THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Gettins**

Respondent 1: **Quest Vehicle Deliveries Limited**
Respondent 2: **Mr D Mabon**

Heard at: **North Shields Hearing Centre** **On: 11th, 12th & 13th February 2019**
Deliberations: 25th February 2019

Before: **Employment Judge Arullendran**

Members: **Ms R Bell**
Mr R Dobson

Representation:

Claimant: **In person**

Respondent: **Mr Aireton, solicitor (Peninsula Group Ltd)**

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's claim for constructive unfair dismissal is not well-founded and is dismissed.

2. The claimant's claim for wrongful dismissal is not well-founded and is dismissed.

3. The claimant's claim for sexual harassment contrary to section 26 of the Equality Act 2010 is not well-founded and is dismissed.

4. The claimant's claim for victimisation contrary to section 27 of the Equality Act 2010 is not well-founded and is dismissed.

REASONS

1. We heard witness evidence from the claimant, Neil Day and the second respondent. The claimant provided a witness statement from Susan Greives and the respondent provided a witness statement from Kirstien Mabon, however neither witness attended the Employment Tribunal hearing in person and, as they could not be cross examined, we have given their evidence little weight.

2. The parties had failed to exchange documents or produce an Employment Tribunal bundle in accordance with the Tribunal directions, however after directions had been given by this Tribunal on the first day of the hearing, a Tribunal bundle had been agreed by 4pm. We were provide with an agreed bundle consisted of 105 pages.

3. The claimant brought claims of constructive unfair dismissal, notice pay, sexual harassment and victimisation on 24th July 2018. However, it was noted at the hearing that the claimant did not produce any evidence or raise any arguments about the claim in respect of wrongful dismissal/notice pay.

4. The issues to be determined by the Employment tribunal were agreed with the parties as follows:

4.1 When did the claimant's period of continuous employment begin?
4.2 Was there a fundamental breach of contract on the part of the respondent?
4.3 Did the employer's breach cause the employee to resign?
4.4 Did the claimant delay in resigning and thus affirm the breach?
4.5 Did the respondent engage in unwanted conduct against the claimant?
4.6 Did the conduct relate to the claimant's protected characteristic, sex, or was it of a sexual nature?
4.7 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that affect), the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
4.8 Did the claimant make any complaints about discrimination?
4.9 Did the respondent subject the claimant to any detriments?
4.10 If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?
4.11 Did the respondent fail to provide the claimant with a section 1 statement of terms and conditions of employment? If so, should the claimant be awarded two or four weeks wages?
4.12 Did the respondent discover evidence of misconduct by the claimant after the termination of her employment?
4.13 Were any of the claims presented by the claimant out of time?

PRELIMINARY ISSUES

5. The second respondent, acting in person and on behalf of the first respondent at the time, made an application for an adjournment of this hearing on 4th February 2019, which was refused by Employment Judge Johnson. The first and second respondent then instructed Peninsula Group Limited to act on their behalf and an application was made on 8th February 2019 by e-mail to adjourn the hearing

listed to take place on 11th, 12th and 13th February 2019. That application was essentially the same as the previous application and was refused by Employment Judge Shepherd.

6. The respondents renewed their application for an adjournment at the beginning of the hearing on 11th February 2019, relying on the same documents which had been considered by Judge Shepherd previously. The documents are a fit note dated 8th February 2019 signing the second respondent off as unfit for work with anxiety and stress for two weeks, plus a letter with appointment details for the second respondent to attend a routine hospital appointment on 1st April 2019 for Arrhythmia. The respondent's application for an adjournment was on the basis that the claim was not ready to be heard as documents and witness statements had not been exchanged and Peninsula had only been instructed at 2.00pm on the Friday before the hearing was due to commence, which left no time for the case to be prepared. The respondents also argued that the claimant had failed to provide further and better particulars as ordered by Judge Beever at the Private Preliminary Hearing which took place on 10th October 2018. The respondents argued that it was not possible to deal with the exchange of documents and witness statements without the further and better particulars from the claimant. Mr Aireton argued that the second respondent has Arrhythmia and this is the reason he had not been able to prepare his case and made reference to the fit note and the appointment letter from the hospital. The claimant objected to the application for an adjournment on the grounds that the further and better particulars were sent to the respondent and the Employment Tribunal on 18th November 2018 by e-mail and that the respondent had replied to the further and better particulars by resubmitting its ET3 form in reply. The claimant argued that the respondent has repeatedly failed to comply with the Employment Tribunal directions and that this application was another delaying tactic.

