little of six months, in my view Bank of Ireland had a duty of care to all staff to take appropriate action to prevent this situation becoming a repeat occurrence.

7.2.3 In the course of the investigation it came to my attention that there was a previous concern raised by a member of staff in relation to F's conduct when he worked in a different part of the Bank in Bangor in the period 2004-2011 and therefore he ceased to work at this location a minimum of five years ago. I asked F about the circumstances of this and he explained to me that he could not remember the details but that the matter was resolved through him apologising to the female colleague concerned and modifying his behaviour in the workplace. Having made enquiries, no other definitive information was available, therefore, due to the length of time and lack of information available I am unable to take this potential incident into account in the context of investigating Ms McNicholl's complaint.

"9.1 Recommendations

…. I conclude that F's conduct should have been escalated to formal proceedings following his unwanted conduct towards R. On that basis

I recommend that Bank of Ireland consider progressing this matter to a formal disciplinary process now due to new information coming to light and this being the second occasion that a female colleague has raised concerns of a similar nature.

I have made some relevant observations during the course of this investigation and would make the following recommendations in the context of this report:

- *I recommend that F is referred to an Occupational Health Physician as a matter of urgency in order to obtain a professional medical opinion in relation to his current state of health and relevant considerations in the workplace.*

- *I recommend that management are provided with guidance in relation to when they should contact Human Resources for advice in relation to managing an employee in the workplace who may have an underlying medical condition.*

- *I also recommend that Bank of Ireland's policy position in relation to occupational health referral is made clear to all line managers and the training on handling sensitive medical conditions in the workplace is provided.*

I recommend Bank of Ireland implement a drugs and alcohol policy which details the measures that the Bank will take in order to assist and support employees with addiction issues and which further details its policy position in relation to consumption of alcohol and drugs in the workplace.

I recommend that all employees in Bank of Ireland undertake training in relation to dignity at work in order to ensure all staff have full awareness of appropriate behaviours towards each other in the workplace.

I recommend that Bank of Ireland consider how information is shared by line management and Human Resources in relation to employees, particularly in the context of line management changes, which do appear to be a reasonably frequent occurrence within the Bank.

I recommend that Bank of Ireland carries out a review of its disciplinary policy and procedure and particularly considers how information about "verbal cautions" should be recorded and shared in the event of line management changes. In addition, consideration should be given to the notification of employee issues to Human Resources. Under the current disciplinary policy Human Resources do not need to be notified when verbal cautions are issued to staff, meaning there is potential for less serious disciplinary issues or behaviours to be repeated without prior knowledge of other incidents or escalation to a formal process when it would have been appropriate to do so.

I recommend that monitoring of F's performance continues and should his performance still be deemed to be unsatisfactory following his interim review then F should be placed on the performance improvement plan with the assistance of Human Resources, in order to assist him to make the necessary improvements.

9.2 Next Steps

It is now a matter for Bank of Ireland to determine if it agrees with my findings and conclusions and to decide what actions, if any, believes is appropriate to take."

In conclusion this element of Natasha McNicholl's complaint is not upheld.

Despite the obtaining of Emma Woods's reports and recommendations, the tribunal noted that at the date of the hearing, apparently the recommendations in the report remained under review.

2.43 In relation to this incident, when F was previously working in the Bangor office of Bank of Ireland, to which F had made some reference at his meeting with Liam Lagan on 1 December 2015, as referred to previously, the tribunal found evidence in relation to it by F, most unsatisfactory. It was clear he was fully aware of what had taken place at that time; but he sought initially, in evidence, to suggest nothing of relevance had taken place. He was also less than truthful when interviewed by Emma Woods, as part of the investigation, resulting in the limited conclusions about this incident, as set out before.

A major difficulty for the tribunal in reaching any conclusion in relation to what happened was not only F's lack of candour but also the absence of any relevant documentation produced by Bank of Ireland. The tribunal has no doubt that F's then manager James McGee knew what had happened but did not prepare any documentation. Significantly, James McGee is now the Managing Director of Bank of Ireland, but who did not give evidence. It was James McGee who told F to apologise to the female member of staff who had complained about his actions. Whatever the full facts of the matter, which remain in some doubt in the circumstances, the tribunal is satisfied, when working in the office in Bangor in or about 2009, there was an incident of inappropriate behaviour by F, towards a female member of staff in that office who complained F had made a suggestion to her they could have had sex together, which he denied; but, at the instigation of James McGee, who clearly understood the seriousness of F's conduct in the circumstances, required him to apologise, which the female member of staff appears to have accepted; and no further action took place. Indeed the tribunal is satisfied that Liam Lagan before he interviewed F on 1 December 2015 was aware of some of the detail of what had taken place in Bangor, given his failure, as seen in the note of the meeting to make any further enquiries about it and/or ask F any detailed questions, which might have been expected in the circumstances.

2.44 As stated previously, Natasha McNicholl was off work from early July 2016 and did not return to work, prior to her resignation. In that period it is to be noted, there is reference in the relevant medical records to "stress at work, on 7 July 2016 and in the subsequent sick lines; but there is no reference in the said records, or complaint to her General Practitioner of "panic attacks and severe anxiety" during this period

or before she left for Australia. This was a period when she was arranging payment etc for her travel arrangements to Australia and the side trips to other countries in the Far East before reaching Australia. The tribunal has no doubt Natasha McNicholl has sought to exaggerate her feelings at this time for the purposes of these proceedings. It is apparent, as confirmed by Natasha McNicholl in the course of the evidence that she had a very successful enjoyable and healthy trip to Australia and there was no evidence of any subsequent ill-health following her arrival in Australia, where she obtained employment.

2.45 The tribunal noted that Liam Lagan trawled through Natasha McNicholl's Facebook entries, with the agreement of HR after Natasha McNicholl resigned and it was ascertained by Bank of Ireland she had gone to Australia but was less than credible in providing an explanation for the purpose it was done. The tribunal has little doubt it was done for the purposes of the defence of this matter by Bank of Ireland and, in particular, in relation to the allegation of Natasha McNicholl's stress in summer 2016 and her ability at that time to plan and go to Australia, which had not been known to Bank of Ireland before her resignation and indeed until sometime later.

3. **Relevant Law**

Unfair constructive dismissal

3.1 Employment Rights (Northern Ireland) Order 1996 ('the 1996 Order') provides:-

Article 126 of the 1996 Order:-

> *"(1) An employee has the right not to be unfairly dismissed by his employer."*

Article 127 of the 1996 Order:-

> *"(1) For the purposes of this Part an employee is dismissed by his employer if …*
>
> *(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

3.2 As stated in Harvey on Industrial Relations and Employment Law, Volume 1, Section D1, at Paragraph 403, it has long been held that:-

> *"In order for an employee to be able to claim constructive dismissal four conditions must be met –*
>
> *(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.*
>
> *(2) That breach must be sufficiently important to justify the employee resigning or else it must be the last in a serious of incidents which*

justify him leaving. Possibly a genuine, albeit erroneous interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

(3) He must leave in response to the breach and not for some unconnected reason.

(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."

(See further ***Western Excavating v Sharp [1978] QB 761.)***

3.3 It should also be noted, in the above context, that a constructive dismissal is not necessarily unfair and it is normal for a tribunal, in order to make a finding of unfair constructive dismissal, to find the reason for the dismissal and whether the employer has acted reasonably in all the circumstances (***Stevenson & Company (Oxford) Ltd v Austin [1990] ICR 609***).

3.4 Even if an employee cannot establish a breach of an express term of a contract, it has also been recognised that a contract of employment includes an implied obligation that an employer would not, without reasonable and proper cause, act in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between an employer and employee. This is often referred to as the Malik term (see ***Malik v Bank of Credit & Commerce International SA [1997] UKHL 23*** and ***Baldwin v Brighton & Hove CC [2007] IRLR 232***).

Baldwin confirmed that the original formulation of 'calculated and likely', as set out in some cases (including the leading case of ***Malik***) was a slip. The test is objective: an intention to damage the relationship is not required (see further ***Leeds Dental Team v Rose [2014] IRLR 8***).

3.5 However, as seen in ***Amnesty International v Ahmed [2009] ICR 1450*** and ***Ministry of Justice v Sarfraz [UKEAT/0578/10]*** the phrases 'without reasonable and proper cause' and 'destroy or seriously damage' must be given their full weight. As Lord Steyn stated in ***Malik***, the term is there to protect 'the employee's interest in not being unfairly and improperly exploited'; the conduct must, objectively speaking, if not destroy then seriously damage trust and confidence – mere damage is not enough.

In ***Abbey National PLC v Fairbrother [2007] IRLR 320*** the Employment Appeal Tribunal set out the following useful guidance:-

"(30) … conduct calculated to destroy or seriously damage the trust and confidence inherent in the employer/employee relationship may not amount to a breach of the implied term; it will not do so if the employer had reasonable and proper cause for the conduct in question. Accordingly, the questions that require to be asked in a constructive dismissal case appear to us to be:-

1. What was the conduct of the employer that is complained of?

2. *Did the employer have reasonable and proper cause for that conduct?*

   If he did have such cause then that is an end of it. The employee cannot claim that he has been constructively dismissed.

3. *Was the conduct complained of calculated to destroy or seriously damage the employer/employee relationship of trust and confidence?"*

A failure, for example, to adhere to a grievance procedure or, in particular, hold a proper appeal, in respect of a grievance, may be a significant breach of the implied term of trust and confidence, entitling the claimant to claim constructive dismissal, even if there is no issue as to the original grievance hearing. (See ***Blackburn v Aldi Stores [2013] IRLR 846***).

In ***Frankel v Topping [2015] UKEAT/01606/15***, Langstaff P, in the EAT, held:-

> *"The test is a demanding test. It has been held (see, for instance, the case of **BG v O'Brien [2001] IRLR 496** at Paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying 'damage' is 'seriously'. This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in **Malik** … as being 'apt to cover the greater diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.' Those last few words are again strong words. Too often we see in this tribunal a failure to recognise the stringency of this test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the appeal tribunal in **Morrow v Safeway Stores [2002] IRLR 9."***

3.6 The above authorities established it is an implied term, which is descriptive of conduct, viewed objectively, that is repudiatory in nature. In assessing whether or not there has been a breach, what is significant is the impact of the employer's conduct on the employee, objectively tested, rather than what, if anything, the employer intended (see further ***Woods v WM Car Services Peterborough [1981] IRLR 3***) and the ***Malik*** decision. In the more recent decision of ***Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121,*** the Court of Appeal emphasised that a tribunal should determine the matter by reference to the law of contract and not by reference to the fairness and/or merits of the case:-

> *"the range of reasonable responses test is not appropriate to establish whether an employer has committed a repudiatory breach of contract entitling an employee to claim constructive dismissal";*

And thereby confirming the test for establishing constructive dismissal remains objective (see ***Western Excavating v Sharp [1978] ICR 221***). In the case of ***Tullet Prebon PLC v BGC Brokers LP [2011] IRLR 420,*** it was confirmed that the test for determining whether there was a repudiatory breach of the implied term of trust and confidence had to be determined objectively, ie from the perspective of

the reasonable person in the position of the innocent party. Applying the ***Malik*** test therefore does not import a range of reasonable responses (as applied when determining the fairness of any dismissal) (see further ***Sharfudeen v T J Morris Ltd T/a Home Bargains [2017] UKEAT/0272/16***).

3.7 In the decision of the Court of Appeal in the case of ***Nottingham County Council v Meikle [20005] ICR 1.***

Keane LJ held:-

> *"It has long been held by the EAT in **Jones v Sirl & Son (Furnishers) Ltd [1997] IRLR 493** that in constructive dismissal cases the repudiatory breach of the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of control and that the employee may leave because of both those breaches and another factor such as the availability of another job. It suggested the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing her with a contractual relationship and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other; see the **Western Excavating** case. The proper approach therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract as at an end. It must be in response to the repudiation but the fact that the employee also objected to other actions or inactions of the employer not amounting to a breach of contract would not vitiate the acceptance of the repudiation … Once it is clear the employer was in fundamental breach … the only question is whether [the employee] resigned in response to the conduct which constituted that breach."*

This dicta was followed by Elias J, as he then was, in the case of ***Abbeycars (West Horndon) Ltd v Ford [UKEAT/0472/07],*** when he stated:-

> *"On that analysis it appears that the crucial question is whether the repudiatory breach played a part in the dismissal …"*
>
> *and*
>
> *"It follows that once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon."*

and also was followed in the case of ***Logan v Celyn Home Ltd [UKEAT/0069/12]*** where HHJ Shanks stated:-

> *"… It should have asked itself whether the breach of contract involved in failing to pay the sick pay [the relevant breach] was a reason for the resignation not whether it was the principal reason."*

Elias J emphasised that there must be a causal connection between the breach of contract relied on and the resignation (see further ***Ishaq v Royal Mail Group Limited [2016] UKEAT/0156/16***).