7. The unanimous decision of the Employment Tribunal was to dismiss the application for an adjournment on the grounds that it was clear from the Employment Tribunal file that the claimant did submit her further and better particulars on the 18th November 2018 and, therefore, the respondents have had over two months to instruct a representative and to prepare their case for this hearing, but they have failed to adduce any evidence as to why they have not done so timeously. The second respondent told the Employment Tribunal that he had been in work during this period of time and we find that this indicates the second respondent had not been so ill that he was unable to prepare his case or instruct a third party to prepare it for him. The letters from the second respondent's GP refers to a process called "choose and book" in order for the second respondent to make a routine appointment with a consultant for his Arrhythmia, however no details have been provided as to the severity of the condition, or otherwise, or the affect the medical condition had on him in November 2018, December 2018 or January 2019, or of the ability of the second respondent to prepare his case for a hearing during this period. Having regard to the overriding objective to deal with cases fairly and justly, the request for an adjournment was denied and the application was dismissed.

8. The claimant had brought five copies of Mr Day's and Miss Greives' witness statements, along with copies of her documents, on the first morning of the

hearing and directions were given for the respondent and the claimant to exchange all the relevant documents and statements by 4.00pm on 11th February 2019 in readiness for the hearing to commence at 9.45am on 12th February 2019.

9. On the third day of the hearing (13th February 2019) the respondent produced a set of documents which had not previously been disclosed to the claimant and made an application to have them admitted into evidence. The documents were a work's diary, messages, images and work e-mails. The claimant objected to the documents being admitted into evidence on the grounds that the respondent had known of the relevant dates referred to in her application prior to the hearing, particularly as the dates were set out in the further and better particulars, therefore the claimant submitted that the respondent should not be allowed to rely on diary entries and messages from those dates. The claimant submitted that some of the images the respondent wished to rely on had been taken from her personal mobile telephone and should not be allowed, but in any event the respondent did not see any of these images until after she had resigned. The respondent submitted that the events the claimant complains of in her evidence could not have taken place as the diary entries and messages produced by the respondent show that he was on holiday at the relevant time and the respondent also argues that the e-mails show the times that they were sent and received by the claimant and the second respondent on the relevant date and are therefore relevant to the evidence given by the claimant on 12th February 2019, particularly as this was the first time that we heard from the claimant her allegation that a conversation had taken place between the claimant and the second respondent on 6th June 2018 between 11.30am and 1.30pm. The respondent submits that the images it wishes to rely on were all synchronised with the work's laptop and that the second respondent did not access them from the claimant's personal mobile telephone, as claimed.

10. The unanimous decision of the Employment Tribunal was that the work's diary and the second respondent's messages would not be admitted into evidence because the respondents had known about the relevant dates from a much earlier stage in the proceedings and certainly from the date the further and better particulars were provided (18th November 2018). Therefore, there has been sufficient time for the respondents to disclose any documents relevant to those dates prior to this hearing. However, the documents relating to the events which the claimant alleges took place on 6th June 2018 were admitted into evidence as the claimant only revealed the time of the alleged conversation in her evidence on 12th February 2019 and the documents appear relevant to those issues in terms of rebuttal evidence. The parties were informed that the images produced by the respondent taken from the laptop used by the claimant would be admitted into evidence but only in relation to the issue of mitigation and could not be relied upon by the respondent on the question of the substantive claims of harassment and victimisation.

THE FACTS

11. These findings of facts are made on the balance of probabilities on the basis of the evidence adduced by the parties.

12. The claimant began her employment with the respondent on 22th September 2015 and was employed as an accounts supervisor. The claimant's employment was originally with F1 Auto Delivery, which was a company owned by the second respondent. F1 Auto Delivery ceased trading and the claimant transferred her employment to the first respondent in early 2017. All four employees from F1 Auto Delivery transferred to the first respondent and all of the employees carried out the same duties with the first respondent as they did with F1 Auto Delivery. It is common ground that the claimant's continuity of service was transferred to the first respondent in early 2017 through the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The first respondent employs in the region of four employees to carry out office based administration work and several drivers are employed on a self-employed basis to deliver vehicles to customers on behalf of the first respondent. It is common ground that the claimant's role was to manage invoices and recover outstanding debts owned to the company and she helped out with delivering cars, as and when required.

13. It is common ground that the claimant was not provided with a written contract of employment when she began her employment with F1 Auto Delivery or at the time her employment was transferred to the first respondent. The claimant has not been provided with a letter of engagement or any written details regarding her terms conditions of employment and it is common ground that the respondent company does not have a staff manual or handbook and it does not provide written policies and procedures to its employees or workers.

14. It is common ground that the culture within the respondent organisation is very male dominated and that all members of staff, including the claimant, joined in with the general banter and the claimant's own evidence is that she considered herself to be part of the "family" within the workplace. The claimant's evidence is that she loved her job and the culture within the workplace and that the banter did not cause her any concern throughout her employment and she was a member of the WhatsApp group, exchanged messages with the drivers and danced with them. Mr Day's evidence is that there were often inappropriate conversations in the workplace and that some of them were "near the knuckle" but that everyone took part. However, it is also common ground that the claimant made a complaint about a fellow employee, David Perrett, in or around June 2016 because she felt that his actions towards her amounted to sexual harassment as he was making inappropriate comments towards her about her appearance and he was sending messages to her outside of work asking her what she was wearing.

15. We note that in the ET1 the claimant claims that "from day one Mr Mabon and Mr Perrett became very over friendly and very obscene". However, the claimant readily accepted in cross examination that the second respondent had never used obscene or vulgar language in her presence and what she had been describing in the ET1 were the actions of Mr Perrett. It is common ground that the second respondent spoke to Mr Perrett about his behaviour towards the claimant and the claimant did not make any further complaints about Mr Perrett to the respondent after 2016. The claimant accepted in cross examination that

the second respondent had dealt with the complaint she had made about Mr Perrett by speaking to him about his conduct and, as a result, Mr Perrett's conduct towards her had changed and she had no cause to make any further complaints about sexual harassment against him.

16. We note that the claimant has stated in her ET1 that she felt bullied by Mr Perrett and the second respondent and as a result she started looking for another job, however she claims the second respondent then offered the claimant a director's position in a new company which he was opening. The respondent's uncontested evidence was that, after the company had lost its contract with Enterprise Rent a Car, the second respondent discussed with the claimant the possibility of starting a new company in her name with a view to trying to re-establish a client account with Enterprise Rent a Car, however the respondent did not set up this new company and the claimant was never given the position of director. The claimant did not produce any evidence of looking for work elsewhere and she provided no evidence about the alleged bullying.

17. In her ET1, the claimant claims that around April 2017 the second respondent asked her if she would have an affair with him, which she declined, and that he suggested it would be financially beneficial to her, which he demonstrated by providing her with a pay rise from £18,000 to £20,000 per annum and by offering to buy her expensive items of clothing and shoes. However, the claimant accepted in cross examination that she received an increase in her salary because she had done a good job in the workplace prior to April 2017 and she makes no mention at all in her evidence or cross examination that the pay rise had any connection to any alleged conversation between her and the second respondent in April 2017 about an alleged affair. In fact, in cross examination and closing submissions the claimant made no mention whatsoever of any inappropriate conduct by the second respondent towards her in or around April 2017.

18. The claimant suggested in her evidence that the respondent had provided her with a laptop to show her another benefit of having an affair with the second respondent. However, the claimant accepted in cross examination that the laptop was provided by the respondent for the claimant to work from home and the respondent's uncontested evidence was that Mr Perrett was also provided with such a laptop so that he could work from home. There was no suggestion from the claimant in her evidence that the laptop had been given to her as a gift or that it was not the property of the respondent company.

19. The claimant's evidence is that on 2nd June 2017 the second respondent advised her that he had arranged a meeting for 16th June 2017 with the factoring company in order to go through the accounts, however the claimant claims that she received a telephone call from the factoring company on 6th June and found out that they had no knowledge of such a meeting on 16th June. The claimant claims that she then spoke to the second respondent about this, who collected her from work and took her to "a local public house" (as stated in the ET1) and proceeded to confide in her that he was in love with her and had fabricated the meeting of 16th June in order to get her alone in a hotel, where he had booked two rooms with a roof-top sauna and had purchased clothing for her. However,

when the claimant was questioned by the Employment Tribunal, she stated that the meeting between her and the second respondent took place in the respondent's car away from the business premises and not in a public house; she stated that it lasted approximately forty minutes and took place between 11.30am to 1.30pm. The claimant stated in cross examination that the second respondent became very upset and was crying when she told him that she did not want to enter into a relationship with him and she returned to the office at the end of the alleged discussion. The respondent has produced e-mails from 6th June 2017, which can be seen at pages 96 to 105 of the Tribunal bundle. The e-mails start at 11:32am at page 96 and conclude at 13:37 at page 105. The intervening e-mails are time stamped 11:44, 11:53, 12:23, 12:43 and 13:37. The e-mail at page 98 of the bundle was sent by the claimant at 11:53am and the e-mail at page 99 of the bundle was sent to the second respondent at 12:23pm advising him that he had used his Apple ID to sign in to iCloud on a MacBook. The date and time stamps on the e-mails clearly show that there was, at the very most, a period of thirty minutes from 11:53am to 12:23pm or forth five minutes from 12:43pm to 1:37pm for the alleged discussion between the claimant and the second respondent to have taken place, but that does not account for the time it would have taken for the second respondent to collect the claimant, drive away from the office, find a place to park, have a discussion for 40 minutes and then drive back to the office. When this discrepancy was put to the claimant in cross examination, the claimant claimed that the conversation between her and the second respondent did take place on 6th June, as claimed, but that the second respondent could have signed into his Apple account from his MacBook from anywhere at 12:23pm because he carried the computer with him and that he could have purchased the trainers which he brought at 12:43pm from his computer. However, when the claimant was cross examining the second respondent, she sought to change her own evidence about the time the alleged discussion took place between her and the second respondent, even though her own evidence had concluded at that point, suggesting that it could have been later in the afternoon. Mr Day's evidence is that he remembers the claimant telephoning him on 6 June, whilst he was waiting for a train, and she told him about the second respondent arranging the bogus meeting because he wanted to have a relationship with her. However, we note from his witness statement that Mr Day states that this conversation took place after the claimant had confided in him in August 2017 that the second respondent was behaving inappropriately towards her. In the circumstances, we prefer the evidence of the respondent as the claimant has been equivocal in her evidence about the alleged events of 6 June and Mr Day's evidence does not corroborate the claimant's evidence at all.