This approach was again recently confirmed and followed by Langstaff P in the case of ***Wright v North Ayrshire Council [EATS/0017/13]*** where he emphasised that it is an error of law for a tribunal, where there is more than one cause, to look for the effective cause in the sense of the predominant, principal, major or main cause and in doing so he raised concerns how the relevant law is expressed in *Paragraph 521 of Harvey on Industrial Relations and Employment Law, Volume 1, Section D1.*

In the 'summary head note', Langstaff P stated:-

> *"In order to determine a claim for constructive dismissal, a tribunal had applied to a test, referred to in Harvey, whether the contractual breach by the employer was 'the effective' cause 'of an employee's resignation'. It was now time to scotch any idea that this approach is correct if it implies ranking reasons which have all played a part in the resignation in a hierarchy so as to exclude all but the principal, main, predominant, cause from consideration. The definite article 'the' is capable of being misleading. The search is not for one cause which predominates over others, or which on its own would be sufficient but to ask (as Elias J put it in* ***Abbey Cars v Ford****) whether the repudiatory breach 'played a part in the dismissal'. This is required on first principles and by Court of Appeal authority (****Meikle****). The tribunal here appeared to seek for 'the' cause rather than 'a' cause … ."*

In ***Buckland v Bournemouth University Higher Education Authority [2010] EWCA Civ 121,*** Sedley LJ in the Court of Appeal acknowledged that:-

> *"No decided case holds, in terms, that a repudiatory breach, once complete (that is not a merely anticipatory breach) is capable of being remedied so as to preclude acceptance … absent waiver or affirmation, the wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reasons or motive for so doing. There is, in other words, no way back.*
>
> *Albeit, with some reluctance, I accept that if we were to introduce into employment law the doctrine that a fundamental breach, if curable and if cured, takes away the innocent party's option of acceptance, it could only be on grounds that are capable of extension to other contracts and for reasons I have given I do not consider that we would be justified in doing this. This does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends … ."*

Further, Jacob LJ, although not sharing Sedley LJ's regret that a repudiatory breach of contract, once happened can be 'cured' by the contract breakdown held:-

"Once he has committed a breach of contract which is so serious that it entitles the innocent party to walk away from it, I see no reason for the law to take away the innocent party's right to go. He should have a clear choice: affirm or go. Of course the wrongdoer can try to make amends – to persuade the wrong party to affirm the contract. But the option ought to be entirely at the wronged party's choice."

As held by Langstaff P, in ***Lochuack v London Borough of Sutton [2014] UKEAT/0197/14*** said there may well be concurrent causes operating on the mind of an employee; that is not fatal to a claim of constructive dismissal (see further ***Carreras v United First Partners Research [2016] UKEAT/02655/15***).

3.8 In relation to the implied term of terms and conditions, to which there has been previous reference, Lord Nicholls in ***Eastwood v Magnox Electric Plc [2004] UKHL 35*** stated that the terms and conditions term meant that an employer must act responsibly and in good faith in the conduct of the employer's business and the employer's treatment of his employees.

In the case of ***Cantor Fitzgerald International v Bird [2002] IRLR 867,*** it was held by the High Court, over-aggressive promotion of proposed changes to terms and conditions by a particular manager, including threatening and intimidatory behaviour, can amount to conduct calculated or likely to seriously damage or destroy the relation of trust and confidence between employee and employer. The case also held that the fact an employee has lost confidence in management is not the same as conduct by the employer calculated to destroy or seriously damage trust and confidence between employer and employee in the sense of the implied term.

3.9 As has long been recognised (see further *Paragraphs 480 – 481.01* in *Harvey on Industrial Relations and Employment Law, Section D1),* many constructive dismissal cases which arise from the undermining of trust and confidence, can involve the employee contending that he left in response to a course of conduct carried on over a period of time, but the particular instance which caused the employee to leave may in itself be insufficient to justify his taking that action; but nevertheless, when viewed against a background of such incidents, it may be considered sufficient by the courts to warrant treating the resignation as a constructive dismissal ('the last straw' doctrine).

As was made clear in the case of ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35***, in order to result in a breach of the implied term of trust and confidence, a 'final straw' which is not itself a breach of contract, must be an act in a series of earlier acts which taken together amount to a breach of the implied term.

The Court of Appeal, at *Paragraph 14* of the judgment, set out, in particular, the following in relation to the relevant principles to be adopted in relation to a claim of unfair constructive dismissal, namely:-

"(1) The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221.***

(2) *It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee : see, for example,* ***Mahmud v Bank of Credit & Commerce International SA [1997]ICR 606*** *, … . I shall refer to this as 'the implied term of trust and confidence'.*

(3) *Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne-Wilkinson J in* ***Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666*** *… . The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship [original emphasis].*

(4) *The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nichol said in* ***Mahmud*** *at Page 610H the conduct relied on as constituting the breach must –*

> *"Impinge on the relationship in the sense that looked at objectively [emphasis added by Dyson LJ], it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have with his employer'.*

(5) *A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in Harvey on Industrial Relations and j Employment Law, Paragraph D1 (or 80):*

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

Further, at Paragraph 16 of his judgment, Dyson LJ said this:

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

Further, at Paragraph 19 Dyson LJ said:

> *'(19) … the quality of that the final straw must have is that it should be an act in a series whose cumulative effect is*

to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts, on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.'."

The Court of Appeal held in particular:-

> *"The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts upon which the employee relies, it amounts to a breach of the terms of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. Thus, if an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign and affirms the contract, he cannot rely on those acts to justify a constructive dismissal if the 'final straw' is entirely innocuous and not capable of contributing to that series of earlier acts. The 'final straw', viewed in isolation, need not be unreasonable or blameworthy conduct. … Moreover an entirely innocuous act on the part of the employer cannot be a 'final straw', even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective."*

See further ***Pan v Portigon AG London Branch [2013] UKEAT/0116*** where the tribunal followed the said principles set out in **Omilaju** and found a return to work letter sent by the respondent to the claimant as 'innocuous', insofar as it was relied upon by the claimant, as the last straw entitling him to regard himself as discharge from further performance; and the said principles were again followed in ***Nicholson v Hazel House Nursing Home Ltd [2016] UKEAT/024/15.***

The passage from the Court of Appeal in ***Omilaju,*** emphasised above, has given rise to some dispute in some recent cases eg ***Addenbrook v Princess Alexandra Hospital NHS Trust [2014] UKEAT/0265*** and ***Vairea v Reech Business Information Ltd [2017] ICRD9, Pets at Home Ltd v MacKenzie [2017] UKEAT/0146;*** and, in particular, where there is subsequent conduct which, taken together with the employer's earlier fundamental breach, causes the employee to resign or plays a part in the decision to resign, can the latter act effectively reactivate with the earlier fundamental breach, which had been affirmed and not acted upon at the time.

In the recent decision of the Court of Appeal in ***Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978,*** Underhill LJ, followed ***Omilaju*** and held that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee. He held, following ***Omilaju*** that if the conduct in question is continued by a further act or acts, in response to which the employee does resign,

he or she can still rely on the totality of the conduct in order to establish a breach of the ***Malik*** implied term. To hold otherwise would mean that, by failing to object at the first moment that the conduct reached the threshold of breaching the ***Malik*** term of trust and confidence, the employee lost the right ever to rely on all conduct up to that point. This would in his judgment be unfair and unworkable.

At paragraph 55, Underhill provided the following guidance namely:-

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

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

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

(4) If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which viewed cumulatively, amounted to a (repudiatory) breach of the ***Malik*** term [breach of the ***Malik*** terms is of its nature repudiatory – see paragraph 14(3) of ***Omilaju***]. (If it was, there is no need for any separate consideration of a possible previous affirmation ……)

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

3.10 In the ***Western Excavating*** case, Lord Denning referred to the necessity for an employee to 'make up his mind' soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'. Issues have arisen in this context in relation to whether an employee can be such to have 'waived the breach' or affirmed the contract and therefore lost the ability to claim constructive dismissal. Indeed, in many cases/textbooks, the terms are often used interchangeably. Indeed, in many claims, even where there is a breach, the employee may choose to give an employer an opportunity to remedy it (see further ***W E Cox Toner (International) Ltd v Crook [1981] IRLR 443***, which was recently referred to with approval in the case of (***Colomar) Mari v Reuters Ltd [2015] UKEAT/0539/13*** and more recently in ***Novakovic v Tesco Stores Ltd [2016] UKEAT/0315/15***)

In ***(Colomar) Mari***, HH Judge Richardson also referred with approval to the more recent decision of the Employment Appeal Tribunal in ***Hadji v St Luke's Plymouth [2013] UKEAT/0095/02*** – where it stated:-

"The essential principles are that:-

*(i) the employee must make up his/her mind whether or not resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. (**Western Excavating v Sharp** … as modified by **W E Cox Toner** … and **Cantor Fitzgerald International v Bird [2002];***

(ii) mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute

affirmation; but it is open to the Employment Tribunal to infer implied affirmation from long delay – see ***Cox Turner****;*

(iii) if the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the EAT may conclude there has been an affirmation – see ***Fereday v South Staffordshire NHS Primary Care Trust [2011] UKEAT/0513;***

(iv) there is no fixed time-limit in which the employee must make up his mind; the issue of affirmation is one which subject to these principles the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive – see ***Fereday.****"*

As seen in the recent decision in the case of ***Adjei-Frempong v Howard Frank Ltd [2015] UKEAT/0044/15****,* after again referring with approval to **Cox Toner**, the Employment Appeal Tribunal made it clear, in determining this issue, 'context is everything'. Further, the EAT referred with approval to the guidance of Langstaff P in the case of ***Chindove v William Morrisons Supermarket PLC [2013] UKEAT/0201/13*** when he stated, inter alia:-

"25. … the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. … But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of ***Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121****, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test. …"*

The cases of ***(Colmar) Mari, Fereday, Hadji*** and ***Chindove,*** on their own particular facts, did raise issues whether, if a period of delay arises where an employee is off sick and in receipt of sick pay, can this be a relevant fact in relation to the issue of

affirmation. As seen in *Harvey on Industrial Relations and Employment Law, Volume 1 Section D (534 – 538):-*

> *"… there may still be cases where there is no affirmation in spite of receipt of sick pay but that will be as a matter of fact (as in **Chindove**) with no particular rule of thumb as to the length of an acceptable period. On the other hand, a finding of affirmation must be seen as a distinct danger for the employee in this difficult position, with the illness absence being in itself no reliable excuse for an ever-lengthening delay, especially where there are other acts or omissions of the employer relevant to the question, in addition to continuing receipt of sick pay."*

4. Harassment on grounds of sex and age

4.1 The Sex Discrimination (Northern Ireland) Order 1976 ('the 1976 Order'), as amended, provides:-

(i) Article 6A of the 1976 Order:

(1) For the purposes of this Order, a person subjects a woman to harassment if –

(a) he engages in unwanted conduct that is related to her sex or that of another person and has the purpose or effect –

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,

(b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect –

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or

(c) on the ground of her rejection of or submission to unwanted conduct of a kind mentioned in sub-paragraph (a) or (b), he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.

(2) Conduct shall be regarded as having the effect mentioned in paragraph (1) (a) or (b) only if, having regard to all the circumstances, including in particular the perception of the woman, it should reasonably be considered as having that effect.