20. The respondent's uncontested evidence was that he was absent from the office on annual leave from 9th June until 25th June 2017 and therefore he would not have arranged a meeting to take place with the factoring company, or for any other reason, on 16th June 2017. The respondent also claims that he would not have had time to have a discussion with the claimant on 6th June 2017 because he would have been busy arranging everything within the respondent organisation in advance of his upcoming holiday. After the second respondent returned from his holiday, the claimant then took her holidays and therefore they were not in the office at the same time.

21. The claimant claims that the discussion the second respondent had with her in his car on 6th June 2017 was a breach of the second respondent's position of trust but she did not resign at that point because she needed the income to pay her bills. However, the claimant presented no evidence that she looked for another job between June 2017 up the date of her resignation in March 2018. The claimant confirmed, in reply to a question asked by the Employment Tribunal, that there were no further incidents of alleged sexual harassment after 6th June 2017. The claimant's evidence is that the second respondent telephoned her a couple of days after 6th June and apologised to her and asked if she was going to make a complaint about sexual harassment, to which she claims to have said that she would not be making any complaints at all. However, we note that the second respondent would have been in Europe on holiday with his wife during this period and it is more likely than not that he did not telephone the claimant, as alleged.

22. The claimant claims in her ET1 that, following the alleged discussion on 6th June 2017, the second respondent "became aggressive towards [her], asking [her] to carry out impossible tasks, stating [her] work was not up to scratch, nasty calls, e-mails with negative comments and unreachable tasks". In her further and better particulars, the claimant states at paragraph 21 and 23 that her contact with the respondent after 6th June 2017 was minimal and then became very strained, hostile and unprofessional. The claimant gives no details of any events to evidence the alleged hostile and unprofessional relationship, nor has she produced any evidence of any of the nasty calls or e-mails with negative comments from his period of time, or at all. The claimant was asked in cross examination about the "impossible tasks" and "unreachable targets" and the claimant told us that she was not subject to any specific targets in the work place, but the second respondent would often ask her to chase outstanding invoices in order to get money into the company. With regard to the unachievable tasks, the claimant claims that she was sent out to collect cars for the respondent company late in the afternoon which would mean she would work over her usual finish time of 4.30pm, however she accepted when she was questioned by the Tribunal that this was not a daily occurrence and the uncontested evidence of the respondent was that the delays were often caused by the garages not being ready to hand over the car at the appointed time and/or delays caused by traffic. The respondent's evidence is that all members of staff were asked to collect cars as and when required and that the claimant was not singled out in any way.

23. The claimant claims that around July 2017 the second respondent's wife, who operated a separate business from the same premises, started commenting and criticising the claimant's clothing and appearance, saying that she looked like a skeleton and suggesting that she needed to eat more. The respondent's evidence is that the claimant started wearing more provocative clothing in the workplace in mid to late 2017 and that Mrs Mabon had cause to speak to the claimant about the appropriateness of her attire.

24. In August 2017 the claimant left her husband and it is common ground that the second respondent offered the claimant the opportunity to rent some premises

owned the second respondent and his wife because the claimant had to leave the matrimonial home, however she declined the offer.

25. In November 2017 the claimant began a new relationship with Neil Day, who was one of the drivers who worked for the respondent company on a self-employed basis. The claimant's evidence is that the second respondent had given her an ultimatum in or around November 2017 that she could either have a relationship with Mr Day or she could keep her job at the respondent company, however the second respondent's evidence is that no such conversation ever took place. We note that in the ET1 the claimant states that the second respondent had become friendlier with her after August 2017 and that he had informed her that he was over her and wanted her to stay on at the work place. The claimant also states on her ET1 that she believed "we had turned a corner and able to move on". We note that Mr Day continued to work for the respondent company until 2018 and the claimant has continued her relationship with him. The respondent's evidence is that the claimant changed her behaviour and started wearing provocative clothing in the workplace after she began her relationship with Mr Day. The respondent's uncontested evidence is that he was working in Lincolnshire from mid-November 2017 to mid-January 2018 and that this was the reason he was not in in the office.

26. The claimant claims in her ET1 that she took some time off sick from 20th February 2018 and that the respondent suspended her on 23rd February without pay due to an investigation into her work. She states that she sought advice from Hartlepool Citizens Advice on 26th February and that the respondent was asking for the work's laptop to be returned, which she had refused. She goes on to state that on 1st March the respondent had telephoned her to state that she would receive nothing from him and it is common ground that the Citizens Advice had tried to negotiate a compromise between the parties. However, at paragraph 28 of the claimant's further and better particulars, the claimant states that on 13th March 2018 family matters arose which meant that she had to take some time off work and that on 16th February 2018 she received a telephone call from the respondent advising her that she had been suspended without pay (paragraph 29 further and better particulars). She goes on to state that she felt intimidated by the fact that two workers from the respondent company had attended her home to take the work's laptop and phone and that she resigned on 30th March 2018 due to the sexual harassment and victimisation she had suffered. The claimant was recalled on the third day of the hearing to give evidence about her resignation as insufficient details had been provided in her witness statement and evidence in chief. The claimant told the Employment Tribunal that her suspension was with pay and she was unable to give a reason why the ET1 should state it was without pay. He claimant was also unable to explain why the dates given in her ET1 for her sick leave and suspension are different from the dates she gives in the further and better particulars. The claimant stated at page 4 of her witness statement that she took time off work due to family matters on 13th March 2018 and was suspended on 16th February 2018 (which we believe to be a typing error and should read March instead of February). She goes on to state that she resigned on 30th March 2018 "solely due to the sexual harassment and victimisation I suffered which led to a breach of trust. The conduct of the respondent Mr Mabon and that of Mr Perrett set out in paragraph 3 amounted to

unlawful harassment". In evidence in chief, after the claimant was recalled to give evidence on third day of hearing, the claimant stated that she was absent from work due to sickness on 12th March 2018 and that she had informed the respondent that she would return to work on 13th, but the second respondent had told her to take the rest of the week off. The claimant then stated that she was informed on 16th March 2018 that she had been suspended, however she informed the second respondent that she was dealing with a serious family matter involving her son at school that day and, therefore, the respondent withdrew the suspension and offered to go through the accounts with the claimant on Monday 19th March 2018. The claimant accepted in cross examination that it was proper and reasonable for an employer to investigate allegations which had been raised against her in the work place that she had not been carrying out her duties properly and had been absent from her desk on several occasions and the respondent's uncontested evidence was that it had discovered the claimant had made very few telephone calls within a specified period of time which indicated that she had not been chasing up the accounts. The claimant accepted that she was due to meet with the second respondent on 19th March 2018 but she did not attend the meeting and sent a sick note to the respondent instead. She claims that she thought it would not be beneficial to meet as it was clear that the respondent was unhappy with her and the respondent had told her that she needed to choose her job over her relationship with Mr Day. The claimant's evidence is that when she received the telephone call advising her of her suspension on 16th March 2018 she made the decision to resign at that point and sought advice through Citizens Advice to try and reach a settlement with the respondent, which the respondent ignored. The claimant's evidence is that she is a 100% sure that the respondent had told her that she had to choose between her job and Mr Day and this was why she had resigned, however she accepted when asked by the Tribunal that Mr Day had already left the employ of the respondent company by the time she resigned and that the only reference, even in the claimant's own evidence, to an ultimatum dated back to November 2017 and had not ever been repeated since then. The claimant accepts that she was paid by the respondent during her notice period.

THE SUBMISSIONS

27. The respondent submits that the claimant has been continuously employed by the respondent company since September 2015 and there was a relevant transfer from F1 Auto Delivery to the respondent company in 2017. The respondent submits that there is a lack of supporting evidence from the claimant that there was a fundamental breach of contract by the respondent, particularly as she agreed all of paragraph 4 of the second respondent's witness statement, that the second respondent did not use vulgar or sexualised language and that the respondent dealt with the complaints she raised about Mr Perrett whereupon the conduct ceased completely. The respondent submits that second respondent did not proposition the claimant for an affair and that the increase in the claimant's salary had come about because she had done a good job prior to the salary increase. The respondent submits that that there is absolutely no evidence of the alleged incident of 6th June 2017 and that the claimant has changed her evidence at the time of cross examination because she was unsure of the dates and the times. The respondent submits that the claimant changed

her behaviour in the workplace, such as the way she dressed, due to her marital problems and her new relationship with Mr Day, but there is no evidence that the claimant was targeted for her work or subjected to any unachievable tasks. The respondent submits that the company mobile telephone bill showed that the claimant was making on average fifteen calls per day and that it was reasonable for the respondent to investigate this and the complaints made about her not being at her desk but the claimant failed to return to work or to go through the bills with the respondent.