(ii) Article 42 of 1976 Order:

> "*(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Order as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.*
>
> *(2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Order as done by that other person as well as by him.*
>
> *(3) In proceedings brought under this Order against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description."*

Article 43 of the 1976 Order

(1) A person who knowingly aids another person to do an act made unlawful by this Order shall be treated for the purposes of this Order as himself doing an unlawful act of the like description.

(2) For the purposes of paragraph (1) an employee or agent for whose act the employer or principal is liable under Article 42 (or would be so liable but for Article 42(3)) shall be deemed to aid the doing of the act by the employer or principal.

(iii) Article 63A of the 1976 Order:

> *(1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.*
>
> *(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent –*
>
> *(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, or*
>
> *(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination or harassment against the complainant,*
>
> *…*

*the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.***"**

(iv) Article 76 of the 1976 Order:

(1) ***…*** *an industrial tribunal shall not consider a complaint under Article 63 unless it is presented to the tribunal before the end of –*

(a) the period of three months beginning when the act complained of was done; or

…

(5) A court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(6) For the purposes of this Article –

(a) where the inclusion of any term in a contract renders the making of the contract an unlawful act that act shall be treated as extending throughout the duration of the contract, and

(b) any act extending over a period shall be treated as done at the end of that period, and

(c) a deliberate omission shall be treated as done when the person in question does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it were to be done.

(v) Article 8 of the 1976 Order:

" …

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her –

……

(b) by subjecting her to any other detriment.

(2A) It is unlawful for an employer, in relation to employment by him at an establishment in Northern Ireland, to subject to harassment –

(a) a woman whom he employs, or

…"

4.2 In relation to the burden of proof provisions set out in the 1976 Order, the English Court of Appeal in the case of ***Igen v Wong [2005] IRLR 258,*** considered similar provisions, relating to sex discrimination, applicable under the legislation applying in Great Britain and, it approved, with minor amendment, the guidelines set out in the earlier decision of ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332.*** In a number of decisions, the Northern Ireland Court of Appeal has approved the decision of ***Igen v Wong [2005] IRLR 258*** and the said two-stage process to be used in relation to the burden of proof (see further ***Brigid McDonagh & Others v Samuel Thom t/a The Royal Hotel Dungannon [2007] NICS 1*** and other decisions referred to below.) The decision in ***Igen v Wong [2005] IRLR 258*** *has been the subject of a number of further decisions in Great Britain, including* ***Madarassy v Nomura International PLC [2007] IRLR 246,*** a decision of the Court of Appeal in England and Wales, and ***Laing v Manchester City Council [2006] IRLR 748***, both of which decisions were expressly approved by the Northern Ireland Court of Appeal in the case of ***Arthur v Northern Ireland Housing Executive & Another [2007] NICA 25.*** (see further the recent Supreme Court decision in the case of ***Hewage v Grampian Health Board [2012] UKSC 37,*** in which the Supreme Court approved the guidance in **Igen** and followed in subsequent case law, such as ***Madarassy*** [see below].), and where it did not consider any further guidance was necessary. It also emphasised it was not necessary to make too much of the role of the burden of proof provisions; they required careful attention where there was room for debate as to the facts necessary to establish discrimination but they had nothing to offer where the Tribunal was in a positon to make positive findings on the evidence one way or the other.

In ***Madarassy v Nomura International PLC [2007] IRLR 246*** the Court of Appeal held, inter alia, that:-

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, <u>without more</u> [Tribunal's emphasis], sufficient material from which a Tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination – could conclude in Section 63A(2) must mean that 'a reasonable Tribunal could properly conclude from all the evidence before it. This would include evidence adduced by the claimant in support of the allegation of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject to the statutory absence of an adequate explanation at this stage the Tribunal needs to consider all the evidence relevant to the discrimination complaint, such as evidence to whether the act complained of occurred at all, evidence as to the actual comparators relied upon by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the claimant were of like with like as required by Section 5(3) and available*

evidence for the reasons for the differential treatment. The correct legal position was made plain by the guidance in ***Igen v Wong.*** *Although Section 63A(2) involves a two-stage analysis of the evidence, it does not expressly or impliedly prevent the Tribunal at the first stage, from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing or rebutting the claimant's evidence of discrimination … ."*

In ***Igen*** the Court of Appeal cautioned Tribunals, at Paragraph 51 of the judgment, 'against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground'.

Even if the Tribunal considers that the conduct of the employer requires some explanation before the burden of proof can shift there must be something to suggest that the treatment was less favourable and by reason of the protected characteristic (eg disability) (see ***B and C v A [2010] IRLR 400*** and ***Curley v Chief Constable of the Police Service of Northern Ireland and Another [2009] NICA 8*** later in this decision).

4.3 In relation to what is to be included by the expression 'something more' – guidance is to be found in the judgment of Elias J in ***The Law Society v Bahl [2003] IRLR 640,*** which judgment was approved by the Court of Appeal (see ***[2004] IRLR 799)***.

In Paragraph 94 of his judgment, Elias J emphasised that unreasonable treatment is not of itself a reason for drawing an inference of unlawful discrimination when he stated:-

"94. It is however a wholly unacceptable leap to conclude that whenever the victim of such conduct is black or a woman that it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. All unlawful discriminatory treatment is unreasonable, but not all unreasonable discriminatory treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way. The fact that the victim is black or a woman does no more than raise the possibility that the employer could have been influenced by unlawful discriminatory consideration. Absent some independent evidence supporting the conclusion that this was indeed the reason, no finding of discrimination can possibly be made.

96. … Nor in our view can Sedley LJ (in ***Anya v University of Oxford)*** *be taken to be saying that the employer can only establish a proper explanation if he shows that he in fact behaves equally badly to members of all minority groups. The fact that he does so will be one way of rebutting an inference of unlawful discrimination, even if there are pointers which would otherwise justify that inference. … No doubt the mere assertion by an employer that he would treat others in the*

same manifestly unreasonable way, but with no evidence that he had in fact done so, would not carry any weight with a Tribunal which is minded to draw the inference on proper and sufficient grounds that the cause of the treatment has been an act of unlawful discrimination."

In particular, in *Paragraph 101* of Elias J's judgment explained that unreasonable conduct is not necessarily irrelevant and may provide a basis for rejecting an explanation given by the alleged discriminator but then added these words of caution:-

"The significance of the fact that the treatment is unreasonable is that a Tribunal will more readily in practice reject the explanation, given that it would if the treatment were reasonable. In short, it goes to credibility. If the Tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend upon why it has rejected the reason he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not discriminated on the proscribed grounds may nonetheless give a false reason for the behaviour. They may rightly consider, for example, that the true reason costs then in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the Tribunal suggest there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support finding of unlawful discrimination itself."

At *Paragraph 113* of his judgment, he also stated:-

"There is an obligation on the tribunal to ensure that it has taken into consideration all potentially relevant non-discriminatory factors which might realistically explain the conduct of the alleged discriminator … ."

At *Paragraph 220* he confirmed:-

"An inadequate or unjustified explanation does not <u>of itself</u> amount to a discriminatory one."

[Tribunal's emphasis]

In ***S Deman v Commission for Equality and Human Rights and Others [2010] EWCA Civ 1279,*** the issue of "something more" and the shifting burden was referred to by Sedley LJ at paragraph 19 of his judgment, when stated:-

"We agree with both counsel that the 'move' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be forwarded by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."

In the case of ***The Solicitors Regulation Authority v Mitchell [2014] UKEAT/0497/12,*** this guidance was summarised in the following way *(Paragraph 46):-*

"(i) In appropriate circumstances the 'something more' can be an explanation proffered by the respondent for the less favourable treatment that is rejected by the Employment Tribunal.

(ii) If the respondent puts forward a false reason for the treatment but the Employment Tribunal is able on the facts to find another non-discriminatory reason, it cannot make a finding of discrimination."

Determining when the burden of proof is reversed can be difficult and controversial as illustrated in the following decisions. In ***Maksymiuk v Bar Roma Partnership [UKEATS/0017/12],*** when Langstaff P at *Paragraph 28* said:-

*"The guidance in **Igen v Wong** has been carefully refined. It is an important template for decision-making. As **Laing** and **Madarassy** have pointed out however, a Tribunal is not required to force the force the facts into a constrained cordon where in the circumstances of the particular case they do not fit it.*

That would not to be apply the words of the statute appropriately. Intelligent application of the guidance, rather than slavish obedience where it would require contorted logic, is what is required."

Further, in ***Birmingham City Council v Millwood [2012] UKEAT/0564,*** Langstaff P stated:-

"26 What is more problematic is the situation where there is an explanation that is not necessarily found to be a lie but which is rejected as opposed to one that is simply not regarded as sufficiently adequate.

*Realistically, it seems to us that, in any case in which an employer justifies treatment that has a detrimental effect as between a person of one race and a person or persons of another bu putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted) there is sufficient to justify a shift of the burden of proof. Exactly that evidential position would have arisen in the days in which **King v Great Britain – China Centre [1992] ICR 516** was the leading authority in relation to the approach should take to claims of discrimination. Although a Tribunal must be statute ignore whether there is any adequate explanation in stage one of its logical analysis of the facts, that does not mean, in our view, to say that it can and should ignore an explanation that is frankly inadequate and in particular are that is disbelieved.*

27 … to prefer one conclusion rather than another is not, as it seems to us, the same as rejecting a reason put as being simply wrong. In essence, the Tribunal in the present case appeared not to believe at least two of the explanations that were being advanced to it, and there were, we accept from what Mr Swanson has said, some three inconsistent explanations put forward for the difference in treatment that constituted the alleged discriminatory conduct."

On the facts of the case, in the ***Solicitors Regulation Authority*** case, it was found that a false explanation for the treatment was given by the respondent's witness, which was found to lack credibility and could therefore constitute the 'something more'; and the Tribunal, having reversed the burden of proof, in the circumstances, was able to properly infer discrimination:-

> *"The tribunal asked the reason why the claimant had been treated as she was. It was not simply a question of the respondent putting forward no explanation but having given a false explanation. This was clearly capable of being 'something more' … ."*

This issue again arose in a further recent decision by the Employment Appeal Tribunal in the case of ***Veolia Environmental Services UK v Gumbs [UKEAT/0487/12]*** where the EAT recognised ***Igen, Madarassy*** and ***Hewage:-***

> *"all exhibit the same tension; how to recognise the difficulty of proving discrimination on the one hand, whilst at the same time not stigmatising as racially discriminatory conduct which is simply irrational or unreasonable, on the other … ."*

In ***Effa v Alexandra Health Care NHS Trust [1999] (Unreported)*** Mummery LJ held:-

> *"It is common ground that an error of law is made by at Tribunal if it finds less favourable treatment from which it can properly make such an inference … . In the absence of direct evidence on an issue of less favourable treatment on racial grounds, the Tribunal may make inferences from other facts which are undisputed or are established by evidence. However, in the absence of adequate material from which inferences can be properly made, a Tribunal is not entitled to find a claim provided by making unsupported legal or factual assumptions about disputed questions of less favourable treatment on racial grounds. This is so whether the discrimination is alleged to rise from conscious or subconscious influences operating in the mind of the alleged discriminator."*

Further, as seen in ***R (on the application of E) v Governing Body of JFS and Others [2010] IRLR 136,*** Lady Hale (*Paragraphs 62 -64)* emphasised that, in all but the most obvious cases involving direct discrimination, a Tribunal requires to consider the mental processes, whether conscious or subconscious, of the alleged discriminator.

It held, as set out in the head note of the judgment, it did <u>not</u> accept that ***Madarassy*** and ***Hewage*** supported the submission that an employer should not have the burden of proof reversed and be required to give a non-discriminatory explanation for its conduct in demoting an employee or denying the employee an opportunity to qualify to do different work where inconsistent explanations for the reason for the demotion had been given and an unacceptable account of knowledge of the ambition to qualify had been given. Whilst the substance of the explanation should be excluded from consideration when deciding whether the burden of proof should be reversed the fact that explanations had been given which were inconsistent could be taken into account. When an account of lack of

knowledge as to the employee's ambition to qualify for different work had been contradicted by other evidence that was a factor to be considered in deciding whether the burden of proof had shifted.