28. The respondent submits that the claimant resigned to avoid an investigation into her activities at work and because of her family problems and the respondent submits that the claimant had affirmed the earlier breach of contract when she decided not leave her employment in June 2017.

29. The respondent submits that the only evidence of unwanted conduct was that of Mr Perrett's inappropriate behaviour in 2016 and there is insufficient evidence that this created an intimidating, hostile or offensive environment. The respondent submits that the claimant did complain about Mr Perrett's behaviour to the respondent, however she was not subjected to any detriment as a result as she agreed that Mr Mabon had dealt with her complaints and there was no repeat of Mr Perrett's actions after Mr Mabon had dealt with him.

30. The respondent submits that there is no evidence at all that any alleged detriments that the claimant says she has been subjected to were due to protected acts as there was no reason for the respondent to subject the claimant to any detriments about her complaint regarding Mr Perrett's behaviour.

31. The respondent submits that it did not provide the claimant with a section 1 statement, however this is not a stand-alone claim and is dependent upon one of the other claims being successful before the Tribunal can make an award.

32. The claimant submits that the respondent has admitted to not providing her with a contract of employment or any policies and procedures and the respondent has admitted that she had issues with Mr Perrett which resulted in the second respondent having a firm talk with him.

33. The claimant submits that the respondent has accepted in his statement that there was often talk about people's sexual relationships within the workplace and that this was done openly and she claims this violated her dignity and breached the law on harassment.

34. The claimant submits that the respondent has admitted that she was excellent at her job and that things changed when she started her relationship with Mr Day. The claimant admits that she may have got her dates mixed up, but she stands by her allegations and the statement that she has made to the Tribunal.

THE LAW

35. We refer ourselves to Section 95 of the Employment Right Acts 1996 in respect of the law on constructive dismissal and we refer ourselves to the leading case of

Western Excavating (ECC) Limited v Sharp [1978] ICR 221 in which the Court of Appeal held that, in order to claim constructive dismissal, the employee must establish the following:

(1) There was a fundamental breach of contract on the part of the employer
(2) The employer's breach caused the employee to resign
(3) The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal

36. We also refer ourselves to the case of Lewis v Motorworld Garages Limited [1986] ICR 157 in which the Court of Appeal held that a course of conduct can cumulatively amount to a fundamental breach of contract following a last straw incident, even though the last straw itself does not amount to a breach of contract. It is immaterial that one of the events was serious enough in itself to amount to a repudiatory breach and the employee did not treat that breach as such by resigning at the time.

37. We also refer ourselves to the case of Omilaju v Waltham Forest London Borough Council [2005] ICR 489 in which the Court of Appeal held that the act constituting the last straw does not have to be of the same character as the earlier acts, but it must contribute to the break of the implied term of trust and confidence. The test of whether the employee's trust and confidence has been undermined is an objective test.

38. We refer ourselves to Section 26 of the Equality Act 2010 which provides the following:

"(2) A also harasses B if (a) A engages in unwanted conduct of a sexual nature, and (b) the conduct has the purpose or effect of referred to in subsection (1)(b)

39. Section 26(1)(b) provides that

"the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating, or offensive environment for B".

40. We refer ourselves to Section 27 of the Equality Act 2010 which provides

"(1) a person A victimises another person B if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.
(2) each of the following is a protected act (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act."

41. We refer ourselves to the case of Ayodele v Citylink Limited [2017] EWCA Civ 1913 in which the Court of Appeal held that it is for the claimant to prove on the balance of probabilities that there are facts from which the court could decide in

the absence of any other explanation that the respondent unlawfully discriminated against the claimant.

42. We refer ourselves to the case of Madarassy v Nomura International Plc [2007] IRLR 246 in which the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bear facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination.

CONCLUSIONS

43. Applying the relevant law to the facts, we find that the claimant was continuously employed by the respondent from 22nd September 2015 to the date of her resignation on 30th March 2018. We also find that the respondent did not provide the claimant with a contract of employment or a statement of terms conditions of employment, as required by Section 1 of the Employment Rights Act 1996, nor did the respondent provide the claimant with any policies or procedures relating to disciplinary and grievance procedures or equal opportunities within the work place.