4.4 In the case of ***Curley v Chief Constable of the Police Service of Northern Ireland and Another [2009] NICA 8,*** the Northern Ireland Court of Appeal approved the judgement of Elias LJ in ***Laing,*** which was also referred to with approval by Campbell LJ in the Arthur case, that it was not obligatory for a Tribunal to go through the steps set out in ***Igen*** in each case; and also referred to the opinion of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] NI 147,*** where he observed at paragraph 8 of his opinion, as follows:-

> *"Sometimes a less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue".*

Lord Nicholl's opinion in the ***Shamoon*** case made clear the normal two step approach of Tribunals in considering, firstly, whether the claimant received less favourable treatment than the appropriate comparator, which can include an actual or hypothetical comparator, and then, secondly whether the less favourable treatment was on the proscribed ground, can often be avoided by concentrating on why the claimant was treated as he/she was; and was it for the proscribed reason or for some other reason. If the latter, the application fails. If the former, there would normally be no difficulty in deciding whether the less favourable treatment, afforded to the claimant on the proscribed ground was less favourable than was or would have been afforded to others (see further Paragraph 11 of Lord Nicholls' opinion). Indeed, Lord Nicholls' opinion emphasised that the question whether there had been less favourable treatment and whether the treatment was on the grounds of [sex] are in fact two sides of the same coin.

4.5 In ***Nelson v Newry and Mourne District Council [2009] NICA 24,*** Girvan LJ referred approvingly to the decisions in ***Madarassy*** and ***Laing*** and also held that the words 'could conclude' are not to be read as equivalent to 'might possibly conclude'. He said "the facts must lead to the inference of discrimination". He also stated:-

> *"24. This approach makes clear that the complainant's allegation of unlawful discrimination cannot be used in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the tribunal could probably conclude in the absence of any adequate explanation that the respondent has committed an act of discrimination. In* ***Curley v Chief Constable the Police Service of Northern Ireland and Another [2009] NICA 8,*** *Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."*

In ***Ayodele v Citylink and Another [2017] EWCA Civ 1913,*** the Court of Appeal confirmed that it remains in relation to the burden of proof (albeit the Court was interpreting the burden of proof provisions under the Equality Act 2010, which does not apply in this jurisdiction but is to the same effect to the provisions in this jurisdiction) – "a claimant" is required to bear the burden of proof at the first stage. If he or she can discharge that burden (which is only to show that there is a prima facie case that the reason for the respondents' act was a discriminatory one) then the claim will succeed unless the respondents can discharge the burden placed on it at the second stage.

In the recent decision of the Court of Appeal, the decision in ***Adoyele*** was followed and binding on the Court.

In the course of the judgment the Court emphasised the judgment of Mummery LJ in ***Mudarassy*** in relation to low evidence adduced by the employer might be relevant, noting that it could even relate to the reason for any less favourable treatment (see paragraphs 70-72).

4.6 Carswell LCJ, as he then was, in the ***Sergeant A*** case, which also emphasised the necessity for the Tribunal to look at the matter, in the light of all the facts as found:-

> *"3. Discrepancies in evidence, weaknesses and procedures, poor record keeping, failure to follow established administrative processes or a satisfactory explanation from an employer may all constitute material from which an influence of religious discrimination may legitimately be drawn. But tribunals should be on their guard against the tendency to assume that every such matter points towards a conclusion of religious discrimination, especially where other evidence shows such a conclusion is improbable on the facts."*

Although, both the ***Curley*** and ***Sergeant A*** cases were dealing with issues of religious discrimination, the dicta is also relevant, in the judgment of the tribunal, to determination of claims of sex discrimination and/or religious discrimination and the interpretation of the relevant provisions relating to the burden of proof provisions, in the case law, referred to above, from the Employment Appeal Tribunal and the Court of Appeal of England and Wales.

In ***Sharmoon*** it was further held, in order for a disadvantage to quality as a 'detriment' it must arise in the employment field in that the court or tribunal must find that by reasons of the act or acts complained of a reasonable worker would or might take the view that he had been thereby disadvantaged in the circumstances in which he thereafter had to work. An unjustified sense of grievance cannot amount to detriment.

In ***CLFIS (UK) Ltd v Reynolds [2015] IRLR 562*** the Court of Appeal held a person may be less favourably treated on the grounds of a 'protected characteristic' either if the act complained of is inherently discriminatory or if the characteristic in question influenced the mental processes of the putative discriminator, whether consciously or unconsciously, to any significant extent.

It further held that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he

is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must have been motivated by the 'protected characteristic'. There is no basis on which his act can be said to be discriminatory on the basis of someone else's motivation.

In a recent decision of the Employment Appeal Tribunal in the case of ***Metropolitan Police v Denby [2017] UKEAT/0314/16*** Kerr J emphasised the ratio of ***CLFIS*** is simple:-

> *"52. … where the case is not one of inherently discriminatory treatment or of joint decision-making by more than one person acting with discriminatory motivation is liable; an innocent agent acting without discriminatory motivation is not. Thus where the innocent agent acts on 'tainted information' (per Underhill LJ at Paragraph 34), ie 'information supplied, or views expressed, by another employer whose motivation is or is said to have been discriminatory', the discrimination is the supplying of the tainted information, not the acting upon it by the innocent recipient."*

Kerr J gave a warning, however, that the ***CLFIS*** decision should not become a means of escaping liability by deliberately opaque decision-making which masks the identity of the true discriminator such as the involvement of senior employers in decisions made by junior employees.

4.7 The now classic test for discrimination was contained in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*** and later summarised by Lord Hoffman in ***Watt (Carter) v Ahman [2008] 1 AC 693*** at *Paragraph 36,* as follows:-

> *"(1) The test for discrimination involves a comparison between the treatment of the complainant and another person ('the statutory comparator') actual or hypothetical, who is not of the same sex or racial group as the case may be.*
>
> *(2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in each case should be (or assumed to be) the same as, or not materially different from, those of the complainant.*
>
> *(3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a Tribunal may infer how a hypothetical comparator would have been treated … This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question ('the evidential comparator') to those of the complainant and all the other evidence in the case."*

In ***Islington London BC v Ladele [2009] ICR 387*** Elias J, in light of ***Ashan*** and ***Shamoon*** (see before) stated that:-

"Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was."

(See further ***D'Silva v NATFHE [2008] IRLR 412, Chondol v Liverpool City Council [2009] UKEAT/0298*** and ***Dr Kalu v Brighton & Sussex University Hospital NHS Trust [2014] EQ LR 488*** – where the approach in ***Ladele*** was endorsed.)

In ***GMB v Henderson [2015] IRLR 451,*** Simler J concluded that where a decision is tainted by discrimination the comparative approach will be:-

"A meaningless comparison that produces the wrong answer. The focus should be on the reason for the treatment bearing in mind that there may be more than one."

In ***Chief Constable of Greater Manchester v Paul Bailey [2017] EWCA Civ 425*** Underhill LJ made the following observations or issues relating to "culture of discrimination" in an organisation.

"99 … authoritative material that discriminatory conduct or attitudes are widespread in the institution may, depending on the case, make it more likely that the alleged conduct occurred, or that the alleged motivations were operative. Or, there may be some more specific relevance. For example, in the present case, it is not implausible the fact that the GMP had been the subject of two recent reports of racist conduct or attitudes by the members might have several to increase the insensitivity or embarrassment which the tribunal found had influenced ACC Sheard's thinking. But such material must always be used with care, and the tribunal must in any case identify with specificity the particular reason why it considers the material to have probative value as regards the motivating of the alleged discriminator(s) in any particular case …. There is "no doctrine of transferred malice".

Applying these observations in Efobi the Court of Appeal held, as the facts, there was no evidence of widespread discrimination or systemic discrimination in the recruitment process; there was also no evidence of a link between the manager's found to leave victimised and harassed the claimant and the recruiters and line managers who considered his applications, who were in entirely different departments. It held in such circumstances it would have been wrong for the tribunal to have given weight to the fact others in the organisation discriminated against the claimant. However, the Court accepted that where there is positive evidence of a culture of discrimination within an organisation it can carry some weight and be material, but even then the evidence is likely to be of limited value ***(GMP v Bailey).***

4.8 In the case of ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336*** Underhill P stated, in a case brought under Section 3A of the Race Relations Act 1976, which is in similar terms to the 1997 Order in Northern Ireland, made observations concerning the approach to be taken by tribunals when considering claims of harassment under the 1976 Act and the equivalent provisions in the legislation relevant to other forms of discrimination:-

"10. As a matter of formal analysis, it is not difficult to breakdown the necessary elements of liability under Section 3A. They can be expressed as threefold:-

(1) The unwanted conduct

Did the respondent engage in unwanted conduct?

(2) The purpose of effect of that conduct

Did the conduct in question either:-

(a) have the purpose; or

(b) have the effect of either –

(i) violating the claimant's dignity; or

(ii) creating an adverse environment for her?

(We were referred to (i) and (ii) as 'the proscribed consequences'.)

(3) The grounds for the conduct.

Was that conduct on the grounds of the claimant's race (or ethnic or national origins)?

11. But that formal breakdown conceals the fact that there are – or will at least in some cases be – substantial overlaps between the questions that rise in relation to each element. To take one obvious example, the question of whether the conduct complained of was 'unwanted' will overlap with the question of whether it creates an adverse environment for the claimant. There is also evidently a considerable overlap between the two defined proscribed consequences, notwithstanding that they are expressed as alternatives: many or most acts which are found to create an adverse environment for an employee will also violate her dignity (though it might be less general for the reverse to apply). The tribunal's eventual decision may often depend on what are, in practice, undifferentiated factual issues which cover more than one element in the analysis. Nevertheless, it would be a healthy discipline for a tribunal in any case brought under this Section (or its equivalent in the other discrimination legislation) specifically to address it in its reasons each of the elements which we have identified, in order to establish whether any issue arises in relation to it and to ensure that clear factual findings are made on each element in relation to which issue arises.

12. We make four other points which we hope may be of assistance to tribunals seeking to apply Section 3A.

13. *First, such case law as there was in relation to 'harassment' as a variety of discrimination prior to the implementation of the Directive is unlikely to be helpful. We did not say there may not be some general observations to be found in that case law which are equally applicable to claims under the new legislation. But the old law was constructed somewhat uncomfortably out of the general statutory definitions of discrimination. The new law, by contrast, derives form discrete statutory provisions with a completely different provenance, and reading across from one to the other is likely to hinder more than it helps. Still less is assistance likely to be gained from the entirely separate provisions of the Protection from Harassment Act 1997 and the associated cases …*

14. *Secondly, it is important the formal breakdown of 'Element (2)' in to two alternative basis of liability – 'purpose' and 'effect'. That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not to have been shown to have done so). It might be though that successful claims of the latter kind will be rare since in a case where the respondent has intended to bring about the proscribed consequences, and his conduct had a significant impact on the claimant for her to bring proceedings, it will be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of 'Element (3)', as discussed below.*

15. *Thirdly, although the proviso in Sub-section (2) is rather clumsily expressed, its core thrust seems to us to be clear. The respondent should not be held liable merely because his conduct has the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that that being so the phrase 'having regard to … the perception of that other person; was liable to cause confusion and to lead tribunals to apply a 'subjective' test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the punitive victim: that is, the victim must have felt or perceived, her dignity was being violated or an averse environment to have been created. That can, if you like, be described as introducing a 'subjective' objective; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then if she did genuinely feel her dignity to have been violated, there would have been no harassment within the meaning of the Section. Whether it was*

reasonable for a claimant to have felt her dignity to have been violated is quintessentially, a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or precisely to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt. See also our observations at Paragraph 22 below.