44. It is clear from the evidence that we have heard from both sides that there was a culture within the respondent organisation which was very male dominated and consisted of banter between the workers which Mr Day described as sometimes being “near the knuckle”. The claimant’s own evidence is that she participated in some of the discussions and joined in, from time to time, with the men by dancing and laughing at the comments. The claimant’s evidence is that she had no cause to make any complaints about the general environment and that she loved her job. In the circumstances, we find that the general culture within the respondent’s work place did not violate the claimant’s dignity as the claimant’s own evidence was that she participated in the discussions and was part of the WhatsApp group which had been set up by the drivers in order to exchange messages with each other, on which she herself sent messages. We note that the claimant’s claim, as set out in the ET1 and the further and better particulars, is not presented as general sexual harassment arising from the environment, but specifically as harassment as a result of conduct by the second respondent and Mr Perrett and the first time she has made any complaints about the environment in the workplace was in closing submissions. In the circumstances, we find that the claimant’s complaint of harassment arising from the general environment in the respondent company’s workplace did not violate her dignity and is not well-founded.

45. It is clear that the conduct of Mr Perrett in June 2016 was of a different character to that of the general culture within the respondent’s workplace and the claimant did raise complaints with the respondent company about Mr Perrett’s conduct, which were dealt with by the second respondent and resulted in the conduct coming to an end. The claimant’s own evidence is that she did not have cause to complain about Mr Perrett again after June 2016. We accept that Mr Perrett’s conduct in June 2016 was in breach of Section 26 of the Equality Act 2010 and

probably also amounted to a fundamental breach of contract, however the matter was dealt with successfully by the respondent and the claimant continued working at the respondent company for a further two years without making any further complaints about Mr Perrett, thus affirming the contract.

46. It has been extremely difficult for us as a Tribunal to make findings of fact about the alleged events which the claimant says took place on 6th June 2016 because there is absolutely no common ground between the parties. Given the discrepancies in the claimant's own account about the time of day she says the discussion took place with the second respondent and also the conflicting account in the ET1, that the discussion took place in a public house, and her oral evidence to this Tribunal that the discussion took place in the second respondent's car, we are satisfied that the claimant has failed to adduce sufficient facts from which this Tribunal can properly and reasonably conclude, on the balance of probabilities, that the discussion took place on 6th June 2017 between the claimant and the respondent, as claimed. The claimant's own evidence is that, a couple of days after the discussion on 6th June 2017 the claimant told the second respondent that she would not be making any complaints, indicating that she did not believe there was any cause for complaint. Taking the claimant's evidence at its highest, there is no evidence that the claimant made any complaint about any inappropriate behaviour contrary to the Equality Act 2010 and, if she did telephone Mr Day immediately after the events and complained to him, which we do not accept due to the discrepancy in Mr Day's evidence that this took place after August 2017, there is no evidence at all that the respondent knew of the complaint the claimant had made to Mr Day. Thus, there is no evidence that the respondent believed the claimant had carried out a protected act or that she would have carried out a protected act in the future.

47. The parties are agreed that the claimant began a relationship with Mr Day in November 2017 and that Mr Day was self-employed as a driver. The respondent's uncontested evidence was that he was working in Lincolnshire from mid-November 2017 to mid-January 2018 and spent very little time in the business in the north east, where the claimant and Mr Day were based and, therefore we do not accept that an ultimatum was ever given, as claimed or at all. However, even if we are wrong, taking the claimant's claim at its highest, her own evidence is that the respondent asked her to make a choice between her relationship with Mr Day or her job with the respondent company in November 2017 and that this ultimatum was not ever repeated after that date. In the circumstances, even if this was a breach of contract by the respondent in November 2017, which we do not accept, the claimant continued working without complaint until 30th March 2018 and we find that she affirmed the contract.

48. It is common ground that Mrs Mabon was not employed by the respondent company but ran a separate business at the same site as the respondent. Therefore, any comments made by Mrs Mabon to the claimant were not made in the course of any employment with the respondent company and, therefore, the respondent cannot be held responsible or liable for them. There is no suggestion that that she was acting as an agent for the respondent company or that she was following instructions from the respondents at the time.

49. With regard to the claimant's claims that she was subjected to unreasonable tasks and targets in July 2017, we find that the claimant accepted in cross examination that she was not subjected to any targets within the workplace, although the respondent wanted her to bring money into the company, which she was employed to do. It is also common ground that she was not asked to pick up and deliver cars daily and that all the staff were asked to complete such tasks from time to time, as and when necessary. There is no evidence the claimant was targeted in any way or that any such requests were made as a result of any alleged protected acts carried out by the claimant. Therefore, the claimant has not established, on the balance of probabilities, that she was subject to any detriments.

50. The claimant's evidence in cross examination was quite clear in that she decided to resign on 16th March 2018 because the respondent had telephoned her to tell her that she had been suspended, but she was on her way to her son's school to deal with a serious incident and she felt that the respondent was being unsympathetic towards her position. However, it is common ground that the respondent decided not to suspend the claimant once she had explained her personal situation and the reason why she was attending her son's school, which we find shows that the respondent was sympathetic toward her and we find that the respondent did not behave in way which would objectively be viewed as undermining mutual trust and confidence. Given that the claimant accepted in cross examination that the respondent was entitled to carry out an investigation where questions had been raised about an employee's competency in the workplace, we find that the act of suspension and asking the claimant to attend an investigatory meeting did not constitute a repudiatory breach of contract by the respondent and this did not entitle the claimant to resign and claim constructive unfair dismissal. The claimant accepted that the suspension was to be with pay and not, as stated in her ET1, without pay. The claimant accepted that she was due to attend a meeting with the respondent on 19th March in order to discuss the reasons for the investigation and suspension, but she chose not to attend and sent in a sick note and then contacted Citizens Advice in order to try and compromise her position with the respondent company, but when the respondent failed to enter into any negotiations, the claimant gave the respondent two weeks' notice and resigned on 30th March 2018. As a result, there cannot be a valid claim for notice pay as the claimant accepted she was paid to the end of her notice period.

51. Whilst we accept that the respondent did not have a contractual right to suspend the claimant, due to the fact that there were no written terms conditions between the parties, and therefore the suspension could be categorised as a breach of contract, although we did not hear any arguments about whether there was an implied right to suspend the claimant, but the claimant accepted that it was proper for the respondent to investigate her in her particular circumstances. However, we find that the breach, if there was one, did not amount to a repudiatory breach entitling the claimant to resign as there is no evidence that the respondent was behaving in a repudiatory manner. In any event, the claimant has given conflicting evidence for her reasons for resigning in that she has stated in the further and better particulars that it was because of the sexual harassment from Mr Perrett and the second respondent, but in oral evidence

(when she was recalled to give evidence) she claimed that it was because the second respondent was unsympathetic towards her position in that she was dealing with a problem at her son's school when he spoke to her on 16th March 2018 suspending her. In all the circumstances, we find that the claimant did not resign from the respondent company as a result of sexual harassment or victimisation or because the suspension amounted to a repudiatory breach of contract. Therefore, we find that the claimant's claim for constructive unfair dismissal is not well-founded and is dismissed. The claimant has not raised any arguments about the last straw doctrine, however we have examined the evidence for ourselves and we are satisfied that there is insufficient evidence of a series of breaches of contract and, in any event, the last incident could not possibly have contributed to any such series of breaches of contract, when objectively viewed, as the parties agreed that the respondent has retracted the suspension and agreed to meet the claimant the following Monday to discuss the issues.

52. Looking at all the evidence in the round, we are not satisfied that the respondent engaged in unwanted conduct against the claimant on 6th June 2017 because of inconsistencies in the claimant's evidence, as set out above, and therefore we find that she has not adduced sufficient evidence which, on the balance of probabilities, proves that there are sufficient facts from which the Tribunal could decide that the respondents unlawfully discriminated against the claimant, in the absence of any other explanation. In the alternative, even if the events as alleged by the claimant did take place on 6th June 2017, the second respondent was not aware that the claimant had made any complaints to Mr Day about him and therefore he was not aware that the claimant had carried out a protected act and the claimant's own evidence was that she told the second respondent she was not making any complaints. In the circumstances, we find that the claimant's claim of victimisation is not well-founded and must be dismissed.

53. Whilst we accept that the claimant did make complaints about Mr Perrett in November 2016, we find that these were dealt with by the respondent and the conduct was never repeated. Further, there is no evidence that the first or second respondent changed its behaviour towards the claimant after she had made complaints about Mr Perrett. In the circumstances, we find that the claimant's claim of victimisation arising out of complaints she made about Mr Perrett are not well-founded and are dismissed. In any event, we have no hesitation in finding that any complaints the claimant may have had against Mr Perrett in June 2016 are out of time and cannot be considered by this Tribunal given that the claimant has not made an application to extend time and has failed to provide any reasons for not making her claim of sexual harassment within three months of the conduct she complained of in June 2016.

54. With regard to the claims that the claimant was subjected to detriments after 6th June 2017, we find that there is insufficient evidence and that the claimant has failed to adduce evidence which proves, on the balance of probabilities, that there are facts from which this Tribunal could decide in absence of any other explanation that the respondent unlawfully discriminated against her because there is no evidence that the claimant was subjected to unreasonable targets or that she was asked to carry out unachievable tasks.

55. In all the circumstances, the claimant's claims of sexual harassment and victimisation are not well-founded and are dismissed. Further, the claimant resigned by giving notice to the respondent, for which she was paid in full, and, therefore, her claim for wrongful dismissal is not well-founded and is dismissed.

56. Given our findings, there is no requirement to make any determination on issue 4.12, as set out above.

EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
.....15 March 2019.....