16. *Fourthly, 'Element (3)' involves an enquiry which will be very familiar to tribunals for other types of discrimination claims. There is ample case law in the nature of the enquiry required by the 'interchangeable' statutory phrases ('on the grounds of' or 'by reason that' – see classically the speeches of Lord Nicholls in* ***Nagarajan v London Regional Transport [2000] 1 AC 501*** *at Pages 510 – 513, … and* ***Chief Constable of West Yorkshire Police v Khan [2001] IC 1065*** *at Paragraph 29 (Page 1072) …) … the inquiry into the perpetrators grounds for acting as he did – or to use Lord Nicholls' phrase 'the reason why he acted' – is logically distinct from any issue which may arise for the purpose of 'element (2)' about whether he intended to produce the proscribed consequences : a perpetrator may intend to violate a claimant's dignity for reasons other than her race (or indeed any of the other reasons proscribed by discrimination legislation).*

…

In some cases the 'ground' of the action complained of is inherently racial. The best known example in the case law … is the decision of the House of Lords in ***James v Eastleigh BC [1990] 2 AC 751****(… Where the nature of the conduct complained of consists, for example, of overtly racial abuse the respondent can be found to be acting on racial grounds without troubling to consider his mental processes."*

It is also relevant to have regard to the observations of Underhill P at *Paragraph 22* of his judgment in the above ***Richmond Pharmacology*** case, when he stated:-

"Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the Cognate Legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase … ."

In this context, in particular, of racial harassment the guidance in the case of ***Law Society and Others v Bahl [2003] IRLR 640*** is relevant when Elias J (as he then was) emphasised that unreasonable treatment is not itself a reason for drawing an inference of unlawful discrimination when he stated:-

> *"94. It is however a wholly unacceptable leap to conclude that whenever the victim of such conduct is black or a woman that it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. All unlawful discriminatory treatment is unreasonable, but not all unreasonable discriminatory treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way. The fact that the victim is black or a woman does not more than raise the possibility that the employer could have been influenced by unlawful discriminatory consideration. Absent some independent evidence supporting the conclusion that this was indeed the reason, no finding of discrimination can possibly be made."*

However at *Paragraph 101* of his judgment, Elias J explained that unreasonable conduct is not necessarily irrelevant and may provide a basis for rejecting an explanation given by the alleged discriminator but then added the following words of caution:-

> *"… But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provides another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nevertheless give a false reason for the behaviour. They may rightly, for example, consider that the true reason casts them in a less favourable light, perhaps because is disclosures incompetence or insensitivity. If the finds of the tribunal suggest there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself … ."*

In ***Insitu Cleaning Co Ltd v Heads [1995] IRLR 4,*** it was held whether a single act of verbal sexual harassment is sufficient to furnish a complaint is a matter of act and degree and "unwanted conduct", relevant to such a claim does not mean a single act can never amount to harassment is that it cannot be said to be "unwanted" until it is done and negated. The word "unwanted" is essentially the same as "unwelcome" or "uninvited".

4.9 In ***Weeks v Newham College of Further Education [2012] Eq LR 788*** it was held a decision of fact in a harassment case must be sensitive to all the circumstances … the fact that unwanted conduct was not itself directed at the claimant is a relevant consideration. The timing of an individual's objection to conduct also has evidential importance. It may mean the individual complaining of conduct after the event did not in fact perceive the conduct as having the relevant offensive qualities. However tribunals should not place too much weight upon timing: where conduct is directed towards the sex of the victim it may be difficult for the victim personally, socially and, in some circumstances, culturally to make an immediate complaint about it. While a legitimate factor to consider, the fact of there being no immediate complaint cannot prevent a complaint being justified.

Further, it was held the term 'environment' in Article 6A of the 1976 Order, means 'a state of affairs'. It may be created by an incident but the effects are of longer duration. A tribunal must consider the relevant words [and presumably also conduct] in context, including other words spoken [and conduct] and the general run of affairs within the workplace. The frequency of the use of the offending words [or conduct] is nor irrelevant.

In ***Warby v Wunda Group Ltd [2012] EQ LR 536,*** it was confirmed in a claim of unlawful harassment, a tribunal must have regard to context. Context is everything. It is for the tribunal to decide what the context of the acts complained of is and to contextualise what has taken place. It may be a mistake to focus upon a remark in isolation. A tribunal is entitled to take the view that a remark, however unpleasant and however unacceptable is a remark made in a particular context; it is not simply a remark standing on its own.

In ***Evans v Xactly Corporation [2018] UKEAT 0128,*** HH Judge Stacey emphasised that harassment claims are highly fact sensitive and context specific.

In ***Reed and Bull Information Systems Ltd V Stedman [1999] IRLR 299,*** the Employment Appeal Tribunal emphasised that the essential characteristic of sexual harassment is that it is words or conduct which are unwelcome to the recipient and it is for the recipient to decide for themselves what is acceptable to them and what they regard as offensive. Further, because it is for each person to define their own levels of acceptance, the question would be whether, by words or conduct, she made it clear she found the conduct unwelcome. Provided any reasonable person would understand her to be rejecting the conduct, continuation of the conduct would generally be regarded as harassment.

In ***Chawla v Hewlett Packard Ltd [2015] IRLR 356,*** it was confirmed the perception of the claimant, as referred to in Article 6A(4) requires an objective finding of the claimant's subjective feelings about the act complained of and the issues relating it reasonableness in the said which require an objective assessment by the tribunal (however ***Chawla*** was a case pursuant to section 26(4) of the Equality Act 2010, which is not in the same terms as Article 6A(4); but, in essence, is of the same effect).

In ***Quality Solicitors CMHT v Tunstale [2014] Eq LR 679,*** the Employment Appeal Tribunal emphasised that when considering a claim of racial harassment based on a single remark, it must have regard to (Regulation 6(2)) and to consider whether it was <u>reasonable</u> for the single remark to have the effect in question. On the facts, it held it did not, and it was merely an introductory remark to a client.

4.10 For the purposes of Article 42, in order to "aid" an act of unlawful discrimination, a person must have done more than merely create an environment in which discrimination can occur. Further, an employee is deemed to have aided the employer to do what he himself did and so be personally liable for it but is not deemed to leave aided the employee to do what fellow employees did. (See ***Gilbank v Miles [2006] IRLR 538.***

4.11 In relation to the statutory defence, pursuant to Article 42(3) of the 1976 Order, it was held in ***Jones v Tower Boot Co Ltd [1997] IRLR 168,*** that the statutory

provisions on employer liability is to deter racial and sexual harassment in the workplace through a widening of the net of responsibility beyond the guilty employee themselves, by making all employers additionally liable for such harassment, and then supplying them with the reasonable steps defence, which will exonerate the conscious employer who has used his best endeavours to prevent such harassment, and will encourage all employers who have not yet undertaken such endeavours to take the steps necessary to make the same defence available in their own workplace.

The leading decision in relation to the statutory defence is the decision of the Employment Appeal Tribunal in the case of ***Canniffe v East Riding of Yorkshire Council [2000] UKEAT/1035/98.*** In that case it was held that an employer did not satisfy the defence to liability for acts of their employee merely by showing that there was nothing he could have done to stop the discrimination from occurring. The proper approach to determining whether an employer has satisfied the defence is, first, to identify whether the employer took any steps at all to prevent the employee from doing the act or acts complained of in the course of his employment; and, secondly, having identified what steps, if any, they took, to consider whether there were any further acts that they could have taken which were reasonably practicable. Whether taking any such steps would have been successful in preventing the acts of discrimination in question is not determinative. An employer will not be exculpated if it is has not taken reasonably practicable steps simply because, if it had taken those steps, they would not have prevented anything from occurring.

In ***Croft v Royal Mail Group PLC [2003] IRLR 592,*** the Court of Appeal in England and Wales held that, in considering whether an action which is submitted the employer should have taken is reasonably practicable, it is permissible to take into account the extent of the difference, if any, which the action is likely to make. The concept of reasonably practicability entitles the employer in this context to consider whether the time, effort and expense of the suggested measures are disproportionate to the result likely to be achieved.

In ***Mahood v Irish Centre Housing Ltd [2011] EQLR 586,*** the Employment Appeal Tribunal held that an Employment Tribunal misdirected itself as to the statutory defence, in that their finding was based on what the respondent had done <u>after</u> the discrimination acts. The defence is limited to matters done in order to prevent a discriminatory act and that can only have effect if steps were taken <u>before</u> that act.

In **Brannigan v Belfast City Council [2002] NIFET/040/98,** a Fair Employment Tribunal decision in relation to religious sectarianism, where there was evidence of sectarian graffiti in the toilets, the Fair Employment Tribunal confirmed that, particularly where a respondent is or ought to be aware of sectarianism within the workplace, it is not sufficient to rely for the purposes of the statutory defence to the complaint upon the existence of an equal opportunity/harassment policy without having taken proactive steps to ensure the effective communication of that policy to the workforce.

4.12 The Employment Equality (Age) Regulations (Northern Ireland) 2006 ('the 2006 Regulations'):-

(i) Regulation 6 of the 2006 Regulations provides:

"(1) For the purposes of these Regulations, a person ('A') subjects another person ('B') to harassment where, on grounds of age, A engages in unwanted conduct which has the purpose of effect of –

(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect."

(ii) Regulation 26 of the 2006 Regulations provides:

"(1) Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.

…

(3) In proceedings brought under these Regulations against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description."

(iii) Regulations 27 of the 2006 Regulations provides:

(i) A person who knowingly aids another person to do as act made unlawful by these Regulations shall be treated for the purpose of these Regulations as himself doing an unlawful act of the like description.

(ii) For the purposes of paragraph (1) an employee or agent for whose act the employer of principal is liable under Regulation 26 (or would be so liable but for Regulation 26(3) shall be deemed to aid the doing of the act by the employer or principal.

(iv) Regulation 42 of the 2006 Regulations provides:

"(1) This regulation applies to any to any complaint presented under regulation 41 to an industrial tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent –

(a) has committed against the complainant an act to which regulation 41 (jurisdiction of industrial tribunals) applies; or

(b) is by virtue of regulation 26 (liability of employers and principals) or regulation 27 (aiding unlawful acts) to be treated as having committed against the complainant such an act,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(v) Regulation 48 of the 2006 Regulations provides:

"(1) An industrial tribunal shall not consider a complaint under regulation 41 (jurisdiction of industrial tribunals) unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done.

…

(4) A court or tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(5) For the purposes of this regulation and regulation 46 (help for persons in obtaining information etc) –

(a) when the making of a contract is, by reason of the inclusion of any term, an unlawful act, that act shall be treated as extending throughout the duration of the contract; and

(b) any act extending over a period shall be treated as done at the end of that period; and

(c) a deliberate omission shall be treated as done when the person in question decided upon it,

and in the absence of evidence establishing the contrary a person shall be taken for the purposes of this regulation to decide upon an omission when he does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it was to be done."

(vi) Regulation 7 of the 2006 Regulations provide:

(2) It is unlawful for an employer in relation to a person whom he employs at an establishment in Northern Ireland, to discriminate against that person.

……

(3) It is unlawful for an employer, in relation to employment by him at an establishment in Northern Ireland, to subject to harassment a person whom he employs or who has applied to him for employment.

(In relation to the 2006 Regulations, the case law set out in paragraphs 4.8-4.11 of this decision is also of relevance and application).

5.1 In relation to time-issues for the commencement of proceedings by the claimant in this matter, pursuant to the 1976 Order and/or the 2006 Regulations, it was not disputed by the representatives that there has been considerable case law on the interpretation of the relevant legislation.

5.2 It has long been held, as seen in ***Hendricks v Commissioner of Policy for the Metropolis [2003] IRLR 96,*** that the burden is on the claimant to prove either by direct evidence or by inference form primary facts that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'. It further held that in determining whether there was an act 'extending over a period' distinct from a succession of unconnected or isolated specific acts, which time will begin to run from the date when each specific act was committed, the focus should be on the focus of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period and should not be treated as complete and constricting statement of the indicia of 'an act extending over a period'. However this has to be distinguished from the consequences of a one-off decision (see ***Owusu v LFCDA [1995] IRLR 574***).

In ***Richman v Knowsley Metropolitan BC [2013] EQULR 1164***, it was held, in determining whether there was evidence of 'conduct extending over a period', it is not sufficient to consider only whether there was evidence of a discriminatory policy, rule or practice, in accordance in which decisions were taken from time to time. The tribunal must consider whether there was something more, such as an ongoing process of proceedings or a continuing state of affairs (see also ***Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 1548).*** The mere repetition of a request similarly cannot convert a single managerial decision into a policy, practice or rule (***Cast v Croydon College [1997] IRLR 14***). However, as noted ***Cast,*** application of a discriminatory policy or regime, pursuant to which decisions may be taken from time to time, is an act extending over a period. There can be a policy even though it is not of a formal nature when expressed in writing, even though it is confined to a particular post or role.

'An ongoing situation' as referred to by Mummery LJ in ***Hendrick*** can include a grievance process carried out by an employer arising immediately from an act of discrimination (namely suspension) and thereby form part of a continuing act (***Bahous v Pizza Express Restaurants [2012] EQLR 4***).

5.4 When considering issues of extension of time in relation to an 'original' claim and whether time should be extended on 'just and equitable' grounds, in the case of

Miller and Others v Ministry of Justice and Others [UKEAT/0003/15] Mrs Justice Laing in her judgment set out points of general application, as follows:-

> *"There are five points which are relevant to the issues in these appeals:-*
>
> *(i) The discretion to extend time is a wide one:* ***Robertson v Bexley Community Centre [2003] EWCA Civ 576; [2003] IRLR 434,*** *Paragraphs 23 and 24.*
>
> *(ii) Time-Limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, Paragraph 25). In* ***Chief Constable of Lincolnshire v Caston [2010] EWCA Civ 1298; [2010] IRLR 327*** *Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in* ***Robertson,*** *but did not, in my judgment, overrule it. It follows that I reject Mr Allen's submission that, in* ***Caston,*** *the Court of Appeal "corrected" paragraph 25 of* ***Robertson.*** *…*
>
> *(iii) If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition.*
>
> *(iv) What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET (****DCA v Jones [2007] EWCA Civ 894; [2007] IRLR 128****). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (ibid, Paragraph 44).*
>
> *(v) The ET may find the checklist of factors in section 33 of the* ***Limitation Act 1980*** *('the 1980 Act') helpful* ***(British Coal Corporation v Keeble [1997] IRLR 336 EAT****; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then wsa) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits something significant:* ***Afolabi v Southwark London Borough Council [2003] ICR 800; [2003] EWCA Civ 15,*** *at Paragraph 33." (See Paragraph 10 of the judgment.)*

(The principle in ***Afolubi*** was subsequently endorsed by the Court of Appeal in ***Governing Body of St Albans Girls School v Neary [2010] IRLR 124****.)*

Further, it was established in ***Apelogun-Gabriels v London Borough of Lambeth [2002 IRLR 116****,* that there is no principle that an extension of time will be granted where the delay is caused by an internal grievance or appeal hearing.

The decision in ***Miller*** subsequently was appealed, as part of the part-time judiciary litigation to the Supreme Court, where a hearing is awaited; but the general principles set out above by Laing J remain in the judgment of the tribunal good law.

5.5 The 'Keeble Guidance' advice (see above) is as follows:-

> *"8… It requires the Court to consider the prejudice which each party would suffer as the result of the circumstances of the case and, in particular, inter alia, to:-*
>
> *(a) the length and reasons for the delay;*
>
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
>
> *(c) the extent to which the party sued had co-operated with any requirements for information;*
>
> *(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
>
> *(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."*

(In ***Lindsay v London School of Economics and Political Science [2014] IRLR 218*** the Court of Appeal held that:-

> *"An extension of time will not automatically be granted simply because it results in no prejudice to the respondent in terms of a fair trial. If a claim is brought out of time it is for the claimant to show that it is just and equitable for the extension to be granted. This is a multifactorial assessment where no single factor is determinative."*

5.6 When considering the exercise of the relevant discretion, it is necessary for the tribunal to identify the cause of the claimant's failure to bring the claim in time – see ***Accurist Watches Ltd v Wadher [2009] UKEAT/102/09*** and ***ABM University Local Health Board v Morgan [2013] UKEAT/0305/13*** where the EAT stated:-

> *"Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see **Chief Constable of Lincolnshire Policy v Caston [2009] EWCA Civ 1298** at Paragraph 25 per Sedley J) a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to do so and the exercise of the discretion is therefore th exception rather than the rule (per Auld LJ in **Robertson v Bexley Community Centre [2003] IRLR 424 (A).** A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time-limit has not been met; and insofar as it is distinct the second reason is why after the expiry of the primary time-limit the claim was not brought sooner than it was … ."*

(approved in ***British Transport Police v Norman [2015] UKEAT/0348/14***).

In ***Morgan,*** the EAT also confirmed it may not always be appropriate to give more than summary reasons for a conclusion that it was just and equitable to extend time and that the precise date of an act or omission may not be material to that question (see further *Paragraph 50* of ***Morgan***).

As seen above, the reason why a claimant delayed in bringing a claim is a relevant consideration, but noting the test to be applied in not one of reasonable practicability (see ***Biggs v Somerset County Council [1996] ICR 364***).

In ***Miller,*** Laing J identified two types of prejudice which a respondent may suffer if the limitation period is extended. The first is the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence. The second is what she described as the 'forensic prejudice' which the respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents and losing touch with witnesses (see *Paragraph 12* of the judgment). She acknowledged that if there is 'forensic prejudice' to a respondent, that will be 'crucially relevant' in the exercise of the discretion, against an extension of time and it may well be decisive; but if there is no 'forensic prejudice' to the respondent that is:-

> *"(a) not decisive in favour of an extension; and*
>
> *(b) depending on the tribunal's assessment of the facts may well not be relevant at all. It will depend on the way the tribunal sees the facts."*

5.7 As seen above, the first relevant circumstance cited in ***Keeble*** is the extent of the delay in issue. To know how long the delay has been for limitation purposes, however, one has to know when time began to run.

As seen in ***Outokumpu Stainless Ltd v Law [UKEAT/0199/07],*** Beatson J stated:-

> *" … It is necessary for a tribunal considering the exercise of its discretion to ascertain when the time-limit expires in order for it to approach the exercise of discretion properly and lawfully. If it does not if cannot consider the length of the delay and it cannot properly consider whether it is just and equitable to allow the claim to proceed."*

5.8 In the recent case of ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278,*** HH Judge Clark referred to a potential conflict of approach emerging in recent case law in the EAT as seen in the case of ***Pathan v South London Islamic Centre [2014] UKEAT/0312/13*** *and* ***Szmidt v AC Produce Imports Ltd [2015] UKEAT/029/14*** and, by way of contrast the decision of Langstaff P, as he then was, in the case of ***Habinteg Association Ltd v Holleran [2015] UKEAT/0274/14*** in relation to how to exercise the discretion where a claimant does not put forward evidence in support of his application for an extension of time, explaining the delay.

In ***Habinteg,*** there was no explanation for the delay. Langstaff P said that the first consideration from the *'**Keeble*** list' is the reason for and extent of the delay. There had to be some evidence, even by inference; since there was no explanation for the delay he held he could come to no other conclusion then the extension be refused.

There was no basis upon which it could be permitted. He followed a similar approach in ***Smith-Twigger v Abbey Protection Group Ltd [UKET/0391/13].*** *In* ***Pathan,*** the tribunal held the claimant had shown no good reason for leaving it until she presented her claim. She was intelligent and had taken advice in order to find out the time-limit. On appeal, the EAT held the tribunal had erred because it had not considered relative prejudice, which was an important factor which should normally be considered by an Employment Tribunal.

In ***Rathakrishnan*** the EAT, decided the decision in ***Habinteg*** was strictly, per incuriam, and held that the exercise of the wide discretion involves a multifactorial approach and failure to provide a good excuse for a delay will not inevitably result in an extension of time being refused. No single factor was determinative. In particular, it held that failure to provide a good reason for the delay in bringing a claim will not inevitably result in an extension of time being refused. Further, the question of balance of prejudice and potential merits of the claim before the tribunal were relevant considerations for the tribunal and it had been wrong not to have weighed these factors in the balance and instead to have terminated the exercise, having rejected the claimant's application for the delay.

In both ***Pathan*** and ***Pathakrishnan*** the tribunal heard the claim on the merits at the same time as it heard the time-point. In the earlier case of ***Bahous v Pizza Express Restaurants [2012] Eq LR 4*** (where again merits and time-points were heard by the tribunal at the same time) HH Judge Clark had similarly held that the merits of the complaint did not require separate consideration but were 'part of the prejudice balancing exercise' likely to be suffered by the respective parties should time not be extended.

5.9 In a further recent decision by Laing J in the case of ***Edomobi v La Retraite RC Girls School [UKEAT/0180/16],*** she preferred to follow the approach in **Habinteg –** stating she found it difficult to see "how a claimant can discharge the burden of showing that it is just and equitable to extend time if he or she simply does not explain the delay, nor do I understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the Employment Tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay."

The above difference of approach by the different divisions of the EAT may, in due course, require to be resolved by the Court of Appeal. Of course, none of these decisions are binding on this tribunal, albeit they would normally be persuasive. Insofar as it may be necessary for this tribunal to resolve this difference of approach, it preferred the approach seen in ***Pathan v Rathakrishnan*** and the multifactorial approach and the necessity, in essence, before reaching any conclusion to put all the relevant factors, as assessed by the tribunal, in the balance; albeit recognising that the absence of any or proper explanation for the delay may, subject to the other factors, as found on the facts, weigh heavily against the granting of any extension – remembering at all times the dicta seen in ***Robertson ,*** *namely* – 'the exercise of the discretion in the exception rather than the rule and time-limits are to be exercised strictly in tribunals' (see further support for a multifactorial approach in ***Lindsay v LSE [2014] IRLR 218).***

5.10 In a recent decision of the Employment Appeal Tribunal in the case of ***Odukoya v Tim Hopkins, The Charity Commission and Another [2017] UKEAT/0251/16*** it was held, when considering the issue of a just and equitable extension in relation to the presentation of an 'original' claim (ie not in the context of an application for leave to amend a claim):-

> *"17. The onus is on a claimant who bring a complaint after the expiry of the initial three month period to persuade the Employment Tribunal that it is nevertheless just and equitable for her to be allowed to bring the complaint. In deciding what is just and equitable, the Employment Tribunal must take into account all relevant circumstances, looking at the matter against the background of the clear statutory policy that [Equality Act] complaints should be brought within a short period of time. Such circumstances are likely to include (i) length of the delay; (ii) the reasons for the delay (iii) the prejudice to the respondent in having to face the complaint (in particular, 'forensic prejudice' caused by the delay), and (iv) the prejudice caused to the claimant by losing the ability to bring a complaint, but there may be more. Assessing the relative prejudice may well involve an assessment (often only a rough assessment) of the strength or weakness of the complaint. I accept … that in making any such assessment a tribunal must take into account the fact that discrimination claims are fact sensitive and difficult to prove.*
>
> *18. There is, however, no need for a tribunal to go through a 'checklist' of potentially relevant factors as long as they sufficiently explain the reason for their decision. It may be sufficient simply to say, for example, the delay has been 'x' days/weeks/months, and no satisfactory reason has been supplied for it so that, regardless of any other factors, it would not be just and equitable to allow the claim to proceed (although I stress that in giving that example I am not intending to suggest that it is never just and equitable to allow a claim to proceed where no satisfactory reason for the delay is put forward … ."*

(This would also appear to give support to the multifactorial approach seen in ***Pathan,*** as referred to previously.)

5.11 In the case of ***Evershed v New Star Asset Management [2009] UKEAT/0249/09,*** Underhill J, as he then was, said, which was not challenged in the context of the subsequent appeal, to which reference has been made previously:-

> *"33 … It is not the business of the tribunals to punish parties (or their advisers) for their errors. In very many, perhaps most, cases where permission is given to amend a pleading, the party in question could if he had been sufficiently careful got it right first time round."*

Evershed was a case in which application for leave to amend was granted. However, similar principles have been applied in cases where the issue has arisen whether the time should be extended to allow a discrimination claim to be heard out of time, on just and equitable grounds, where the fault of the claimant is a

relevant factor to be considered but the claimant was not held to be culpable for what was properly regarded to be the fault of his or her legal advisers.

In the case of ***Virdi v Commissioner of Police of the Metropolis and Another [2006] UKEAT/0373/06,*** a case involving an application for extension of time on just and equitable grounds in a discrimination case, Elias P, as he then was, stated:-

> *"35. It is well established, and common ground, that the claimant cannot be held responsible for the failings of his solicitors: see **Steeds v Perverill Management Services Ltd [2001] EWCA Civ 419** Paragraph 27. For that reason it is not legitimate for a Court to refuse to extend time merely on the basis that the solicitor has been negligent and that the claimant will have a legal action against the solicitor. Mr Sethi went so far as to submit that the existence of a potential claim against a legal adviser was a factor which should not be taken into account at all. He contends that this was the view of the EAT in **Chohan v Derby Law Centre [2004] IRLR 685.***
>
> *36. I am not satisfied that this was what the EAT was saying in that case, but if they were then the observation cannot sit with the views of the Court of Appeal in the **Steeds** case when it accepted that it would be a factor, and sometimes a highly relevant factor, in the exercise of the discretion."*

In ***Chohan,*** HH Judge J McMullen QC, in setting out the legal principles to be applied in relation to the exercise of discretion whether time should be extended on just and equitable grounds stated:-

> *"16. A failure by a legal adviser to enter proceedings in time should not be visited upon the claimant for otherwise the defendant would be in receipt of windfall: **Steeds v Perverill Management Services Ltd [2001] EWCA Civ 419,** Paragraphs 38-40."*

Steeds was a personal injury claim dealing with issues of limitation, but again the principles, as set out therein have been applied in **Virdi** and **Chohan**' and in this context, it must be noted that the 'Keeble Guidance', referred to previously, is drawn from the checklist of factors in Section 33 of the Limitation Act 1990, as applied in the ***Steeds*** decision of the Court of Appeal.

5.12 In the recent decision of the Employment Appeal tribunal in the case of ***Bowden v Ministry of Justice and Department for Communities and Local Government,*** it was held by the Employment Appeal Tribunal that the Employment Judge did not apply correct principles of law when deciding whether it was just and equitable to consider the claimant's claim out of time. This claim was a claim arising out of the part-time judicial pension litigation (see ***O'Brien v Department of Constitutional Affairs***). In the particular circumstances of the case, the claimant was a retired legal chair of the former Residential Property Tribunal Service. He brought proceedings, under the Part-time Workers Regulations, alleging that he ought to have a received a judicial pension and certain other improvements to his terms and conditions. He had asked the Employment Judge to hold that it was just and equitable to consider his claim out of time. The Employment Appeal Tribunal

decided the Employment Judge placed impermissible reliance on the decision in ***Millers & Others v Ministry of Justice,*** another case in the part-time judicial pension litigation, referred to previously, and did not consider whether, in the claimant's particular case, the claimant was reasonably ignorant of his right to bring the claim, and how the prejudice to both parties should be balanced.

For the purposes of the present proceedings, the Employment Appeal Tribunal stated, in the course of the judgment, as follows:-

> *"36. In this case the explanation given by the claimant was that he was unaware of the **O'Brien** litigation or of the possibility of pensions for part-time judicial office holders. It was to my mind essential that the Employment Judge should apply correct principles of law when he evaluated this explanation.*
>
> *37. A convenient starting point is the well-known dictum of Brandon LJ in **Wall's Meat**. He was addressing the stricter test for extension of the time limit applicable in unfair dismissal cases – namely, whether it was reasonably practicable to bring the claim in time:*
>
> > *'With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of three months form the date of dismissal, an industrial tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.*
> >
> > *For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonably ignorant.*
> >
> > *While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, her should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries.*

To that extent, therefore, it may, in general, be easier for a complainant to avail himself of the 'escape clause' on the ground that the was reasonably ignorant of his having a right at all, than on the ground that, knowing of the right, he was reasonably ignorant of the method by which, or the time limit within which, he ought to exercise it'.

38. *These well-known principles are widely applied in unfair dismissal cases: see* ***Williams-Ryan*** *at paragraph 21, where the passage was specifically commended. But they are relevant when ignorance is the explanation in a case which is concerned with whether it is just and equitable to extend time: see* ***Averns v Stagecoach in Warwickshire [2008] UKEAT/0065/08*** *at paragraphs 20 to 23 (Elias J). They set out basic principles of justice which it is appropriate to apply in the context of a test which requires the tribunal to decide what is just and equitable.*

39. *To similar effect is* ***DPP v Marshall [1998] ICR 518.*** *In that case the claimant was unaware of the right to bring a complaint of transgender discrimination until a European Court decision came to his attention. He brought his claim promptly afterwards. The Employment Tribunal extended time; and the Employment Appeal Tribunal approved that decision. …*

40. *Applying these principles, given that the claimant was claiming ignorance of his right, the Employment Judge was required to consider whether he was truthful in what he said and whether he was reasonably ignorant of the right. For the reasons which Brandon LJ stated, it will be a rare case where it was reasonable to expect a claimant to make inquiries about a right which he does not know he has.*

41. *To approach the case in this way is not special pleading for Judges of the kind which the Employment Judge found in* ***Miller and Others.*** *Rather it is to treat the claimant, a retired Judge, according to the same legal principles as any other person.*

…

43. *In the claimant's case therefore it was not sufficient for the Employment Judge to say that the claimant knew he was not receiving a pension and knew that full-time Judges were. He was bound to ask, given that the claimant said he was ignorant of his right to bring a claim, whether he accepted this was the case and whether he accepted, given the claimant's circumstances, that his ignorance was reasonable.*

… ."

(see further ***Dowokpor v Ministry of Justice (UKEAT/0156/17).***

This decision in ***Bowden*** is a further example illustrating that issues in relation to extension of time, under the relevant legislation applying to each said claim, increasingly are focusing on similar matters to determine whether the relevant 'escape clause' is appropriate, despite the difference in terminology under the legislation (ie reasonably practicable/just and equitable).

6.1 In this matter, issues arose during the course of the evidence and submissions by the representatives in relation to the failure of the first respondent to call as witnesses certain employees of the first respondent.

The relevance of any such failure therefore required to be considered further by the tribunal.

In ***Lynch v Ministry of Defence [1983] NI 216,*** Hutton J, as he then was, endorsed the principles which had been stated in ***O'Donnell v Reichard [1975] VR 916*** at *Page 929:-*

> *"… Where a party without explanation fails to call as a witness a person whom he might reasonably be expected to call, if that person's evidence would be favourable to him, then, although the jury may not treat as evidence what they may, as a matter of speculation, think that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that that person's evidence would not have helped that party's case; if the jury drew that inference, then they may properly take it into account against the party in question for the purposes, namely:-*
>
> *(a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken; and*
>
> *(b) in deciding whether to draw inferences of fact, which are open to them upon evidence which has been given, again in relation to matters with respect to which the person not called as a witness could have spoken."*

In ***Wiszniewska v Central Manchester Health Authority [1998] PIQR 324,*** Brooke LJ helpfully set out the following principles for this line of authority in ***Reichard:-***

> *"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence of silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*

(3) *There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*

(4) *If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."*

This line of authority was approved more recently by the Court of Appeal in ***Breslin v McKevitt and Others [2011] NICA 33, CM v United Hospital Trust [2010] NIQB 49*** and referred to, without further comment, in ***Curley v Chief Constable of the Police Service of Northern Ireland and Another [2009] NICA 8.***

In ***Habinteg Housing Association Ltd v Holleron [2015] UKEAT/0274/14,*** Langstaff P held at *Paragraph 29* of his judgment, when giving some guidance on the absence of a witness to give evidence; albeit in a very different factual matrix to the present proceedings:-

"… First, it seems to me that a Tribunal is entitled to take into account the absence of a witness who could give contradictory evidence in assessing whether the assertion made by a party is accurate. That is because it is a sound principle that a party's case is to be determined not just by the evidence produced but by the evidence which it is within the power of either party to produce to support or refute the allegation. In simple terms, if a conversation is critical, then if a party has within its powers to call a person who could give evidence of that conversation which is supportive of its case and does not do so, a Tribunal is entitled to draw an inference."

6.2 In this matter, as confirmed in the course of submissions, both representatives sought to strongly rely on the 'credibility' of the witnesses, called by each of them.

Gillen J in ***Thornton v NIHE [2010] NIQB 4*** stated:-

"Credibility of a witness embraces not only the concept of his truthfulness, ie whether the evidence of the witness is to be believed but also the objective reliability of the witness [that is] his ability to observe or remember facts and events about which the witness is giving evidence."

In a recent decision in the case of ***ES (a minor) by Rachel Ann Savage, her mother and next friend v Emma Savage and Others [20917] NIQB 56 (a civil case)*** Stephens J in ***Thornton,*** namely:-

"(a) the inherent probability or improbability of representation of fact;

(b) the presence of independent evidence tending to corroborate or undermine any given statement of fact;

(c) the presence of contemporaneous records;

(d) the demeanour of witnesses, for example, does he equivocate in cross-examination;

(e) the frailty of the population at large in accurately recollecting and describing events in the distant past;

(f) does the witness take refuge in wild speculation or uncorroborated allegations of fabrication;

(g) does the witness have a motive for misleading the court; and

(h) weighing up one witness against another."

In ***R v G [1998] Crim LR 483,*** the Court of Appeal in England and Wales said that:-

> *"a person's credibility is not a seamless robe, any more than in their reliability."*

A tribunal is entitled, if appropriate, to take a different view as to the credibility or the reliability of a witnesses' evidence in relation to different issues (see further ***R V H [2016] NICA 41***).

In the case of ***Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721,*** Elias LJ set out some helpful guidance for employers faced with "diametrically conflicting accounts of an incident.

> *"73. The second point raised by this appeal concerns the approach of employers to allegations of misconduct were, as in this case, the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other. Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even were that does not appear to be so, there will be cases where it is perfectly proper for the employer to say they are* not satisfied they can resolve the conflicting evidence and accordingly do not find they can resolve the conflicting evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employee to give the alleged wrongdoer the benefit of the doubt without feeling compelling to have to come down in favour of one side or the other".

As confirmed in ***Parkes v BC Softwear Ltd (UKEAT/0213/17)*** although this is helpful guidance for an employer, it does not lay down any rule of law for a tribunal,

faced with conflicting evidence in a tribunal hearing sitting, in relation to a key issue in the case. The tribunal is entitled to make an assessment of the evidence and resolve the issue and is not bound to resort to the burden of proof; and if there is primary evidence on both sides a tribunal will usually be able to reach a conclusion on that evidence.

6.3 Awards of compensation, pursuant to the 1976 Order and/or 2006 Regulations, provide that awards may be made not just against employers but also individual respondents, where named on the claim form, such as the second respondent in the present proceedings. Where a claim against an individual is upheld by the tribunal, the tribunal may make individual awards against any particular respondent or make all respondents jointly and severally liable for the award.

In ***London Borough of Hackney v Sivanandan [2013] EWCA CIv 22*** the Court of Appeal held that where the same, indivisible, damage is done to a claimant in a discrimination claim by two or more respondents, who either are jointly liable for the same act or have separately contributed to the same damage each is jointly and severally liable to the claimant for the whole of that damage, and it is not possible for the tribunal to apportion an award between contributing respondents, pursuant to the Civil Liability (Contribution) Act 1978, which applies in Northern Ireland. However, where the injury caused by different acts of discrimination is "divisible" a tribunal can and should apportion to each discriminator responsible for the part of the damage caused by him (see Underhill J in the EAT, which was approved by the Court of Appeal).

6.4 It has long been established, with the approval of the Court of Appeal in Northern Ireland, awards for injury to feelings under the anti-discrimination legislation are made in accordance with the bands of compensation, identified in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102,*** as amended in ***Da'bell v NSPCC [2010] IRLR 19.*** In ***De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879,*** following the decision in ***Simmons v Castle [2012] EWCA Civ 1288,*** it was held that the ***Vento*** bands should be further amended to:-

"(1)	*The upper band*	*£19,800 to £33,000*
(2)	*The middle band*	*£ 6,600 to £19,800*
(3)	*The lower band*	*£ 600 to £ 6,600*

The tribunal, in the absence of any decisions of the Northern Ireland Court of Appeal were satisfied the bands, as amended, as set out above should be applied to these proceedings. (In Great Britain, but not Northern Ireland, following Presidential Guidance, the said bands have been further increased).

Where an individual has suffered a number of acts of discrimination, eg sex, age, the tribunal can make separate awards for each said protected ground as each is a separate way giving right to damages.

However where the discriminatory acts overlap, because for example, they arise from the same set of facts, it is not appropriate, to separate the injury to feelings and attribute parts to each form of discrimination. In any event a tribunal must

always have regard to the proportionality of the overall figure awarded for injury to feelings. (See ***AC Jumarch v Clywd Leisure Ltd [2008] IRLR 345 and the judgment of Elias J).***

6.5 Aggravated damages are recoverable where the respondent has behaved in high handed, malicious, insulting or oppressive manner in committing the act of discrimination (see further ***Alexander v Home Office [1980] ICR 685****)* or the act is done in an exceptionally upsetting way (see further ***Commissioner of Police of the Metropolis v Shaw [2011] UKEAT/0125***). Such damages, which are an aspect of injury to feelings, are compensatory and not punitive, and are awarded to the extent the aggravating features have increased the impact of the discriminatory act on the claimant and thus the injury to feelings (see ***McConnell v Police Authority for Northern Ireland [1997] NI 244****).* Subsequent conduct, such as failing to investigate complaints and/or apologise or failing to treat the complaint with the requisite seriousness can be relevant matters for such an award in an appropriate case (see further ***Armitage Marsden and HM Prison Service v Johnston [1997] ICR 275*** and ***Bungay v Saini [2010] UKEAT/0331/10***) and ***Zaiwalla & Co v Walia [2002] IRLR 697.)***

In ***H M Land Registry v McGlue [2013] Eq LR 701*** the Employment Appeal Tribunal reviewed the relevant case law and held, when considering such a claim, a tribunal has to look first as to whether, objectively viewed, the conduct is capable of being aggravating, that is aggravating in the sense of injustice which the individual feels and injuring their feelings further. It further held such an award may be made where the distress caused by the act of discrimination has been made worse:-

(a) by being done in an exceptionally upsetting way eg in a high handed malicious, insulting or oppressive way;

(b) by motive: conduct based on prejudice, animosity, spite or vindictiveness is likely to cause more distress provided the claimant is aware of the motive;

(c) by subsequent conduct: for example, where a case is conducted at trial in an unnecessarily offensive manner, or a serious complaint is not taken seriously, or there has been a failure to apologise.

6.6 Simple interest can be awarded by a tribunal on awards of compensation, pursuant to the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 and pursuant to the Industrial Tribunals (Interest on Awards in Age Discrimination Cases) Regulations (Northern Ireland) 2006, which are both in similar terms. Interest is awarded on awards for injury to feelings from the date of the act of discrimination complained of to the date of calculation; whereas interest is awarded on all other sums, other than injury to feelings from the midpoint of the date of the act complaint of and the calculation date. (The relevant rate of interest is the present judgment rate of 8%). Where a tribunal considers that serious injustice would be caused if interest were to be so calculated, as referred to above, it can calculate interest in such different periods as it considers appropriate. Interest cannot be awarded in respect of future loss or loss arising before the discrimination complained of. (The tribunal found no evidence of any such relevant serious injustice).

7.1 In light of the facts, as found by the tribunal and after applying the legislative provisions and guidance set out in the legal authorities referred to in the previous paragraphs of this decision, and after considering the submission of the representatives, the tribunal reached the following conclusions, as set out in the following sub-paragraphs.

7.2 In relation to the claim by Natasha McNicholl of unfair constructive dismissal the tribunal is satisfied that Natasha McNicholl decided, following receiving the written warning for sickness absence which was properly awarded in accordance with the relevant procedure, at the weekend of 10-13 June 2016 to apply and obtain a working visa for twelve months to travel to Australia and, having so decided and obtained the visa, she obtained flights with a deposit to enable her and her fiancé to travel to Australia in flights commencing on 17 October 2016 and had made all relevant payments by on or about 8 August 2016. The tribunal does not accept that any of the conduct of F in June/July 2016 played a part in this decision to leave her employment and go to Australia and, in particular, rejects Natasha McNicholl's reliance on the second interview of 19 August 2016 as the 'last straw'; which interview, as found by the tribunal, was fairly and properly carried out by Emma Woods and in no different way to the earlier interview.

At all times, from the weekend of 10-13 June 2016, Natasha McNicholl was leaving her employment and travelling to Australia for her 'trip of a lifetime'; and regretfully Natasha McNicholl has wrongly, with hindsight, sought to rely on subsequent events, including the conduct of Bank of Ireland in the said period and the subsequent investigations by Emma Woods, for the purposes of the unfair dismissal claim. In doing so, the tribunal does not ignore the many serious repudiatory failures identified by Emma Woods in her report and are the subject of her recommendations, which the tribunal accepts; but, on the facts as found by the tribunal, these failures did not play a part in the dismissal and were not a reason for the dismissal. Natasha McNicholl's resignation was timed to enable her to give the requisite notice to Bank of Ireland, so that she could leave on the pre-arranged flights to Australia, the details of which she did not disclose before or at the time of the resignation. Indeed, Natasha McNicholl did not see, before sending her letter of resignation, the report of Emma Woods with the findings and recommendations set out therein. The tribunal is satisfied, as set out in its findings of fact, that Natasha McNicholl was in agreement at the relevant time with the informal resolution of her complaints about the June-November 2015 events and therefore no issue of breach of contract at that time arises. Again with hindsight, she has attempted to do so; but in the tribunal's view wrongly. In any event she agreed to work on, subject to the terms of the verbal warning given to F, which she was in agreement with. The tribunal therefore dismisses the claim of Natasha McNicholl for unfair constructive dismissal.

7.3 As recognised by the representatives, the claims of harassment in relation to the events of in 2015, were out of time, and in particular, the statutory three month time period required to bring any such claim to the tribunal, subject to any extension that might be allowed by the tribunal on just and equitable grounds or, in circumstances, where the tribunal was satisfied there was 'continuous discrimination'.

The tribunal noted, that the same persons, namely Natasha McNicholl and F, were involved in the events of in or about June-November 2015 and June/July 2016, the events took place in the same office and gave rise to the same or similar type of

conduct. The verbal warning on 1 December 2015 included the warning that <u>further</u> action would be taken if there was a repeat of his earlier conduct. There was also evidence of F's approach to R, which was similar to the previous conduct in June-November 2015 involving F and Natasha McNicholl. In the circumstances the tribunal, is satisfied, despite the gap between November 2015, when F was the subject of a warning which allowed for further action by Bank of Ireland in the event of a repeat of earlier conduct, and June/July 2016 that, as a consequence there was a continuing state of affairs (***See Hendricks)***, with relevant links, as set out above, between the said conduct of F in June-November 2015 and subsequently in June/July 2016 and which were not a succession of unconnected or isolated events. In light of the foregoing, the tribunal therefore had jurisdiction to determine the said claim of harassment.

Even if the tribunal is wrong, the tribunal would have been prepared to extend the time on just and equitable grounds. No issue of real prejudice arises and Bank of Ireland and F were able to defend the claims and the delay did not give rise to any issue relating to the cogency of the evidence of the parties in the circumstances. In this context, the tribunal noted again the terms of the verbal warning, given by Liam Lagan on 1 December 2015 and the warning as to further action if there was any repeat of the conduct by F and for Natasha McNicholl to tell Bank of Ireland of any repeat of similar/same actions by F. Following the events of June/July 2016, Natasha McNicholl did report them to relevant management. There then began the sequence of events, where ultimately Emma Woods was appointed to produce an independent report in relation to all the conduct of F in June-November 2015 and June/July 2016; with the recognition by Bank of Ireland of the said link in circumstances, where, due to F resuming his conduct, a further investigation was required into the earlier events of 2015.

7.4 All the relevant claims involved actions by F against Natasha McNicholl, who is female. She is younger than F, as was R. The tribunal noted that it was not until after the investigation by Emma Woods had already started and she had been initially interviewed by Emma Woods that Natasha McNicholl alleged harassment on the grounds of age and sex. In November 2015, and in her initial summary of July 2016 which she gave to Judith Skelton, harassment on grounds of age was not alleged. In light of the foregoing, although the tribunal understands why Natasha McNicholl has subsequently sought to allege age as well as sex in the circumstances, as they arise out of the same facts, the tribunal has concluded, in the absence of any other relevant evidence, that any actions by F towards Natasha McNicholl were because she was female and not because she was younger than him. In any event, even if the tribunal is wrong, it would have not made any difference to the tribunal's award of compensation (see further ***Jumard v Clywd Leisure Ltd [2008] UKEAT 0334).***

7.5 As stated previously, there was no dispute between the parties Bank of Ireland was vicariously liable for the actions of F, subject to the statutory defence (reasonable steps). Bank of Ireland, in the judgment of the tribunal, has produced no relevant evidence to enable the tribunal to find the said defence has been established, after taking into account the complete failure to train F in relation to the Harassment Policy or even to provide him with a copy, despite the events of June-November 2015 and the warning given, until at the time he was suspended in July 2016. In addition, in this context, the tribunal takes into account the failures identified by Emma Woods in her report, including the failure, in particular, of any

relevant training in the policy of Lisa McManus and Liam Lagan. The tribunal also noted, in this context, the failure of any relevant training for F, following the events in Bangor in 2009.

7.6 The tribunal is satisfied applying the relevant legal authorities and, in particular, the guidance set out in the case of ***Richmond Pharmacology,*** that F harassed Natasha McNicholl on the ground of sex in relation to all of F's conduct in June-November 2015, as found by the tribunal; save in relation to the issue of the insect email, which was disturbing, but the tribunal is prepared to accept, not without some hesitation, was sent by Natasha McNicholl in error and related to a television programme. These were, in the judgment of the tribunal, serious examples of repeated sexual harassment by Natasha McNicholl and does not agree with the conclusion of Emma Woods in the report that they fell within the "less serious spectrum of behaviour". On the facts found by the tribunal in relation to this conduct, Natasha McNicholl was the victim of unwanted conduct by F, which had the effect of repeatedly violating her dignity and creating an adverse working environment for her and it was on the ground of her sex.

The events of June/July 2016, as found by the tribunal, were further examples, in the judgment of the tribunal, of unwanted conduct by F, affecting Natasha McNicholl in the same way and it was again done by him on the grounds of her sex. All these said acts of conduct by F were clearly in breach of the Harassment Policy of Bank of Ireland.

However, the tribunal accepts that, although Natasha McNicholl agreed to the informal resolution of the June-November 2015 acts of sexual harassment, when F's actions resumed in June/July 2016, despite the verbal warning, the injury to the feelings of Natasha McNicholl were thereby significantly increased, as she had believed the matter had been resolved in November 2015. However Natasha McNicholl, with her allegation of panic attacks and severe anxiety in the period of sick leave from July 2016 to her resignation, which the tribunal does not accept, has wrongly sought to exaggerate the injury to her feelings and thereby increase any award of compensation, which the tribunal has had to take into account when assessing any such award.

Although the tribunal had some concerns about the trawling through Natasha McNicholl's Facebook account by Liam Lagan, for the purposes of these proceedings, given the exaggeration by Natasha McNicholl, as set out above, and her lack of candour at the relevant time about her plans for Australia, the tribunal was not satisfied such conduct, in seeking to find evidence defend the claim, amounted to high handed and insulting actions by Bank of Ireland , which would justify any increase of the award for injury to feelings, by way of aggravated damages.

7.7 In light of the foregoing, the tribunal concluded that Natasha McNicholl was sexually harassed by F, by his conduct, as referred to previously, in June-November 2015 and June/July 2016, for whose acts Bank of Ireland is vicariously liable. The said acts were therefore not "divisible" and, in the circumstances the respondents (Bank of Ireland and F) are jointly and severally liable for the said acts and any award of compensation made by the tribunal for injury to the feelings of Natasha McNicholl, as set out below.

7.8 In light of the foregoing the tribunal came to the conclusion the award for injury to feelings fell within the middle ***Vento*** band and the tribunal makes the following award, jointly and severally, against Bank of Ireland and F of £14,000, together with interest from 10 June 2015 to 10 June 2019 in the sum of “4,483.07. Total Award £18,483.07.

7.9 This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: **1 August 2017, 2 August 2017, 3 August 2017, 4 August 2017, 7 August 2017, 8 August 2017, 9 August 2017, Belfast**

This judgment was entered in the register and issued to the parties on: